The Updated FCPA Resource Guide

Something Old, Something New, Something Borrowed, Something Blue

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By Jacqueline C. Wolff
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In July of this year, the Department of Justice and the SEC released their first comprehensive update to the original FCPA Resource Guide published in 2012 (the "original guide"). Much of the new version (the "Resource Guide" or the "Guide") is the same as the old one and many of the new sections essentially borrow from other DOJ and SEC guidances and pronouncements that have been issued since 2012. But this second edition also contains some new "hypotheticals" — facts of actual cases the DOJ finds important enough to focus on — and, in keeping true to its name, has included additional resources and links for chief compliance officers looking to design and audit their companies' anticorruption compliance programs. And for those of you who think that in the age of COVID, FCPA enforcement is dead, having been replaced by investigations of companies fraudulently touting cures and vaccines, one only has to look so far as public company SEC filings and the DOJ's website announcing large FCPA settlements to know this is no time for companies to relax their vigilance.

As noted above, the Resource Guide incorporates guidances and the like that have been issued by the DOJ since 2012. Among them are the FCPA Corporate Enforcement Policy, the Criminal Division's Evaluation of Corporate Compliance Programs, and the updated Principles of Federal Prosecution of Business Organizations, all three of which put a premium on a company's compliance program. Some insight into DOJ's priorities can be gleaned from which sections of those prior pronouncements DOJ decided to include in the Guide and which it did not. For example, the Resource Guide specifically reiterates the possibility of receiving a declination from the DOJ when Company A acquires Company B, the latter with clear violations of the FCPA, because the acquirer, among other things, has its own robust compliance program in place and put it in place at Company B "as quickly as practicable." See, Resource Guide at 29, 31 and 50.

Similarly, the Guide reminds the reader that the DOJ, when considering whether to charge a company, will consider not just whether the company had a compliance program in place at the time of the violation but will also give credit to a company that may not have had one at the time of the violation but had one at the time of the charging decision and/or resolution.

The Guide even provides a compliance officer confronting a reluctant C Suite with some ammunition to convince management that spending more on compliance goes beyond the FCPA.

"Companies with ineffective internal controls often face risks of embezzlement and self-dealing by employees, commercial bribery, export control problems, and violations of other U.S. and local laws." Id. at 41.

The Guide is similarly replete with sections recommending voluntary disclosure of violations — another topic given a lot of attention in the various interim guidances and DOJ updated policies. In the declination discussions, much like those focused on robust compliance programs, voluntary disclosures are given significant weight as a factor in declination decisions. For example, an acquiring company is deemed potentially eligible for a declination if it promptly disclosed to DOJ the acquired company's violations.

One of the more interesting additions to the new Guide is how the DOJ has dealt with the intervening Hoskins case. In Hoskins, the Second Circuit initially ruled that a foreign national who worked at a wholly owned foreign subsidiary of a foreign company and who never ventured into the U.S. in connection with the charged bribery was not subject to the jurisdiction of the FCPA on the theory that he was a co-conspirator of another foreign national who had been hired as a consultant by the U.S. subsidiary because the defendant did not fit under one of the three classes of individuals in the FCPA anti-bribery provisions who are subject to the statute's long arm jurisdiction for acts conducted overseas. United States v. Hoskins, 902 F.3d 69, 76-97 (2d Cir. 2018). He was not a U.S. citizen, employed by a U.S. company or personally conducted any acts in the U.S. in furtherance of the conspiracy. The Circuit did, however, leave open the door to the DOJ establishing at trial that the defendant was an agent of the U.S. subsidiary that had ultimately hired the consultants with whom he was allegedly "conspiring." The jury convicted under that theory but the trial court ruled on a post-trial motion to kick all the FCPA charges finding that no reasonable jury could have found the defendant to be an agent of the U.S. subsidiary; he was neither paid by the U.S. subsidiary nor reported to or was controlled by that subsidiary in any way. Ruling on Def.'s Rule 29(c) and Rule 33 Mots., No. 3:12-cr-238-JBA (D. Conn. Feb. 26, 2020), ECF No. 617. Although DOJ has filed an appeal — United States v. Hoskins, No. 3:12-cr-238 (JBA), 2020 WL 914302 (D. Conn. Feb. 26, 2020) — due to the pandemic, query when it will be heard.

Given the blow given to the DOJ's expansive reading of the statute coupled with the uncertainty at the time of publication as to if and when the case will be heard by the Second Circuit, the Guide spends a good amount of time presenting its view of the Second Circuit's original decision while not mentioning the district's court's decision to essentially throw out the entire FCPA case notwithstanding a jury verdict. That view suggests defense counsel will be arguing with the DOJ about this issue for some time to come.

More specifically, the Guide attempts to limit the conspiracy ruling to the Second Circuit as if it were the home of an outlier jurisprudence by citing a district court decision and stating:

> "Therefore, at least in the Second Circuit, an individual can be criminally prosecuted for conspiracy to violate the FCPA anti¬bribery provisions or aiding and abetting an FCPA anti-bribery violation only if that individual's conduct and role fall into one of the specifically enumerated categories expressly listed in the FCPA's anti-bribery provisions. At least one district court from another circuit has rejected the reasoning in the Hoskins decision, and concluded that the defendants could be criminally liable for conspiracy to violate the FCPA anti-bribery provisions, and aiding and abetting a violation, even though they do not 'belong to the class of individuals capable of committing a substantive FCPA violation.'"

Resource Guide at 36.

Note also that the Guide leaves open the possibility that even if a foreign national does not come under the jurisdiction of the FCPA's anti-bribery provisions, that foreign national may still be subject to the jurisdiction of the FCPA's books and records and internal control provisions. "Unlike 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." Id. at 46.

The Resource Guide also provides a window into what types of cases DOJ is looking to prosecute when it notes: "As with the anti-bribery provisions, DOJ's and SEC's enforcement of the books and records provision has typically involved misreporting of either large bribe payments or widespread inaccurate recording of smaller payments made as part of a systematic pattern of bribery, and both DOJ and SEC look to the nature and seriousness of the conduct in determining whether to pursue an enforcement action." Id.at 39. This information is valuable when assessing if a voluntary disclosure is more likely to result in a declination than a guilty plea.

Similarly, its choice of hypos is informative. For example, in the original guide, one of the hypos was one where the payment itself was never made, even though all the other elements were satisfied. This was deleted and replaced with one where the payment was, in fact, made but stayed with the middleman, who had lied to the putative defendant about his access to a Foreign Official. In addition, the "anything of value" discussion added two more hypos: paying tuition for a Foreign Official's child and hiring a Foreign Official's child. The "instrumentality" section has been bolstered by the Esquenazi and Haiti Telecom cases, defining an instrumentality as "controlled by the foreign government performing a function the government treats as its own." Id. at 20.

Due in part to companies following in the footsteps of Siemens looking to avoid a guilty plea to a bribery violation, which can easily result in debarment, and opting instead to plead to the books and records and/or accounting control provisions, the latter have been used more frequently since 2012. The Guide does not disappoint, including hypotheticals from the leading cases, including that involving Och-Ziff, the hedge fund that admitted to falsifying its books and records to conceal its use of an "agent" to conceal bribes to a Libyan official in order to obtain business from Libya's sovereign wealth fund and Panasonic Avionics, wherein the company conducted similar bribery and concealment and, as a public company, filed false subcertifications regarding its SOX compliance. Deferred Pros. Agreement, United States v. OchZiff Capital Mgmt. Group LLC, No. 16-cr-516 (E.D.N.Y. Sept. 29, 2016), and Deferred Pros. Agreement, United States v. Panasonic Avionics Corp., No. 18-cr-118 (D.D.C. Apr. 30, 2018).

One of the more useful additions to the Guide are the links to other agency websites that provide practical information that may be more specific to particular industries seeking to comply. For example, links are provided to the International Trade Administration's U.S. and Foreign Commercial Service website sections giving guidance on conducting due diligence on partners and new markets including how the Commercial Service itself can help a company conduct background checks on potential overseas partners and how that service can be incorporated into a compliance policy. Links to relevant United Nations and foreign organization websites appear to have been added as well.

In sum, the revisions to the Resource Guide make it useful in putting all the post-2012 guidances and pronouncements in one place and focusing on those sections which DOJ appears to find most important — compliance programs and voluntary disclosure — as well as providing additional resources and hints as to how to design an appropriate program and when voluntary disclosure may result in a declination. And, of course, insight into DOJ's view of Hoskins and when a foreign national may still find herself in the crosshairs of the DOJ in spite of not having ventured into the U.S. or having worked for a U.S. company.

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