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Legal Update

Beyond the FCPA Resource Guide Redlines: *What's New and Why It Matters*

On July 3, 2020, the US Department of Justice (DOJ) Criminal Division and the Securities and Exchange Commission (SEC) released the second edition of the US Foreign Corrupt Practices Act Resource Guide ("Resource Guide").[1] More compilation than revolution, in this second edition the agencies weave in the foundational FCPA principles with enforcement examples, case law, and policy announcements of the past eight years, since the Resource Guide's initial publication in 2012.

This Mayer Brown Legal Update includes a quick blue box update on what's new in the second edition (with a redline comparison) and then moves beyond the redlines, providing context for some of the key themes in the updated Resource Guide, and related practical points that companies can implement now as part of continuous improvements to keep their compliance programs relevant and up to date.

A Timely Update: New Examples, *New Case Law, and New Policies*

Overall, there is little in this first (and only major) update to the Resource Guide that will surprise compliance and investigations practitioners. In fact, much of the original Resource Guide has retained its relevance, now reinforced by the second edition's new case studies and hypotheticals, recent case law, and new enforcement policies. Key updates include:

- ***Case studies and hypotheticals*** have been added, drawing from recent enforcement actions, including on:
  - *corrupt intent* in the absence of an actual bribe payment (United States v. Joo Hyun Bahn);
  - anything of value including:
    - cash paid via dedicated slush funds (United States v Odebrecht S.A.);
    - employment opportunities (Credit Suisse Non-Prosecution Agreement); and
    - travel and entertainment violations (United States v. SBM Offshore; United States v Ericsson);
  - *third party agents* (United States v. SBM Offshore);
  - application of the lo*cal law affirmative defense* (United States v Ng Lap Seng);
  - *mergers & acquisitions* (United States v. TechnipFMC (in the context of the merger of Technip plc and FMC Corp); United States v. Alstom S.A. (in the context of its acquisition by G.E.));
  - criminal liability for *accounting violations* (United States v. Och-Ziff Capital Management Group LLC; United States v. Panasonic Avionics Corp); and
  - coordinated FCPA resolutions to avoid *"piling on"* (United States v. Braskem S.A.).

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- Since the Resource Guide was first published, defendants have increasingly (although still relatively rarely) challenged FCPA prosecutions in court, leading to an expansion of the body of ***case law*** interpreting the FCPA. New case law updates include:
  - the meaning of "*instrumentality*" (United States v. Esquenazi);
  - whether a non-U.S. employee was acting as an *agent* for a U.S. affiliated subsidiary of a foreign entity (United States v. Hoskins); and
  - statute of limitations and SEC's *disgorgement* powers (Kokesh v. SEC and Liu v. SEC).
- Finally, and not surprisingly, many of the most substantial additions reflect the proliferation of new ***FCPA-related policies and guidance*** since 2012. These include the incorporation of detailed summaries and links to the DOJ's:
  - FCPA Corporate Enforcement Policy;
  - Selection of Monitors in Criminal Division Matters;
  - Coordination of Corporate Resolution Penalties or No "Piling On" Policy; and
  - the Criminal Division's Evaluation of Corporate Compliance Programs, updated just last month.

See our redline of the changes linked here.

Beyond the Redlines: Key Themes and Focus Points

Beyond the markup, the updated Resource Guide provides an opportunity to see the bigger picture and evolution of the FCPA and, more importantly, of global anti-corruption enforcement since 1977. The growth in FCPA enforcement from around the early 2000's, and particularly in the intervening eight years between the first and second editions of the Resource Guide, underscores the timely consolidation of related materials in the new update. By the numbers, since the FCPA was introduced in 1977:

- The first 26 years, from 1977–2003, saw 80 public DOJ/SEC corporate enforcement actions, resulting in over $125 million in total monetary sanctions imposed in FCPA-related enforcement actions.
- The next eight years, from 2004 (*Vetco Gray*) to 2011 (just prior to the publication of the Resource Guide first edition), included 247 DOJ/SEC enforcement actions and approximately $4.3 billion in total sanctions imposed.
- From 2012 to the present, the period between Resource Guide updates, saw 309 enforcement actions and $20 billion in related penalties paid to US authorities, or as is increasingly common, imposed as part of a global resolution and credited to foreign regulators by US authorities.[2]

Thus, the past eight of the statute's 43 years represent just under 50 percent of the total public corporate DOJ/SEC FCPA enforcement actions and more than 80 percent of the total monetary penalties. This also indicates major changes in the FCPA and corruption enforcement landscape and compliance risk over the last decade that continue to impact compliance practice today.

Below we consider five key themes and focus points:

1) the transformation to global anti-corruption enforcement,
2) the evolution of the bribe,
3) the growth of ethics and compliance as a discipline and within corporate entities,
4) the role mergers and acquisitions have played in FCPA expansion, and
5) the central role of the issuer (particularly the foreign issuer) and the accounting provisions in the FCPA story.

THE TRANSFORMED GLOBAL CORRUPTION ENFORCEMENT LANDSCAPE

Recalling its roots, the agencies begin the updated Resource Guide with a quote from the United States House of Representatives upon the FCPA's introduction in 1977, emphasizing the US stance on foreign bribery as both bad for business and running counter to the moral expectations and values of the US public: "*Bribery of foreign officials by some American companies casts a shadow on all U.S. companies*."

Perhaps prophetically, the legislative history reflects how the FCPA's origins include the very 2020 concept of reputational risk. Its genesis may have included the goal of preserving the reputation of the US and US companies operating abroad, but the reality of the last eight years has been about the FCPA's impact on, and the marked shift in, global anti-corruption enforcement. The number of metaphorical chairs around the global resolution negotiation table has multiplied, with the DOJ and SEC now routinely sitting alongside a proliferation of both other US regulators and international enforcers.

Locally, the Resource Guide also specifically recognizes the increasing cross-agency involvement between US enforcement, with added call-outs to dedicated FBI resources, the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, and the Treasury Department's Financial Crimes Enforcement Network. In our work, we have also seen increased coordination with the Department of Homeland Security, the IRS, and other investigative agencies.

The addition of foreign laws, such as the UK Bribery Act of 2010 including Deferred Prosecution Agreements introduced in 2014, France's Sapin II of June 2017, the Brazilian Anti-Bribery Law (Law No. 12,846/2013), Singapore's Prevention of Corruption Act, and Mexico's General Administrative Liabilities Act—each with important differences, although all largely inspired by the successes of the high-profile FCPA actions—have changed the anti-corruption enforcement landscape dramatically since the Resource Guide was first published. Cooperation efforts between the US and foreign authorities have only continued to increase over time, with the updated Resource Guide citing DOJ and SEC coordinated resolutions in more than 15 cases with foreign authorities in the United Kingdom, France, Singapore, Brazil, the Netherlands, Switzerland, and Germany. The Resource Guide also references the new Deferred Prosecution Agreement (DPA) regimes now in force in both the United Kingdom and France.

The Resource Guide also updates the section on local law affirmative defenses, confirming the very narrow scope of this rarely raised defense in responding to FCPA charges.[3] As the number and sophistication of foreign enforcement counterparts continues to grow, they also appear to be sharing not only the proceeds of enforcement actions but also the cost of anti-corruption efforts. The Resource Guide reports a substantial decrease in US funding of anti-corruption efforts abroad (from a reported $1 billion in 2009, as per the Resource Guide's first edition, to $112 million in 2019).[4]

The continued rise of a truly global corruption enforcement landscape has resulted in multi-national companies in particular finding themselves under scrutiny by multiple regulatory bodies. Here there are some ***key practice points*** to remember:

- **The FCPA May Not Be the Highest Bar:** In some cases, applicable local laws may be even more restrictive than the FCPA, including, for example, in relation to gift giving and government officials,[5] employment of former government officials,[6] and facilitation payments.[7]
- **Increasing Legal and Stakeholder Expectations:** At the same time, compliance programs are expanding to cover other non-financial risks, including rapidly expanding human rights and modern slavery-related regimes.[8]

- **Compliance Can Enable Responsible Growth:** This evolving and uneven landscape has made companies' risk assessment and diligence, including particularly as part of new-country entry, all the more important.
- **Value in Dynamic Continuous Improvement and Structuring Short Feedback Loops:** Companies must take a dynamic view of the changing risk landscape, set up continuous feedback loops, and maintain compliance visibility in strategic business planning and decision-making to ensure that:
  - expanding local requirements and stakeholder expectations are integrated; and
  - where possible, leveraged as leading indicators of emerging risks.[9]

FCPA SCOPE AND THE ONGOING EVOLUTION OF THE BRIBE

As corruption enforcement efforts have expanded globally, so too have the tools and methods employed to enrich unscrupulous government officials. The Resource Guide includes multiple new case studies reflecting indirect corruption touchpoints and enforcement's willingness to target deeper into companies' business models and supply chains. The Petrobras resolution is a prime example, with inflated invoices in multiple supply chain tiers used to enable and mask improper payments. The Petrobras investigation also illustrates how one investigation can spawn a web of related inquiries and enforcement actions. One matter, one agent, one source of documents, or one modus operandi can lead to multiple related investigations of other companies, individuals, and government entities—following the sphere of influence of a particular agent or similarly situated competitors in a marketplace. The Resource Guide updates include case studies on the Petrobras-linked Odebrecht S.A. and Braskem S.A. resolutions.

The updated Resource Guide also reflects new case law that illuminates some of the outer contours of the FCPA's jurisdictional reach. As one example, it addresses the Second Circuit's decision in *Hoskins* that rejected the DOJ's attempt to expand the FCPA's jurisdictional reach through the use of agency theory.[10] In that case, the Second Circuit held that an individual not otherwise directly covered by the FCPA's anti-bribery provisions (here, a foreign individual who had never set foot in the United States) could not be convicted of conspiring to violate, or aiding and abetting a violation of, the FCPA. The Resource Guide goes on to refer to the opposite conclusion reached by a judge in the Northern District of Illinois, leaving open the approach prosecutors will take outside of the Second Circuit going forward.[11] As another example, the Resource Guide, consistent with recent policy pronouncements, now includes a new qualification that in order for a parent company to be liable for a subsidiary's actions, the government must show that "the subsidiary is acting within scope of authority conferred by the parent."[12]

Related to the question of agency, a small update is also made to clarify the scope of the FCPA's anti-bribery provisions related to a company's shareholders—changing from a general reference to a company's "shareholders" to "stockholders acting on behalf of an issuer."

Since the agencies published the first edition, stakeholder expectations have only risen for companies to manage and respond to corruption-related risks appropriately in their wider corporate family network and deeper into their supply chains. In this context, companies can gain value by:

- applying a holistic approach to compliance risk across businesses and geographies; and
- using a combination of measures that are:
  - *proactive* (e.g., "horizon scanning," risk assessment, stakeholder engagement, planning and structure);
  - *preventative* (e.g., controls and monitoring); and

- *mitigating* (e.g., reporter response/detection, investigation, remediation/discipline, and active feedback).

The term "risk" itself appears over 75 times in the updated Resource Guide. Risk is not static, nor can a company's compliance program afford to be. Recent guidance and the Resource Guide reflect the importance of not just conducting risk assessments but also incorporating an active risk calculus in the daily operations and fabric of corporate culture. Companies can do this by:

- understanding their baseline risk profile, including learnings from their jurisdiction footprint, industry, and business model;[13]
- mapping the corruption risk touchpoints in every phase of a company's business model from supply chain, through operations, to go-to-market sales, and all the way to the end user; and
- aligning the compliance program (including proactive, preventative and mitigation elements) to this simplified profile and dynamic map.

Alongside regular company-wide risk assessments, structure-based feedback loops, and frequent re-evaluation at points of change and strategic business direction, can assist in enabling the future, rather than reacting to what's fallen through the cracks. Whether working towards a new-country entry, a new business line or a change in business model structure, companies should take these factors into account in real time rather than in the next two-year audit plan or even in a yearly business unit risk assessment.

THE GROWTH OF ETHICS AND COMPLIANCE INTO A CORPORATE INSTITUTION

When the agencies published the first edition of the Resource Guide, the Dodd–Frank Wall Street Reform and Consumer Protection Act and the SEC's Office of the Whistleblower were still in their relative infancy. A number of related updates now bring the second edition into line with the exponential development and maturity of ethics and compliance program practice in the years since 2012. Updates and additions of note include:

- Consistent with the most recent June 2020 update to the DOJ's Evaluation of Corporate Compliance Programs Guidance, the Resource Guide now replaces "implement effectively" with "adequately resourced and empowered to function effectively" in its core expectations for compliance programs.
- A new section titled "Investigation, Analysis, and Remediation of Misconduct" is largely consistent with the content found in the DOJ's Evaluation of Corporate Compliance Programs Guidance but also notes the DOJ and SEC's view that "the truest measure of an effective compliance program is how it responds to misconduct."
- The Resource Guide includes a new section regarding the effect instituting a compliance program may have in criminal resolutions—citing the Evaluation of Corporate Compliance Programs Guidance.

The ongoing proliferation of guidance and emphasis on providing adequate resources to compliance programs underscores the growth of ethics and compliance functions within global corporates. Anti-corruption risk is increasingly one of the more mature and developed areas of corporate risk management. For this reason, companies are now increasingly interested in leveraging anti-corruption compliance programs in other areas of growing corporate social responsibility expectations and emerging risk areas.

In the arena of non-financial risks, regulatory and legislative frameworks race to keep up with the speed of growing civil and societal expectations and commercial standards setting. Companies must assess and navigate a broader landscape of non-financial reputational and business risks—including those involving human rights/human capital, inclusion and diversity, environmental, and community impacts. In this context, the volume of different risks on which global companies' legal and compliance departments are now advising can seem overwhelming.

As compliance programs continue to evolve into covering a more diverse range of complementary risk areas, one helpful approach is to map, align and leverage from what the company already does well—with FCPA programs a potential key starting point or baseline. Illustrating the commercial case for compliance and executing a holistic map, align, leverage approach to non-financial risk can help create additional business support and pull the ethics and compliance function into the empowered and resourced position that the Resource Guide and related guidance now consider to be the standard for effective compliance.

ROLE OF THE ISSUER AND THE ACCOUNTING PROVISIONS

One prominent aspect of FCPA enforcement over the past eight years has been the SEC's use of the FCPA's accounting provisions (i.e., its requirements that issuers have accurate books and records and an effective system of internal accounting controls). The SEC has been particularly active in applying those provisions to foreign issuers of US securities for conduct occurring largely or wholly outside of the United States. As of December 2019, approximately 40 percent of publicly reported US FCPA investigations involved companies headquartered outside of the United States (particularly foreign issuers) or foreign national individuals.[14] The updates in the Resource Guide, as well as several related case law developments, highlight the importance of the issuer under the FCPA.

The definition of "domestic concern" is updated to refer to companies "other than an issuer," in line with the distinction between the two made elsewhere in the Resource Guide. The updated Resource Guide also incorporates the Supreme Court's rulings on the SEC's power to seek disgorgement as an equitable remedy in *Kokesh v. SEC* and *Liu v. SEC*.[15] Consistent with those cases, the Resource Guide now states that the civil disgorgement remedy is subject to a five-year statute of limitations and that "disgorgement is permissible equitable relief only when it does not exceed a wrongdoer's net profits and is awarded for victims." Additional updates include:

- Reference to the court's decision in *Kokesh v. SEC*, the Resource Guide confirms that the limitations period for criminal violations of the FCPA's accounting provisions is six years (as opposed to five years in civil enforcement actions).
- Clarification of the *mens rea* standard for corporate criminal liability under the accounting provisions, to make clear that there must be a "knowing and willful" failure to maintain accurate books and records or to implement an adequate system of internal accounting controls.

Finally, the Resource Guide makes clear that "a company's internal accounting controls are *not synonymous* with a company's compliance program."[16] The Resource Guide continues to note the likely overlap, however, stating that effective compliance programs will "contain a number of components that may overlap with a critical component of an issuer's internal accounting controls."

FCPA IMPACTS ON MERGERS AND ACQUISITIONS: YOU ARE WHAT YOU BUY

Consistent with policy pronouncements and other sources of guidance published in the interim, the updated Resource Guide substantially expands on M&A and corporate successor liability.[17] Modern FCPA enforcement owes its rapid growth in many ways to mergers, acquisitions and divestments. Expectations of due diligence, integration and the understanding of successor liability risks evolved from opinion releases and 2004's bellwether case of *Vetco Gray* enforcement action to Halliburton (and what compliance professionals often call the "Halliburton Protocol"). This protocol largely became the formal DOJ and SEC guidance and was institutionalized in the analysis of recent enforcement actions. The Resource Guide update brings additional focus on M&A and the importance of post-close integration efforts, especially where comprehensive due diligence may not be possible pre-close. Supporting DOJ's Corporate Enforcement Policy, the Resource Guide update adds examples of declinations related to successor liability based on M&A due diligence, post-close look-back and integration efforts, and a buyer's proactive and timely voluntary disclosure.

Overall, while the updated Resource Guide does not signal a revolution in FCPA enforcement, it does serve as a timely compilation that brings together eight years of examples, cases, and policies that build on core FCPA foundation principles. More importantly, it presents an opportunity for companies to reflect on the increasingly global nature of enforcement, broadening of stakeholder expectations, and rapidly changing business models—and, thus, find value in aligning their programs to this dynamic state, using holistic approaches and making continuous improvements to both protect and grow their companies.

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Endnotes

[1] The DOJ and SEC first published the Resource Guide in 2012. They made a small number of (unannounced) revisions in 2015. The second edition of the Resource Guide is available for download here: https://www.justice.gov/criminal-fraud/fcpa-resource-guide

[2] *See* data compiled by Stanford Law School, Foreign Corrupt Practices Act Clearinghouse, available here: http://fcpa.stanford.edu/index.html

[3] An additional case study is now included: the 2017 Southern District of New York trial in *United States v. Ng Lap Seng*, in which the court denied the defendant's motion for a jury instruction for the local law affirmative defense. In that case, the court held that even a finding by the jury that certain payments were not unlawful under the written laws and regulations of Antigua and the Dominican Republic would not require acquittal on related FCPA charges. *See United States v. Ng Lap Seng,* No. 15-cr-706 (S.D.N.Y. 2017).

[4] *See* Press Release, DOJ, Petróleo Brasileiro S.A. – Petrobras Agrees to Pay More Than $850 Million for FCPA Violations (Sept. 27, 2018); and Press Release, DOJ, Airbus Agrees to Pay over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case (Jan. 31, 2020).

[5] For example, Mexico's General Administrative Liabilities Act (GLAR) and South Korea's Kim Young-ran Act both provide for stricter thresholds preventing officials from accepting gifts or compensation from any person or organization.

[6] See, e.g., strict restrictions in certain circumstances placed by Mexico's GLAR on hiring public officials within one year of their departure from their prior government employment.

[7] The United States' facilitation payment exception, although narrow, is increasingly a global outlier. For example, facilitation payments are not permitted under multiple other international anti-corruption laws, including the UK Bribery Act, Canada's Corruption of Foreign Public Officials Act, Mexico's GLAR and India's Prevention of Corruption Act.

[8] See, e.g., United Nations Global Compact, https://www.unglobalcompact.org/ ; California's Transparency in Supply Chains Act, https://oag.ca.gov/SB657; and European Commission plans to introduce mandatory human rights due diligence, https://www.mayerbrown.com/en/perspectives-events/publications/2020/06/mandatory-human-rights-due-diligence-what-you-need-to-know

[9] *See* Audrey Harris, Matthew Alexander & Juliet Gunev, "Addressing Ethics and Compliance Risks in Uncertain Times," Law 360, April 6, 2020; available here: https://www.law360.com/articles/1258164

[10] *See* Jason Linder and William Sinnott, "Limits of FCPA Jurisdiction Over Foreigner After Hoskins," Law 360, April 10, 2020; available here: https://www.law360.com/articles/1256815/limits-of-fcpa-jurisdiction-over-foreigners-after-hoskins The DOJ has since appealed the court's decision in Hoskins.

[11] *See United States v. Firtash*, 392 F. Supp. 3d 872, 889. (N.D. Ill. 2019) (rejecting the holding in *Hoskins* and finding that the FCPA's jurisdiction extends to agents of any principal that itself falls within the FCPA's jurisdiction). The Resource Guide 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."

[12] Resource Guide at 28. This statement is consistent with remarks delivered by Assistant Attorney General Brian A. Benczkowski at the American Conference Institute's 36th International Conference on the Foreign Corrupt Practices Act (December 4, 2019): "…the Department is not looking to stretch the bounds of agency principles beyond recognition, or even push the FCPA statute towards its outer edges. For example, the Criminal Division will not suddenly be taking the position that every subsidiary, joint venture, or affiliate is an 'agent' of the parent company simply by virtue of ownership status. Conversely, we will also not be taking the position that every parent company should automatically be held liable for the acts of its subsidiaries, joint ventures, or affiliates based on an agency theory. Simply put, the law requires more. Each case and application of agency liability will need to be evaluated on its own and be based on a provable facts that align with agency principles." Available at: https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-american-conference

[13] This is consistent with June 2020 updates to the DOJ's Evaluation of Corporate Compliance Programs, which prompts prosecutors to ask whether a company has in place a process for tracking and incorporating into its periodic risk assessment lessons learned either from the company's own prior issues or from other companies facing similar risks by virtue of operating in the same industry and/or geographic region; the document is available here: https://www.justice.gov/criminal-fraud/page/file/937501/download

[14] *See* TRACE Global Enforcement Report 2019 (Mar. 2019, at 9, available for download at: https://info.traceinternational.org/2019-ger)

[15] Kokesh v. SEC, 137 S. Ct. 1635 (2017); and Liu v SEC, 591 U.S. __ (2020).

[16] Emphasis added.

[17] See, Press Release, DOJ, ABB Vetco Gray, Inc. and ABB Vetco Gray U.K. Ltd Plead Guilty to Foreign Bribery Charges (July 6, 2004), https://www.justice.gov/archive/opa/pr/2004/July/04_crm_465.htm; and Haliburton Opinion Release, DOJ Op. No. 08-02 (June 13, 2008), www.justice.gov/criminal/fraud/fcpa/opinion/2008/0802.pdf