
DOJ and SEC Release Second Edition of the FCPA Resource Guide

July 14, 2020

Introduction

On July 3, 2020, the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) released the second edition of the *Resource Guide to the U.S. Foreign Corrupt Practices Act* (2020 Guide), the first update to the Guide in nearly 10 years. Like the first edition, which was released in November 2012, the 2020 Guide does not break any meaningful new ground.¹ Instead, the 2020 Guide refreshes and updates the prior Guide in three main ways. First, the new edition incorporates significant policies that have been released by the DOJ since the first edition—for example, the Corporate Enforcement Policy (CEP). Folding these new policies into the 2020 Guide reinforces the DOJ’s stated goal of providing more guidance about the information considered and the standards applied when assessing and resolving Foreign Corrupt Practices Act (FCPA) matters with corporate entities.² Second, the 2020 Guide incorporates the recently decided and, in some cases, contested court decisions in the *Kokesh*, *Hoskins* and *Esquenazi* matters and sounds some critical notes as to the general applicability of the decisions in *Hoskins* and *Kokesh* by rejecting the holdings in these cases as not yet final or generally applicable. Third, the new edition updates case examples, referring to more recently resolved matters and adding those that illustrate new

¹ US Dep’t of Justice and US Sec. and Exch. Comm’n, *Resource Guide to the U.S. Foreign Corrupt Practices Act* (1st. ed. 2012), <https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf> (hereinafter “2012 Guide”).

² Rod Rosenstein, Deputy Att’y Gen., US Dep’t of Justice, Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017) (“The new [FCPA Corporate Enforcement Policy] enables the Department to efficiently identify and punish criminal conduct, and it provides guidance and greater certainty for companies struggling with the question of whether to make voluntary disclosures of wrongdoing.”), <https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign>; Leslie Caldwell, Asst. Att’y Gen., US Dep’t of Justice, Remarks at American Conference Institute’s 32nd Annual International Conference on Foreign Corrupt Practices Act (Nov. 17, 2015) (“[O]ne of [the] priorities in the Criminal Division has been to increase transparency regarding charging decisions in corporate prosecutions.”), <http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-rcaldwell-delivers-remarks-american-conference>.

developments in the field; for example, the 2020 Guide highlights the “connected hiring” cases as illustrations of what constitutes a “thing of value” under the statute.

The 2020 Guide refreshes a basic resource that will be familiar to compliance officers and practitioners. In fact, many compliance professionals will likely have digested the various guidance documents and case updates upon their earlier issuance but will benefit from their collection and consolidation in one document.

DOJ’s Policy Guidance Reflected, but Where is the SEC?

As noted above, much of the new content in the 2020 Guide pertains to the incorporation of guidance issued by the DOJ since 2012 concerning how it decides to open an investigation and how it makes charging decisions. It bears emphasizing that the updated content stems nearly entirely from DOJ-generated guidance and that the SEC has seemingly not “signed on” to these portions of the Guide. This means that since the issuance of the 2012 Guide, the SEC has offered very little formal, published guidance on its own enforcement views and the best explanation of the SEC’s corporate charging decisions remains the *2001 Seaboard Report* (as incorporated into the SEC’s *Enforcement Manual*)—a document that is nearly 20 years old.³ As we discuss further below, it is also notable that the updated Guide omits or tempers some of the DOJ guidance issued since 2012, namely the Yates Memo and its focus on individual accountability.

– DOJ Corporate Enforcement Policy

The 2020 Guide explains that in addition to the Principles of Federal Prosecution⁴ and the Principles of Federal Prosecution of Business Organizations⁵—both of which were described in the 2012 Guide—the DOJ’s decision regarding whether to open an investigation or bring charges will also be guided by the 2017 CEP.⁶ As we noted upon its issuance, the CEP effectively made permanent the DOJ’s 2016 FCPA “pilot program” that increased incentives for self-disclosure by adding a presumption of a declination if certain cooperation, remediation and disgorgement standards were met.⁷ The 2020 Guide also reflects the caveat from the CEP that, in some cases,

³ Sec. & Exch. Comm’n, Release No. 44969, *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions* (2001), <http://www.sec.gov/litigation/investreport/34-44969.htm>.

⁴ Dep’t of Justice, *Justice Manual* § 9-27.000, Principles of Federal Prosecution, <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution>.

⁵ *Id.* § 9-28.000, Principles of Federal Prosecution of Business Organizations, www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations.

⁶ 2020 Guide at 51–52. See also *Justice Manual* § 9-27.000, <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution>; *Justice Manual* § 9-28.000, www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations.

⁷ Andrew Weissmann, US Dep’t of Justice, *The Fraud Section’s Foreign Corrupt Practices Act Enforcement Plan and Guidance* (2016), <https://www.justice.gov/opa/file/838386/download>.

aggravating circumstances such as involvement by executive management of the company in the misconduct and criminal recidivism may warrant prosecution, self-disclosure notwithstanding.

As noted in the new 2020 Guide, “[a] declination pursuant to the CEP is a case that would have been prosecuted or criminally resolved except for the company’s voluntary disclosure, full cooperation, remediation, and payment of disgorgement, forfeiture, and/or restitution.”⁸ CEP declinations are made public as a matter of course, but the second edition marries the CEP policy guidance with the actual CEP declinations, which will likely prove a useful tool for analysis. In one example, the DOJ explains that it declined to prosecute a company for misconduct despite the involvement of high-level corporate officers for a number of reasons, particularly because of the company’s actions: (1) timely and voluntary self-disclosure and cooperation with the DOJ; (2) thorough and comprehensive investigation; (3) agreement to disgorge to the DOJ all profits made from the illegal conduct, a figure just under \$100,000; (4) multiple steps to reform its compliance program and internal controls; (5) remediation measures, including the termination of all executives and employees involved in the misconduct; and (6) assistance in enabling the DOJ to identify and charge the culpable individuals.⁹ The DOJ notes in a second example that it declined to prosecute a company that voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated, and where the company also agreed to pay a significant fine as part of a parallel investigation with the UK Serious Fraud Office.¹⁰

Declinations are also discussed elsewhere in the second edition. Although the text introducing these examples suggests that these were not declinations issued in connection with the CEP,¹¹ they nonetheless provide a real-life illustration of some of the factors set forth in the CEP—voluntary disclosure, cooperation, remediation and disgorgement—and therefore merit close analysis, particularly as the facts of non-CEP declinations typically are not publicized.

References to the CEP in the updated Guide are carefully preceded by “DOJ” and are included only in a section specific to the DOJ—the text explicitly makes clear that “[t]he CEP applies only to DOJ, and does not bind or apply to SEC.”¹² Although many of the factors employed by the SEC are similar to those utilized by the DOJ, with respect to this issue, the 2020 Guide notes simply: “As discussed above, SEC’s decision to bring or decline to bring an enforcement action under the FCPA is made pursuant to the guiding principles set forth in the *Seaboard Report*, as incorporated into the SEC’s *Enforcement Manual*.”¹³

⁸ 2020 Guide at 77.

⁹ *Id.* at 53.

¹⁰ *Id.* at 52–53.

¹¹ *See id.* at 79 (“Other than those pursuant to the CEP, neither DOJ or SEC typically publicizes declinations but, to provide some insight into the process, the following are anonymized examples of matters DOJ and SEC have declined to pursue.”).

¹² *Id.* at 52.

¹³ *Id.* at 79. The SEC’s policies regarding awarding cooperation credit are also set forth in the *Seaboard Report*, published in 2001. *See supra* note 3.

– **Incorporation of the DOJ's *Evaluation of Corporate Compliance Programs***

Strong compliance programs continue to be essential in preventing and detecting FCPA violations. The 2020 Guide details the hallmarks of an effective compliance program, while noting that “no one-size-fits-all program” exists, and describes the impact of strong compliance programs on charging decisions.¹⁴ New content in the 2020 Guide reflects the incorporation of recent elements from DOJ guidance, specifically the DOJ's *Evaluation of Corporate Compliance Programs* (DOJ Compliance Guidance). [As we described just last month when the DOJ issued updates to its guidance](#), the most recent iteration of the DOJ Compliance Guidance frames its examination of corporate compliance programs in the context of factors prosecutors should note and questions prosecutors should ask in the course of the investigation and resolution of DOJ matters.¹⁵ For example, the 2020 Guide notes that a well-designed compliance program requires a thoughtful root cause analysis of misconduct and timely and appropriate remediation and states that “[t]he truest measure of an effective compliance program is how it responds to misconduct.”¹⁶

As with the inclusion of the CEP, the 2020 Guide incorporates the FCPA content from the DOJ Compliance Guidance, and there is nothing substantively new in those additions. Interestingly, unlike the sections incorporating the CEP, the SEC does appear to “sign on” to the inclusion of these new updated compliance guidance elements, although the content in the 2020 Guide is obviously limited to the evaluation of FCPA compliance programs, whereas the DOJ Compliance Guidance is much broader.

– **Guidance on the Selection and Imposition of a Compliance Monitor or Independent Consultant**

Illustrating the DOJ's and the SEC's continued efforts to increase transparency around the imposition of compliance monitors in FCPA resolutions, including the recent publication of all current DOJ monitors on the Fraud Section website,¹⁷ the 2020 Guide again incorporates a discussion of when the selection and appointment of a compliance monitor or independent consultant might be appropriate. New to this section are considerations from the DOJ's 2018 memorandum, *Selection of Monitors in Criminal Division Matters* (2018 Monitor Memorandum);¹⁸ as [we noted](#) when this guidance was issued, it seemed to suggest the tempering of the imposition of corporate monitors and a potential narrowing of their scope of review during monitorships. The 2020 Guide echoes some of the cost and prudential considerations noted in the 2018 Monitor

¹⁴ 2020 Guide at 58.

¹⁵ The 2020 Guide explicitly includes “Confidential Reporting and Internal Investigations,” “Continuous Improvement: Periodic Testing and Review,” “Mergers and Acquisitions: Pre-Acquisition Due Diligence and Post-Acquisition Integration,” and “Investigation, Analysis, and Remediation of Misconduct” as hallmarks of an effective compliance program. *Id.* at 66–68.

¹⁶ *Id.* at 67.

¹⁷ Dep't of Justice, *List of Independent Compliance Monitors for Active Fraud Section Monitorships* (June 2, 2020), <https://www.justice.gov/criminal-fraud/strategy-policy-and-training-unit/monitorships>.

¹⁸ Brian A. Benczkowski, US Dep't of Justice, *Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations* (2018), <https://www.justice.gov/criminal-fraud/file/1100366/download>.

Memorandum, ultimately restating that “[w]here a corporation’s compliance program and controls are demonstrated to be effective and appropriately resourced at the time of resolution, a monitor will likely not be necessary.”¹⁹

While the discussion of the 2018 Monitor Memorandum in the updated 2020 Guide identifies it clearly as a DOJ document, there are some changes to factors both agencies consider when determining whether a compliance monitor is appropriate. For example, rather than focusing solely on the seriousness of the misconduct, the 2020 Guide indicates that the “nature” of the misconduct will now also be considered. Additionally, the Guide clarifies that both agencies will now take a full view of the evaluation of a company’s compliance program from the time of misconduct to the present: specifically, while the 2012 version identified the “[q]uality of the company’s compliance program at the time of the misconduct” as a factor, the updated version now notes that the evaluation will also include “whether the company’s current compliance program has been fully implemented and tested.”²⁰

– Incorporation of the “No-Piling-On” Policy

Finally, the 2020 Guide explains that a goal of both the DOJ and the SEC is to avoid imposing duplicative penalties, forfeiture and disgorgement of the same conduct and cites the 2016 Braskem resolution between the DOJ, the SEC, and Brazilian and Swiss authorities as an example of how the agencies have sought to pursue this goal. Here again, however, the Guide notes that the DOJ has “memorialized this practice of coordinating resolutions to avoid ‘piling on’” with written guidance to prosecutors. As we noted in 2018 when the DOJ issued its *Policy on Coordination of Corporate Resolution Penalties* (No-Piling-On Policy), the No-Piling-On Policy sets out four basic principles.²¹ The 2020 Guide makes explicit these principles—essentially that US prosecutors should endeavor to coordinate with international counterparts and domestic regulators to avoid duplicative

¹⁹2020 Guide at 74 (citing Benczkowski, *supra* note 17, <https://www.justice.gov/criminal-fraud/file/1100366/download>).

²⁰ *Id.*

²¹ Dep’t of Justice, *Justice Manual* § 1-12.100, Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings, <https://www.justice.gov/jm/jm-1-12000-coordination-parallel-criminal-civil-regulatory-and-administrative-proceedings>. The policy sets out four basic principles: (1) “Department attorneys should remain mindful of their ethical obligation not to use criminal enforcement authority unfairly to extract, or to attempt to extract, additional civil or administrative monetary payments”; (2) where multiple DOJ components investigate a company for the same conduct, “Department attorneys should coordinate with one another to avoid unnecessary imposition of duplicative fines, penalties, and/or forfeiture against the company,” with the “goal of achieving an equitable result”; (3) the DOJ “should also endeavor, as appropriate, to coordinate with and consider the amount of fines, penalties, and/or forfeiture paid to other federal, state, local, or foreign enforcement authorities that are seeking to resolve a case with a company for the same misconduct”; and (4) the DOJ “should consider all relevant factors in determining whether coordination and apportionment between Department components and with other enforcement authorities allows the interests of justice to be fully vindicated,” including “the egregiousness of a company’s misconduct; statutory mandates regarding penalties, fines, and/or forfeitures; the risk of unwarranted delay in achieving a final resolution; and the adequacy and timeliness of a company’s disclosures and its cooperation with the Department.” *Id.*

resolutions for the same misconduct—and the related factors prosecutors should consider in determining how much to credit penalties paid to a foreign authority.²²

– Exclusion of the Yates Memo

The 2020 Guide’s discussion of what the DOJ considers when deciding to open an investigation or bring charges does not refer to the DOJ’s 2015 *Memorandum on Individual Accountability for Corporate Wrongdoing* (Yates Memo).²³ Authored by then Deputy Attorney General Sally Q. Yates, the purpose of the memorandum was to further the DOJ’s goal of holding individuals accountable for corporate wrongdoing. [As we previously reported](#), for corporations to receive *any* cooperation credit, the Yates Memo required them to provide the Department with “all relevant facts relating to the individuals responsible for the misconduct.” In other words, companies no longer could pick and choose what to disclose. In 2018, the DOJ slightly modified the approach in the Yates Memo, revising its protocols to allow companies seeking cooperation credit in criminal cases to identify every individual who was *substantially* involved in or responsible for the criminal conduct.²⁴ Following concerns about the inefficiency of requiring companies to identify every employee involved regardless of culpability, the DOJ clarified that investigations should not be delayed merely to collect information about individuals who were not likely to be prosecuted and whose involvement was not substantial. This allowed the DOJ greater flexibility and discretion in awarding cooperation credit in civil cases. Notably, the 2020 Guide neither refers to the “all relevant facts” requirement in the Yates Memo nor discusses the tempering of that requirement in 2018. Juxtaposed against repeated statements from DOJ officials over recent years emphasizing that individual prosecutions remain a priority, the omission of the Yates Memo from the 2020 Guide is notable.²⁵

Settled Law? Recent Relevant Court Decisions

As we have discussed here,²⁶ the years following the publication of the first edition of the Guide have seen courts weigh in on several issues of importance to the FCPA bar. That the 2020 Guide

²² 2020 Guide at 71.

²³ Sally Q. Yates, US Dep’t of Justice, *Individual Accountability for Corporate Wrongdoing* (2015), <https://www.justice.gov/archives/dag/file/769036/download>.

²⁴ Rod J. Rosenstein, Deputy Att’y Gen., US Dep’t of Justice, Remarks at the American Conference Institute’s 35th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2018), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0>.

²⁵ See, e.g., Rod J. Rosenstein, Deputy Att’y Gen., US Dep’t of Justice, Keynote Address on FCPA Enforcement Developments (Mar. 7, 2019), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-keynote-address-fcpa-enforcement> (stating that the DOJ would focus on identifying individuals “who play significant roles in setting a company on a course of criminal conduct” in an effort to identify those individuals “who devised and authorized criminal schemes.”).

²⁶ WilmerHale, *Client Alert: Second Circuit Limits Government’s Ability to Prosecute Foreign Persons and Companies for Conspiracy to Violate the FCPA* (Aug. 28, 2018), <https://www.wilmerhale.com/en/insights/client-alerts/20180828-second-circuit-limits-governments-ability-to-prosecute-foreign-persons-and-companies-for-conspiracy-to-violate-the-fcpa>; WilmerHale, *Client Alert: Supreme Court Articulates Dodd-Frank Whistleblower Definition in Digital Realty Trust, Inc. v. Somers* (Feb. 23, 2018), <https://www.wilmerhale.com/en/insights/client-alerts/supreme-court-articulates-dodd-frank>

incorporates court decisions in *Esquenazi*, *Hoskins* and *Kokesh* will come as no surprise to practitioners or compliance professionals, but the extent to which the enforcement authorities seek to downplay the significance of *Hoskins* may indicate their intention to contest this ruling in other contexts in the future. Notably, the 2020 Guide omits discussion of the Supreme Court's *Digital Realty* decision despite its importance in connection with the SEC's whistleblower program.

– ***United States v. Esquenazi*, 752 F.3d 912 (11th Cir. 2014)**

In 2014, the Eleventh Circuit in *United States v. Esquenazi* provided a two-part definition of government “instrumentality” and outlined a non-exhaustive list of factors to consider when applying each part of the test.²⁷ The decision generally supported the position previously advanced by the US government and memorialized in the 2012 Guide that the FCPA prohibits payments to employees of government-owned and -controlled entities, even when those entities operate in the commercial arena.²⁸

The Eleventh Circuit defined “instrumentality” under the FCPA as “an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own.”²⁹ The court then offered a non-exhaustive list of factors to consider when assessing each part of the definition.³⁰ The 2020 Guide accordingly replaces the list of factors borrowed from prior cases included in the 2012 Guide with the *Esquenazi* factors.³¹

– ***United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018)**

The question before the *Hoskins* court was whether a nonresident foreign national acting entirely outside the United States who is not an employee or agent of an American company can be prosecuted on a theory of conspiracy to commit or accessory liability to a violation of the FCPA.³² The DOJ has jurisdiction to prosecute US persons or entities or any officer, director, employee or agent thereof and any person in US territory acting in furtherance of a corrupt payment.³³

The Second Circuit affirmed the lower court's ruling that the government cannot charge the defendant with conspiracy to violate § 78dd-2 absent an agency relationship, nor could it charge a defendant with conspiracy to violate § 78dd-3 absent proof that the defendant committed an act in furtherance of a bribe while physically present in the United States.³⁴ The court cited the FCPA's

[whistleblower-definition-in-digital-realty-trust-inc-v-somers](#); WilmerHale, *Client Alert: Implications of the Supreme Court's Kokesh Decision* (June 19, 2017), <https://www.wilmerhale.com/en/insights/client-alerts/2017-06-19-implications-of-the-supreme-courts-kokesh-decision>; WilmerHale, *Client Alert: Eleventh Circuit Adopts Broad Definition of Government “Instrumentality” Under FCPA* (May 22, 2014), <https://www.wilmerhale.com/en/insights/client-alerts/eleventh-circuit-adopts-broad-definition-of-government-instrumentality-under-fcpa#22>.

²⁷ *United States v. Esquenazi*, 752 F.3d 912 (11th Cir. 2014).

²⁸ 2012 Guide at 20–21.

²⁹ *Id.* at 925.

³⁰ *Id.* at 928–29.

³¹ 2020 Guide at 20.

³² *United States v. Hoskins*, 902 F.3d 69, 97 (2d Cir. 2018).

³³ 15 U.S.C. §§ 78dd-2-3.

³⁴ *Hoskins* at 71–72.

legislative history to exclude foreign nationals from FCPA liability “when they do not act as agents, employees, directors, officers, or shareholders of an American issuer or domestic concern and when they operate outside United States territory”³⁵ and held that the government failed to demonstrate clear congressional intent to permit accomplice and conspiracy liability to extend the statute’s extraterritorial reach.³⁶

The 2020 Guide nevertheless asserts that “[a] foreign company or individual may be held liable for aiding and abetting an FCPA violation or for conspiring to violate the FCPA, even if the foreign company or individual did not take any act in furtherance of the corrupt payment while in the territory of the United States”³⁷ and emphasizes *Hoskins*’ potentially limited reach as a Second Circuit decision that has not been followed by “[a]t least one district court from another circuit.”³⁸ Notably, in its discussion of accounting controls, the 2020 Guide also mentions that the accounting provisions, unlike the FCPA anti-bribery provisions, apply to “any person” and are therefore not subject to the potentially applicable constraints laid out in *Hoskins*.³⁹

– ***Kokesh v. SEC*, 137 S. Ct. 1635 (2017)**

In 2017, the Supreme Court unanimously held that disgorgement imposed as a sanction for violating federal securities law constituted a “penalty” and was subject to a five-year statute of limitations under 28 U.S.C. § 2462,⁴⁰ which applies to any “action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise” brought by any government entity.⁴¹ The Court held that SEC disgorgement is a penalty because it is meant to (1) address a wrong to the public as opposed to an individual investor and (2) deter future violations of the federal securities laws.⁴²

Amending its prior guidance that 28 U.S.C. § 2462 “does not prevent SEC from seeking equitable remedies, such as injunction or the *disgorgement of ill-gotten gains*, for conduct pre-dating the five-year period,” the 2020 Guide clarifies that, after *Kokesh*, disgorgement is a penalty, not an equitable remedy.⁴³

While acknowledging that *Kokesh* applies the five-year limitations period to disgorgement actions,⁴⁴ the 2020 Guide section on forfeiture and disgorgement nevertheless appears to reject the characterization of “disgorgement” as a penalty, asserting that “[w]hile the purpose of a penalty or fine is to punish and deter misconduct, the purpose of forfeiture and disgorgement is primarily to return the perpetrator to the same position as before the crime, ensuring that the perpetrator does

³⁵ *Id.* at 93–94.

³⁶ *Id.* at 95.

³⁷ 2020 Guide at 36.

³⁸ *Id.*

³⁹ *Id.* at 46.

⁴⁰ *Kokesh v. SEC*, 137 S. Ct. 1635, 1639 (2017).

⁴¹ 28 U.S.C. § 2462.

⁴² *Kokesh* at 1643.

⁴³ 2020 Guide at 37.

⁴⁴ *Id.*

not profit from the misconduct.”⁴⁵ The 2020 Guide also briefly mentions the Court’s recent holding in *Liu v. SEC* that the SEC may obtain disgorgement provided the disgorgement is awarded to the victims and does not exceed a wrongdoer’s net profits.⁴⁶

– ***Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767 (2018)**

The 2020 Guide does not mention *Digital Realty Trust, Inc. v. Somers*. In 2018, the Supreme Court held in this case that the anti-retaliation whistleblower protections contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) apply only to those individuals who have reported to the SEC when the alleged retaliatory conduct occurs.⁴⁷ The Dodd-Frank Act defines “whistleblower” as a person who provides “information relating to a violation of the securities laws to the Commission.”⁴⁸

Rule 21F-2(b), an SEC rule promulgated under the Dodd-Frank Act, purported to extend the whistleblower definition “for purposes of the anti-retaliation protections” to cover individuals who “possess a reasonable belief that the information [they] are providing relates to a possible securities law violation” and who provide that information to a federal regulatory or law enforcement agency, Congress, or a supervisor.⁴⁹ The Court rejected the SEC’s rule, holding that the Dodd-Frank Act’s anti-retaliation rule does not extend to individuals who have not reported to the SEC.⁵⁰ The decision incentivizes potential whistleblowers to report to the SEC immediately in order to qualify for an SEC award and, in the event of retaliation, to avail themselves of the broader protections of the Dodd-Frank Act. The 2020 Guide does not explicitly mention *Digital Realty*, which is notable given the substantial awards for SEC whistleblowers and the competing goal of corporate compliance programs to encourage internal reporting.⁵¹

Explaining Elements of the Statute, Illustrated by Recently Resolved Matters

Finally, the 2020 Guide also supplements its interpretation of several key elements of the statute, illustrating these points with descriptions of recent corporate resolutions.

– **Offers and Promises, as Well as Payments, Can Run Afoul of the FCPA**

While not groundbreaking, the 2020 Guide states more clearly that the business purpose analysis extends not only to payments, but also to offers and promises of things of value made to gain or

⁴⁵ *Id.* at 70.

⁴⁶ *Liu v. SEC*, 140 S. Ct. 1936, 1940 (2020).

⁴⁷ *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767, 778 (2018).

⁴⁸ 15 U.S.C. § 78u-6(a)(6).

⁴⁹ 17 C.F.R. § 240.21F-2(b).

⁵⁰ *Digital Realty* at 772–73.

⁵¹ For a discussion of protections available to whistleblowers, see 2020 Guide at 82–83.

maintain direct or indirect business advantages.⁵² The 2020 Guide reinforces the point that mere “offers” can run afoul of the FCPA even if an improper payment to an official is not ultimately made, citing a resolution with Joohyun Bahn, a New York-based commercial real estate broker.⁵³ Bahn promised a middleman that he would pay a \$2.5 million bribe to a government official at a Middle Eastern sovereign wealth fund to induce business, and he paid the middleman \$500,000 up-front. Unbeknownst to Bahn, the middleman did not have a relationship with the foreign official, and he kept the \$500,000 payment. Bahn pled guilty to DOJ charges of violating the FCPA and conspiracy to violate the FCPA, and the SEC charged Bahn with violating the anti-bribery, books and records, and internal controls provisions of the FCPA.⁵⁴

– Things of Value

The 2020 Guide also offers new and updated examples for categories that have previously been established as “of value.” In the category of “large, extravagant gift-giving,” the 2020 Guide holds out SBM Offshore as an example.⁵⁵ The company entered into a three-year deferred prosecution agreement with the DOJ in November 2017 in connection with an alleged conspiracy to violate the FCPA by providing foreign officials with travel to sporting events and with “spending money,” shipping them luxury vehicles and paying for school tuition for their children.⁵⁶

Another illustration of improper travel and entertainment expenses is found in the 2020 Guide’s reference to the December 2019 blockbuster settlement with Ericsson, in which the company agreed to pay more than \$1 billion to resolve FCPA charges.⁵⁷ The 2020 Guide explains that Ericsson paid millions of dollars to third parties, who used a portion of the funds to pay for gifts, travel and entertainment for Chinese government officials; and although the trips purportedly involved training at the company’s facilities, no training occurred on many of these trips, as the company had no facilities at those locations—citing, for example, a luxury cruise through the Caribbean and trips to Las Vegas and London.⁵⁸

The 2020 Guide also acknowledges the recent series of cases involving the hiring, promotion and retention (often as paid or unpaid interns) of the children of government officials as a “thing of

⁵² 2020 Guide at 11. The 2020 Guidance repeats the language of the statute, noting that the FCPA applies only to payments, offers or promises made for the purpose of “(i) influencing any act or decision of a foreign official in his official capacity, (ii) inducing a foreign official to do or omit to do any act in violation of the lawful duty of such official, (iii) securing any improper advantage; or (iv) inducing a foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality.”

⁵³ *Id.* at 13.

⁵⁴ US Department of Justice Press Release No. 18-11: New Jersey Real Estate Broker Pleads Guilty to Role in Foreign Bribery Scheme Involving \$800 Million International Real Estate Deal (Jan. 5, 2018); Order Instituting Cease-and-Desist Proceedings, In the Matter of Joohyun Bahn, Rel. No. 3968, File No. 3-18728 (Sep. 6, 2018).

⁵⁵ 2020 Guide at 15.

⁵⁶ Deferred Prosecution Agreement, *United States v. SBM Offshore N.V.*, No. 17-686 (S.D. Tex. Nov. 21, 2017).

⁵⁷ 2020 Guide at 15; US Department of Justice Press Release No. 19-1360: Ericsson Agrees to Pay Over \$1 Billion to Resolve FCPA Case (Dec. 6, 2019).

⁵⁸ 2020 Guide at 15; US Department of Justice Press Release No. 19-1360: Ericsson Agrees to Pay Over \$1 Billion to Resolve FCPA Case (Dec. 6, 2019).

value.” The 2020 Guide focuses specifically on the July 2018 Credit Suisse resolution with the DOJ and the SEC related to a Hong Kong subsidiary’s “systematic scheme to hire, promote, and retain the children of Chinese officials in order to win business with those officials.”⁵⁹

– Third Parties

In addition, the 2020 Guide provides fresh examples of the perils of using third-party intermediaries, including the 2018 resolutions with Société Générale and Legg Mason,⁶⁰ as well as the aforementioned SBM case, where an intermediary was used to provide extravagant gifts and commissions to foreign government officials in Brazil, Angola, Equatorial Guinea, Kazakhstan and Iraq.⁶¹

– Clarification Regarding FCPA Internal Controls

The FCPA’s internal accounting controls provision requires companies to provide “reasonable assurances” for the reliability of financial reporting and the preparation of financial statements.⁶² Importantly, the 2020 Guide notes that the FCPA does not specify a particular set of controls that companies are required to implement, and it makes clear that a company’s internal controls “are not synonymous with a company’s compliance program.”⁶³ Nevertheless, an effective compliance program will overlap with components of an issuer’s accounting controls, and the design of these controls must account for the operational risks attendant to the company’s business.⁶⁴ This recognition indicates that neither the DOJ nor the SEC will shy away from its pursuit of internal controls violations where companies fail to apply adequate remedies to avoid misconduct.

– Clarifications Regarding Statute of Limitations for Criminal FCPA Violations

The 2020 Guide also provides two key clarifications regarding application of the FCPA books-and-records and internal controls provisions. First, the 2020 Guide states that the five-year statute of limitations set forth in 18 U.S.C. § 3282 applies to substantive violations of the FCPA anti-bribery provisions, while violations of the accounting provisions are considered “securities fraud offense[s]” and are therefore subject to the six-year limitations period under 18 U.S.C. § 3301.⁶⁵ Second, the 2020 Guide clarifies that criminal liability for violating the FCPA’s accounting provisions can be imposed only on defendants who both knowingly and willfully fail to comply with the books-and-records or internal controls provisions.⁶⁶

⁵⁹ 2020 Guide at 16.

⁶⁰ *Id.* at 22.

⁶¹ Deferred Prosecution Agreement, *United States v. SBM Offshore N.V.*, No. 17-686 (S.D. Tex. Nov. 21, 2017).

⁶² 2020 Guide at 40.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 36.

⁶⁶ *Id.* at 45.

– Local Law Defense

Finally, the 2020 Guide uses the example of *Ng Lap Seng* to illustrate the narrowness of the local law affirmative defense. In that case, the district court rejected the defendant’s request for a jury instruction on the local law affirmative defense, holding that the proposed instruction was “inconsistent with the plain meaning of the language of the written laws and regulations affirmative defense contained in the FCPA.”⁶⁷ The court also reasoned that the defendant’s request was not directly supported by the majority of sources that had addressed the issue and, if applied, “would lead to impractical results.”⁶⁸

Conclusion

The 2020 Guide, released with little fanfare on the last day of Brian Benczkowski’s tenure as head of the Criminal Division, makes good on the DOJ’s promise to provide guidance on and insight into the rationale behind decisions it makes in charging and at the time of resolution. The second edition incorporates most major DOJ guidance announced since the first edition was released in 2012, addresses new case law developments and provides additional guidance as to the interpretation of key elements of the statute. The 2020 Guide may also be instructive in the points it does not address, such as the whistleblower policy updates from the SEC and several DOJ policy initiatives that once received significant attention, such as the Yates Memo and its focus on individual accountability.

⁶⁷ *Id.* at 24.

⁶⁸ *Id.*

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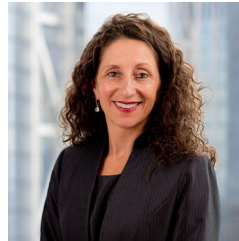
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