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FCPA RESOURCE GUIDE

Second Edition of the DOJ/SEC FCPA Resource Guide Spotlights U.S. Enforcers' Controversial Legal Interpretations

By Philip Urofsky, *Shearman & Sterling*

On the evening of Friday July 3, 2020, the DOJ and the SEC released the second edition of the Resource Guide to the U.S. Foreign Corrupt Practices Act (the Resource Guide), originally published in 2012. The new edition is helpfully updated to include new enforcement action examples, new caselaw and new DOJ policies, but for those who have kept up to date on cases and policies, there are no major announcements or policy changes. There are, however, a few takeaways worth noting, as they reflect the government's continuing adherence to certain controversial interpretations of the statute as well as some strong indications of new foci in the government's evaluation of a company's compliance and cooperation.

Before delving into the details of what has changed, it is important to note that the Resource Guide represents the *government's* interpretation of the statute, the lessons the *government* takes from court opinions (in its favor or not), and the *government's* view of what represents best practices in compliance. It provides valuable insight, but one should not take it as gospel. There are plenty of areas in which the private sector and defense bar – and the courts – may have different and perhaps a "more correct" understanding of the law and its implications for corporate and individual behavior and liability.

See "Top Practitioners Analyze the New FCPA Guidance (Part One of Two)" (Nov. 28, 2012); Part Two (Dec. 12, 2012).

International and Intra-Agency Cooperation

In several passages, the DOJ and the SEC acknowledge that they are not the only ones active in combatting corruption either domestically or transnationally. For example, the new version expands the list of agencies cooperating in FCPA investigations from DHS, IRS and OFAC to now including the Federal Reserve, the CFTC and FinCEN.

At the same time, the agencies recognize that, after many years, they are seeing the development of an international enforcement effort, giving a particular shout-out to the French for their increasing efforts and noting the adoption of the deferred prosecution agreement mechanism by a number of countries.

See the Anti-Corruption Report's three-part series on the Airbus case: "A Milestone in International Anti-Corruption Cooperation" (Feb. 19, 2020); "Compliance Lessons" (Mar. 4, 2020); and "The Value of Cooperation" (Mar. 18, 2020).

"Business Advantage"

In 1998, as part of the amendments to the FCPA to implement the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention or Anti-Bribery Convention), Congress added as part of the requisite *quid pro quo* "securing any improper advantage." In the new edition of the Resource Guide, the agencies draw upon various enforcement actions to define a "business advantage" (not a term found in the statute) to include steps taken "to secure favorable tax treatment, to reduce or eliminate customs duties, to obtain government action to prevent competitors from entering a market, or to circumvent a licensing or permit requirement."

See "Navigating the Vagaries of the FCPA's Business-Nexus Requirement" (Nov. 18, 2015).

Payments to Third Parties

The FCPA prohibits corrupt payments (or offers or promises) to "any foreign official … foreign political party or official thereof or any candidate for foreign political office." It also prohibits payments to "any person" with the knowledge that some portion of such payment will be offered, promised, or paid by that person to a foreign official, political party, party official or candidate. The statute very clearly does not cover payments to other persons simply to influence a foreign official – it does not, in other words, criminalize peddling influence, rather it penalizes public corruption.

Nevertheless, in the new version of the Resource Guide, the government insists, as it has done in a number of recent settled enforcement actions, that that is exactly what the statute does, stating, "Companies also may violate the FCPA if they give payments or gifts to third parties, such as an official's family members, as an indirect way of corruptly influencing a foreign official."

Unfortunately, the bank internship cases in which the government has applied this theory all involved bad facts and were settled without judicial review, but ultimately the government will have to reconcile its theory with the actual words of the statute.

See "Barclays Resolves Hiring Practices Problems With the SEC for $6.3M" (Oct. 16, 2019).

Parent-Subsidiary Liability

Until shortly before the release of the 2012 version of the Resource Guide, the government had consistently and without deviation taken the position that a parent was liable for the acts of its subsidiaries when it "authorized, directed, or controlled" the subsidiary's unlawful activities, *i.e.*, when it was itself culpable in some degree.

In the first edition of the *Resource Guide*, the government embraced a second theory of parent liability, holding that the subsidiary could be viewed as an *agent* of the parent for all purposes and, thus, under principles similar to *respondeat superior*, be held liable for its subsidiary's actions regardless of whether it knew or approved of them. In December 2019, Assistant Attorney General Brian Benczkowski appeared to walk back from this position, promising a return to a narrower, more accountable theory of agency that, we hoped, would be more aligned with black-letter principles of corporate liability.

In the new edition, however, the DOJ and the SEC not only retained their commitment to the broader theory but made the connection to employer/employee liability even stronger, stating that a parent would be liable for bad conduct by its "agent" subsidiary whenever "the subsidiary is acting within the scope of authority conferred by the parent."

See "DOJ Enforcers Tout Transparency, the Defense Bar Responds" (Dec. 11, 2019).

Hoskins and a Workaround

The Second Circuit's decision in *United States v. Hoskins* is one of the most significant legal developments since the Resource Guide was published in 2012, and was interpreted by many as a blow to the DOJ's enforcement of the FCPA. One can take many things from the *Hoskins* saga, and, frankly, the DOJ might not have been as wrong in some of its approach as the courts' decisions indicate, but the Resource Guide takes an extremely narrow lesson from the multiple decisions, summarizing the holding as meaning only that a person not covered by the statute cannot conspire to violate it – *and only in cases brought in the Second Circuit*. The Resource Guide notes that a district court in another circuit took a different approach and it is clear that, outside the Second Circuit, the DOJ intends to continue charging foreign persons with conspiring with U.S. persons who acted in the U.S. even if the foreign person herself did not do so.

Moreover, the Resource Guide also points to a possible workaround at least when an issuer is involved by adding discussion of criminal liability for violations of the FCPA's accounting provisions. Indeed, the Resource Guide is less than subtle on this point, noting, "Unlike the FCPA anti-bribery provisions, the accounting provisions apply to 'any person,' and thus are not subject to the reasoning the Second Circuit's decision in *United States v. Hoskins* limiting conspiracy and aiding and abetting liability under the FCPA anti-bribery provisions."

See "After *Hoskins*: Critical Takeaways from the Most Important FCPA Trial in Years" (Apr. 15, 2020).

Tangential Territorial Jurisdiction

Since at least the Siemens and Magyar Telekom matters, the government has relied on tangential territorial jurisdiction to reach foreign persons, asserting that they acted in the U.S. because wire transfers from and to financial institutions outside the U.S. had passed through correspondent accounts in the U.S. or because emails from and to persons outside the U.S. had transited through U.S.-based servers.

This view was embraced in the 2012 version of the *Resource Guide*, and the government did not back away from it in the second edition. This is not, frankly, surprising, but it remains to be seen whether the Second Circuit's decision in *United States v. Napout*, in which the court warned against such tangential territorial jurisdiction being "the domestic tail [that] wag[s], as it were, the foreign dog," will put a crimp in the government's approach.

At any rate, under the holding in *Napout*, going forward – at least in the Second Circuit – it would appear that the government is going to have to prove more than a tangential territorial jurisdiction but also that the use of such

interstate commerce facilities is "essential, rather than merely incidental" to the offense.

See "The History and Reach of dd-3 Jurisdiction and Lessons for Companies Investigating Potential Violations" (Apr. 18, 2018).

Mergers & Acquisitions

Mergers and acquisitions have long been fruitful sources of FCPA enforcement actions, as hidden conduct comes out of the woodwork under the light of due diligence and the buyer tries to shed successor liability. In three separate sections, the Resource Guide discusses the importance of voluntary disclosures and compliance remediation in the M&A context.

First in a carrot-and-stick section, the Resource Guide outlines the spectrum of resolutions that might be available from pure successor liability for ongoing criminal conduct to charges only against the acquired company to the holy grail of a complete declination in recognition of extraordinary cooperation and remediation by the acquiring company.

Second, the Resource Guide discusses the importance of effective and rigorous pre-acquisition due diligence and, significantly, *post*-acquisition due diligence when the transaction did not allow for effective pre-acquisition due diligence.

Finally, the Resource Guide cautions that due diligence is only the beginning – that the government will also look at the acquiring company's efforts to integrate its new acquisition into its existing compliance program.

See the Anti-Corruption Report's three-part series on managing M&A anti-corruption risk: "Pre-Deal Prep" (Oct. 3, 2018); "Pre-Closing Risk Assessments and Due Diligence" (Oct. 17, 2018); and "Deal Terms and Integration" (Oct. 31, 2018).

Investigation Funding

In the recent third edition of the DOJ Criminal Division's guidance on Evaluation of Corporate Compliance Programs (ECCP), one of the noteworthy revisions was repeated admonitions that a corporate compliance program must be "adequately resourced" to be effective. This theme is continued in the Resource Guide, which twice states the importance of a "well-functioning and *appropriately funded* mechanism for the timely and thorough investigations of any allegations" and for "documenting the company's response, including any disciplinary or remediation measures taken." In fact, the company's commitment to a thorough investigation and remediation of wrongdoing is, according to the Resource Guide, the "truest measure of an effective compliance program."

See "A Side-by-Side Look at Recent Revisions to the ECCP" (Jun. 10, 2020).

Conclusion

In short, the second edition of the Resource Guide, like the first, is a helpful guide, as it were, to what to expect when encountering the government in an FCPA matter. Although the government may not be right in all aspects of its approach and interpretation we, as compliance and defense counsel, can and should push back when the government has strayed from the path. The Resource Guide nevertheless reflects the government's starting position as to the scope and meaning of the statute, what the government considers to be mitigating and aggravating circumstances, and

what factors it may consider in exercising its discretion as to resolutions.

See "ECCP Refinements Encourage Companies to Make Compliance a Positive Feedback Loop" (Jun. 24, 2020).

Philip Urofsky, a partner in the litigation group at Shearman & Sterling LLP, is a former federal prosecutor whose responsibilities encompassed investigating and prosecuting criminal and civil violations of the FCPA, as well as the money laundering and mail and wire fraud statutes and economic sanctions laws and regulations. He advises clients on conducting internal investigations, designing and implementing compliance programs, and responding to and defending against federal, state, and international criminal, civil, and administrative investigations, prosecutions, and trials on behalf of both business entities and Urofsky was a member of the United States' delegation to the OECD Working Group on Corruption. As a DOJ attorney, he was the primary drafter of the Department's Principles of Federal Prosecution of Corporations.