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FCPA Resource Guide, Second Edition: What You Need To Know
《FCPA 信息指引》第二版：你需要了解的内容

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Anti-corruption/FCPA and White Collar Defense and Investigations
反腐败/FCPA 和白领犯罪辩护和调查

On July 3, 2020, the U.S. Department of Justice's ("DOJ" or the "Department") Criminal Division and the U.S. Securities and Exchange Commission's ("SEC") Enforcement Division quietly released *A Resource Guide to the U.S. Foreign Corrupt Practices Act, Second Edition* (the "Second Edition"). The first edition of the *Resource Guide* (the "First Edition") was released in November 2012 and has served as an important reference tool for Foreign Corrupt Practices Act ("FCPA") practitioners and compliance professionals. Like the First Edition, the Second Edition remains non-binding, informal guidance on DOJ's and the SEC's positions on a variety of issues arising under the FCPA.

2020 年 7 月 3 日，美国司法部（下称"司法部"）刑事司和美国证券交易委员会（下称"证交会"）执法部低调发布了《美国反海外腐败法信息指引（第二版）》（下称"第二版"）。该《信息指引》第一版（下称"第一版"）发布于 2012 年 11 月，已成为《反海外腐败法》（下称"FCPA"）从业者和合规专业人士重要的参考资源。如同第一版一样，第二版仍然是关于司法部和证交会对 FCPA 各种相关问题立场的非约束性、非正式指引。

The Second Edition is largely an update of the original. The revisions generally incorporate developments in the FCPA space in the last eight years, rather than attempt to break new ground. Indeed, with the exception of clarifications on DOJ's views of standards applicable to criminal FCPA accounting provisions charges, the Second Edition primarily catalogues and incorporates recent case law, provides updated practical examples based on more recent enforcement actions, and incorporates policies and concepts from various guidance documents released by DOJ in recent years, including the Policy on Coordination of Corporate Resolution Penalties (the "Anti-Piling On Policy"), the FCPA Corporate Enforcement Policy, the Selection of Monitors in Criminal Division Matters, and the Evaluation of Corporate Compliance Programs.

第二版主要是对原版的更新。修订内容总体上涵盖了过去八年里 FCPA 领域的发展，而非试图进行改革。确实，除了关于司法部对适用于 FCPA 会计规定刑事指控的观点外，第二版主要记载和加入了近期的判例法，提供了基于最近执法行动的实际案例，并加入了来自司法部近年来发布的各项指导文件的政策和概念，包括《关于公司结案处罚的协调政策》（"反叠加政策"）、《FCPA 公司执法政策》、《刑事组案件监督人的选择》以及《公司合规方案的评估》。

In this sense, while the Second Edition will be a useful reference guide, it does not offer any major policy or positional shifts that would cause organizations fundamentally to re-think how they approach various aspects of their anti-corruption compliance programs. Accordingly, organizations that are already updating their compliance programs to incorporate recent DOJ guidance and learnings from enforcement actions since the First Edition should find themselves well-positioned to meet DOJ and SEC expectations regarding their programs. Indeed, the publication of the Second Edition is a timely reminder that even during a time of global economic disruption, FCPA enforcement will march on and companies should continue to review, test, and enhance their anti-corruption compliance programs.

从这个意义上说，虽然第二版会是有用的参考指南，但并未反映重大的政策或立场转变，需要各类组织从根本上重新思考如何处理其反腐败合规体系的各个方面。因此，那些已经在更新其合规方案，以加入近期司法部指引以及自第一版以来从执法行动中汲取经验的组织完全能够满足司法部和证交会对于其合规方案的期望。确实，第二版的发布及时地提醒我们，即使是在全球经济动荡期间，FCPA 执法仍将继续，企业应当继续审核、测试和加强其反腐败合规方案。

Below we summarize the key revisions in the Second Edition.

以下我们总结了第二版的主要修订。

1. The Second Edition Makes Clarifications Regarding Criminal Violations of the Accounting Provisions
第二版就会计条款的刑事违法行为作出了澄清

Among the most notable revisions to the Second Edition are DOJ's clarifications regarding the statute of limitations and scienter standards for criminal violations of the FCPA's accounting provisions. For practical purposes, we do not believe that these clarifications will have a substantial impact on corporate enforcement activities or how companies approach their compliance programs.

第二版最值得注意的修订是司法部对 FCPA 会计条款刑事违法行为的诉讼时效和主观犯意的标准作出了澄清。就实践而言，我们不认为这些澄清会对公司执法活动或公司处理其合规方案产生实质性的影响。

A. The Statute of Limitations Is Six Years
诉讼时效是六年

The First Edition stated that the statute of limitations for both the FCPA's anti-bribery and accounting provisions was five years in criminal cases, pursuant to the general statute of limitations period set forth in 18 U.S.C. § 3282. The Second Edition now points to a statute – 18 U.S.C. § 3301 – that sets forth a six-year statute of limitations period for criminal violations of the FCPA's accounting provisions. The statutory basis for the claim leaves little to question: in particular, § 3301 applies a six-year limitations period to "securities fraud offense[s]," including, specifically, the FCPA's accounting provisions.

第一版规定，根据《美国法典》第 18 篇第 3282 条中规定的一般诉讼时效，刑事案件中 FCPA 反贿赂和会计条款的诉讼时效均为五年。第二版现在提出另一条法规（《美国法典》第 18 篇第 3301 条），为违反 FCPA 会计条款的刑事违法行为规定了六年的诉讼时效。该主张的法规依据毫无疑问：具体而言，第 3301 条对"证券欺诈违法"（明确包括涉及 FCPA 会计条款的违规行为）施以六年的诉讼时效。

Section 3301, enacted as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act a decade ago, has not been subject to recent amendment or relevant case law that would cause DOJ to revise its position in this area. Whatever led to this clarification, as a practical matter, its impact may be limited. The one-year difference in the applicable statute of limitations for criminal FCPA accounting provisions matters is likely to have little impact in the context of negotiated corporate resolutions, in which statutes of limitations may be extended subject to tolling agreements or for other reasons.

第 3301 条是在十年前作为《多德-弗兰克华尔街改革和消费者保护法》的一部分颁布的，其并不受限于可能促使司法部改变其在该领域立场的近期修订或相关判例法。无论导致此项澄清的原因是什么，事实上，其影响可能是有限的。在谈判公司结案的背景下，适用于 FCPA 会计条款刑事事项的诉讼时效的一年差异很可能影响很小，因为在此情况下诉讼时效可根据时效中止协议或以其他理由延长。

B. Criminal Violations by Companies Require Willfulness
公司刑事违法需要主观故意

The Second Edition clarifies that both companies and individuals must act "knowingly and willfully" as a predicate for a criminal enforcement action under the FCPA accounting provisions. The First Edition left unclear whether corporations also were subject to a "willfulness" requirement – *i.e.*, knowledge that one's conduct is unlawful. This clarification likely will not affect the vast majority of cases, as the statute already makes clear that it is a crime to "knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account." Where such conduct has occurred, DOJ usually will have evidence, or at least infer, that the company or individual knew that the conduct was unlawful. For those cases, however, where a company or individual did not know that the conduct was unlawful, in theory DOJ should not pursue enforcement under the criminal accounting provisions.

第二版澄清，基于 FCPA 会计条款的刑事执法行动的前提是，公司和个人必须"在知情且故意"的情况下行事。第一版未明确对公司是否也有"故意"的要求（即知道某人的行为是非法的）。该项澄清很可能不会影响绝大多数情况，因为法规已经明确，"故意规避或故意不实施内部会计控制体系或故意篡改任何账簿、记录或账目是犯罪行为。"如果此类行为发生，司法部通常会有证据，或至少会推断，公司或个人知道该行为是非法的。但是，对上述情形而言，如果公司或个人不知道相关行为是非法的，则理论上司法部不会根据刑事会计条款进行执法。

2. The Second Edition Suggests That the SEC Will Continue to Take an Expansive View of What Constitutes "Internal Accounting Controls"
第二版表明，证交会会继续对构成"内部会计控制"的内容进行全面考量

As we observed in our 2018 Year in Review, in recent years we have noted a trend of SEC enforcement actions addressing control deficiencies in areas that are not traditionally viewed as internal accounting controls, such as controls over procurement, hiring, and third-party due diligence. While questions have been raised over whether the internal accounting controls provision was intended to reach such control deficiencies, we have previously advised that issuers are well-served to consider the SEC's expansive view in the design, implementation, and maintenance of their internal control frameworks and anti-corruption compliance programs.

正如我们在 2018 年年度回顾中提出的那样，近年来我们注意到证交会有针对传统上不被视为内部会计控制（如采购、招聘的控制及第三方尽职调查）的领域内的控制缺失采取执行行动的趋势。尽管对于内部会计控制规定是否意在涵盖此类控制缺失存在争议，但我们曾建议，发行人最好考虑证交会对其内部控制框架和反腐败合规方案的设计、实施和维护的全面考量。

The Second Edition further supports this view. It explains that "[a]lthough a company's internal accounting controls are not synonymous with a company's compliance program, an effective compliance program contains a number of components that may overlap with a critical component of an issuer's internal accounting controls." The updated guidance goes on to call for internal accounting controls that are "tailored" to a company's risk profile, stating that "the design of a company's internal controls must take into account the operational realities and risks attendant to the company's business," such as "the nature of its products or services"; "the extent of its government interaction"; and "the degree to which it has operations in countries with a high risk of corruption."

第二版进一步支持了这种观点。第二版解释称，"尽管一家公司的内部会计控制并不等同于其合规方案，但有效合规方案包含的若干组成部分可能与发行人内部会计控制的重要组成部分重合。"该更新版指引继续要求"针对"公司的风险状况实施内部会计控制，并称"公司内部控制的设计必须考虑到与公司业务相关的运营现实和风险"，如"其产品或服务的性质"；"其与政府互动的程度"；以及"其在具有高腐败风险的国家的业务规模"。

The Second Edition does not address the statutory basis for this expansive view of the internal controls provision. While it is undoubtedly good practice for internal accounting controls to address "operational realities and risks," this seems to go beyond the requirements of the "reasonable assurances" standard and the four specific control areas set forth in 15 U.S.C. § 78m(b)(2)(B). That said, unless and until the reach of the internal accounting controls provision is litigated, we expect that we will continue to see aggressive use of this provision by the SEC. Accordingly, issuers should continue to focus on implementing and maintaining controls that are tailored to their corruption risk profile, and on ensuring that their anti-corruption policies and procedures are integrated into their internal control frameworks.

第二版未提及对内部控制规定作上述全面考量的法规依据。尽管通过内部会计控制来应对"运营现实和风险"无疑是好的惯例，但这似乎超出了"合理确信"标准的要求以及《美国法典》第 15 篇第 78m(b)(2)(B)条中规定的四项具体控制领域。尽管如此，除非且直到内部会计控制规定的适用范围受到质疑，我们估计证交会将继续激进地运用该规定。因此，发行人应当继续专注于实施和维护针对其腐败风险状况制定的控制措施，并确保将其反腐败政策和程序纳入内部控制框架中。

3. The FCPA's Jurisdictional Reach Under Conspiracy and Accomplice Liability Theories Will Likely Remain the Subject of Litigation for the Foreseeable Future 合谋共犯责任理论下的 FCPA 管辖范围在可预见的将来很可能仍是争议的主题

The First Edition reflected DOJ's long-standing, expansive interpretation of FCPA jurisdiction under which a foreign person or entity could be liable for conspiring with or aiding and abetting a person or entity within the FCPA's jurisdictional reach in the commission of an anti-bribery violation, even if the conspirator or accomplice was not independently subject to FCPA jurisdiction.

第一版反映了司法部对 FCPA 管辖范围一贯的广义解释，根据这种解释，外国人或实体可能因与受 FCPA 管辖范围内的人或实体合谋或协助及教唆该人或实体实施违反反贿赂法规的行为而承担责任，即使合谋或共犯本身并不单独受到 FCPA 的管辖。

The Second Edition continues to advance expansive views of conspiracy and accomplice liability, while acknowledging that such theories were dealt a significant blow by the Second Circuit in *United States v. Hoskins*.[1] In that case, which we covered in a previous advisory, the Second Circuit held that the government may not employ conspiracy or accomplice liability theories to bring charges against foreign defendants that do not fall within the FCPA's explicit categories of covered persons. Although the Second Edition acknowledges this limitation, it cabins the *Hoskins* decision to the Second Circuit and highlights the 2019 decision in the District Court for the Northern District of Illinois in *United States v. Firtash*.[2] In *Firtash*, the district court declined to follow the Second Circuit's reasoning as contrary to Seventh Circuit precedent on conspiracy and accomplice liability, and declined to dismiss FCPA charges against foreign nationals alleged to have engaged in wrongful conduct exclusively outside of the United States and who would not otherwise be subject to anti-bribery jurisdiction under the FCPA.

第二版继续推进了关于合谋和共犯责任的广义考量，同时承认此类理论在美国政府诉 Hoskins 案[3]中遭到第二巡回法院的重挫。在该案（我们在之前一篇报告中分析过）中，第二巡回法院认为，政府不得运用合谋或共犯责任理论对不属于 FCPA 涵盖人明确分类的外国被告人提出指控。尽管第二巡回法院确认了这一限制，但将 Hoskins 案的裁定限于第二巡回法院，并强调了伊利诺伊州北区联邦地区法院在 2019 年美国政府诉 Firtash 案中的裁定。[4]在 Firtash 案中，联邦地区法院拒绝遵循第二巡回法院的推论，因该推论与第七巡回法院有关合谋和共犯责任的判例相矛盾，并拒绝驳回针对被指完全在美国境外从事不法行为且本不会受 FCPA 反贿赂规定管辖的外国国民的 FCPA 指控。

Not surprisingly, DOJ is sending a strong signal that it will continue to advance expansive theories of conspiracy and accomplice liability, notwithstanding the setback it experienced in *Hoskins*.

意料之中，司法部释放了一个强烈信号，即，尽管其在 *Hoskins* 一案中遭遇挫折，但是其将继续推动合谋与共犯责任理论的广义理论。

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[1] 902 F.3d 69 (2d Cir. 2018).
[2] 392 F. Supp. 3d 872 (N.D. Ill. 2019).
[3] 902 F.3d 69 (2d Cir. 2018)。
[4] 392 F. Supp. 3d 872 (N.D. Ill. 2019)。

Finally, the Second Edition notes that any limitations imposed by *Hoskins* in the context of anti-bribery violations do not affect conspiracy and accomplice liability for violations of the accounting provisions, as the latter apply to "any person" rather than a limited group of covered persons.

最后，第二版指出，*Hoskins* 一案针对违反反贿赂规定的情形施加的任何限制都不会影响针对违反会计条款的行为适用合谋与共犯责任，因为后者适用于"任何人"，而非某个有限的群体。

4. The Second Edition Acknowledges Recent Limitations to the Disgorgement Remedy, but Leaves Key Questions Unanswered
第二版承认了目前非法所得追缴救济制度的限制，但关键问题仍待解决

The Second Edition incorporates recent U.S. Supreme Court case law constraining the SEC's disgorgement authority. As we covered previously, the Court held in *Kokesh v. SEC* that disgorgement is a penalty subject to a five-year statute of limitations under 28 U.S.C. § 2462.[5] The Second Edition reflects the Court's unanimous holding in *Kokesh*, stating that in civil actions by the SEC, the five-year statute of limitations applies to claims for disgorgement.

第二版纳入了美国联邦最高法院近期的一些判例，这些判例约束了证交会的追缴权力。如我们先前所述，根据美国联邦最高法院在 *Kokesh v. SEC* 一案中的判决，追缴制度作为一种处罚手段，受限于《美国法典》第 28 篇第 2462 节规定的五年时效。[6]第二版反映了美国联邦最高法院在 *Kokesh* 一案中的一致判决，即，在证交会采取的民事行动中，五年时效适用于追缴非法所得的主张。

The Second Edition also – at least superficially – tackles the Court's recent decision in *Liu v. SEC*.[7] We recently covered that decision and the many questions that remain in its wake. The Second Edition acknowledges the Court's decision in just a single sentence, reflecting that the Court held that "disgorgement is permissible equitable relief when it does not exceed a wrongdoer's net profits and is awarded for victims." Given the considerable uncertainty that exists following the *Liu* decision – including about how the SEC will interpret and apply its holding, not only in civil actions but also in administrative proceedings – the Second Edition is unlikely to be the last word from the SEC in this area, with the disgorgement remedy likely to be the subject of continuing debate and litigation.

同时，第二版至少表面上反映了美国联邦最高法院最近关于 *Liu v. SEC* 一案的判决。[8]我们近期对此判决以及随之而来的许多问题进行了简要分析。第二版中仅用一句话承认了美国联邦最高法院的判决，称美国联邦最高法院判决"在不超过违法行为人净利润且授予受害者的情况下，非法所得追缴制度是一种被允许的衡平救济手段"。鉴于 *Liu* 一案判决后存在的许多不确定性，包括证交会将如何解释以及如何在民事行动和行政程序中运用该案的判决，第二版可能并非是证交会在此方面的最终定论，追缴救济制度可能会成为持续争议和诉讼的主题。

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[5] 137 S. Ct. 1635 (2017).
[6] 137 S. Ct. 1635 (2017)。
[7] No. 18–1501, 2020 WL 3405845 (U.S. June 22, 2020).
[8] No. 18–1501, 2020 WL 3405845（美国2020年6月22日）。

5. The Second Edition Incorporates the *Esquenazi* Factors to Define "Instrumentality" for Purposes of Identifying Foreign Officials
第二版结合了 *Esquenazi* 一案的因素来定义"机构"，以确定外国官员

The Second Edition incorporates more recent case law on the term "instrumentality" for purposes of identifying "foreign officials" under the anti-bribery provisions. The FCPA defines "foreign official" to include, among other things, any officer or employee of an "instrumentality" of a foreign government, but the statute does not define the latter term. Like the First Edition, the Second Edition continues to make clear that the "term 'instrumentality' is broad and can include state-owned or state-controlled entities." Whether or not an entity is an instrumentality of a foreign government has been an issue vigorously contested both in court and at the conference table in negotiated resolutions.

为了确定反贿赂条款下的"外国官员"，第二版纳入了有关"机构"一词的近期判例。根据 FCPA，"外国官员"的定义包括但不限于外国政府之"机构"的任何官员或工作人员，但该法并未定义后者。与第一版一样，第二版继续明确表示"'机构'一词含义很广，可包括国家所有或控制的实体"。一个实体是否构成某外国政府的机构，一直是在法院以及在谈判结案过程中谈判桌上激烈争论的问题。

The Eleventh Circuit addressed this issue in its 2014 decision in *U.S. v. Esquenazi*,[9] and the Second Edition incorporates the court's definition of "instrumentality" – *i.e.*, "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own" – as well as the list of non-exhaustive factors the Eleventh Circuit outlined to aid in the fact-specific analysis of whether a particular entity meets that definition.

第十一巡回法院在其 2014 年对 *U.S. v. Esquenazi* 一案的判决中解决了这个问题，[10]第二版纳入了该法院对"机构"的定义，即"受外国政府控制的实体，且该等实体所行使的职能被控制它的政府视为自身职能"，同时，第二版还纳入了第十一巡回法院所列举的、有助于基于特定事实分析特定实体是否满足前述定义的非穷尽因素。

As with so many concepts in the FCPA space, the *Esquenazi* definition, and in particular the factors used to support an instrumentality analysis, is subject to considerable discretion, particularly when addressed in the context of a negotiated resolution. Therefore, the inclusion of the *Esquenazi* definition and factors in the Second Edition should not portend a shift in the approach of DOJ or the SEC. However, while courts in several circuits have approved in jury instructions non-exhaustive factors similar to those from *Esquenazi*, not all of them have adopted the factors for all purposes, let alone the definition. Thus, the incorporation of the *Esquenazi* definition and related factors in the Second Edition may serve as a useful reference point in negotiations with DOJ and the SEC in matters not otherwise tethered to the Eleventh Circuit or other circuits that have adopted some basis for crediting the *Esquenazi* definition or factors.

[9] 752 F.3d 912, 925 (11th Cir. 2014).
[10] 752 F.3d 912, 925（第11巡回法院，2014）。

如同 FCPA 领域的许多概念，*Esquenazi* 一案给出的定义，特别是用于辅助分析特定实体是否满足机构之定义的因素，受限于大量的自由裁量，尤其是就协商解决的情况而言。因此，第二版中虽包含了 *Esquenazi* 一案给出的定义和因素，但并不意味着司法部或证交会采取其方法的转变。然而，尽管多个巡回法院在对陪审团的指示中批准了与 *Esquenazi* 一案类似的非穷尽性因素，但并非所有这些法院都为所有目的采纳了这些因素，更何况是对该定义的应用。因此，对于不牵涉第十一巡回法院或在一定程度上认可 *Esquenazi* 一案之定义或因素的其他巡回法院的案件，在与司法部和证交会进行谈判时，可将第二版所纳入的 *Esquenazi* 一案给出的定义和相关因素作为有用参考。

6. The Second Edition's Additional Hallmark of an Effective Compliance Program Reflects DOJ Compliance Program Guidance
第二版新增的有效合规方案标志反映了司法部的合规方案指南

The Second Edition's hallmarks of an effective compliance program remain largely unedited, with the exception of the addition of a new hallmark: Investigation, Analysis, and Remediation of Misconduct. Rather than creating new compliance expectations for companies, this newest hallmark tracks DOJ's Guidance on the Evaluation of Effective Corporate Compliance Programs, combining into one hallmark the "Investigation of Misconduct" and "Analysis and Remediation of Any Underlying Misconduct" sections of DOJ's other guidance. The Second Edition reminds companies that an effective compliance program must have a "well-functioning and appropriately funded mechanism" to timely and thoroughly investigate allegations and an established way of documenting the company's disciplinary and remedial measures taken in response. Finally, the company should analyze the root cause of misconduct in order to integrate lessons learned into the compliance program.

第二版对有效合规方案的标志未作太多变动，只是增加了一个新的标志：调查、分析和补救不当行为。此新增标志并未给公司设置新的合规期望，而是涉及司法部关于评估有效公司合规方案的指南，其合并了司法部其他指南中的"调查不当行为"和"分析与补救任何相关不当行为"部分。第二版提醒公司注意，有效的合规方案必须具有可供及时彻底调查指控的"运行良好且资金充足的机制"，以及业已确立的方式来记录公司为应对相关问题所采取的纪律措施和补救措施。最后，公司应分析不当行为的根本原因，以便将汲取的经验教训体现到合规方案中。

In addition to the hallmarks, the Second Edition updates the section on "Other Guidance and Compliance Program Best Practices," adding references to DOJ's Evaluation of Corporate Compliance Programs guidance and a few additional resources from inter-governmental and non-governmental organizations. Notably, the International Standards Organization's ("ISO") anti-bribery management system standard – first published in 2016 – is not on the list of updated resources, perhaps suggesting, as we have previously noted, that DOJ and the SEC place little weight on this ISO certification when evaluating compliance programs.

除了上述标志，第二版还更新了"其他指南与合规方案最佳做法"部分，新增提及了司法部关于公司合规方案之评估的指南以及来自政府间组织和非政府组织的一些其他资源。值得注意的是，国际标准化组织（ISO）首次发布于 2016 年的反贿赂管理体系标准并未包含于更新的资源清单中，正如我们先前所指出的，这可能表明，司法部和证交会在评估合规方案时不太看重此 ISO 认证。

7. The Second Edition Reinforces a Narrow View of the Local Law Defense
第二版强调了当地法律抗辩的局限性

The so-called "local law defense" to the FCPA has long been recognized as a narrow one.[11] The Second Edition highlights the many limitations of this defense, including that "[i]n practice" the defense "arises infrequently," "as the written laws and regulations of countries rarely, if ever, permit corrupt payments." The Second Edition bolsters the position of DOJ and the SEC on the limited nature of the defense with reference to *United States v. Ng Lap Seng*.[12] While *Lap Seng* has garnered much attention for the Second Circuit's holding on the lack of an "official act" requirement under the FCPA, it is the district court's decision on the local law defense that is highlighted in the Second Edition. In particular, the Second Edition notes the district court's rejection of the defendant's requested jury instruction that the jury must acquit if the payments at issue were lawful under the written laws and regulations in the relevant foreign countries. The district court found that such an instruction would be "inconsistent with the plain meaning of the language of the written laws and regulations affirmative defense contained in the FCPA."[13] In other words, it would appear that DOJ will continue to reject any attempt to invoke the local law defense in the absence of explicit approval of corrupt payments in written local laws and regulations.

长期以来，针对 FCPA 的所谓"当地法律抗辩"的做法一直被认为具有其局限性。[14]第二版强调了这种抗辩的诸多限制，包括"在实践中"，该等抗辩"不太经常出现"，"因为各国的成文法律法规很少（若有）允许腐败付款。"通过援引 *United States v. Ng Lap Seng* 一案，第二版支持了司法部和证交会在前述抗辩之局限性方面的立场。[15]虽然 *Lap Seng* 一案因第二巡回法院关于缺乏 FCPA 规定之"职务行为"要求的判决而引起了广泛关注，但第二版中强调的是地区法院关于当地法律抗辩的判决。尤其是，第二版指出，地区法院驳回了被告请求的陪审团指示，即被告请求指示：如果根据相关外国的成文法律法规，争议付款是合法的，则陪审团必须宣告无罪。地区法院认定，该等指示将"有悖于 FCPA 中所包含的关于成文法律法规之积极抗辩语言的明确含意"。[16]换句话说，在当地成文法律法规未明确准许进行腐败付款的情况下，司法部似乎仍将拒绝任何采用当地法律抗辩的尝试。

[11] 15 U.S.C. § 78dd-1(c)(1); 15 U.S.C. §§ 78dd-2(c)(1), 78dd-3(c)(1).
[12] Jury Instructions at 4249–62, No. 15-cr-706 (S.D.N.Y. July 26, 2017).
[13] *Id.* at Trial Transcript 715–18.
[14] 美国法典第15篇第78dd-1(c)(1)节；美国法典第15篇第78dd-2(c)(1)节、第78dd-3(c)(1)节。
[15] 陪审团指示，4249–62, No. 15-cr-706（S.D.N.Y. 2017年7月26日)。
[16] 同上，见庭审记录715–18。

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