



INTERNATIONAL INVESTIGATIONS
GLOBAL ANTI-CORRUPTION SUMMARY

December 2013



INTRODUCTION

We are proud to release this *Global Anti-Corruption Summary*, December 2013, the first publication of Jones Day's new International Investigations practice team. Jones Day has advised and defended corporations around the world for many years and has long been considered a leading law firm for companies that have become the subject of government investigation—whether the investigation involves antitrust, securities, environment, food and drug, energy, defense, corruption, or any other subject matter. Historically, these government investigations have been based in a single country and have addressed the concerns of a single governmental entity. However, with the spread of globalization, this is no longer the case.

Over the last several years, we have seen a dramatic increase in corporations grappling with government investigations and litigation that span multiple countries and multiple government agencies. The impact of this phenomenon on companies can be staggering: hiring legal representatives in multiple countries; addressing privacy and labor issues in multiple countries; analyzing relevant laws, regulations, and practices of multiple countries; coordinating the company's own investigations and defenses in jurisdictions that often have vastly different laws and processes; prioritizing and coordinating government demands and requests from multiple agencies; and most importantly, resolving each of the investigations quickly, in the best interests of the company, with as little disruption as possible to the company's business.

Jones Day created its International Investigations practice team to assist clients in addressing these difficult issues. With the Firm's global footprint in more than 18 countries and attorneys who speak 60 languages, we have experience in every significant market around the world and experienced lawyers who are familiar with local laws and customs.

When it comes to multijurisdictional investigations, there is no hotter issue than corruption. Authorities in the United States, Germany, and the United Kingdom have historically taken the lead in investigating and prosecuting corporate bribery around the world. In recent years, however, other countries have begun inquiries into corruption matters with an eye toward prosecution. China, in particular, has recently made international headlines by swiftly and publicly cracking down on corruption in certain industries.

This *Global Anti-Corruption Summary* is an overview of the current status of anti-corruption enforcement in various countries around the world. The *Summary* was prepared by Jones Day attorneys from Australia, Brazil, China, France, Germany, Japan, Mexico, Russia, Saudi Arabia, Singapore, Taiwan, the United Arab Emirates, the United Kingdom, and the United States, who have extensive experience dealing with these issues in each of the jurisdictions summarized below. We hope you find it useful.

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UNITED STATES

Large and small multinational companies continue to be concerned about compliance with the U.S. Foreign Corrupt Practices Act (“FCPA”). Though most U.S. companies prohibit bribery through a code of conduct, doing business in foreign locations where extortion, kickbacks, and gratuities may be part of the culture presents challenges that a compliance policy alone does not solve. The letters “FCPA” now roll off the tongues of virtually every CEO and general counsel, as well as most directors, of every major U.S. company with operations overseas and non-U.S. companies subject to the law. Companies are increasingly aware that FCPA compliance involves much more than simply announcing that bribery is prohibited. The cycle of risk assessment, responsive policy creation, training, monitoring, and discipline is now continuously repeated by companies.

The raw number of Department of Justice (“DOJ”) prosecutions and Securities and Exchange Commission (“SEC”)

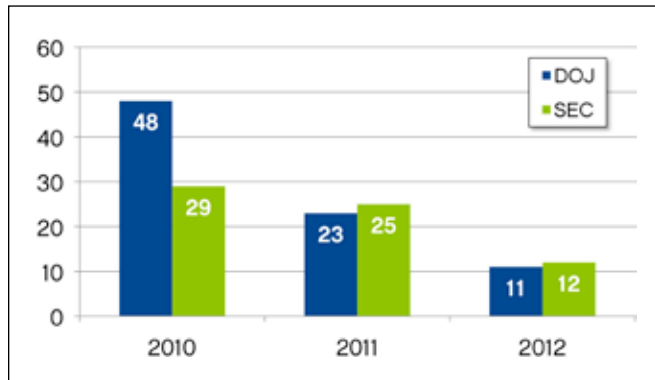
enforcement actions involving FCPA violations declined from 2011 to 2012. Similarly, the aggregate amount of corporate fines and penalties collected by the U.S. government went down as well. Some commentators point to the DOJ’s well-publicized losses in certain FCPA cases as the source of a less-aggressive approach. However, our experience as counsel for companies that are the subjects of DOJ and SEC investigations in this area indicates otherwise. In our experience, the enforcement community remains aggressive and firmly dedicated to the FCPA, and the government’s perspective generally does not tend toward leniency, even in self-reported cases.

Looking back over a year of enforcement is instructive and helpful to our clients, including those who face government inquiries, those who are grappling with FCPA issues without the government’s involvement, and those who seek to enhance their compliance structure to ward off future issues.

Trends are observable, and the government's treatment of particular issues and use of language is important in crafting an effective defense strategy.

We begin, therefore, with a look at the numbers. The table below summarizes the number of FCPA enforcement actions by the DOJ and SEC from 2010 to 2012.

FCPA ENFORCEMENT ACTIONS, 2010-2012



In 2012, the number of enforcement actions filed by the DOJ dropped by more than half from the previous year, from 23 in 2011 to 11 in 2012. The number of actions filed by the SEC also dropped by approximately half, from 25 in 2011 to 12 in 2012.

Corresponding to the decrease in overall enforcement actions, total civil and criminal monetary penalties also showed a marked decline. In 2012, U.S. authorities fined corporations approximately US\$260 million for FCPA violations, roughly half the nearly US\$500 million charged in 2011.¹ The lower total fines in 2012 are also explained by the absence of landmark settlements exceeding US\$100 million, such as JGC Corporation, BAE Systems, and Technip in the past. However, the average amount paid per company, excluding amounts in excess of US\$100 million, was US\$21 million in 2012, US\$18 million in 2011, and US\$24 million in 2010. The relative consistency of the average fines paid indicates that the substantial financial costs associated with any FCPA enforcement action continue.

The last year of FCPA enforcement featured five noteworthy FCPA developments that demonstrate the continuing risk of FCPA enforcement and related civil actions. First, and perhaps most significantly, U.S. authorities provided



enforcement and compliance guidance in the November 2012 *A Resource Guide to the U.S. Foreign Corrupt Practices Act (Resource Guide)* and in two opinion procedure releases. Second, the DOJ publicly disclosed its rationale for declining to prosecute a company that had violated the FCPA. Third, U.S. authorities showed that they are increasingly amenable to companies self-monitoring their own compliance with the terms of deferred prosecution agreements (“DPAs”) and non-prosecution agreements (“NPAs”), rather than requiring costly, and often burdensome, independent compliance monitors. Fourth, the trend of the DOJ and SEC jointly undertaking industry-wide corruption investigations appears to have continued in 2012, with an apparent focus on the pharmaceutical, retail, and financial services industries. Lastly, the plaintiffs’ bar continues to target companies going through FCPA investigations to seek recoveries for the purported victims of bribery schemes under U.S. racketeering laws.

DOJ/SEC GUIDANCE

NOVEMBER 2012 RESOURCE GUIDE

U.S. authorities released the highly anticipated *Resource Guide* in November 2012. This document provides a

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detailed description of the DOJ's and SEC's interpretation of key provisions of the FCPA, as well as examples of conduct that the DOJ and SEC believe to be in violation of—or in compliance with—the FCPA.² Most information contained in the *Resource Guide* was culled from prior DOJ and SEC guidance, public statements made by DOJ and SEC officials, and other preexisting documents. The *Resource Guide* collects this information into a helpful tool for FCPA practitioners and companies that want to learn the basics about FCPA compliance. For more information on the *Resource Guide*, we refer readers to the Jones Day publication *DOJ/SEC's Resource Guide to the U.S. Foreign Corrupt Practices Act: Jones Day Summary and Analysis*, published in December 2012. Key topics in the *Resource Guide* include:

- Definition of “foreign official”;
- Gifts, travel costs, and entertainment expenses;
- Hallmarks of an effective corporate compliance program;
- FCPA due diligence pre-acquisition;
- Post-acquisition FCPA compliance integration;

- Civil liability for issuers, subsidiaries, affiliates, individuals, and other entities;
- Benefits of self-reporting, cooperation, and remedial efforts; and
- Jurisdictional reach of the anti-bribery provisions.

While the *Resource Guide* merely provides guidance and is not binding on DOJ prosecutors or SEC enforcement staff, it provides substantial insight into how U.S. authorities are likely to view frequently occurring factual scenarios. In remarks made shortly after the release of the *Resource Guide*, Assistant Attorney General Lanny Breuer touted the *Resource Guide* as “perhaps the boldest manifestation of our transparent approach to enforcement” and stated that it “will help businesses that are unsure of their obligations, and should therefore improve compliance.”³

OPINION PROCEDURE RELEASES

In 2012, the DOJ issued two opinion releases discussing two questions that companies often find difficult to answer. Release 12-01 addressed who in a royal family is a foreign official under the FCPA. Release 12-02 clarified when the payment of travel and entertainment expenses may violate the FCPA.

Release 12-01 advises that the DOJ does not believe that a member of a royal family is a “foreign official” under the FCPA in all instances, and the FCPA is not triggered when the royal family member “does not directly or indirectly represent that he is acting on behalf of the royal family or in his capacity as a member of the royal family.”⁴ Accordingly, Release 12-01 indicates that when assessing whether an individual is a “foreign official” under the FCPA, a party should look beyond the individual’s title to assess the individual’s role, duties, and job functions.

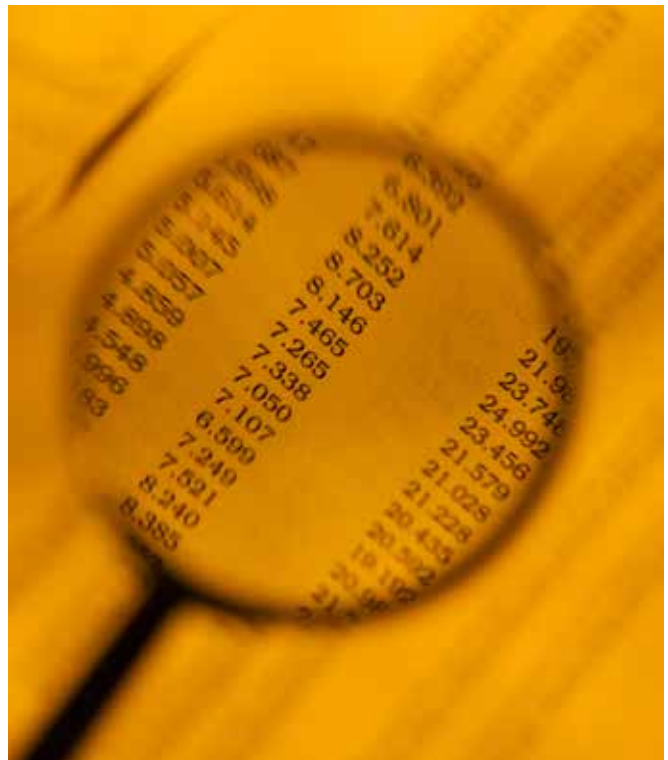




Release 12-02 addresses the provision of travel and entertainment to foreign officials visiting the U.S. pursuant to legitimate product demonstration and promotion. Release 12-02 advises that the DOJ does not object to the provision of airfare on international flights (business class for enumerated senior officials and coach for all other officials), two- or three-night stays in a business-class hotel, and meals and transportation where the rates for hotels and meals are no greater than the General Services Administration rates and where the proposed travel and entertainment do not violate the foreign country's laws. In the fact pattern presented to the DOJ, the requesting party advised that one planned entertainment event would be of nominal cost and would directly involve the requestor's product and services; the requestor would not plan, fund, organize, or host any other entertainment, side trips, or leisure activities; the requestor would not have any role in selecting which officials would attend the trip; the designated officials would be hosted with no family members accompanying them; any souvenirs provided would be of nominal value and would reflect the requestor's business logo; no stipends or per diems would be provided; and all costs and expenses would be limited to those that are reasonable and necessary to educate the visiting officials about the company's business and services.⁵ Release 12-02 thus provides guidance about the "no frills" travel and entertainment a company can provide to foreign officials to avoid FCPA risk.

DECLINATIONS OF CORPORATE PROSECUTIONS

A declination (decision not to prosecute) is the best resolution a company or individual facing potential FCPA-related charges can obtain. Typically, U.S. authorities did not publicly describe the rationale behind FCPA declination decisions. However, on April 25, 2012, the DOJ broke with precedent and provided a public, written statement in support of its decision not to prosecute Morgan Stanley. The case involved the actions of a former Morgan Stanley managing director of real estate in China who admitted to engaging in a conspiracy to transfer a multimillion-dollar ownership interest in a Shanghai building to an influential Chinese government official in return for additional business from the government official.⁶ The DOJ's decision not to prosecute Morgan Stanley for the criminal acts of its employees was based on the company's robust system of internal controls, its decision to self-disclose the misconduct, and its cooperation during the DOJ's investigation. The DOJ uncharacteristically went out of its way to recognize the internal controls Morgan Stanley had in place at the time the managing director engaged in the criminal acts. Those controls included the firm's "frequent" training sessions, "extensive due diligence on all new business partners," and robust internal audit function.



The DOJ's decision not to prosecute for the criminal acts of its employees was based on the company's robust system of internal controls, its decision to self-disclose the misconduct, and its cooperation during the DOJ's investigation.

After the Morgan Stanley declination, the DOJ also declined to prosecute Grifols S.A., a Spanish pharmaceutical company. The basis for this declination was reported in the company's November 30, 2012, SEC filing. When Grifols acquired Talecris Biotherapeutics Holdings Corporation ("Talecris") in February 2011, Talecris was conducting an ongoing internal investigation into alleged FCPA violations. Grifols continued the internal investigation, cooperated with the DOJ, and undertook several actions (including suspending shipments to certain countries, terminating consultants, and terminating distributors) until "additional safeguards [could be put] in place."⁷ Ultimately, in November 2012, Grifols disclosed that the DOJ closed the investigation due to Grifols's "significant cooperation ... by taking immediate steps to secure valuable information," its compliance program, its internal audit function, and its continued "improvements in the global anti-corruption compliance procedures."



These two cases indicate that U.S. authorities may be willing to decline to prosecute FCPA violations where companies demonstrate robust and effective compliance programs and provide significant and meaningful cooperation to the authorities.

DECREASING USE OF INDEPENDENT COMPLIANCE MONITORS AND SHIFT TO SELF-MONITORING

A third notable trend from the last year is the decreased frequency with which U.S. authorities require a company to appoint an independent monitor to assess and ensure the company's compliance with a DPA or NPA. A Government Accountability Office review of 152 DPAs and NPAs entered into between 1993 and September 2009 indicated that an independent compliance monitor was required in approximately one-third of these cases (48 of 152 or 31.6 percent).⁸ In the FCPA context, "[f]rom 2004 to 2010, more than 40 percent of all companies that resolved an FCPA investigation with [U.S. authorities] through a settlement or plea agreement retained an independent compliance monitor as a condition of that agreement."⁹ Yet in 2012, U.S. authorities required only three companies (25 percent of corporate FCPA cases) to retain an independent compliance monitor.

At least in partial recognition of the cost and intrusiveness of independent compliance monitors, there is a growing trend among U.S. authorities toward allowing corporate

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self-monitoring. For example, Pfizer HCP Corporation's DPA, which was filed in August 2012, allowed the company to self-monitor, rather than engage an independent monitor.¹⁰ The DOJ explained that "Pfizer, Inc.'s extensive remediation and improvement of its compliance systems and internal controls" was the basis for allowing Pfizer to self-monitor.¹¹ Another example of a company allowed to self-monitor is a subsidiary of Lufthansa Technik AG, which pled guilty

to conspiring to violate the FCPA and agreed to pay a US\$11.8 million fine in addition to self-monitoring.¹²

The self-monitoring trend is not limited to cases involving large, publicly traded companies. In June 2012, Data Systems & Solutions LLC agreed to a DPA in an FCPA case. Under the DPA, it reports to the Department periodically, "at no less than twelve-month intervals during a two-year term, regarding remediation and implementation of the compliance program and internal controls, policies, and procedures..."¹³ Likewise, in July 2012, the DOJ announced the resolution of an FCPA investigation in which the Nordam Group, Inc. agreed to a three-year NPA, with similar periodic reporting about its compliance efforts.¹⁴ Nordam's NPA was a result of its timely, voluntary, and complete disclosure of the conduct; cooperation with the DOJ; and remedial efforts.

Further, the self-monitoring concept was highlighted in the *Resource Guide*. The *Resource Guide* advises that self-monitoring may be appropriate in cases where companies have made "voluntary disclosure[s], ha[ve] been fully cooperative, and ha[ve] demonstrated a genuine commitment to reform."

INDUSTRY-WIDE SWEEPS

U.S. authorities continue to engage in industry-wide FCPA sweeps. In 2012, the health care industry found itself in the U.S. authorities' focus with pharmaceutical companies

Pfizer and Eli Lilly, as well as medical device manufacturers Biomet and Smith & Nephew, resolving FCPA investigations that were based on allegedly corrupt activity in Argentina, Brazil, Bulgaria, China, Croatia, Czech Republic, Greece, Italy, Kazakhstan, Poland, Russia, and Serbia. Indeed, at least eight of the 10 world's top pharmaceutical companies have reportedly disclosed FCPA probes.¹⁵ Some reports indicate that the retail industry may be the next to experience an FCPA sweep.¹⁶ Similarly, there are reports that an industry-wide probe of the financial services industry's interactions with sovereign wealth funds may be underway,¹⁷ as well as an SEC probe seeking information from Hollywood studios about inappropriate dealings with certain Chinese government officials.¹⁸



“VICTIMS” OF CORRUPTION SEEKING REDRESS IN U.S. COURTS

FCPA investigations and prosecutions increasingly have the potential to subject a company, and its officers and directors, to civil litigation. In most instances, civil litigants attempt to “piggy-back” onto government investigations and use a company's admissions of guilt made in connection with resolving a government investigation to prove the conduct at issue in the civil case.¹⁹ Typically, these civil actions fall into two categories: (i) shareholder class actions alleging that a company did not adequately disclose the facts that led to the plea or DPA, and (ii) derivative actions against officers and directors alleging that they failed in their corporate duties.²⁰ A trend toward a third, new category of FCPA-related civil litigation is emerging as the purported

victims of corruption schemes, aided by the plaintiffs' bar, seek redress in U.S. courts, typically bringing claims under the civil liability provisions of U.S. anti-racketeering laws.

For example, on October 9, 2012, an industry-leading mining company announced that it had settled a civil racketeering suit brought by a Bahraini state-owned enterprise alleging, among other things, that the company overpaid for raw materials because its employees were bribed.²¹ Two months later, on December 12, 2012, the self-proclaimed victim of a corruption scheme in Mexico initiated a substantially similar lawsuit alleging, among other things, that it had overpaid for services because Siemens and other multinational companies bribed its employees.²² In this action, the plaintiffs expressly relied upon the SEC's allegations in the 2008 resolution of *Siemens*.²³



These cases represent the continued efforts of the plaintiffs' bar to articulate new theories of private civil liability for companies facing FCPA investigations. Following an FCPA resolution with the U.S. authorities, a civil litigant's parallel case may be relatively easy to plead, and perhaps to prove. Therefore, it is expected that the efforts pushing for new theories of civil liability will continue through 2013 and beyond. The prospect of concurrent or subsequent private litigation may become an increasingly likely collateral consequence for companies resolving FCPA allegations with U.S. authorities.

Notwithstanding a year-over-year drop in FCPA prosecutions from 2011 to 2012, the year 2012 remained an interesting and noteworthy year in FCPA developments. The release of the *Resource Guide* is a boon for FCPA enforcement guidance and perhaps signals U.S. authorities' sustained interest in ramping up FCPA enforcement actions. Never before has such a "one-stop shop" of information been available about the FCPA. The fledgling trend of U.S. authorities providing more public information about FCPA prosecutions was also present in the very public DOJ declinations to prosecute companies for FCPA violations. It appears that U.S. authorities are gradually willing to reveal their perception of effective compliance programs and meaningful cooperation with the authorities. Indeed, U.S. authorities are tailoring compliance with the FCPA through the enhanced use of self-monitoring of companies in DPAs and NPAs, instead of a "one-size-fits-all" approach requiring the appointment of a burdensome and expensive independent compliance monitor. Additionally, the trend of industry-wide corruption probes appears to have continued through 2012, with a particular focus on the pharmaceutical, retail, and financial services industries. This scrutiny of entire industries could encourage increased and faster cooperation of companies

within the cross-hairs of U.S. authorities. Finally, companies facing FCPA allegations remain in the purview of plaintiffs' lawyers who are pushing new theories of liability, beyond the traditional securities class actions or derivative actions, to obtain private monetary recoveries for the purported victims of corruption schemes.



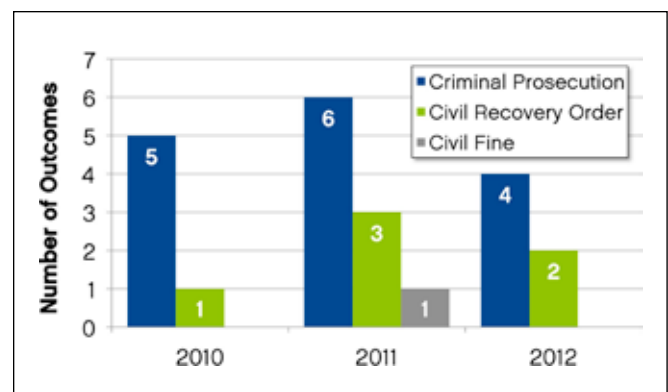


UNITED KINGDOM

Following the furor that surrounded the implementation of the UK Bribery Act (“UKBA”) in July 2011, the year 2012 started rather slowly. As the first anniversary of the Act coming into force approached without any sign of a company being charged under the UKBA, many commentators questioned what all the fuss had been about. The only convictions for bribery and corruption in 2012 were under the old legislative scheme. The chart to the right shows the outcomes of bribery and corruption enforcement activity for the last three years.

The Serious Fraud Office (“SFO”), the UK law enforcement agency with primary responsibility for tackling overseas corruption, has insisted publicly that it was actively pursuing a number of investigations. Since 2010, the SFO has undergone a significant change of personnel, and with it came a change of approach. SFO Director Richard Alderman resigned in April 2012 and was replaced by David

BRIBERY AND CORRUPTION CASES, 2010-2012



Green Q.C. Alderman did much to raise the profile of bribery and corruption issues in the UK and around the world. He also introduced a willingness to reach negotiated settlements with companies that self-reported instances of corruption. This approach was not universally admired and drew criticism from both the UK judiciary and the

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Organisation for Economic Co-operation and Development (“OECD”).

The new SFO director, a barrister with lengthy experience as a prosecutor, made clear from the outset that he intended to take a different approach than his predecessor, with his preference being to prosecute rather than to reach deals. Green’s top team reflected his different priorities. Administrators were replaced by experienced criminal lawyers, and most notably, Green employed a former Senior Circuit Judge, His Honour Judge Rivlin, who specialized in fraud cases.

In October 2012, the SFO withdrew its existing guidance on the UKBA and self-reporting. This step was taken without notice or explanation. Shortly thereafter, revised guidance was issued addressing facilitation payments, corporate hospitality, and self-reporting. The revised policies are, for the most part, a change of tone and emphasis rather than a substantive shift in the SFO’s approach. The SFO is no longer actively encouraging self-reporting, but self-reporting remains the key factor in determining whether a company

facing bribery charges might avoid prosecution. Further, the SFO is stepping back from its commitment to engage with corporations and to help them devise robust anti-corruption strategies. The SFO no longer sees its role as a thought leader on standards of effective corporate governance and ethics.

Further clarification of the steps required to make an effective self-report were published in late 2012. These clarifications advise that a self-report must be accompanied by a formal written report and supported where appropriate by copies of relevant evidence. For a company to receive credit, the self-report “must form part of a genuinely proactive approach.” A report preempting an imminent criminal investigation is unlikely to bring the company in question much credit. Even where all these requirements are met for a self-report, no guarantee is given about the eventual outcome.

It remains to be seen whether, in practice, the SFO will be less likely to negotiate non-prosecution outcomes as a result of these new policies. However, the tone set by this

revised guidance may make corporations and their advisors more wary about self-reporting until the SFO's appetite for prosecution can be properly gauged.

One may not have to wait long to see how this revised guidance plays out in practice. After a slow start to investigations and prosecutions in 2012, the end of 2012 saw significant developments. In August 2012, the SFO announced that it had commenced a criminal investigation into alleged corruption at GPT, a subsidiary of EADS. This was significant because EADS had, for some considerable time, been in discussion with the SFO concerning bribery and corruption issues. The GPT investigation was followed by Rolls Royce reporting findings of bribery and corruption to the SFO in December 2012.

Companies operating in the financial sector also face exposure to regulatory risk. In July 2011, the Financial Services Authority ("FSA") fined Willis Limited £6.895 million for failures in its anti-bribery and corruption ("ABC") systems and controls. The fine was the largest imposed to date by the

FSA for systems and controls breaches related to financial crime.

In March 2012, the FSA published findings of a thematic review into ABC systems and controls in investment banks. In conducting the review, the FSA visited 15 firms, including eight major global investment banks and a number of smaller operations, to examine how firms mitigate bribery and corruption risk. The FSA found that the majority of firms it visited had more work to do to implement effective ABC systems and controls. The FSA highlighted the following common weaknesses:

- Most firms had not properly followed FSA rules covering bribery and corruption, before or after the implementation of the Bribery Act 2010;
- Nearly half the firms visited did not have an adequate ABC risk assessment;
- Management information on ABC was poor, making it difficult for the firms' senior management to provide effective oversight;
- Only two firms had either started or carried out specific ABC internal audits;
- There were significant issues in firms' dealings with third parties used to win or retain business; and
- Though many firms had recently tightened up their gifts, hospitality, and expenses policies, few had processes to ensure that gifts and expenses in relation to particular clients and projects were reasonable on a cumulative basis.

In conclusion, it seems likely that companies operating in the UK can expect to see significant criminal and regulatory activity in the bribery and corruption sphere in the near future and going forward. With this activity will come greater guidance about how the SFO intends to enforce the UKBA.





CHINA

The year of the dragon was a year of scandal and intrigue for China's Communist Party—complete with Ferrari crashes, murder, attempted defections, and online exposés. Amidst significant public fallout from these scandals, China's senior leadership made stern pronouncements that cracking down on corruption would become the government's highest priority.

Nearly a year into the central government's much-publicized campaign against corrupt officials, anti-corruption watchdogs can point to promising signs that such efforts are already reaping results. Nonetheless, actions taken against corrupt officials still primarily consist of either politically driven prosecutions or reactive posturing designed to mute public outrage by curbing the most visible signs of official misconduct. Overall, the central government still seems reluctant to use its nearly unlimited powers to further a proactive and comprehensive enforcement regime.

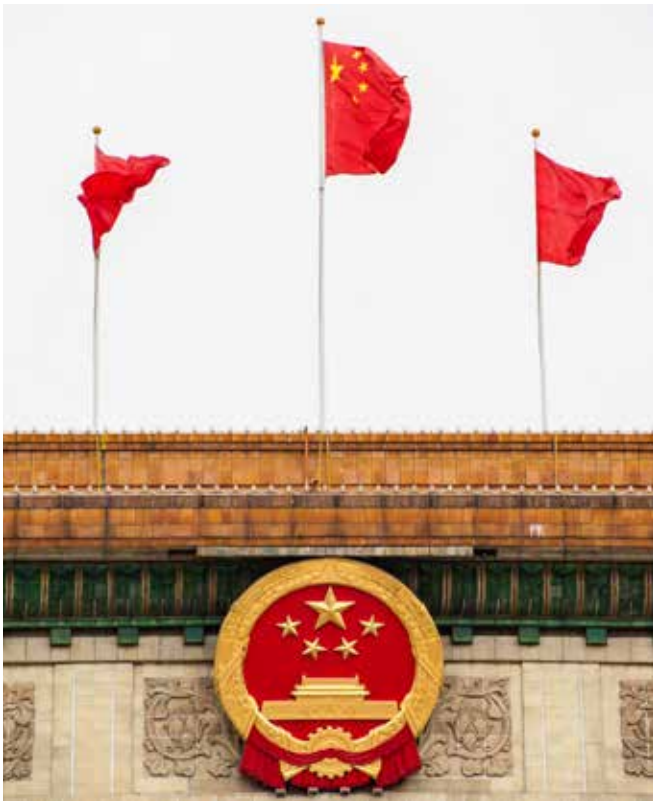
In contrast, in recent months, the Chinese government has shown how swiftly it can act when it comes to punishing foreign companies that have allegedly run afoul of Chinese anti-bribery or unfair competition laws. Indeed, administrative and criminal enforcement actions ensnared over a dozen multinationals in industry-specific sweeps that have manifested overnight, and individual wrongdoers have confessed to crimes on television even before formal charges had been filed.

One theme that all current anti-corruption efforts in China have in common, however, is the prominent role played by whistleblowers. A substantial percentage of the corruption investigations against public officials and foreign companies were initiated after Chinese whistleblowers approached authorities with, or publicly disclosed, alleged misconduct.

We summarize below the manner in which recent developments have shaped corruption enforcement efforts in China and examine the conflicting directions in which those efforts continue to evolve.

SENIOR OFFICIALS ENSNARED IN CORRUPTION PROBES

In the latter half of 2012, public outrage over corruption reached a crescendo as corruption allegations ensnared officials in the highest levels of government. In November 2012, the Communist Party expelled Bo Xilai, a former member of the Central Politburo and Party Chief of Chongqing, and Liu Zhijun, the former head of the powerful Railways Ministry. Liu was later given a suspended death sentence after being convicted of accepting 64.6 million yuan in bribes as well as sexual favors in exchange for helping companies secure contracts to build the prized Chinese high-speed railway system. Liu's downfall exacerbated public criticism that corrupt bidding practices caused a series of deadly safety and technical glitches that afflicted the rail system in its first months of operation.



Bo Xilai's expulsion created even bigger shockwaves and reportedly involved complex political in-fighting ahead of the once-in-a-decade Party leadership change, the poisoning of a British businessman by Bo's wife, and the attempted defection to the U.S. of Bo's police chief, Wang Lijun. Corruption became a focal point in the Bo scandal as well, as it was widely speculated in Western media that Gu poisoned the British businessman because he threatened to expose the Bo family's enormous hidden overseas wealth. After a five-day trial that fixated much of the country—during which the trial court released real-time updates via its microblog—Bo was sentenced to life in prison for accepting more than 20 million yuan in bribes, abuse of power, and embezzlement of public funds.

THE LAUNCH OF A HIGH-PROFILE ANTI-CORRUPTION CAMPAIGN

Faced with surging public resentment, senior Party officials have repeatedly expressed their desire to stamp out corruption within the Party. In November 2012—when Bo and Liu were expelled for corruption—China underwent a once-in-a-decade leadership succession in which seven new leaders were appointed to the ruling Politburo Standing Committee. Almost immediately after assuming power, China's new President, Xi Jinping, made several speeches declaring that the fight against corruption would be a top priority. Xi cited examples of corruption triggering major social unrest in other countries and warned that if corruption became increasingly severe, it would lead to the ruin of the Party and the country. These admonitions echoed outgoing Premier Wen Jiabao's speech stating that fighting corruption was "a matter of life or death to the Party and the country."

In November 2012, the Party also reorganized the Central Commission for Discipline Inspection ("CCDI")—the Party's top internal anti-graft agency—to coincide with its new anti-corruption campaign. All of the new standing committee members of the CCDI have previous experience fighting corruption, and the new head of the CCDI, Wang Qishan, earned a reputation for successfully handling several crises for the Party. Shortly after assuming this position, Wang launched annual local "patrol inspections" to

President Xi announced a campaign to combat the “four forms of decadence”—formalism, excessive bureaucracy, hedonism, and extravagance—that had eroded public support for the Party. Central to this campaign were new frugality measures applicable to senior government officials designed to assuage widespread public complaints about profligate spending of public funds.



uncover corruption among officials at the local level and also reopened an investigation in Maoming, Guangdong, which previously implicated 303 officials and resulted in more than 60 prosecutions. The new investigation is intended to determine whether additional officials were involved, regardless of their seniority.

In December 2012, President Xi also announced a campaign to combat the “four forms of decadence”—formalism, excessive bureaucracy, hedonism, and extravagance—that had eroded public support for the Party. Central to this campaign were new frugality measures applicable to senior government officials designed to assuage widespread public complaints about profligate spending of public funds. The regulations included prohibitions against the types of spending that have long infuriated the public, such as extravagant receptions, alcohol-fueled banquets,

overseas “study” trips for officials, and luxury vehicles. President Xi also promised to punish both high-ranking and low-ranking government officials, or what he referred to as “tigers” and “flies.”

The government has been eager to trumpet the preliminary results of its new anti-corruption campaign. The CCDI announced that from the end of 2012 through July 2013, more than 2,300 officials had been investigated and punished for violations of the new austerity rules. Meanwhile, the Supreme People’s Procuratorate announced that local prosecutors had prosecuted 129 officials at the prefectural level or higher in the first eight months of 2013 and had investigated 30,398 persons on suspicion of corruption, which represented a 3.8 percent increase from the same period in 2012.

One of the most notable examples of the new leadership’s willingness to investigate high-ranking officials has been the detention of Jiang Jiemin, the head of the State-owned Assets Supervision and Administration Commission, which oversees China’s largest state-owned corporations and trillions of dollars in state assets, and former chairman of a powerful state-owned oil and gas company, along with four senior managers of the company. All have been removed for “disciplinary violations.” Media reports have linked the aforementioned officials to a retired member of China’s ruling Politburo Standing Committee and former head of China’s domestic security agencies, prompting media to speculate whether this would mark the first time an acting or retired member of the Politburo Standing Committee could become the target of a corruption investigation.

1.3 BILLION WHISTLEBLOWERS AND CONFLICTING GOVERNMENT REACTIONS

Unwilling to rely solely upon the Party to police its own members, Chinese citizens have begun to take matters into their own hands with the aid of the internet. An increasingly common feature of Chinese corruption prosecutions is the effort of internet citizens, called “netizens” in China, who use social media to expose officials for a wide range of misconduct, such as keeping mistresses, flaunting luxury watches, and hoarding real estate.

Even the deputy director of the powerful National Development and Reform Commission, Liu Tienan, was dismissed from his post after an investigative journalist posted accusations (supplied by Liu’s mistress) on a microblog that Liu defrauded banks, took bribes, and threatened to kill his mistress. Another investigative reporter single-handedly brought down 21 senior Party members when he released a sex video featuring Lei Zhengfu, an official from Chongqing, that quickly went viral. The video was made at the request of a businessman who attempted to blackmail Lei by procuring prostitutes for him and making videos of their trysts because Lei’s other illicit business dealings had made him too rich to bribe with money.

This reliance on information from online citizens, who help police official misconduct and combat corruption, is a promising and powerful new development in a country with the most internet users in the world. It is also a development that is forcing officials to adjust all aspects of their daily behavior. This development will arguably have the greatest impact in China’s rural areas and smaller cities, where local officials have for thousands of years depended on relative obscurity and distance from central government officials and the emperors who preceded them, to rule as de facto kings in their own fiefdoms. Such officials are particularly unprepared for the increased transparency and scrutiny that have resulted from this new wave of online whistleblowing, and there have already been several examples of internet users exposing local officials for blatant misconduct, such as clumsily attempting to cover up a fatal tunnel explosion by paying off workers and relatives and sending bodies outside the province for cremation, or keeping twin sisters as mistresses and providing them both with government positions.



The Party itself appears conflicted about the recent phenomenon of private citizens holding their rulers accountable via internet and social media tools, which have proven difficult to censor and control. On one hand, the Party has welcomed additional online whistleblowing. In September 2013, the CCDI and the Ministry of Supervision jointly opened a website that allows the public to report misconduct by government officials anonymously or with their real names. The CCDI also announced in 2013 that disciplinary bodies recently launched 155,144 investigations based on tips from the public, and that as a result, 160,718 government and state enterprise officials were punished. But not all official reactions to whistleblowers have been positive, and the government has taken steps that critics fear will deter private citizens from making allegations. In 2012, the government introduced new regulations that require social networking operators to compel users to register their real identities before opening an account. In 2013, the National Internet Information Office closed more than one hundred

informal news websites in a government campaign against “extortionists.” Closed websites included that of a well-known corruption whistleblower. Some local governments have experienced such an influx of anonymous complaints against officials that those governments have gone on the offensive, painting many of those allegations as fabrications by criminal gangs of extortionists.

In September 2013, China’s Supreme People’s Court and Supreme People’s Procuratorate jointly issued an interpretation that expanded criminal laws in a manner that would subject social media users to criminal defamation charges and up to three years in prison if a libelous post is viewed more than 5,000 times or is forwarded more than 500 times. The interpretation does provide an exemption from prosecution for corruption allegations against officials so long as the allegations are not deliberately fabricated. Following the issuance of this interpretation, the government detained several high profile individuals. Two such detainees, a well known social and political commentator and a journalist who published stories accusing a state-controlled entity of exaggerating its profits, have confessed on state television to irresponsible internet posting and publishing unverified articles, respectively, even before formal charges were filed against them. A third corruption whistleblower known for exposing officials for their taste in luxury watches has also been detained on suspicion of spreading rumors online, blackmail, and extortion.

GSK AND OTHER FOREIGN COMPANIES COME UNDER SCRUTINY

President Xi’s anti-corruption campaign has focused on the officials accepting bribes, so bribe-givers have not been consistently prosecuted. This has not been true, however, with respect to the government’s recent decision to begin scrutinizing the business practices of large multinationals operating in sensitive consumer markets, where prosecuting government and Party officials for accepting bribes has been largely an afterthought. The investigation that has garnered the majority of headlines within and outside China has been the Ministry of Public Security’s investigation into GlaxoSmithKline (“GSK”). Specifically, authorities allege that GSK funneled up to 3 billion yuan through travel



agencies in order to bribe and reward doctors, hospitals, and government officials in exchange for prescribing GSK products. Police and prosecutors have detained four GSK China executives, questioned at least 18 other China-based employees, and have implied that they are considering imposing substantial fines on GSK itself.

While carrying out its investigation, the government has not hesitated to publicize details of GSK’s alleged misconduct. Chinese state media broadcast a televised confession of a GSK vice president even before formal charges had been filed against the individual. In his confession, the vice president detailed how third parties such as travel agencies were used to generate funds for bribes and how these improper practices could account for 20 to 30 percent of the total drug price. At press time, the Chinese government’s investigation into GSK was still ongoing, but the investigation and the corruption allegations had reportedly caused GSK’s sales in China to fall 61 percent in the third quarter of 2013.

GSK was not the only foreign pharmaceutical company that was the subject of bribery allegations in China. After the GSK investigation became public, a series of whistleblowers came forward with allegations against a half dozen other European and American pharmaceutical companies. Allegations were similar in each case—cash kickbacks in exchange for prescriptions had been given to doctors and hospital officials, often through third parties and usually disguised as research fees, grants, fees for clinical



Allegations were similar in each case—cash kickbacks in exchange for prescriptions had been given to doctors and hospital officials, often through third parties and usually disguised as research fees, grants, fees for clinical trials, consulting fees, and speaking fees.

trials, consulting fees, and speaking fees. In many cases, Chinese media reports stressed that these improper practices have resulted in higher prices for Chinese consumers and, in some instances, have accounted for as much as 50 percent of sales prices.

The milk formula industry has been the latest industry to come under government scrutiny. In August 2013, the National Development and Reform Commission (“NDRC”) fined six milk formula manufacturers a total of US\$110 million for resale price maintenance and other anti-competitive practices. All six companies stated they would not appeal the fines, and many indicated they would lower prices by as much as 20 percent. Shortly after the NDRC fines, a whistleblower publicly alleged that the Chinese subsidiary of a major European milk formula manufacturer had paid bribes to doctors and nurses in hospitals to increase sales of milk formula. Authorities have begun investigating these allegations, as well as the sales practices of other foreign milk formula manufacturers.

One characteristic that the government’s probes into the pharmaceutical and milk powder industries have in common (other than whistleblowers) is the government’s interest in controlling rising prices for consumers. Bribery has long been cited as a major factor in rapidly rising costs in China’s hospitals and general discontent with the medical system, which in turn has led to an upsurge in violent



attacks on hospital staff. In the milk formula industry, a food safety scandal in 2008 led to widespread distrust of domestic brands, allowing foreign brands to charge twice the price of domestic brands.

OTHER ENFORCEMENT DEVELOPMENTS

Although the sense of urgency emanating from senior leadership and the recent success of private citizens in provoking officials into taking action are encouraging signs, authorities have often taken action only after allegations of corruption made by private citizens had spread over the internet and could no longer prudently be ignored, or when there was a political advantage in doing so. Similarly, President Xi's austerity campaign targets those forms of extravagance that are impossible to hide from the public eye: the use of luxury cars as official vehicles, mass banquets in five-star hotels and high-class restaurants, and extravagant receptions and ceremonies. The future of corruption enforcement thus remains hazy, but one cannot deny that the overall trend over the past year, especially with regard to regulating the practices of foreign companies, is toward increased enforcement.

Some additional developments, often sending conflicting messages about the Party's true commitment to fighting corruption, include the following:

- In 2013, Chinese authorities formally arrested two foreign investigators based in China, Peter Humphrey and Yu Yingzeng. The husband and wife pair are the cofounders



The future of corruption enforcement thus remains hazy, but one cannot deny that the overall trend over the past year, especially with regard to regulating the practices of foreign companies, is toward increased enforcement.

of a risk advisory firm that provides investigative and due diligence services in China. Humphrey confessed on Chinese national television to violating Chinese law and stated that "the way we acquired information was sometimes illegal." Shanghai authorities stated that the couple illegally purchased private information about Chinese citizens such as personal household registrations (*hukous*), automobile and homeownership records, and international travel details, and then sold this information for a profit. This development has continued a recent trend in which it has become increasingly difficult to obtain sufficient background information in a legal manner on potential business partners, even as corruption risks in China rise, especially with regard to use of third parties.

- After a series of Western media reports alleging that the families of high-ranking officials had accumulated staggering wealth, many local authorities, including those in Beijing, subsequently made it more difficult to obtain information regarding the identities of shareholders and directors of PRC companies.

- In a similar vein, local authorities have responded to the rash of property ownership scandals (netizens have exposed multiple officials who had amassed dozens of real estate property leases and concealed their ownership by purchasing fake household registration identifies) by restricting public access to databases identifying the owners of real property leases.
- In 2013, a new interpretation concerning the enforcement of criminal bribery cases, issued by the Supreme People's Court and the Supreme People's Procuratorate, became effective. Notably, the new interpretation includes provisions designed to encourage whistleblowers. One provision indicates that prosecutors may provide leniency or decline to prosecute if an employee involved in a company's bribery scheme provides information about the company's crimes prior to prosecution. Another provision provides that a bribe-giver may be eligible for leniency or a declination if the bribe-giver discloses other criminal acts by the bribe-taker.
- In 2013, the central government dispatched 10 teams of anti-graft inspectors around the country to identify "corruption problems" among government agencies and state-owned enterprises. The teams reportedly found rampant corruption, especially among low-level officials, as well as various irregularities in record-keeping and reporting. The CCDI is planning to open formal investigations based on these reports.
- In 2013, SAIC, the agency responsible for enforcement of unfair competition laws, began a three-month investigation into bribery and other anti-competitive practices in various industries, including the pharmaceutical industry, and stated it would impose severe punishments to both bribe-givers and bribe-takers. Meanwhile, the NDRC began a pricing investigation into pricing practices of 60 foreign and local pharmaceutical firms.
- One sign that the Party may not be fully committed to its anti-corruption campaign was the detention of several anti-corruption activists. For years, senior Party officials have been required to report their income, investments, assets, real estate holdings, and other valuable property,



and the Party announced in 2011 that the income declaration requirements would be expanded to officials at every level and would include the income of family members and close relatives. Few, if any, government authorities have actually given the public access to this information, however, and several activists were detained after demanding that government officials publicly disclose their assets. This document was headed to print on the eve of trial for three activists supporting such calls for transparency.

- Since China's enactment of its version of the FCPA in 2011, there have been no public reports of any prosecutions under this law, despite the fact that in Africa, for instance, several Chinese companies have been accused of large-scale bribery in attempts to win government bids since the law was enacted.
- From 2010 through the present, U.S. authorities have charged or settled FCPA enforcement actions against more than a dozen companies based in part on violations arising from conduct in China. Chinese authorities do not appear to have made a systematic effort to follow up on the detailed leads provided by U.S. enforcement agencies, despite their broad authority to collect evidence and interview persons located in the Chinese subsidiaries of implicated foreign companies.



AMERICAS

ARGENTINA

A recent development in Argentina demonstrates that country's willingness to piggyback on prosecutions and admissions in the U.S. to undertake local anti-corruption enforcement, even when the outcome in the U.S. was extremely favorable to the target.

In April 2013, the Ralph Lauren Corporation ("Ralph Lauren") concluded a dual non-prosecution agreement with the U.S. DOJ and the SEC relating to allegations that it violated the FCPA through a customs bribe scheme in Argentina. In exchange for admissions to certain conduct, including the payment by its subsidiary, Ralph Lauren Argentina ("RLA"), of US\$593,000 in bribes to customs officials to secure clearance of prohibited goods and to avoid inspections, the U.S. DOJ and the SEC agreed not to prosecute the company—a favorable outcome. Nevertheless, on the day following public disclosure of the non-prosecution

agreement, Argentine tax authorities decided to launch their own enforcement effort.

The Argentine tax agency, AFIP, initiated a three-pronged attack on Ralph Lauren. First, based on the facts disclosed in Ralph Lauren's non-prosecution agreement, it requested the criminal court to open an investigation of RLA. In addition to this, it suspended the Tax and Employment Identification Number (known as the "CUIT") of the Ralph Lauren and Polo subsidiary in Argentina as well as of its individual directors. Argentina's tax chief, Ricardo Echegaray, also demanded that the SEC identify the Argentine officials who took the bribes and asked U.S. Ambassador Vilma Martinez to make evidence from the U.S. available to the judge assigned to the case, Jorge Bruno. Argentina and the United States are parties to a mutual legal assistance treaty that permits the sharing of evidence between the countries in criminal cases.

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These actions may represent a further policy shift toward penalizing companies for corrupt acts. Much anti-corruption enforcement in Argentina has been directed toward individuals, such as officers and directors, in cases involving corruption intended to benefit a company. More recently, Argentina has begun to seek to recover from companies the amount of benefit they received due to corrupt activity allegedly perpetrated on their behalf. The suspension of tax identification numbers is a crippling device, as companies cannot issue invoices or pay taxes, and therefore cannot conduct business, without their tax identification numbers. In Ralph Lauren's case, it was largely meaningless; in

the course of its cooperation with the SEC, Ralph Lauren had already shut down the Argentine subsidiary. Nevertheless, use of such a tool is a warning to companies that local anti-corruption enforcement tactics may abruptly jeopardize operations.

The court has begun holding hearings in the Ralph Lauren matter, and Echegaray was himself called to testify, in part on the question of whether he had any inkling of the bribe scheme while he was head of Argentina's customs authority from 2004 through 2008.

The Ralph Lauren case arrived in an environment fraught with concern about corruption. Public disclosure of Ralph Lauren's settlement came just two weeks after a widely seen television exposé of corruption between a businessman and the government of former Argentine president Nestor Kirchner, and amid protests against his wife and successor, Christina Kirchner, over stories of corruption and fears of constitutional and legislative maneuvering to secure her a currently prohibited third term. The case also resonates due to the exposure of importers to pressure on customs and licensing issues. Due to policies aimed at promoting domestic production, companies importing into Argentina have had import licenses held up until they promise to match their cargoes' value by agreeing to shift an equal amount of production or investment into Argentina.

BRAZIL

In early July 2013, as millions of Brazilians flooded the streets to protest against government corruption and waste, Brazil took the final steps to enact a landmark anti-corruption law. On August 1, Brazilian President Dilma Rousseff signed Law No. 12.846, also known as the Clean





Company Law (the “Law”), which establishes a corporate anti-corruption regime that shares characteristics with the U.S. Foreign Corrupt Practices Act (“FCPA”) and the UK Bribery Act. The Law imposes strict civil and administrative liability on Brazilian companies for domestic and foreign bribery. International companies with a presence in Brazil are also covered if they engage in bribery within Brazil.

The Law will go into effect on January 29, 2014, 180 days from the date of its publication in Brazil’s Official Gazette, and will have important and immediate implications for companies that operate in Brazil. The new liability imposed on companies is in addition to existing criminal liability for individuals who engage in bribery of Brazilian and foreign public officials. The ability of Brazilian prosecutors to target companies under the Law may mean heightened exposure under existing law for officers, directors, and employees of those companies. The Law also provides for an enforcement regime that promises to be expensive for companies that might become its targets.

The adoption of the Law caps a three-year process that mostly predates the recent public outcry against corruption. Its longer aim was to improve Brazil’s compliance with the OECD Convention on Combating Bribery of Foreign Public Officials, to which Brazil (although not an OECD member) is a signatory. Approval of the Law was widely regarded as an important move to align Brazil with other nations with corporate anti-corruption laws on their books, and it demonstrates Brazil’s significant commitment to the rule of law.

Penalties consist of administrative fines ranging from 0.1 percent to 20 percent of the responsible company’s prior year’s gross revenue (taxes excluded), with alternatives for instances where gross revenue cannot be assessed.

These considerations and other recent events, such as the trial and conviction of high-ranking officials of the former presidential administration and members of Congress in a widespread corruption case known as the “*Mensalão*,” created an atmosphere favorable to the Law’s passage in April by the Brazilian *Câmara dos Deputados* (House of Representatives), where it had been stalled since 2010. Corruption fatigue, boosted by the revelations of the *Mensalão* and the huge expenditures associated with Brazil’s hosting of the World Cup and the Olympics, whose cost overruns many attribute to corruption, provided impetus for the recent protests and ensured the bill’s swift passage in the Senate and its subsequent signing into law.

Hence, the Law arrives in a heated atmosphere of heightened attention to corruption and corruption enforcement, which may influence how and against whom the Law is enforced. This is still uncharted territory; questions still remain as to what extent Brazil will step up its anti-corruption enforcement, how it will define the bases for leniency under the Law, and to what extent Brazilian authorities will coordinate their enforcement activity with other countries such as the U.S. and UK, whose anti-corruption laws—the FCPA and the UK Bribery Act—can reach conduct in Brazil.



KEY PROVISIONS OF THE LAW

APPLICATION AND JURISDICTION

The Law has a jurisdictional reach slightly less ambitious than that of the FCPA and the UK Bribery Act. It governs both the domestic and foreign actions of Brazilian companies, including Brazilian subsidiaries of foreign parent companies. It also governs actions within Brazil of non-Brazilian companies that have an office, branch, or other type of representation in Brazil. This includes both foreign companies that are legally established in Brazil and those that are determined to be de facto in Brazil, even if only temporarily.

PROHIBITED CONDUCT

The Law prohibits direct and indirect acts of bribery or attempted bribery of Brazilian public officials or foreign public officials, including the giving of any financial or other support to the bribe activity or its concealment, and the use of third parties to assist the bribe scheme. The Law also forbids bid rigging and fraud in the public procurement process, and forbids tampering with government investigations.

In defining “foreign public entities” and “foreign public officials,” the Law makes explicit what the FCPA left implicit and subject to judicial or executive guidance. “Foreign public

entities” and “foreign public officials” include, respectively, entities directly or indirectly controlled by the public sector of a foreign country (the Law includes a control test for determining this), and individuals with even temporary or unpaid employment at such entities.

LIABILITY

Under the Law, companies are subject to strict civil and administrative liability, in the form of restitution for damages, administrative fines, and other civil penalties for the acts of their directors, officers, employees, and agents when such acts of prohibited conduct would benefit the company (directors and officers are liable only to the extent of their fault). Parents and affiliates (even, in some cases, joint venture partners) can be held jointly and severally liable for fines and restitution. Officers and even shareholders are at risk whenever the company is used to facilitate or conceal the illicit conduct. Successor liability is imposed even for acts that took place prior to a merger or acquisition, subject to certain limitations.

PENALTIES

Penalties consist of administrative fines ranging from 0.1 percent to 20 percent of the responsible company’s prior year’s gross revenue (taxes excluded), with alternatives for instances where gross revenue cannot be assessed. Notably, the Law states that these fines can never be lower than



the benefit obtained by the responsible company. Judicial penalties, including disgorgement of benefits obtained by the illegal act, suspension or partial interruption of the company's activities, or dissolution of the legal entity, may also be imposed.

BENEFITS OF COMPLIANCE, SELF-REPORTING, AND LENIENCY AGREEMENTS

The Law provides incentives in the form of reduced fines for companies with effective anticorruption compliance programs, essentially codifying a form of leniency similar to the consideration given to compliance programs in the United States under the U.S. Sentencing Guidelines and by the U.S. Department of Justice when it decides whether to charge organizations or when negotiating a plea. Like the UK Bribery Act but less explicitly (and without providing an affirmative defense), it recognizes internal integrity procedures, internal audits, and a structure of reporting mechanisms as key components to an effective anticorruption compliance program. Brazil's government is expected to publish further guidance on these topics; we will provide further updates when this occurs.

Apart from cooperation incentives, the Law permits leniency agreements with companies that self-report violations. Companies that are the first to come forward to report a violation and admit their own participation may benefit from a reduction of up to two-thirds of the fines that could have been imposed (this reduction in fines does not apply to forfeiture/restitution) and protection against debarment from public subsidies and benefits and from widespread publication of the penalty.

Note that there is some uncertainty as to the efficacy of leniency agreements, which grant only limited protection from prosecution of conduct regulated by the Law. By making admissions to gain leniency, companies may open themselves to prosecution and penalties under other applicable statutes and their admission can be used as a powerful tool by prosecuting authorities to justify steep penalties.

STATUTE OF LIMITATIONS

Violations of the Law are subject to a five-year statute of limitations.



ROUSSEFF'S VETOS

In signing the bill into law, President Rousseff vetoed three notable provisions of the version that had been sent to her by Brazil's Congress: a provision that would have limited the amount of the fine to the value of the asset or service sought by the company through the illegal act, a provision that would have allowed authorities to consider the conduct of the involved public officials when calculating the fine, and a requirement for proof of fault or willful misconduct for the imposition of the harsher civil penalties. These penalties include suspension of business activities, dissolution of the corporate entity, and a prohibition from the receiving of government grants. The result of these vetoes is a harsher law than was approved by Brazil's Congress.

ENFORCEMENT CONSIDERATIONS

ADMINISTRATIVE PROSECUTION

One of the unique features of the Law is that enforcement rests with the highest executive, legislative, or judicial authority affected by the conduct. This means that enforcement actions can be brought by affected government

Given the Law's liability provisions and hefty penalty structure, companies facing enforcement under both the Law in Brazil and under the FCPA in the U.S. may, when planning negotiations with the U.S. Department of Justice, wish to factor in the potential for penalties to be paid in Brazil.

regulators, such as IBAMA (environment), ANVISA (health), ANP (oil and gas), and many others. Because of this, interpretation and enforcement of the Law is likely to proceed in haphazard and conflicting ways, according to differing procedures and subject to differing policy influences. Civil prosecution by the *Ministério Público* may give rise to other problems. Under the Brazilian system, the *Ministério Público*—which is made up of public prosecutors at both the federal and state levels—is a functionally independent part of the Federal Executive branch, whose decision-making is not subject to approval or check. Each individual prosecutor is free to initiate prosecution actions according to his or her convictions under the law, with little prospect of being overruled.

As written, the Law will provide government agencies and the *Ministério Público* with a strong tool to investigate and prosecute companies doing business or operating in Brazil for any corrupt activity within the Brazilian territory and abroad. The enhanced public scrutiny of corruption in Brazil, coupled with prosecutorial independence, may embolden public prosecutors to seek high-profile companies against which to enforce the Law. It is too early, however, to predict whether government agencies will aggressively enforce the Law.

FCPA CONSIDERATIONS

Given the Law's liability provisions and hefty penalty structure, companies facing enforcement under both the Law in Brazil and under the FCPA in the U.S. may, when planning negotiations with the U.S. Department of Justice, wish



to factor in the potential for penalties to be paid in Brazil. Companies in such circumstances should consider whether the form of a contemplated resolution in the U.S. (or any other jurisdiction) may provide a predicate or create an incentive, by establishing facts or yielding admissions, that give a roadmap for Brazilian authorities to take action under the Law.

The Law may also provide a basis for joint enforcement activity by U.S. and Brazilian authorities. The U.S. and Brazil are parties to a Mutual Legal Assistance Treaty, or "MLAT," which entered into force in 2001. The MLAT was designed to enhance the ability of the United States and Brazil to investigate and prosecute criminal matters. The avenue exists, therefore, for Brazilian authorities enforcing the Law to seek assistance from the U.S. where U.S. companies or persons are concerned, and for U.S. authorities to seek the cooperation of Brazilian authorities in matters they are

The Federal Anti-Corruption Law in Public Contracting (*Ley Federal Anticorrupción en Contrataciones Públicas*) reinforces the regime of liabilities and penalties applicable to Mexican and foreign entities and individuals who bribe public officials in order to obtain or maintain a benefit in federal public contracting matters...

investigating under the FCPA. The Law's application of anticorruption enforcement to companies may provide additional incentive for cooperation between Brazilian and U.S. authorities in such cases.

MEXICO

Tales of corruption have always been present in Mexico since the days of the Spanish conquest, but corruption has never received the kind of attention it has received in the last few years. Fueled by the U.S. government's enforcement of the FCPA, stories of corruption by companies subject to the FCPA have literally flooded newspapers in Mexico and abroad. This has prompted the federal government of Mexico to take significant and visible steps against corruption.



On June 11, 2012, Mexico enacted the Federal Anti-Corruption Law in Public Contracting (*Ley Federal Anticorrupción en Contrataciones Públicas*). The law reinforces the regime of liabilities and penalties applicable to Mexican and foreign entities and individuals who bribe public officials in order to obtain or maintain a benefit in federal public contracting matters, as well as Mexican entities and individuals who make illegal payments in commercial international contracting with the public sector of foreign states. It is, therefore, a law with international reach.

In the last few years, several foreign corruption prosecutions prompted parallel investigations by Mexican agencies. Some of the investigations are described below.

- On March 2012, Bizjet International Sales & Support, Inc. pled guilty in the U.S. to bribing officials of the Presidential Staff (*Estado Mayor Presidencial*) and Federal Police (*Policía Federal*), as well as the governments of Sinaloa and Sonora, in order to obtain contracts. In May 2012, Mexico's Attorney General's Office (*Procuraduría General de la República*) began an investigation into the assets of those supposedly involved, and with the help of the Ministry of Public Administration (*Secretaría de la Función Pública*), the Attorney General's Office began a review of the alleged contracts awarded to Bizjet by Mexican officials in exchange for bribes. In July 2012, the Attorney General's Office froze the bank accounts of Brigadier General Crisanto Garcia, deputy head of the Presidential Staff Logistics, and Eduardo Laris McGregor,

air operations coordinator of the Federal Police, for allegedly receiving illegal payments from Bizjet.

- On April 21, 2012, *The New York Times* reported allegations that a U.S. company in the retail sector made corrupt payments to public officials for the purpose of expanding its presence in Mexico. On the heels of the U.S. government opening an FCPA investigation against the company, the Mexico Attorney General's Office began a parallel corruption investigation in Mexico as well, which is being handled by the Special Unit for Crimes Committed by Public Officials (*Unidad Especializada de Investigación de Delitos cometidos por Servidores Públicos*).
- In July 2012, Orthofix, a medical equipment company, admitted to violating the FCPA by bribing officials of the Mexican Social Security Institute (*Instituto Mexicano del Seguro Social*), through its subsidiary in Mexico, Promeca, S.A. de C.V. A complaint was filed by the Institute in Mexico to identify the officers who benefited from the bribes in order for legal action to be taken. The matter is under investigation by the Attorney General's Office.

These cases have caused companies doing business in Mexico to strengthen their anti-corruption compliance policies and training and have raised the Mexican business community's awareness of Mexico and U.S. anti-corruption issues. We have found that purely Mexican companies are requesting assistance to implement anti-corruption controls and policies.

The victory of Enrique Peña Nieto in the presidential election of 2012 marks the return to power of the "*Partido Revolucionario Institucional*," which was defeated in 2000 by Vicente Fox in part due to a perception of widespread corruption in the 70 years that the party held the presidency.

Likely for that reason, on November 15, 2012, President Enrique Peña Nieto presented before the Senate an initiative proposing the creation of (i) the National Anti-Corruption Commission (*Comisión Nacional Anticorrupción*), an autonomous body of the federal government responsible for preventing, investigating, and punishing administratively acts of corruption committed by public officials or by any other individual or entity; and (ii) the National Council for Public Ethics (*Consejo Nacional por la Ética Pública*), an inter-institutional body responsible for promoting actions to strengthen the ethical behavior of the community and to coordinate government agencies responsible for preventing and combating corruption throughout Mexico. Additionally, the initiative orders the development of a Federal Anti-Corruption Law (*Ley Federal Anticorrupción*) that will regulate the proposed institutions. The initiative has yet to be approved.





ASIA

INDIA

Over the past five years, India has experienced a noticeable grass-roots anti-corruption movement. From Facebook protests to public outcry leading to government-led investigations, anti-corruption sentiment is being voiced at all levels of the population in India.

The 2010 Commonwealth Games held in New Delhi highlighted, in a very public manner, the issues related to corruption in India. The construction delays leading up to the Games, and the substandard condition of the athletes' village, once finally completed, were widely reported inside and outside of India. These reports and the ensuing public outrage prompted an investigation by India's Central Bureau of Investigation ("CBI") into alleged violations of the Prevention of Corruption Act ("PCA"). In 2011, the CBI arrested the Chief of the Organizing Committee for awarding illegal contracts, alleging that such

improperly awarded contracts resulted in a loss of more than US\$31 million.

In 2011, India's former telecom minister was arrested for improperly awarding 2G telecom licenses, allegedly resulting in financial revenue losses of more than US\$40 billion. The Indian Supreme Court later invalidated 122 2G licenses as a result of this corruption scandal.

Most recently, in 2013, the CBI brought a corruption case against an Italian company and its UK subsidiary for allegedly bribing Indian officials in securing a US\$753 million helicopter deal with the Indian military. The fact that anti-corruption sentiment has reached a new level in India can best be summed up by reference to comments made by Indian Prime Minister Manmohan Singh to visiting UK Prime Minister David Cameron during meetings held in



Despite the rising tide of internal anti-corruption investigations by the Indian government and the steady deluge of U.S. government enforcement actions against U.S. companies operating in India, Transparency International's annual Global Corruption Barometer 2013 revealed that corruption in India is at an all-time high.

India to discuss the strengthening of trade relations between the two nations and the UK's request that India allow greater Foreign Direct Investment from the West. During a press conference held in conjunction with those meetings, Prime Minister Singh stated that he had raised to Prime Minister Cameron "very serious concerns regarding allegations [of] unethical means used in securing the 2010 contract for AugustaWestland helicopters," demanded an explanation from the company as to whether it had violated ethical practices in that deal, and sought assurance from the UK that it would fully cooperate and assist the Indian government in its investigation.²⁴

U.S. government investigations into alleged improper payments by U.S. companies in India also show no sign of waning. Despite the rising tide of internal anti-corruption investigations by the Indian government and the steady deluge of U.S. government enforcement actions against U.S. companies operating in India, Transparency International's annual Global Corruption Barometer 2013 revealed that corruption in India is at an all-time high. The survey found that 70 percent of those surveyed in India believe that corruption had *increased* in the last two years and placed India at the top of the scale of bribery, with as many as one in two respondents (54 percent) admitting to paying a bribe in the past 12 months, compared to one in four respondents (27 percent) globally.²⁵

INDONESIA

Indonesia's anti-corruption legislation relies primarily on certain provisions of the Indonesian Criminal Code that have been substantially supplemented by Law No. 31 of 1999 on the Eradication of the Criminal Act of Corruption ("Law No. 31/1999") and Law No. 20/2001 on the Amendment to Law No. 31/1999 on the Eradication of the Criminal Act of Corruption ("Law No. 20/2001"). The legislation is also supported by not insignificant anti-corruption infrastructure such as the Corruption Eradication Commission ("KPK") and the Court of Acts of Corruption.

Article 2 of Law No. 31/1999 states that causing loss to state finances or the state economy is a crime punishable by life imprisonment. Given the very broad scope of what

constitutes causing a loss to the state or its finances, it is not surprising that the primary enforcement efforts so far have focused on areas such as government procurement, payments to government officials to procure certain decisions, and certain recent large tax avoidance measures. Although government officials are the primary defendants, private-sector individuals paying the bribes are sometimes prosecuted as persons who assisted in the illegal receipt of the corrupt payment.

During speeches marking International Anti-Corruption Day, on December 9, 2012, President Yudhoyono reiterated his administration's commitment to the eradication of corruption from government. From 2004 through 2012, the KPK handled 332 corruption cases involving legislators, ambassadors, law enforcers, and other local and national officials. During the same period, the KPK received 55,964 tip-offs from Indonesians, including Indonesians living overseas. The KPK chairman stated that as a result of his Commission's activities, Rp152 trillion of state money was saved in the oil and gas upstream section during the period 2009 to 2012. Additionally, Rp2 trillion was saved from rights transfers of state assets.

While the Corruption Perception Index value for Indonesia improved in 2012,²⁶ the chairman of the KPK and the President agree that it remains a significant issue threatening the continued economic growth of Indonesia.

JAPAN

Japan prohibits the bribery of foreign public officials under its Unfair Competition Prevention Act ("UCPA"). Japan's Ministry of Economy Trade and Industry ("METI") has issued non-binding advisory guidelines called "Guidelines to Prevent Bribery of Foreign Public Officials," which were most recently revised in September 2010. The public prosecutor's office in Japan and the National Policy Agency both have responsibilities for investigating possible violations of UCPA, and the public prosecutor is responsible for taking enforcement actions against violators.

Historically, Japan has not aggressively prosecuted violations of its anti-corruption laws. Japan's lack of enforcement

of the UCPA has drawn criticism from the OECD Working Group on Bribery, most recently in its Phase 3 Report on Japan issued in December 2011. The Working Group commented in the report that the number of prosecutions under the UCPA "seems very low" and that "Japan is still not actively detecting and investigating foreign bribery cases...."

Japanese companies focus far more attention on the possibility of being implicated in a corruption investigation initiated by a non-Japanese enforcement agency, and there have been recent cases where Japanese companies admitted to violations of the FCPA and paid substantial fines. For example, in January 2012, a major Japanese trading company agreed to pay US\$54.6 million to resolve FCPA charges related to the bribery of Nigerian government officials in order to obtain contracts. This case followed another one that was settled in 2011 where a Japanese engineering company admitted to FCPA violations and agreed to pay a US\$218.8 million fine.

Employees of overseas operations of Japanese companies have also been caught up in bribery allegations. For example, in late 2012, a Japanese national, formerly a director of an Indonesia subsidiary of a Japanese electrical wire manufacturer, was reported to have been convicted in Indonesia of bribery of an Indonesian public official and sentenced to three years in prison.

Japanese companies have increasingly recognized the risks of anti-corruption enforcement in foreign countries as the pace of Japanese outbound investment has grown. We expect this trend to continue.



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SINGAPORE

Singapore is one of the most corruption-free countries in the world, ranked just behind New Zealand and the Scandinavian countries. Public sector complaints and prosecutions are said to remain consistently low due to the aggressive stance taken by the Corrupt Practices Investigation Bureau (“CPIB”) and the high wages paid to public servants, which reduces the financial attraction of bribes. The majority of CPIB’s work involves the private sector, which comprised 80 percent of its case load in 2010. There was a 93 percent conviction rate with respect to the matters that went to trial. The CPIB targets corruption at all levels, from small payments to low-level workers to actions against those in the upper echelons of business. The CPIB celebrated its 60th anniversary on September 18, 2012.

Singapore’s anti-corruption laws, particularly their extra-territorial effect, drew considerable academic and legal professional interest in 2012. Singapore’s main anti-corruption statutes, the Prevention of Corruption Act (“PCA”)

and the Penal Code, cover both private and public bribery, and they target both givers and recipients of bribes. Under these laws, corruption can include both financial and non-financial benefits. The twin test of corrupt intent (objective) and corrupt knowledge (subjective) is satisfied only if the prosecution can prove that the acts of the perpetrator are considered corrupt by a reasonable third party and that the perpetrator himself knew that his acts were corrupt.

There is increasing coordination between Singapore’s law enforcement agencies and agencies in different jurisdictions fighting cross-border corruption. The CPIB and prosecutors in Singapore are developing working relationships with their counterparts in Malaysia, Hong Kong, and Indonesia. Information sharing and mutual legal assistance can only further strengthen anti-corruption measures where anti-corruption legislation is becoming increasingly extra-territorial in nature.

TAIWAN

In 2003, Taiwan amended the Anti-Corruption Act (the “Act”) to impose criminal liability for bribing foreign officials. Under the 2003 amendment, any person who bribes foreign public officials for matters related to cross-border trade, investment, or other business activities shall be punished by imprisonment or a fine, regardless of whether such conduct will be penalized in the foreign country. In 2011, the Act was amended to elevate the punishment, so one who bribes a foreign official can be subject to imprisonment up to seven years and a fine up to NT\$3 million (approximately US\$100,000).

While there is no public record of any case in a Taiwanese court involving the offense of bribing a foreign official after the amendment of the Act in 2003, corruption is still

The revised law adopts stronger and more feasible provisions, including, for example, transparency within state-owned enterprises, public officials' accountability, the responsibility to publicly disclose personal assets, the people's and the media's right to access information, and mechanisms to protect whistleblowers.

rampant in Taiwan. In 2011, as a declaration of determination to combat corruption and a response to pressure from society, the Agency Against Corruption was established to handle all anti-corruption investigations.

VIETNAM

While the Vietnamese government has indicated its willingness to tackle corruption in many circumstances, corruption remains widespread in Vietnam. In 2010 and 2011, the government did not initiate any anti-corruption enforcement actions against high-ranking officials from provincial or ministerial levels. But in 2012, the Vietnamese government increased efforts to combat corruption and made several high-profile arrests, including a founder of the Asia Commercial Bank, Nguyen Duc Kien, and senior figures in the state-owned Vietnam Shipbuilding Industry Group.

During the fifth meeting of the Communist Party of Vietnam's ("CPV") Central Committee in May 2012, General Secretary Nguyen Phu Trong acknowledged that corruption is prevalent in Vietnam to the extent that it represents a threat to the CPV's continued survival and legitimacy. For the first time, however, the source of this threat has come from "interest groups," referring to state corporations or state-sponsored economic groups. These interest groups are particularly dominant in areas such as banking and property development.

The fifth CPV Central Committee meeting continued the focus of previous meetings on combating corruption by adopting a series of initiatives, including removing the Central Steering Committee on Anti-Corruption ("CSCAC") from the government's portfolio and placing it under the CPV Politburo. This will likely make CSCAC more powerful and independent from the executive branch. Accordingly, CSCAC's former national office, headed by Prime Minister Nguyen Tan Dung, will be abolished and replaced by the CPV's Central Commission of Internal Affairs, which is going to be re-established.

On November 23, 2012, Vietnam's National Assembly passed a revised Law on Anti-Corruption. The revised law adopts stronger and more feasible provisions, including, for example, transparency within state-owned enterprises, public officials' accountability, the responsibility to publicly disclose personal assets, the people's and the media's right to access information, and mechanisms to protect whistleblowers. A number of proposed laws related to fighting corruption, such as the Law on Public Investment, the Law on Public Procurement, the revised Law on Thrift Practices and Anti-Wastefulness, and the revised Land Law, are also on the National Assembly's agenda.

Despite continued improvements to the national legislative framework addressing corruption, the lack of implementation and nonexistence of an independent anti-corruption agency still present major hurdles in the fight against corruption.





AUSTRALIA

The last year was a significant one in Australia for anti-bribery and corruption matters. Australia's energy and resources sector continues to deepen its trading and interests in high-risk jurisdictions in Southeast Asia, the Middle East, and Africa. At the same time, Australia's investigative and enforcement bodies, the Australian Federal Police ("AFP") and the Department of Public Prosecutions, have, for the first time, prosecuted a corporation for breach of the foreign corruption provisions of the Criminal Code. This prosecution was made more noteworthy because it involved a subsidiary of Australia's Reserve Bank, Suncurrency. In addition, it has been reported that a number of Australian companies, including Leighton Holdings and Tenix, have self-reported possible breaches of the Criminal Code to Australian authorities.

In October 2012, the OECD delivered its Phase III report on Australia's enforcement of the anti-bribery provisions of

the Criminal Code. The OECD report was highly critical of Australia's performance to date, and the impact of this report has been immediate. A specialized AFP unit has been established to investigate bribery and corruption cases. The AFP also began taking an active role in identifying potential violations of the law by Australian companies.

In 2013, the AFP announced that it is reopening the investigations into allegations that Cochlear and Oz Minerals breached the Criminal Code. In addition, the AFP reopened an investigation into the activities of BHP Billiton Ltd. in a number of Southeast Asian countries. These activities are also the subject of a current DOJ investigation.

It has been widely reported that the AFP has 18 additional open investigations, so further enforcement actions against Australian companies remain a distinct possibility in the short to medium term.



EUROPE

FRANCE

France's failure to enforce its anti-bribery laws has recently drawn criticism from the OECD. In an October 2012 report, OECD examiners noted that 12 years ago, France created a criminal offense for bribing foreign officials when it joined the OECD, yet France has achieved only four convictions—with one more under appeal—since then. OECD examiners said in the report that they “deplore the very low number of convictions” and recommend that France “review its overall approach to enforcement” to effectively fight bribery of foreign public officials. The report described the response of French authorities to fighting corruption as “lacklustre” and pointed out legal and structural hurdles that prevent a more effective approach.

Despite these observations, on September 5, 2012, the Criminal Court of Paris fined Safran (formerly Sagem)

€500,000 for bribing public officials in Nigeria to secure a €171 million contract for the printing of more than 70 million identity cards. Safran lodged an appeal against the sentence. The company was accused of paying US\$30,000 to US\$500,000 to high-ranking public officials, including a former Nigerian minister who was later arrested for alleged corruption.

If the decision is confirmed by the French Court of Appeal, the decision will become a remarkable landmark in French criminal law, as it is the first time that a legal person has been found guilty for corruption of foreign officials since the law creating this offense was passed in 2000. It would also set a precedent for “organizational misconduct,” holding a company responsible for a criminal offense without any individuals being convicted.



GERMANY

In recent years, landmark corruption cases involving Siemens, MAN, and Ferrostaal have shown German prosecutors to be active in tackling corruption. Additionally, certain federal states in Germany have established specific prosecutors' offices whose mission is to address corruption related to specific geographic areas. In addition to corruption investigations and prosecutions directed at individuals, companies themselves have been pursued and have been subject to huge fines. For example, in 2008, Siemens paid €400 million; in 2009, MAN paid €150 million; and in 2011, Ferrostaal paid €140 million.

These fines are based on a provision of German law according to which the management of a company is obligated to ensure sufficient supervision within the company. As such, in practice, if corruption is discovered within a company, German prosecutors tend to argue that a sufficient management compliance system was not in place. The effect of this argument, if successful, is that the company will be fined. The establishment, review, and improvement of a compliance program is very important for companies seeking to avoid these fines.

In June 2012, a German banker at Bayern LB, who was in charge of selling Formula 1, admitted in court that he accepted €44 million bribes from Bernie Ecclestone in

These fines are based on a provision of German law according to which the management of a company is obligated to ensure sufficient supervision within the company.

exchange for selling the motor racing group to the private equity firm CVC. The banker was sentenced to eight and a half years in prison. In July 2013, Munich prosecutors also brought a charge against Ecclestone himself.

In August 2013, German prosecutors searched the offices of Rheinmetall and Atlas Elektronik. Managers of both firms were suspected of paying €9 million in bribes to Greek officials in connection with the delivery of German submarines to the Greek navy.

In another ongoing matter, Hewlett Packard has been subject to a criminal bribery investigation in connection with a computer deal in Russia. In August 2012, German

prosecutors brought a charge against two former and one current manager of HP in connection with alleged bribes paid to Russian officials. It was alleged that €7.5 million in bribes were paid to secure a contract worth €35 million. The German prosecutors have also charged HP. The level of the fine could in theory be in the amount of the profits received in connection with the Russia transaction.

Finally, in August 2013, charges were filed against former Federal President of Germany Christian Wulff, who was alleged to have accepted €754 in travel expenses from a German movie producer in connection with an Oktoberfest trip Wulff took with his wife. Wulff had previously resigned his office in February 2012 on suspicion of, among other things, accepting bribes.

RUSSIA

In February 2012, Russia signed the OECD Anti-Bribery Convention. Later in the year, Russia underwent the first phase of OECD evaluation, designed to review how effectively anti-bribery legislation and structures were at combating bribery.

It is likely that Russia will have significant work to address bribery and corruption risks. According to Russian law enforcement authorities, corruption-related criminal investigations in 2012 increased by 42 percent, with overall corruption-related court convictions increasing by 22 percent. At the same time, more than 80 percent of those convicted for bribery were held criminally liable for



giving or taking bribes up to an equivalent of US\$1,500. Thus, systemic corruption in Russia, which according to numerous assessments is concentrated in public procurement and the state government sector, remains largely untouched.

In late 2012 and early 2013, Russian law enforcement authorities commenced a number of high-profile investigations affecting or targeting federal ministers and regional governors, as well as top officers of federal and regional agencies, state companies, and state organizations. Most of these investigations are expected to be ongoing for at least the rest of 2013.



MIDDLE EAST

Several Gulf nations are signatories to the United Nations Convention Against Corruption (“UNCAC”) and have ratified the Convention, including Afghanistan, Bahrain, Iran, Iraq, Jordan, Lebanon, Qatar, Saudi Arabia, the United Arab Emirates, and Yemen. Additionally, many Gulf Cooperation Council (“GCC”) countries—including the UAE, Oman, and the Kingdom of Saudi Arabia—have enacted local anti-corruption laws that criminalize the bribery of domestic officials. Generally speaking, such laws provide criminal fines and imprisonment for those who offer a bribe to a domestic official, as well as for the domestic official receiving the bribe. In general, any type of gift, travel expense, meal, or entertainment might be prohibited under the local laws of a Gulf state if it can lead to a conflict of interest and/or if there is corrupt intent. The legitimacy of any such benefit will therefore often depend on its value, the frequency of the benefit being given, and the intent behind it. Such laws may, however, allow for some

organizational units (usually specified by the local ministry) to receive gifts that are symbolic advertising or promotional in nature and that bear the name of the offeror. While enforcement actions under these laws have been brought to the courts by local prosecutors throughout the Gulf, such laws have not been as fervently enforced as in other jurisdictions in the West.

A particular note should be made of gift and entertainment policies in the Middle East. Hospitality is a hallmark of Middle Eastern culture, and it is common to show appreciation to friends, family, and business partners (who may all be the same individual in this region) by providing gifts and hospitality of a nature commensurate with one’s wealth. Western notions of anti-corruption compliance are likely to clash with traditional values of Middle Eastern society. Therefore, careful attention should be paid to international education and training standards that can be implemented

Hospitality is a hallmark of Middle Eastern culture, and it is common to show appreciation to friends, family, and business partners (who may all be the same individual in this region) by providing gifts and hospitality of a nature commensurate with one's wealth.



in a way that is sensitive to Middle Eastern culture and does not offend locally.

In the coming years, it is expected that many Sovereign Wealth Funds ("SWFs") in the Middle East will come under global scrutiny as the U.S. begins an industry-wide investigation into the financial services industry, including investigating into business dealings with SWFs.

Over the past five years, there has been a noticeable increase in the acceptance of Western anti-corruption

policies and procedures by local companies that do not otherwise have ties to the U.S. or the UK. It appears that many local companies throughout the Middle East have come to view corporate compliance policies as making good business and commercial sense. Many local distributors, agents, JV partners, and the like, who may not already have such policies and procedures in place, have recently begun to see the competitive advantage of having such policies, as they will be more likely to have a competitive advantage in pursuing Western investment opportunities against their local competitors who might not have any anti-corruption compliance policies in place.

KINGDOM OF SAUDI ARABIA

The heart of Saudi Arabia's efforts to eliminate corruption from the public sector is the Combating Bribery Law ("CBL"), issued by Royal Decree No. M/36 of 29/12/1412 A.H. (June 30, 1992). The CBL penalizes the offering of any promise or gift to a public official to do or cease to do or neglect any of the public official's duties or to use the public official's powers to obtain from any public authority an order, decision, commitment, authorization, supply contract, job, employment, service, or any kind of privilege, or to use the public official's powers to follow up on a transaction in any governmental department.

A renewed focus has been placed on these issues in the context of the Saudi Arabian government's recent efforts to liberalize the economy and encourage foreign investment in the Kingdom. The National Strategy for Protecting

Integrity and Combating Corruption (“National Strategy”), Council of Ministers Resolution No. 43, dated 1/2/1428 A.H. (February 19, 2007), sought to strengthen the government’s efforts against corruption through a variety of initiatives, including measures to study and diagnose the phenomenon of corruption, developing appropriate administrative processes, systems, and practices; enhancing transparency within state agencies; encouraging the participation of civil society institutions; educating the general public; and reinforcing Arab, regional, and international cooperation.

As contemplated by the National Strategy, in March 2011, a National Commission for Combating Corruption (“NCCC”) was established and was tasked with addressing all forms of corruption in the Kingdom. The NCCC reports directly to His Majesty King Abdullah bin Abdulaziz. A number of other state agencies, such as the Prosecution and Investigation Commission and the General Auditing Bureau, also play important roles in implementing anti-corruption rules.

Notwithstanding the centrality of the CBL to the Kingdom’s anti-corruption efforts, a number of other Saudi laws also directly or indirectly deal with corruption. Importantly, Article 53 of the Government Tendering and Procurement Regulations issued by Royal Decree No. M/58 dated 4/9/1427 A.H. (September 27, 2006) authorizes government agencies to terminate any contract that was secured through bribery or where the contractor has offered a bribe to an official employed by the agencies covered by these regulations.

Saudi Arabia ratified the UN Convention Against Corruption on April 29, 2013.

UNITED ARAB EMIRATES

In the United Arab Emirates (“UAE”), bribery of domestic officials is prohibited under the Federal Penal Code, the penal codes of the individual Emirates, the Federal Human Resources Law, local human resources laws, and the Dubai Financial Fraud Law, among others. For purposes of the Federal Penal Code, the term “Public Official” includes both a public officer and any person to whom a public service is assigned, which would cover, for example, employees of state-owned and state-controlled companies.



The Federal Penal Code also criminalizes bribery in the private sector and prohibits members of nonpublic companies from receiving bribes in exchange for committing or omitting an act in violation of their duties. However, the Penal Code neither criminalizes the act of giving or offering the bribe nor penalizes the offeror of the bribe. Furthermore, there is no exception for facilitation payments.

UAE law does not specifically distinguish between various types of gifts and hospitalities. Thus, in principle, meals, accommodations, transportation, gifts, entertainment, and expenses are all treated equally, and the legitimacy of these types of expenses in each individual case will ultimately depend on the value of such gifts, the frequency with which they are offered, the intention behind offering them, and the relevance of such gifts to both the recipient and the offeror.

The UAE signed the UNCAC on August 10, 2005, and the Convention was ratified on February 22, 2006. In general, the UAE has been praised for its efforts in the fight against corruption. However, there have been a number of high-profile corruption cases since the financial crisis.

The UAE has in place a special anti-corruption unit that is maintained under the Ministry of Defense, as well as within specific police departments. The State Audit Institution (“SAI”), an independent organization insulated from political interference, is primarily responsible for auditing spending and public funds. It also has broad authority in investigating fraud and corruption matters. For example, the SAI has the power to independently initiate a corruption investigation, and it may refer complaints or cases to the police or the public prosecutor. It has been reported that the SAI is currently drafting the UAE’s first stand-alone anti-corruption law, separate from the various anti-bribery provisions found in the Penal Code and other local laws. This law is expected to address the UAE’s commitments under the UNCAC, as well as to govern the bribery of foreign officials.²⁷



ENDNOTES

- 1 See *SEC Enforcement Actions: FCPA Cases*, SEC, available at <http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> (hereinafter “2012 SEC Enforcement Actions”); *FCPA and Related Enforcement Actions*, DOJ, available at <http://www.justice.gov/criminal/fraud/fcpa/cases/2010.html>.
- 2 *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission 71 (Nov. 14, 2012), available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>.
- 3 See Press Release, “Assistant Attorney General Lanny A. Breuer Speaks at the American Conference Institute’s 28th National Conference on the Foreign Corrupt Practices Act” (Nov. 16, 2012), available at <http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1211161.html>.
- 4 *Opinion Procedure Release 12-01*, U.S. Dept. of Justice (Sept. 18, 2012), available at <http://www.justice.gov/criminal/fraud/fcpa/opinion/2012/1201.pdf> (noting that the royal family member in question “holds no title or position in the government, has no governmental duties or responsibilities, is a member of the royal family through custom and tradition rather than blood relation, and has no benefits or privileges because of his status”).
- 5 *Opinion Procedure Release 12-02*, U.S. Dept. of Justice (Oct. 18, 2012), available at <http://www.justice.gov/criminal/fraud/fcpa/opinion/2012/1202.pdf>.
- 6 See Press Release, DOJ, “Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA” (Apr. 25, 2012), available at <http://www.justice.gov/opa/pr/2012/April/12-crm-534.html> (hereinafter “Morgan Stanley Press Release”); *U.S. v. Peterson*, 12-CR-224 (JBW), Criminal Information (E.D.N.Y. Apr. 25, 2012) (information alleging that “[i]n or about and between October 2004 and December 2007, ... Garth Peterson, together with others, did knowingly and willfully conspire to circumvent the system of internal accounting controls of Morgan Stanley and Morgan Stanley Real Estate, contrary to Title 15, United States Code, Sections 78m(b)(5) and 78ff(a”).
- 7 See, e.g., Grifols, S.A., Report of Foreign Issuer (Form 6-K) (Nov. 30, 2012) (hereinafter “Grifols Nov. 30 Form 6-K”); see also Christopher Matthews, “DOJ Closes FCPA Probe into Grifols,” *Wall St. J.* (Dec. 5, 2012) (reporting in a disclosure that the DOJ had sent an “official declination” on the basis of its “exemplary level of cooperation”); Grifols, S.A., Report of Foreign Issuer (Form 6-K) (July 31, 2012).
- 8 “Prosecutors Adhered to Guidance but DOJ Could Better Communicate: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary,” 111th Cong. 11 (2009) (statement of Eileen R. Larence, Director, Homeland Security and Justice, Government Accountability Office), available at <http://judiciary.house.gov/hearings/pdf/Larence091119.pdf>.
- 9 Warin, Diamant, & Root, “Somebody’s Watching Me: FCPA Monitorships and How They Can Work Better,” 13 *U. Pa. J. of Bus. L. Rev.* 321, 322 (Winter 2011).
- 10 *United States v. Pfizer H.C.P. Corp.*, 1:12-CR-00169-ESH, Deferred Prosecution Agreement at 9-10 (D.D.C. Aug. 7, 2012). The DPA continued that, “[t]he first such update shall take place within 60 days after the entry of the Pfizer HCP DPA.” *Id.*
- 11 Press Release, DOJ, “Pfizer H.C.P. Corp. Agrees to Pay \$15 Million Penalty to Resolve Foreign Bribery Investigation” (Aug. 7, 2012), available at <http://www.justice.gov/opa/pr/2012/August/12-crm-980.html>.
- 12 Press Release, DOJ, “Bizjet International Sales and Support Inc., Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$11.8 Million Criminal Penalty” (Mar. 14, 2012), available at <http://www.justice.gov/opa/pr/2012/March/12-crm-321.html>. The DOJ cited in its press release that the DPAs “acknowledge BizJet’s and Lufthansa Technik’s voluntary disclosure of the FCPA violations to the department and their extraordinary cooperation, including conducting an extensive internal investigation, voluntarily making U.S. and foreign employees available for interviews, and collecting, analyzing and organizing voluminous evidence and information for the department. In addition, BizJet and Lufthansa Technik engaged in extensive remediation, including terminating the officers and employees responsible for the corrupt payments, enhancing their due-diligence protocol for third-party agents and consultants, and heightening review of proposals and other transactional documents for all BizJet contracts.” *Id.*
- 13 *U.S. v. Data Sys. & Solutions, LLC*, 12-CR-00262-LO, Deferred Prosecution Agreement at 9 (E.D. Va. June 18, 2012).
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- 18 Michael White, “Hollywood Moves on China No Matter What SEC Probe Finds,” *Bloomberg* (May 16, 2012), available at <http://www.bloomberg.com/news/2012-05-17/hollywood-moves-on-china-no-matter-what-sec-probe-finds.html> (describing SEC investigation into Hollywood studios’ purported improper dealings with Chinese government officials).

- 19 Under the Federal Rules of Evidence, a guilty plea would be admissible evidence in a subsequent civil proceeding. See Fed. R. Evid. 803(22) (providing a hearsay exception for facts admitted pursuant to a guilty plea); Fed. R. Evid. 803(8)(A)(iii) (providing hearsay exception in civil litigation for factual findings of a legally authorized governmental investigation); Fed. R. Evid. 801(d)(2)(A) (stating that statements and admissions made by a party or a party's representative are not hearsay).
- 20 See, e.g., *Strong derivatively on behalf of Tidewater Inc. v. Taylor*, 2:11-CV-392 (E.D. La. July 2, 2012) (Order Dismissing Complaint) (dismissing derivative action seeking to recover damages against the defendant officers and directors for breaches of fiduciary duties, abuse of control, gross mismanagement, waste of corporate assets, and unjust enrichment and to enjoin Tidewater's implementation and administration of a system of internal controls and accounting systems sufficient to satisfy the requirements of the FCPA); *Wollman v. Coleman*, No. 11-CV-02511 (D.N.J. May 2, 2011) (Complaint) (citing admissions made by Johnson & Johnson ("J&J") in its criminal and civil resolutions of FCPA allegations with DOJ and SEC in alleging that J&J's board of directors failed to implement appropriate procedures to ensure FCPA compliance and wrongfully concealed FCPA violations from shareholders).
- 21 See Press Release, Alcoa Inc., "Alcoa and Alba Resolve Civil Litigation" (Oct. 9, 2012), *available at* http://www.alcoa.com/global/en/news/news_detail.asp?pageID=20121009006367en&newsYear=2012; *Aluminum Bahrain B.S.C. v. Alcoa Inc.*, 2:08-CV-00299 (W.D. Pa. Feb. 27, 2008) (Amended Complaint).
- 22 See *Petroleos Mexicano v. Conproca S.A. de C.V.*, 1:12-cv-09070 (Complaint) (S.D.N.Y. Dec 12, 2012).
- 23 See *id.* ("The allegations of this Complaint rest on plaintiffs' own knowledge with respect to their conduct, and upon information and belief as to other matters. Plaintiffs' information and belief are based, among other things, on the contents of a Complaint filed by the Securities and Exchange Commission ("SEC") as well as plaintiffs' own investigation of the facts underlying this Complaint. Plaintiffs therefore believe that discovery from defendants will reveal additional information that further supports plaintiffs' claims.").
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