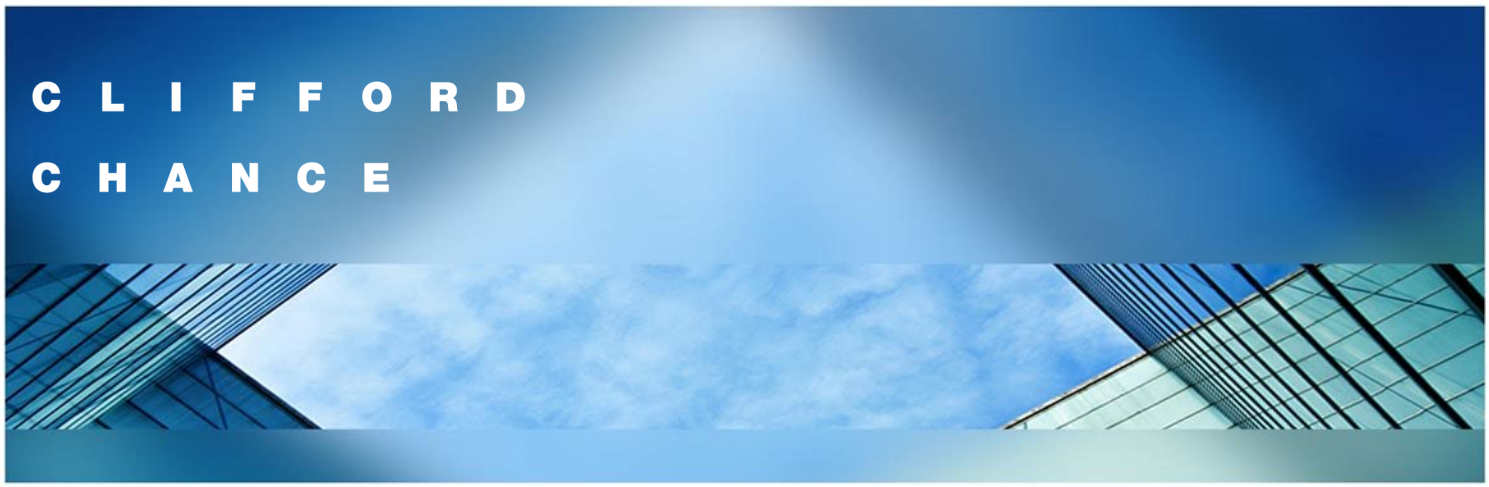

DOJ AND SEC REVISE FCPA RESOURCE GUIDE, INCORPORATING SECOND CIRCUIT'S RULING IN *US V. HOSKINS*

On July 3, 2020, the US Department of Justice ("**DOJ**") and Securities and Exchange Commission ("**SEC**") released a Second Edition of the FCPA Resource Guide (the "**Second Edition**"), the first substantive update to the Resource Guide since it was originally published in 2012. The Second Edition maintains the structure of the First Edition while incorporating policies and guidance issued in the intervening eight years, addressing significant court decisions in FCPA cases, clarifying issues that have arisen in practice, and providing additional examples and case studies. Since its original publication, the Resource Guide has provided valuable guidance for practitioners, particularly in light of the relatively sparse caselaw interpreting provisions of the FCPA. The Second Edition answers certain lingering questions and also signals the direction DOJ and SEC intend to take with respect to FCPA enforcement.

Below, we summarize the key updates and changes reflected in the Second Edition.[1] These include:

- Addressing the recent decisions of the US Supreme Court in *Kokesh v. SEC* and *Liu v. SEC* regarding the disgorgement remedy and the decision of the US Court of Appeals for the Second Circuit in *United States v. Hoskins* regarding the extraterritorial reach of the FCPA;
- Incorporating the test for "instrumentality," within the definition of "foreign official," set out by the US Court of Appeals for the Eleventh Circuit in *United States v. Esquenazi*;
- Providing additional guidance on corporate successor liability in the M&A context;

[1] Please see a redline of the Second Edition showing the changes from the 2015 version of the First Edition here. The 2015 revisions were primarily technical.

- Clarifying the *mens rea* required for criminal violations of the FCPA's accounting provisions; and
- Incorporating DOJ's FCPA Corporate Enforcement Policy, recently-revised guidance on "Evaluation of Corporate Compliance Programs," principles for imposition of a corporate monitor, and Anti-Piling On Policy.

Notably, eight of the 10 largest settlements to-date for FCPA misconduct allegations involve non-US companies: Ericsson (US$1.06B),[2] MTS (US$850M),[3] Siemens (US$800M),[4] Alstom (US$772M),[5] Teva Pharmaceuticals (US$519M),[6] Telia (US$483M),[7] Total (US$398M),[8] and VimpelCom (US$397.5M).[9] While *Hoskins* called into question the extent to which the US government can continue to pursue non-US actors for conduct abroad, DOJ and SEC have signaled with their treatment of *Hoskins* in the Second Edition their intention to continue applying the statute broadly to non-US companies and individuals.

KEY UPDATES

Extraterritoriality and *Hoskins*

- The Second Edition discusses the implications of the ruling of the US Court of Appeals for the Second Circuit in *United States v. Hoskins*[10] on the extraterritorial reach of the FCPA. In *Hoskins*, the Second Circuit held that a foreign national could not be convicted of conspiring to violate the FCPA or aiding or abetting an FCPA violation based on conduct outside the United States, unless he or she belonged to one of the categories of individuals expressly covered by the statute.[11] In reaching this conclusion, the *Hoskins* court reasoned that the FCPA expressly applies to the overseas conduct of only certain categories of actors—namely US "issuers" (*i.e.*, companies whose securities are listed on US exchanges),

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2 *Ericsson Agrees to Pay Over $1 Billion to Resolve FCPA Case*, US DEP'T OF JUST. OFF. OF PUB. AFF. (Dec.6, 2019), https://www.justice.gov/opa/pr/ericsson-agrees-pay-over-1-billion-resolve-fcpa-case.

3 *Mobile Telesystems Pjsc and Its Uzbek Subsidiary Enter into Resolutions of $850 Million with the Department of Justice for Paying Bribes in Uzbekistan*, US DEP'T OF JUST. OFF. OF PUB. AFF. (Mar. 7, 2019), https://www.justice.gov/opa/pr/mobile-telesystems-pjsc-and-its-uzbek-subsidiary-enter-resolutions-850-million-department.

4 *Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines*, US DEP'T OF JUST. OFF. OF PUB. AFF. (Dec. 15, 2008), https://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html.

5 *Alstom Pleads Guilty and Agrees to Pay $772 Million Criminal Penalty to Resolve Foreign Bribery Charges*, US DEP'T OF JUST. OFF. OF PUB. AFF. (Dec. 22, 2014), https://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery.

6 *Teva Pharmaceutical Industries Ltd. Agrees to Pay More Than $283 Million to Resolve Foreign Corrupt Practices Act Charges*, US DEP'T OF JUST. OFF. OF PUB. AFF. (Dec. 22, 2016), https://www.justice.gov/opa/pr/teva-pharmaceutical-industries-ltd-agrees-pay-more-283-million-resolve-foreign-corrupt.

7 *Telia Company AB and Its Uzbek Subsidiary Enter Into a Global Foreign Bribery Resolution of More than $965 Million for Corrupt Payments in Uzbekistan*, US DEP'T OF JUST. OFF. OF PUB. AFF. (Sept. 21, 2017), https://www.justice.gov/opa/pr/telia-company-ab-and-its-uzbek-subsidiary-enter-global-foreign-bribery-resolution-more-965.

8 *French Oil and Gas Company, Total, S.A., Charged in the United States and France in Connection with an International Bribery Scheme*, US DEP'T OF JUST. OFF. OF PUB. AFF. (May 29, 2013), https://www.justice.gov/opa/pr/french-oil-and-gas-company-total-sa-charged-united-states-and-france-connection-international.

9 *VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More Than $795 Million; United States Seeks $850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme*, US DEP'T OF JUST. OFF. OF PUB. AFF. (Feb 18, 2016), https://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million; *VimpelCom to Pay $795 Million in Global Settlement for FCPA Violations*, SEC (Feb. 18, 2016), https://www.sec.gov/news/pressrelease/2016-34.html#:~:text=VimpelCom%20to%20Pay%20%24795%20Million%20in%20Global%20Settlement%20for%20FCPA%20Violations,-FOR%20IMMEDIATE%20RELEASE&text=The%20settlement%20requires%20VimpelCom%20to,for%20at%20least%20three%20years.

10 902 F.3d 69 (2d Cir. 2018).

11 Clifford Chance litigated the appeal in this case on behalf of the defendant, Lawrence Hoskins, as well as the subsequent trial and post-trial proceedings.

US "domestic concerns" (*i.e.*, US citizens, nationals or residents, and businesses formed in and / or with a principal place of business in the United States), and the officers, directors, employees, agents, and stockholders of such issuers and domestic concerns.[12] The Second Circuit explained that, because this limited scope reflected Congress's affirmative intent to limit the extraterritorial application of the FCPA only to these actors, DOJ could not rely on accessorial theories of liability such as conspiracy or aiding and abetting to reach the overseas conduct of persons who do not fit within one of these enumerated categories in the FCPA.[13]

- Following a jury trial, the district court granted Hoskins' motion for a judgment of acquittal on all FCPA counts because the government had failed to prove that Hoskins was subject to the FCPA.[14] Specifically, the district court held that the government's evidence that Hoskins acted as an "agent" of a domestic concern was insufficient as a matter of law, as there was no evidence that Hoskins had "agreed or understood" that API, the relevant domestic concern, would have control over the work he performed on the project at issue, as required to establish an agency relationship.[15] The government has appealed this decision to the Second Circuit, and the appeal is pending. The Second Edition does not provide guidance regarding what it means to be an "agent" for purposes of the FCPA.
- The Second Edition notes that *Hoskins*' reach is limited to the Second Circuit, and highlights a district court opinion from the Northern District of Illinois that declined to follow *Hoskins* in light of Seventh Circuit precedent, holding that the two defendants in that case *could* be held criminally liable for FCPA violations under theories of conspiracy or aiding and abetting, even though they were not within one of the enumerated categories of actors explicitly covered by the statute.[16] By highlighting the fact that other Circuits have not yet adopted the Second Circuit's reasoning in *Hoskins*, it is possible that DOJ will push the extraterritorial reach of the FCPA in future prosecutions in an effort to deepen the Circuit split and eventually seek Supreme Court review.

Refining the Definitions of "Foreign Official" and "Instrumentality"

- The Second Edition provides further clarity regarding the definition of a "foreign official" under the FCPA. Under the statute, a "foreign official" is "any officer or employee of a foreign government or any department, agency, or *instrumentality* thereof."[17] The FCPA itself offers no guidance on what constitutes an "instrumentality" of a foreign government. In 2014, the US Court of Appeals for the Eleventh Circuit delivered the first federal appellate decision addressing this issue in *United States v. Esquenazi*,[18] discussed here. The Second Edition incorporates the Eleventh Circuit's

12 *Hoskins*, 902 F.3d at 84-85; 15 U.S.C.A. §§ 78dd–1-3.
13 *Hoskins*, 902 F.3d at 83-84.
14 *United States v. Hoskins*, No. 3:12cr238 (JBA), 2020 WL 914302 (D. Conn. Feb. 26, 2020).
15 *Id*. at *9.
16 *United States v. Firtash*, 392 F. Supp. 3d 872, 888-92 (N.D. Ill. 2019).
17 15 U.S.C.A. § 78dd-1(f)(1)(A) (emphasis added).
18 752 F.3d 912 (11th Cir. 2014).

ruling in that case, which defines "instrumentality" as "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own."[19] While the First Edition provided a general list of factors to be considered in determining whether an entity was an "instrumentality," the Second Edition incorporates the specific test used by the court in *Esquenazi*, namely: (1) whether the government controls the entity; and (2) whether the entity performs a function that the government treats as its own, along with the factors considered by the *Esquenazi* Court.

Corporate Successor Liability

- The Second Edition expands the discussion of corporate successor liability to offer additional guidance related specifically to mergers and acquisitions. The Second Edition acknowledges the potential benefits from an FCPA compliance perspective where an acquiring company with a strong compliance program promptly ensures the adoption of that program at the merged or acquired company.
- While reiterating the importance of conducting vigorous due diligence prior to closing M&A deals, the Second Edition also notes that sometimes, "robust pre-acquisition due diligence" is not possible. The Second Edition makes clear that, in these cases, DOJ will consider the "timeliness and thoroughness of the acquiring company's post-acquisition due diligence and compliance integration efforts" in deciding whether to take action against the successor entity for pre-transaction conduct by the predecessor entity. With respect to post-acquisition conduct, the Second Edition adopts the approach of DOJ's FCPA Corporate Enforcement Policy (discussed further below) that—even where aggravating circumstances exist—if a successor company voluntarily discloses post-transaction misconduct by the predecessor entity *and* takes the appropriate remedial steps, it may be entitled to a declination.
- To elucidate these and other established principles, the Second Edition discusses a number of recent DOJ cases addressing corporate successor liability in the M&A context. For example, the Second Edition cites General Electric's 2015 acquisition of part of Alstom, which had, prior to the acquisition, agreed to settle charges that it bribed government officials in order to obtain contracts for power and transportation-related projects. In that settlement, Alstom agreed to plead guilty to conspiracy to violate the anti-bribery provisions of the FCPA and to pay a large criminal penalty, and two of its US subsidiaries entered into deferred prosecution agreements with DOJ. Prior to paying the criminal penalty, GE acquired several of the business units involved in the underlying FCPA conduct. However, Alstom, rather than GE, was required to pay the full penalty amount.[20] (The *Hoskins* case arose from Mr. Hoskins' employment at Alstom.)

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19 *Id*. at 925.

20 *See* Plea Agreement, *United States v. Alstom S.A*., No. 14-cr-246 (D. Conn. Dec. 22, 2014), ECF No. 5, *available at* https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/09/DE-5-Plea-Agreement-for-SA.pdf; Deferred Pros. Agreement, *United States v. Alstom Grid, Inc*., No. 14-cr-247 (D. Conn. Dec. 22, 2014), ECF No. 4, *available at* https://www.justice.gov/sites/default/files/criminal-

Accounting Provisions

- The FCPA's accounting provisions are increasingly used, in particular by the SEC, to bring enforcement actions where the allegations fall short of actual bribery. Alexion Pharmaceuticals' July 2020 settlement with the SEC for US$21.5M[21] and Eni S.p.A.'s April 2020 settlement with the SEC for US$24.5M[22] are two recent examples of such "no-charged bribery disgorgement" resolutions. Under these provisions, companies must (1) make and keep books and records that in reasonable detail accurately and fairly reflect the company's transactions (the "books and records" provision); and (2) devise and maintain a system of internal accounting controls sufficient to ensure management's control over the company's assets (the "internal controls" provision).
- The Second Edition clarifies a number of points about the accounting provisions:
    - Internal Controls Not Synonymous with Compliance Program: The Second Edition clarifies that "a company's internal accounting controls are not synonymous with a company's compliance program," although there is overlap, and "[j]ust as a company's internal accounting controls are tailored to its operations, its compliance program needs to be tailored to the risks specific to its operations."
    - *Mens Rea*: The Second Edition provides that criminal liability for violations of the books and records or internal accounting controls provisions will be imposed where the company or individual "knowingly and *willfully*" failed to comply.
    - Application: The Second Edition states that, unlike the anti-bribery provisions, the accounting provisions apply to "any person," and thus are not subject to the Second Circuit's limitation of the extraterritorial scope of the anti-bribery provisions in *Hoskins*.
    - Limitations Period: The Second Edition clarifies that the five-year limitations period in 18 U.S.C. § 3282 applies to substantive violations of the anti-bribery provisions, but the limitations period for violations of the accounting provisions—which are defined as "securities fraud offense[s]"—is six years.

FCPA Corporate Enforcement Policy

- The Second Edition incorporates DOJ's FCPA Corporate Enforcement Policy, discussed here, which was piloted in 2016, formalized in 2017, and updated most recently in November 2019. This policy, which is now contained within DOJ's Justice Manual, provides a presumption of declination where a company voluntarily self-discloses misconduct, fully cooperates with DOJ, and timely and appropriately remediates, and where

fraud/legacy/2015/01/09/DE-4-DPA-Grid.pdf; Deferred Pros. Agreement, *United States v. Alstom Power, Inc.*, No. 14-cr-248 (D. Conn. Dec. 22, 2014), ECF No. 4, *available at* https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/09/DE-4-DPA-Power.pdf.

21 *SEC Charges Alexion Pharmaceuticals With FCPA Violations*, SEC (July 2, 2020), https://www.sec.gov/news/press-release/2020-149.

22 *SEC Charges Eni S.p.A. with FCPA Violations*, SEC (Apr. 17, 2020), https://www.sec.gov/enforce/34-88679-s.

there are no aggravating circumstances. If a company undertakes these steps but declination is not appropriate, or undertakes some but not all of these steps, the policy provides reductions from the low end of the US Sentencing Guidelines fine ranges.

Evaluation of Corporate Compliance Programs

- The Second Edition updates the guidance regarding corporate compliance programs to incorporate DOJ's recently-revised guidance on "Evaluation of Corporate Compliance Programs," discussed here. This guidance informs charging decisions, forms of resolutions, monetary penalties, and prospective compliance obligations.
- Key features of the updated guidance include:
    - Explicit addition of the key question: "[I]s the program adequately resourced and empowered to function effectively?";
    - Continuation of an individualized focus on the effectiveness of the company's compliance program in managing its particular risks;
    - Increased emphasis that DOJ will assess the effectiveness of the compliance program both at the time of the misconduct and at the time of resolution; and
    - Explicit instructions that companies should maintain a "well-functioning and appropriately funded mechanism for the timely and thorough investigations of any allegations or suspicions of misconduct" and should "integrate lessons learned from any misconduct into the company's policies, training, and controls. The Second Edition explains that this is because the "truest measure of an effective compliance program is how it responds to misconduct."

Remedy of Disgorgement

- The Second Edition discusses two recent Supreme Court decisions relating to disgorgement: *Kokesh v. SEC*[23] and *Liu v. SEC*.[24] In *Kokesh*, the Court held that civil disgorgement is a "penalty" to which a five-year limitations period applies.[25] In *Liu*, discussed here, the Court considered the contours of disgorgement, holding that the amount must not exceed the defendant's net profits, and the disgorged funds must be awarded to the victims of the crime or civil wrong.[26]

Imposing a Corporate Monitor

- The Second Edition reflects the recently-updated DOJ guidance on the "Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations," which was first published in 2008. The Second Edition recites the list of factors for prosecutors to

23 137 S. Ct. 1635 (2017).
24 591 U.S. __ (2020).
25 *Kokesh*, 137 S. Ct. at 1638.
26 *Liu*, 591 U.S. __, slip op.1, 5-20.

consider in making these determinations, which includes, among other things:

- Whether the misconduct at issue involved manipulating corporate books and records or exploiting weak internal controls;
- Whether management facilitated the misconduct, or it was otherwise pervasive across the company; and
- Whether the company has made significant investments in and improvements to its compliance program subsequent to the misconduct.

"Piling On"

- Finally, the Second Edition incorporates DOJ's Anti-Piling On Policy, discussed here, which was issued in May 2018 and is also contained within the Justice Manual. This policy discourages the "piling on" of penalties by different agencies for the same misconduct by instructing prosecutors to coordinate with other law enforcement agencies and regulators—including foreign authorities—in determining the penalty amount. The Anti-Piling On Policy mirrors the approach of the US Commodity Futures Trading Commission ("**CFTC**"), which is a relative newcomer to the world of FCPA enforcement. As discussed here, in March 2019 the CFTC announced its intention to prosecute violations of the Commodity Exchange Act involving bribery and explained that, in cooperation with DOJ and SEC, it would strive to avoid conducting redundant investigations into and piling on penalties for conduct that was potentially subject to both the Commodity Exchange Act and the FCPA. At least one commodities firm has publicly confirmed that it is subject to a CFTC anti-corruption investigation, but the CFTC has yet to publicly resolve any corruption matters.

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With the publication of the Second Edition, DOJ and SEC have signaled their intention to continue to aggressively investigate and prosecute potential violations of the FCPA—including against non-US companies and executives. Multinational companies should familiarize themselves with the changes reflected in the Second Edition in order to ensure that their compliance programs are adequate to mitigate corruption risk.

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