



A Resource Guide to the FCPA, 2nd Edition

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INTRODUCTION

On July 3, 2020, quietly and with little fanfare, the Criminal Division of the US Department of Justice (“DOJ”) and the Securities and Exchange Commission (“SEC”) released the 133-page Resource Guide to the US Foreign Corruption Practices Act, Second Edition (“the FCPA Resource Guide”).¹ This came just a month after DOJ’s publication of its Evaluation of Corporate Compliance Programs guidance, an update to the April 2019 guide.²

The first edition of the FCPA Resource Guide was published in 2012. The DOJ and SEC reiterate that while many aspects of the first edition of the FCPA Resource Guide hold true today, the second edition seeks to address updates to new cases, laws, and policies related to the FCPA. The guidance includes case studies, examples, and hypotheticals to demonstrate the fact patterns that have occurred during FCPA-related prosecutions. While compliance professionals may believe this updated guidance was long overdue, much of the updated guidance reiterates what those in the space have already been practicing.

The DOJ and SEC conclude the second edition’s Foreword with:

Foreign bribery is a scourge that must be eradicated. It undermines the rule of law, empowers authoritarian rulers, distorts free and fair markets, disadvantages honest and ethical companies, and threatens national security and sustainable development. This updated Guide is meant not only to summarize the product of the dedicated and hardworking individuals who combat foreign bribery as part of their work for the U.S. government, but also to help companies, practitioners, and the public—many of whom find themselves on the front lines of this fight—prevent corruption in the first instance. We hope that the Guide will continue to be an invaluable resource in those efforts.³

KEY UPDATES AND TAKEAWAYS

With that in mind, Steele Compliance Solutions Inc., in its role to assist companies prevent corruption in the first instance, has identified the following key updates and takeaways from the second edition of the FCPA Resource Guide. For ease of reference, this summary follows the order of the titles and subtitles in the FCPA Resource Guide.

WHAT DOES “CORRUPTLY” MEAN?

The FCPA Resource Guide reiterates that in order for the violating offer, promise, or payment to be corrupt, it is intent, not success, that must exist. To highlight this, a recent example is included where a New York-based commercial real estate broker promised a middleman a \$2.5 million bribe (and paid \$500,000) in exchange for the purchase of real estate by a sovereign wealth fund. In reality, the middleman had no relationship with any foreign official and therefore no official was ever paid; however, the broker was found to have violated the FCPA, as the intent element was present.

WHO IS A FOREIGN OFFICIAL? DEFINING DEPARTMENT, AGENCY OR INSTRUMENTALITY OF A FOREIGN GOVERNMENT

The FCPA Resource Guide acknowledges that the term “instrumentality” is broad and requires a fact-specific analysis of an entity’s ownership, control, status, and function. To assist with this analysis, the Eleventh Circuit’s case, *United States v. Esquenazi* is referenced, providing a non-exclusive list of factors to determine whether the government “controls” an entity.

HOW ARE PAYMENTS TO THIRD PARTIES TREATED?

The FCPA Resource Guide includes recent caselaw to demonstrate that the FCPA expressly prohibits corrupt payments made through third parties or intermediaries, whether there is, or should have been, actual knowledge.

PRINCIPLES OF CORPORATE LIABILITY FOR ANTI-BRIBERY VIOLATIONS: SUCCESSOR LIABILITY

Over the last eight years, significant cases and policies have developed around the importance of pre-acquisition due diligence in connection with a merger or acquisition.



Questions arise around the timelines and thoroughness of when pre- or post- acquisition due diligence must be conducted on the acquired entity, and when the theory of successor liability applies.

The updated Guidance provides additional points and considerations such as:

- the DOJ and SEC recognize 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
- the DOJ and SEC recognize that, in certain instances, robust pre-acquisition due diligence may not be possible. In such instances, DOJ and SEC will look to the timeliness and thoroughness of the acquiring company's post-acquisition due diligence and compliance integration efforts
- the DOJ and SEC have pursued enforcement actions against the predecessor company, rather than the acquiring company, particularly when the acquiring company uncovered and timely remedied the violations or when the government's investigation of the predecessor company preceded the acquisition
- an acquiring company that voluntarily disclosed misconduct may be eligible for a declination, even if aggravating circumstances existed as to the acquired entity

ADDITIONAL PRINCIPLES OF CRIMINAL LIABILITY FOR ANTI-BRIBERY VIOLATIONS: AIDING AND ABETTING AND CONSPIRACY

Notable is *United States v. Hoskins*, where the Second Circuit held that an individual can be criminally prosecuted for conspiracy to violate, or aiding and abetting an FCPA anti-bribery violation, only if the individual's conduct and role fall into one of the specifically enumerated categories listed in the FCPA. The FCPA Resource Guide further notes that while this holding applies in the Second Circuit, a district court located in another circuit has rejected the reasoning in *Hoskins*. Furthermore, unlike the FCPA anti-bribery provisions, the accounting provisions of the FCPA apply to conspiring or aiding and abetting by "any person" and thus are not subject to any *Hoskins* limitations.

THE FCPA: ACCOUNTING PROVISIONS

The FCPA Resource Guide acknowledges that even though a company's internal accounting controls are not synonymous with a company's compliance program, an effective compliance program will have many of the same elements. This highlights the importance of a clear, consistent message of compliance coming from the top of an organization and the need for a non-siloed approach among stakeholders for FCPA compliance.



GUIDING PRINCIPLES OF ENFORCEMENT: DOJ FCPA CORPORATE ENFORCEMENT POLICY

- The FCPA Resource Guide included a significant update on the FCPA Corporate Enforcement Policy (“CEP”) that is contained in the US DOJ’s Justice Manual. The CEP provides that where a company voluntarily self-discloses misconduct, fully cooperates, and timely and appropriately remediates, there will be a presumption that the DOJ will decline to prosecute the company, absent aggravating circumstances. These declinations are published online and made publicly available. The CEP, similar to the FCPA Resource Guide, recognizes the benefits of corporate mergers and acquisitions, and highlights the importance of a robust compliance program, thorough and timely due diligence of the acquired entity, and post-acquisition audits and compliance integration efforts.
- An important takeaway from CEP Declination Example 3, where the DOJ declined to prosecute a publicly traded technology services company, was factor (6): the existence and effectiveness of the company’s pre-existing compliance program, as well as steps that it had taken to enhance its compliance program and internal accounting controls. This is an incentive for organizations to have compliance programs in place before an occurrence or violation. While this factor was included in the 2012 edition of the FCPA Resource Guide, the updated version demonstrates the government’s application of it.

- Corporate Compliance Program
 - The updated FCPA Resource Guide reiterates the importance of an effective compliance program: “a company’s compliance and ethics program can help prevent, detect, remediate, and report misconduct, including FCPA violations, where it is well-constructed, effectively implemented, appropriately resourced, and consistently enforced.”⁴
 - The Hallmarks of Effective Compliance Programs remain mostly unchanged and reiterate and align closely with the DOJ guidance published in April 2019 and refreshed in June 2020.
 - The FCPA Resource Guide has added four entirely new sections:
 - 1) Confidential Reporting and Internal Investigation
 - (2) Continuous Improvement: Periodic Testing and Review
 - (3) Mergers and Acquisitions: Pre-Acquisition Due Diligence and Post-Acquisition Integration
 - (4) Investigation, Analysis, and Remediation of MisconductThese sections highlight the importance of providing a mechanism for an organization’s employees to be able to report suspected or actual misconduct of a company’s policies on a confidential basis (such as an anonymous hotline); the need for a compliance program to be proactively reviewed and tested, and the ability for it to evolve; the importance of performing adequate FCPA due diligence prior to, or, where necessary, post-merger or acquisition; and the need for an organization to have a well-functioning mechanism to investigate or respond to any suspicions of misconduct within the company.
 - The prevention of bribery and corruption is certainly not merely an issue of concern for those in the United States, and the FCPA Resource Guide acknowledges that there is a developing international consensus on compliance best practices, with links to additional resources for organizations.

FCPA PENALTIES, SANCTIONS, AND REMEDIES: FORFEITURE AND DISGORGEMENT / COORDINATED RESOLUTIONS AND AVOIDING “PILING ON”

The FCPA Resource Guide updated these sections with new, applicable caselaw (Kokesh v. SEC: the Supreme Court ruled that the civil disgorgement remedy is subject to five-year statute of limitations and SEC v. Liu: the Supreme Court ruled that disgorgement is permissible equitable relief when it does not exceed a wrongdoer’s net profits) as well as a case study highlighting the practice of coordinating resolutions to avoid the “piling on” of penalties, forfeitures, and disgorgements.

WHEN IS A COMPLIANCE MONITOR OR INDEPENDENT CONSULTANT APPROPRIATE?

New to the FCPA Resource Guide are some additional factors the DOJ and SEC consider when determining whether appointing a compliance monitor is appropriate, such as (1) the risk profile of the company; (2) the quality of the company’s compliance program at the time of the resolution; and (3) whether the company’s current compliance program has been fully implemented and tested, among others.

CONCLUSION

The Resource Guide to the FCPA, Second Edition is one of the most comprehensive compliance guidelines published by the SEC and DOJ. The document itself is not only lengthy, but it also incorporates many other often-referenced documents, such as the 2017 FCPA Corporate Enforcement Policy and the 2019/2020 updates to the Evaluation of Corporate Compliance Programs, amongst others. The FCPA Resource Guide provides not only guidance, but also anonymized fact patterns, case studies, and a refresh of case law. Reviewing the document as part of a suite of government-issued compliance guidance, these are the areas that time and again, should be the focus for compliance professionals:

- Corporate compliance programs must have the ability to evolve and improve and should be subject to periodic review and monitoring
- Organizations must create a “culture of compliance” that includes methods for employees to report known or suspected misconduct and a way for the organization to investigate and respond to such incidents

- Importance of pre-acquisition (or, post-acquisition, if necessary) due diligence in the event of a merger or acquisition, as well as integrating the acquired company into the acquiring company’s compliance program
- Positive treatment of organizations that voluntarily self-disclose misconduct, so long as there are no aggravating circumstances

In conclusion, the Resource Guide to the FCPA, Second Edition reiterates that a “one-size-fits-all” or “check-the-box” approach to compliance will not be successful in combatting bribery or corruption, and will not be looked favorably upon by enforcement agencies. Compliance programs must not be static and must adjust, especially when high-risk parties are identified. This guide is a welcomed update from the SEC and DOJ.

RESOURCES:

¹ <https://www.justice.gov/criminal-fraud/file/1292051/download>

² Steele’s commentary can be found here:
<https://steeleglobal.com/10-critical-lessons-doj-2020-update/>

³ FCPA Resource Guide, p. iv

⁴ FCPA Resource Guide, p. 57

ABOUT STEELE COMPLIANCE SOLUTIONS, INC.

Steele is the global leader in Ethics & Compliance Management. We partner with the world's largest, most respected companies to deliver compliance products and services that help organizations embrace a culture of compliance while protecting their brand.



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