

CLIENT ALERT

Despite COVID-19, DOJ and SEC Update the Resource Guide to the FCPA

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On July 3, 2020, the Department of Justice (“DOJ”) and the Securities and Exchange Commission (“SEC”) published the Second Edition of the Resource Guide to the Foreign Corrupt Practice Act (“2020 FCPA Resource Guide”), which updates and refines the current guidance for companies and individuals navigating Foreign Corrupt Practices Act (“FCPA”)-related risks. Like the First Edition published in 2012, the 2020 FCPA Resource Guide provides extensive and valuable guidance regarding enforcement objectives and evaluative measures of two of the largest federal law enforcement agencies.

The timing of the 2020 FCPA Resource Guide – coming on the heels of the DOJ’s recent update regarding corporate compliance programs, issued last month¹ – underscores both the DOJ’s and the SEC’s commitment to FCPA enforcement, even in the midst of COVID-19. The 2020 FCPA Resource Guide, in conjunction with the DOJ’s other compliance-related updates, emphasizes the critical role compliance plays in this era of uncertainty.

The 2020 FCPA Resource Guide incorporates several major developments from the last eight years, including (1) several DOJ enforcement policies, such as the DOJ’s FCPA Corporate Enforcement Policy² and updated Evaluation of Corporate Compliance Programs; (2) updates reflecting new case law involving aiding and abetting liability³ as well as the recent Supreme Court decisions regarding the SEC’s disgorgement remedy⁴; and (3) many recent FCPA cases that serve as examples of the DOJ and SEC’s enforcement strategy. Significantly, rather than posing hypothetical scenarios, the new 2020 FCPA Resource Guide incorporates actual cases and outcomes to illustrate the Government’s approach to particular situations.

Key Additions to the 2020 Resource Guide

The below non-exhaustive list highlights the key areas in which the 2020 FCPA Resource Guide provides updated guidance:

- **Importance of Dynamic Corporate Compliance Programs.** The 2020 FCPA Resource Guide incorporates the DOJ’s most up-to-date guidance regarding compliance programs, reflected in the DOJ’s revised Evaluation of Corporate Compliance Programs released last month. This guidance emphasizes the need for companies to **continuously monitor and evaluate** the effectiveness of their programs through the use of data, auditing, and hotlines, and to subsequently revise programs to address new or evolving compliance risks.⁵ The 2020 FCPA

Resource Guide also further breaks down the DOJ's guidance into four distinct categories: (1) confidential reporting and internal investigations; (2) continuous improvement: periodic testing and review; (3) mergers and acquisitions: pre-acquisition due diligence and post-acquisition integration; and (4) investigation, analysis, and remediation of misconduct.¹¹

- **Importance of Adequate Internal Controls.** The 2020 FCPA Resource Guide now explains that while “[i]nternal controls and compliance [are] not synonymous, [] similar considerations apply.”¹² Again, this requires a company to adopt tailored internal controls that address risks specific to that company's operations. The 2020 FCPA Resource Guide and its exemplar cases reiterate that the DOJ may pursue internal control cases even without an underlying, viable substantive bribery charge. Furthermore, the 2020 FCPA Resource Guide clarifies that charges related to failure to establish efficient internal controls apply to “any person” and are not subject to some of the jurisdictional limitations imposed on bribery charges.¹³
- **Mergers & Acquisitions: Successor Liability.** The revised 2020 FCPA Resource Guide expressly recognizes the benefits of corporate mergers—specifically where an acquiring company “has a robust compliance program in place and implements that program as quickly as practicable.”¹⁴ Recognizing that “in certain instances, robust pre-acquisition due diligence may not be possible,” the 2020 FCPA Resource Guide details the potential benefits awaiting acquiring companies that come forward to voluntarily disclose issues as soon as they come to light.¹⁵
- **Voluntary Disclosure and Declinations.** The 2020 FCPA Resource Guide explicitly refers to the DOJ's FCPA Corporate Enforcement Policy, under which companies may remain eligible for declinations so long as voluntary disclosures are made. The 2020 FCPA Resource Guide cites examples where companies remained eligible for – and ultimately received – declination letters, even where senior management engaged in the bribery scheme or where other aggravating circumstances existed.¹⁶
- **Nonmonetary Gifts.** The revised guidance now reiterates that, while small gifts do not normally draw the focus of the DOJ and SEC, less obvious nonmonetary gifts may incur suspicion as being “anything of value” under the FCPA. These cases involved defendants paying for school tuition for the children of foreign officials, shipping luxury vehicles to foreign officials, paying travel expenses for foreign officials unrelated to company business, and providing gifts to relatives of foreign officials.¹⁷
- **Imposing a Monitor.** Adopting the DOJ's guidance on Selection of Monitors in Criminal Division Matters as set forth by Assistant Attorney General Brian A. Benczkowski in 2018,¹⁸ the 2020 FCPA Resource Guide lays out the manner in which the DOJ approaches imposing corporate monitors. This guidance explains that the Department will assess: (1) the potential benefits to the company and the public, and (2) the cost of a monitor and its impact on a company's operations. These factors are considered in the context of the type and pervasiveness of the misconduct uncovered and the quality of the company's existing compliance program. Finally, the 2020 FCPA Resource Guide notes that monitors may also be required in civil cases, but that the DOJ and the SEC will coordinate their requirements such that one monitor can satisfy all requirements.

The 2020 FCPA Resource Guide does not present new policies or a fundamental shift in FCPA enforcement, but it does reflect how the DOJ and the SEC have approached enforcement over the last several years and how those agencies will view FCPA-related misconduct and company responses going forward. Even in the midst of the vast law enforcement challenges related to COVID-19, the DOJ and the SEC have taken time to emphasize and highlight the importance of FCPA compliance – indicating that FCPA enforcement remains a top priority for the federal government.

¹¹ The DOJ issued its updated Evaluation of Corporate Compliance Programs on June 1, 2020. See U.S. Department of Justice Criminal Division, *Evaluation of Corporate Compliance Programs* (June 2020) <https://www.justice.gov/criminal-fraud/page/file/937501/download>. Winston & Strawn also provided an analysis of that update. See <https://www.winston.com/en/thought-leadership/amid-covid-19-doj-issues-updated-guidance-on-the-evaluation-of-corporate-compliance-programs.html>.

¹² The DOJ established a version of the FCPA Corporate Enforcement Policy in 2017 and provided updated guidance in 2019. See U.S. Department of Justice, *FCPA Corporate Compliance Policy* (March 2019) <https://www.justice.gov/criminal-fraud/file/838416/download>.

^[3] See Department of Justice & Securities & Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, Second Edition (July 3, 2020) <https://www.justice.gov/criminal-fraud/file/1292051/download> [hereinafter “FCPA Resource Guide”] at 35-36, 46; comparing *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018) with *United States v. Firtash*, 392 F. Supp. 3d 872 (N.D. Ill. 2019).

^[4] See 2020 FCPA Resource Guide at 71 (citing *Kokesh v. SEC*, 137 S. Ct. 1635 (2017)).

^[5] FCPA Resource Guide at 56-57.

^[6] *Id.* at 66-67.

^[7] *Id.* at 40.

^[8] *Id.* at 46.

^[9] *Id.* at 29.

^[10] *Id.* at 30.

^[11] *Id.* at 32, 51-54.

^[12] *Id.* at 15-16.

^[13] See Brian A. Benczkowski, Assistant Att’y General, U.S. Department of Justice, *Memo to All Criminal Division Personnel on Selection of Monitors in Criminal Division Matters* (Oct. 11, 2018) <https://www.justice.gov/opa/speech/file/1100531/download>.

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