



White Collar, Government & Internal Investigations ADVISORY ■

JULY 20, 2020

DOJ and SEC Release the Second Edition of the FCPA Resource Guide

by [Brian D. Frey](#), [Debolina Das](#), and [Edward T. Kang](#)

On July 3, 2020, the Criminal Division of the U.S. Department of Justice (DOJ) and the Enforcement Division of the U.S. Securities and Exchange Commission (SEC) released a long-awaited update to the [Resource Guide to the U.S. Foreign Corrupt Practices Act](#) (FCPA) released in 2012. The Second Edition of the FCPA Guide will likely serve as one of the final acts of DOJ Criminal Division head Brian Benczkowski, whose last day in the role was the day of the update's release.

The Second Edition reflects numerous developments in the FCPA space since the FCPA Guide's initial publication in 2012, including refreshers on case law, guidance on definitions in the FCPA, discussion of policy changes, and incorporation of the DOJ Corporate Enforcement Policy, among other changes. Since 2012, defendants have increasingly challenged FCPA prosecutions on numerous grounds, and the updated FCPA Guide reflects the development in the body of FCPA case law in the past eight years. A redline comparing the substantive portions of the guide can be found [here](#).

"Business Purpose Test"

The original version of the FCPA guide merely stated that the FCPA applied only to payments intended to induce or influence a foreign official to use their position and provided little color on the application of the anti-bribery provision's business purpose test. The Second Edition provides greater clarity by more explicitly highlighting that the FCPA applies to payments, offers, or promises made for the purpose of: (1) influencing any act or decision of a foreign official in their official capacity; (2) inducing a foreign official to do or omit to do any act in violation of the official's lawful duty; (3) securing any improper advantage; or (4) inducing a foreign official to use their position with a foreign government or instrumentality thereof to affect or influence any act or decision of the government or instrumentality. It also highlights that the FCPA can be used as an enforcement tool against bribery when conducting business or to gain a business advantage.

The Second Edition also adds a reference to *United States v. Joo Hyun Bahn, et al.*, No. 1:16-cr-00831 (S.D.N.Y. Dec. 15, 2016), in which the defendant was convicted of an FCPA violation even though no foreign official actually received a bribe. It was enough that the defendant gave money to a third-party agent *for the purpose of* bribing a government official. The fact that the money never made it to the government official did not bear on the defendant's liability. The decision in *Bahn* supports the government's expansive view of the business purpose test and puts defendants on notice that it is the *corrupt intent* of the act that matters, not whether the bribe was successfully completed.

This advisory is published by Alston & Bird LLP to provide a summary of significant developments to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. This material may also be considered attorney advertising under court rules of certain jurisdictions.

“Instrumentality of a Foreign Government”

The Second Edition provides additional guidance on what constitutes an “instrumentality of a foreign government” for purposes of the FCPA. The updated FCPA Guide highlights the decision in *United States v. Esquenazi*, 752 F.3d 912 (11th Cir. 2014), which discusses the determination of whether an entity is an instrumentality of a foreign government. *Esquenazi* identifies the following non-exhaustive list of factors to determine whether the government “controls” an entity:

- The foreign government’s formal designation of that entity.
- Whether the government has a majority interest in the entity.
- The government’s ability to hire and fire the entity’s principals.
- The extent to which the entity’s profits, if any, go directly into governmental fiscal accounts and, by the same token, the extent to which the government funds the entity if it fails to break even.
- The length of time these indicia have existed.

The court further noted the following non-exhaustive factors to determine whether the entity performs a governmental function:

- Whether the entity has a monopoly over the function it exists to carry out.
- Whether the government subsidizes the costs associated with the entity providing services.
- Whether the entity provides services to the public at large in the foreign country.
- Whether the public and the government of that foreign country generally perceive the entity to be performing a governmental function.

As FCPA enforcement has shifted to include a greater focus on bribery involving entities that are distinct from but are nonetheless owned or controlled by foreign governments, the government’s incorporation of *Esquenazi*’s guidance is a useful acknowledgement of the significance of the decision.

Successor Liability

The DOJ and SEC specifically recognize in this edition the benefits of corporate mergers and acquisitions and provide more guidance with recent examples of compliance actions acquiring entities can take to mitigate and avoid FCPA issues that predated a merger or acquisition and the role of due diligence.

Aiding and Abetting and Conspiracy

The updated FCPA Guide adds a significant case on the theories of FCPA liability involving aiding and abetting and conspiracy. In *United States v. Hoskins*, 902 F.3d 69 (2nd Cir. 2018), the Second Circuit addressed whether individuals who could not be independently liable for an FCPA violation could nonetheless be guilty of conspiring to violate, or aiding and abetting the violation of, the FCPA anti-bribery provisions. Significantly, the court concluded they could not.

Although the Second Edition acknowledges this negative precedent for the government, it also points out that one district court has rejected the *Hoskins* decision. The FCPA Guide also explicitly states that the DOJ does not believe that

the *Hoskins* decision bars liability for conspiracy or aiding and abetting in cases involving the accounting provisions of the FCPA.

Statute of Limitations

The updated FCPA Guide provides some clarification on the applicable statutes of limitations for FCPA charges. The government explains that substantive violations of the anti-bribery provision are subject to a five-year statute of limitations, whereas violations of the accounting provision are subject to a six-year statute of limitations. The FCPA Guide also highlights a recent U.S. Supreme Court case holding that, because disgorgement in the civil context constitutes a “penalty,” it is subject to the five-year statute of limitations.

Additional Updates and Guidance

The Second Edition also updates a variety of other legal and policy issues related to the FCPA, including:

- Clarification of the *mens rea* requirement for criminal liability related to the accounting provision. The update adds that a violation must be knowing *and willful* to hold companies and individuals criminally liable.
- Revisions to the factors the DOJ considers in deciding whether to conduct an investigation or bring charges. The FCPA Guide lists 10 factors, including the following new or revised considerations:
 - The corporation’s willingness to cooperate with the government’s investigation, including into potential wrongdoing by the corporation’s agents.
 - The adequacy and effectiveness of the corporation’s compliance program at the time of the offense, as well as at the time of a charging or resolution decision.
 - The corporation’s timely and voluntary disclosure of wrongdoing.
 - The corporation’s remedial actions, including any efforts to implement an adequate and effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, or to pay restitution.
 - The adequacy of remedies such as civil or regulatory enforcement actions, including remedies resulting from the corporation’s cooperation with relevant government agencies.
- Extensive discussion of the DOJ FCPA Corporate Enforcement Policy, including examples of declinations relying on the policy, and emphasizing the incentives and benefits to voluntary disclosure.
- Addition of discussion of forfeiture and disgorgement and the DOJ and SEC striving not to impose duplicative penalties by coordinating resolutions between the agencies (also known as the “anti-piling on” policy).

Conclusion

The update provides welcome insights into the DOJ and SEC’s current priorities, policies, and considerations as both agencies continue to develop more transparency into their enforcement efforts. Notwithstanding the guide, defendants should continue to vigorously pursue defenses against ambiguous language open to interpretation within the statute. As is made clear by the abundance of new case law in the guide, as more defendants challenge the government’s charging decisions in FCPA cases, the case law interpreting and applying the FCPA will continue to evolve. The FCPA Guide will remain an important resource in helping companies and counsel navigate complicated FCPA issues in an

You can subscribe to future *White Collar, Government & Internal Investigations* advisories and other Alston & Bird publications by completing our [publications subscription form](#).

If you have any questions or would like additional information please contact your Alston & Bird attorney or any of the following:

White Collar, Government & Internal Investigations

Edward T. Kang
202.239.3728
edward.kang@alston.com

Meredith Jones Kingsley
404.881.4793
meredith.kingsley@alston.com

R. Joseph Burby IV
404.881.7670
joey.burby@alston.com

Jenny Kramer
212.210.9420
jenny.kramer@alston.com

Mark T. Calloway
704.444.1089
mark.calloway@alston.com

Paul N. Monnin
404.881.7394
paul.monnin@alston.com

Brian D. Frey
202.239.3067
brian.frey@alston.com

Jason D. Popp
404.881.4753
jason.popp@alston.com

Michael R. Hoernlein
704.444.1041
michael.hoernlein@alston.com

T.C. Spencer Pryor
404.881.7978
spence.pryor@alston.com

William H. Jordan
404.881.7850
202.756.3494
bill.jordan@alston.com

Thomas G. Walker
704.444.1248
919.862.2212
thomas.walker@alston.com

ALSTON & BIRD

WWW.ALSTON.COM

© ALSTON & BIRD LLP 2020

ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777
BEIJING: Hanwei Plaza West Wing ■ Suite 21B2 ■ No. 7 Guanghua Road ■ Chaoyang District ■ Beijing, 100004 CN ■ +86.10.85927500
BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719
CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111
DALLAS: Chase Tower ■ 2200 Ross Avenue ■ Suite 2300 ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899
LONDON: 5th Floor ■ Octagon Point, St. Paul's ■ 5 Cheapside ■ London, EC2V 6AA, UK ■ +44.0.20.3823.2225
LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100
NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444
RALEIGH: 555 Fayetteville Street ■ Suite 600 ■ Raleigh, North Carolina, USA, 27601-3034 ■ 919.862.2200 ■ Fax: 919.862.2260
SAN FRANCISCO: 560 Mission Street ■ Suite 2100 ■ San Francisco, California, USA, 94105-0912 ■ 415.243.1000 ■ Fax: 415.243.1001
SILICON VALLEY: 950 Page Mill Road ■ Palo Alto, California, USA 94304-1012 ■ 650.838.2000 ■ Fax: 650.838.2001
WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.239.3300 ■ Fax: 202.239.3333