DEBEVOISE & PLIMPTON LLP

FCPA Update

August 2013 ■ Vol. 5, No. 1

Hiring Relatives of Foreign Officials: The DOJ's Guidance, Some Key Issues, and Potential Internal Controls Solutions to a Recurring Issue Under the FCPA

On August 17th, *The New York Times* reported that the U.S. Securities and Exchange Commission ("SEC") is investigating JPMorgan Chase in connection with the firm's hiring of children of Chinese "officials."[1] Because of the importance of relationships to doing business in China, hiring the children of important political or business figures is common, both for Chinese and non-Chinese companies, and, in this respect, it is somewhat surprising that the topic has gained U.S. regulatory attention at this particular moment given the well-known nature of this practice.[2]

The issue is, moreover, not limited to China. As noted in the *Times*[3] and elsewhere,[4] hiring children of powerful figures is common world-wide, including in the United States. As in other countries, children of the Chinese elite have not only well connected relatives, but also in many cases the educational and personal connections that make it easier for them to obtain the legitimate and properly valued credentials often looked upon favorably by multi-national employers.

We find these hires prevalent and mostly unremarkable throughout the world, including in the United States. As such, these hiring actions do not necessarily violate any laws, including the FCPA. Accordingly, whether hiring of children or other relatives of foreign officials is a violation of the FCPA or other anti-bribery statutes presents a question that warrants a decidedly careful and thoughtful approach from enforcement authorities.

CONTINUED ON PAGE 2

1. Jessica Silver-Greenberg, Ben Protess and David Barboza, "Hiring in China by JPMorgan Under Scrutiny," *The New York Times* (Aug. 17, 2013), http://dealbook.nytimes.com/2013/08/17/hiring-in-china-by-jpmorgan-under-scrutiny/?_r=0.
2. In China, the situation is further complicated by the distinction between the child of an official and a "princeling." Not every official is a princeling, and not all princelings are officials. In contrast to children of current government officials, a "princeling" is usually considered a member of a "revolutionary aristocracy," descended from a person who was a high-ranking official during the Chinese revolution or in the early years of the People's Republic. These families often enjoy considerable power and influence, even when no family member currently holds high political office. *See e.g.*, Shai Oster, Michael Forsythe, Natasha Khan, Dune Lawrence and Henry Sanderson, "Heirs of Mao's Comrades Rise as New Capitalist Nobility," *Bloomberg News*, (Dec. 26, 2012), http://www.bloomberg.com/news/print/2012-12-26/immortals-beget-china-capitalism-from-citic-to-godfather-of-golf.html.
3. Andrew Ross Sorkin, "Hiring the Well-Connected Isn't Always a Scandal," *The New York Times*, (Aug. 19, 2013), http://dealbook.nytimes.com/2013/08/19/hiring-the-well-connected-isnt-always-a-scandal/?_r=0.
4. Russell A. Stamets, "Doesn't the SEC Watch Mad Men?" *FCPA Blog*, (Aug. 21, 2013), http://fcpablog.squarespace.com/blog/2013/8/21/doesnt-the-sec-watch-mad-men.html.

Also in this issue:

Click *here* for an index of all *FCPA Update* articles.

If there are additional individuals within your organization who would like to receive FCPA Update, please reply to ssmichaels@debevoise.com or pferenz@debevoise.com.

Hiring Relatives of Foreign Officials ■ Continued from page 1

Thus far, the issue of hiring relatives of officials has been addressed in the FCPA context in several U.S. Department of Justice ("DOJ") opinion releases, which provide guidance that is potentially useful although not always entirely satisfying.

In the sections below we summarize these opinions, discuss some of the key legal principles at stake, and identify compliance practices that can be employed to mitigate the anti-bribery risks in this area. Because of the evolving nature of this issue and the lack of clear guidance, companies are well advised to consult with experienced counsel familiar with the FCPA and other applicable anti-bribery laws.

Prior DOJ Opinions

There are several DOJ Opinion Releases dealing with the hiring of relatives of foreign officials or the hiring of officials themselves. Review Procedure Release 82-04 (November 11, 1982) involved the hiring of an agent who was the brother of a foreign official. Upon pledges from the agent and his brother that both would adhere to the anti-bribery provisions of the FCPA and assurances of other controls, the DOJ stated that it would not take an enforcement action with respect to the hiring.

More to the point are Review Procedure Release 84-01 (August 16, 1984) and Opinion Procedure Release 95-03 (September 14, 1995). In Review Procedure Release 84-01, an American firm sought to engage a marketing representative whose principals were related to the head of state of a foreign country. Upon assurances that the contract with the marketing representative would contain FCPA representations and covenants, that the marketing representative would make full disclosure of commissions "when required," and that the marketing representative had appropriate experience and a good reputation, the DOJ stated that it would not take enforcement action.

Similarly, in Opinion Procedure Release 95-03, a U.S. company was considering entering into a joint venture with an entity "which is the family investment company of, among others, a relative of the leader of the country in which the Joint Venture will conduct business." The relative independently held public office in the country in question and was to "receive annual payments in the range of $100,000 to $250,000 for services rendered as officers of the joint venture," including "*making important contacts in the country*, providing investment advice and management consulting, and *the development of new business…*" (emphasis added). The foreign official's duties did not involve decisions to award business to the joint venture, and the joint venture undertook to institute relatively elaborate transparency controls, such as being prohibited from personally setting up meetings with government officials, being accompanied by others at meetings he did attend and providing a transparency letter to the supervisors of any civil servant with whom he met. As in Review Procedure Release 84-01, the relationship with the "leader of the country" was not specifically dealt with in the company's undertakings. Again, the DOJ stated that it would take no enforcement action.

Key Legal Principles

FCPA anti-bribery offenses contain numerous elements, the lack of evidence as to any one of which takes the conduct at issue out of the statute. But two such elements –

CONTINUED ON PAGE 3

FCPA Update

FCPA Update is a publication of Debevoise & Plimpton LLP

919 Third Avenue
New York, New York 10022
+1 212 909 6000
www.debevoise.com

Washington, D.C.
+1 202 383 8000

Moscow
+7 495 956 3858

London
+44 20 7786 9000

Hong Kong
+852 2160 9800

Paris
+33 1 40 73 12 12

Shanghai
+86 21 5047 1800

Frankfurt
+49 69 2097 5000

Paul R. Berger
Co-Editor-in-Chief
+1 202 383 8090
prberger@debevoise.com

Bruce E. Yannett
Co-Editor-in-Chief
+1 212 909 6495
beyannett@debevoise.com

Sean Hecker
Co-Editor-in-Chief
+1 212 909 6052
shecker@debevoise.com

Andrew M. Levine
Co-Editor-in-Chief
+1 212 909 6069
amlevine@debevoise.com

Steven S. Michaels
Executive Editor
+1 212 909 7265
ssmichaels@debevoise.com

Erich O. Grosz
Co-Managing Editor
+1 212 909 6808
eogrosz@debevoise.com

Philip Rohlik
Co-Managing Editor
+852 2160 9856
prohlik@debevoise.com

Erin W. Sheehy
Co-Managing Editor
+1 202 383 8035
ewsheehy@debevoise.com

Noelle Duarte Grohmann
Deputy Managing Editor
+1 212 909 6551
ndgrohmann@debevoise.com

Samantha J. Rowe
Assistant Editor
+1 212 909 6661
sjrowe@debevoise.com

James H. Graham
Assistant Editor
+1 212 909 6526
jhgraham@debevoise.com

Michael T. Leigh
Assistant Editor
+1 212 909 6684
mtleigh@debevoise.com

Please address inquiries regarding topics covered in this publication to the editors.

Please note: The URLs in *FCPA Update* are provided with hyperlinks so as to enable readers to gain easy access to cited materials.

Hiring Relatives of Foreign Officials ■ Continued from page 2

"corrupt" intent and the offer or conveyance of "anything of value" – present particularly thorny issues in the context of the hiring of relatives of officials.

As both the government and the courts have repeatedly recognized, mere "relationship building" both under the FCPA and U.S. domestic bribery law is not a criminal offense.[5] The element of "corrupt" intent requires the government to prove that the defendant intended "to induce the [foreign official] recipient to misuse his official position; for example, wrongfully to direct business…, or to obtain preferential legislation or regulations, or to induce a foreign official to fail to perform an official function."[6] It would be naïve to suggest that hiring a well-connected individual is not ever undertaken, at least in part, for the purpose of gaining access and hopefully business as a result of the connections the employee can bring to the table. But the question is whether such actions should be viewed as being undertaken "corruptly" under the FCPA or would be better dealt with by the ethics and conflicts-of-interest rules of the jurisdiction in question.[7] Under the well-developed law protecting mere relationship building from prosecution under anti-bribery laws, it is the latter approach that governs. Indeed, hiring the child of an official seems far less risky than the facts underlying Opinion Release 95-03, *i.e.,* paying a relative of "the leader of the country" $100,000 to $200,000 per year, in part to "make[] important contacts in the country." Thus, with appropriate internal controls, hiring any individual, including the close relative of a foreign official, for the mere purpose of "making important contacts" should not be, on its own, an indictable offense.

> "As both the government and the courts have repeatedly recognized, mere 'relationship building' under the FCPA and U.S. domestic bribery law is not a criminal offense."

In order to prove a violation of the FCPA, the government must also show that "anything of value" was, directly or indirectly, offered, promised, or given to a "foreign official." Although there is no question that the child of an official receives value in the form of a salary, a simple blood relationship to a foreign official does not make one a foreign official.[8] The situations in which payments to a relative have been identified by the government as violating the FCPA, such as the *Tyson Foods*[9] and *Daimler*[10] cases, involved payments to spouses of officials, which might be presumed to indirectly benefit the government official because of the presumed pooling of assets in a marriage. Moreover, these enforcement actions either explicitly state, in the case of *Tyson Foods*,[11] or suggest, in the case of *Daimler*,[12] that the relative was paid without having performed any work.

Absent particularly stark facts, such as an explicit *quid pro quo*[13] or an attempt to conceal the hire, it should be difficult to prove that fair market salaries paid to well-qualified children of foreign officials in exchange for actual services performed by those children provided any legally cognizable benefit to the official.

While "anything of value" has been interpreted by the enforcement agencies to include the prestige associated with directing

CONTINUED ON PAGE 4

5. The law of "mere relationship building" was last addressed in detail by the U.S. Supreme Court in a prosecution under the federal anti-gratuity statute, under which the government need not prove *quid pro quo* bribery, but must prove, with respect to the intent element of the statute, more than that the payor intended "to build a reservoir of good will that might ultimately affect a multitude of unspecified acts, now and the future." *United States v. Sun Diamond Growers of Cal.*, 526 U.S. 398, 405-07, 414 (1998). A more detailed recitation of the doctrine is discussed in Bruce E. Yannett, Sean Hecker, Steven S. Michaels, and Noelle Duarte Grohmann, "Corrupt Intent, Relationship Building, and *Quid Pro Quo* Bribery: Recent Domestic Bribery Cases," *FCPA Update*, Vol. 3, No. 2 (Sept. 2011), www.debevoise.com/files/...9f86.../FCPA_Update_Sept_2011.pdf.

6. S. Rep. No. 95-114 at 10 (1977).

7. Some of the U.S. domestic conflict of interest statutes, until recently, did not even apply to certain spouses of U.S. officials, *i.e.*, same-sex spouses of U.S. government officials, because of the Defense of Marriage Act. *See United States v. Windsor*, No. 12-307 (U.S. June 26, 2013), Slip Op. at 24 (citing 18 U.S.C. § 208(a)).

8. *See* DOJ Op. Rel. 12-01, Foreign Corrupt Practice Act Review at 5 (Sept. 18, 2012).

9. *United States v. Tyson Foods*, No. 11-CR-037, Information at ¶¶ 15-16 (D.D.C. Feb. 10, 2011).

10. *United States v. DaimlerChrysler China Ltd.*, No. 1:10-CR-00063, Information at ¶ 16(f) (D.D.C. Mar. 22, 2010) (citing payments to relatives of Chinese officials).

11. *See Tyson Foods*, note 9, *supra* at ¶ 16(l). *See also SEC v. UTStarcom, Inc.*, No. CV-09-6094, Complaint at ¶¶ 19-21 (N.D. Cal. Dec. 31, 2009) (alleging payments to foreign officials and family member "as if they were real employees, even though they never worked for UTSI in any capacity").

12. *See Daimler*, note 10, *supra*. *See also United States v. Siemens Bangladesh Ltd.*, No. 08-CR-369, Information at ¶ 28(l) (D.D.C. Dec. 12, 2008) (citing payment to daughter of an official for services not required).

13. *See In re Paradigm*, Non-Prosecution Agreement, Appendix A ¶ 14 (Sept. 21, 2007) (hiring official's brother-in-law, at the request of the official, as a driver; a task actually performed by the brother-in-law). The *Paradigm* statement of facts presents the hiring as an explicit *quid pro quo*, "a demand" to which Paradigm "acquiesced." The statement of facts lists the hiring as one fact of many "improper payments" without subjecting it to any legal analysis.

Hiring Relatives of Foreign Officials ■ Continued from page 3

payments to charities with which an official is associated,[14] a theory that itself has been vigorously challenged as beyond what Congress intended in enacting the FCPA, to say that the psychic benefit of "the feeling of contentment associated with the knowledge that one's child has a good job" is "anything of value" threatens to stretch that phrase dramatically. Taken to its conclusion, this "psychic contentment" theory demands that literally anything that a company or individual did to benefit a third party (including the foreign government itself) could be subject to prosecution, a result that Congress surely did not intend.

The difficulty in this arena, as in so many others under the FCPA and other transnational anti-bribery statutes, is that, absent further guidance from the courts as to the content of the phrase "anything of value," government prosecutors are likely to resist bright line rules and point to (as well as seek evidence relating to) aggravating circumstances such as the practical "employability" of a particular official's child. With every case potentially turning on its facts, companies therefore rightly look to risk mitigation strategies in this recurring area. We discuss some of these below.

Controls Around the Hiring of Children of Officials

Companies can protect themselves from many aspects of the appearance of impropriety that arise out of hiring relatives of foreign officials by instituting various internal controls. Each company of course has different human resources and labor law needs, and the design of anti-bribery controls for hiring processes should be coordinated with legal counsel well-versed in local labor law as well as anti-bribery requirements. As in all internal controls problems, there are multiple ways of mitigating risk; the following suggested controls have a long track record and are well worth considering as starting points when designing and implementing relevant controls.

- Make sure that the company has standards and require qualifications that apply to all hires and that these standards would be justifiable when looked at by an independent third party;
- Establish and follow standard hiring procedures; taking connections into account when allocating scarce job offers raises fewer questions than creating a special position for someone;
- Have the company's anti-bribery compliance function independently review the file of the connected potential hire and interview the employee recommending the hire to determine whether the hire appears justifiable or appears to be a *quid pro quo*; and
- Institute transparency and conflict of interest procedures (similar to those described in Release 95-03) relating to how a connected hire interacts with foreign officials.

Conclusion

As we mentioned at the outset, enforcement agencies should approach this subject in a careful and thoughtful manner. Every day, friends and relatives of individuals one might characterize as government officials are hired in private and public industry. Most of these hires are undertaken for legitimate reasons, not least of which is the time-honored practice of building strong business relationships. Imputing corrupt intent to this practice is a dicey proposition, and legitimate hiring practices ought not to be a target of even the most aggressive enforcement policies.

Egregious cases involving the hiring of relatives of public officials for the purpose of obtaining an improper advantage or obtaining or retaining business that could be delivered or influenced by the related officials are fair game for review. But the vast majority of cases involving the hiring of relatives of officials will have very little evidence of corrupt intent and enforcement agencies should tread carefully.

Paul R. Berger
Bruce E. Yannett
Sean Hecker
Philip Rohlik
Steven S. Michaels

Paul R. Berger is a partner in the firm's Washington, DC office. Bruce E. Yannett and Sean Hecker are partners, and Steven S. Michaels is a counsel, in the firm's New York office. Philip Rohlik is a counsel in the firm's Hong Kong office. They are members of the Litigation Department and the White Collar Litigation Group. The authors may be reached at prberger@debevoise.com; beyannett@debevoise.com, shecker@debevoise.com, prohlik@debevoise.com and ssmichaels@debevoise.com. Full contact details for each author are available at www.debevoise.com.

14. This enforcement interpretation largely arises out of the so-called Chudow Castle Foundation cases, which were books and records and internal controls matters related to alleged "illicit" and "improper" payments, rather than cases that charged anti-bribery offenses *per se*. In 2004 and 2012, the SEC, first with Schering-Plough Corporation and then with Eli Lilly and Co., settled FCPA books and records and internal controls charges arising out of allegations that the companies' Polish subsidiaries made payments to the foundation, which was associated with the Director of the Silesian Health Fund, for the purpose of influencing orders of pharmaceutical products. *See* SEC Press Rel. No. 2012-273, SEC Charges Eli Lilly & Co. with FCPA Violations (Dec. 12, 2012), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171487116; SEC Litig. Rel. No. 18740, SEC Files Settled Enforcement Action Against Schering-Plough Corporation for Foreign Corrupt Practices Act Violations (June 9, 2004), http://www.sec.gov/litigation/litreleases/lr18740.htm.

NEWS FROM THE BRICs

Brazil Enacts Long-Pending Anti-Corruption Legislation

1. Introduction and Executive Summary

Brazil's national government has taken long-awaited action in adopting sweeping anti-corruption legislation, a critical step in the ongoing battle against corruption and a direct answer to acute pressures mounting within Brazil and around the world. The new law (the "Anti-Corruption Law") is scheduled to take effect in January 2014 – prior to Brazil's hosting of the 2014 World Cup and 2016 Summer Olympics – and will materially change Brazil's anti-corruption enforcement landscape.

The Anti-Corruption Law establishes offenses and corresponding penalties for legal entities that engage in corruption or in fraudulent acts relating to public tenders and government contracts. In doing so, the new law helps fulfill Brazil's obligations under the OECD Convention on Combating Bribery of Foreign Public Officials in International Transactions ("OECD Anti-Bribery Convention").

For those in legal and compliance functions at multinational and Brazilian corporations and other legal entities, the key takeaways of the new legislation include the new provisions for civil and administrative liability of legal entities that expand the kinds of conduct covered by Brazilian anti-bribery law, the specific predicates for liability, and the remedies available and procedures identified for government enforcement actions.

At the same time, the Anti-Corruption Law does not impose criminal liability on legal entities and does not directly alter pre-existing Brazilian anti-corruption laws – whether criminal, civil, or administrative in nature – that apply to natural persons.

Perhaps the Anti-Corruption Law's most significant effect will be to hold corporate entities to a stricter standard of liability in the administrative and civil spheres than under the previously existing Brazilian anti-corruption laws. This is particularly so because the government will not need to prove fault or corrupt intent on behalf of senior managers or the board of directors of the corporate entity in order to succeed in holding such entities liable. In addition, under the law, companies found guilty will face much stiffer penalties than under the pre-existing legal framework. Of course, only time will tell how the Brazilian authorities will enforce the Anti-Corruption Law and therefore the extent of further regulatory challenges and compliance pressures that await companies operating in Brazil will remain somewhat uncertain for the immediate future.

In this article, we discuss the principal features of the Anti-Corruption Law, setting it in the context of existing Brazilian laws, and preliminarily identify ways in which companies subject to the new law can prepare to meet its challenges.

2. Legislative History

More than three years ago, in February 2010, then-President Luiz Inácio Lula da Silva first introduced in the Brazilian Congress the bill that became the Anti-Corruption Law (also known as Federal Law No. 12.846/2013). After roughly three years of relative inactivity, a Special Committee of Brazil's House of Representatives passed the bill on April 24, 2013. The bill next was referred to the Senate on June 19, 2013, which provided its well-chronicled approval on July 4, 2013.

President Dilma Rousseff formally approved the Anti-Corruption Law on August 1, 2013. As part of her approval, she exercised her constitutional authority to veto three provisions adopted by the Congress that would have softened the law's potential impact on corporate entities, as will be discussed below. The new law was then published in the Diário Oficial da União, the official gazette of Brazil's federal government, on August 2, 2013, and will become effective 180 days later on January 29, 2014, absent a highly unlikely veto-override.[1]

1. Diário Oficial da União, No. 148 (Aug. 2, 2013) (hereinafter "August 2 Gazette"), 1-3, http://www.in.gov.br/visualiza/index.jsp?data=02/08/2013&jornal=1&pagina=1&totalArquivos=128. A veto-override is possible only if approved by an absolute majority of the National Congress. *See* Constitution of the Federative Republic of Brazil, Art. 66, para. 4 ("The veto shall be examined in a joint session, within thirty days as of the date of receipt, and may only be rejected if approved by the absolute majority of the Deputies and Senators, by secret voting") (official English translation), http://www2.stf.jus.br/portalStfInternacional/cms/verConteudo.php?sigla=portalStfSobreCorte_en_us&idConteudo=120010.

Brazil Enacts Long-Pending Anti-Corruption Legislation ■ Continued from page 5

The passage of the Anti-Corruption Law came after several weeks of public demonstrations and protests, and is widely seen as part of an effort by the government to respond to the protestors' demands for, among other things, a cleaner, less corrupt public administration. Indeed, other corruption-related legislation, such as that which categorizes "corruption," including bribery, as a "heinous" crime under the Brazilian Criminal Code and the Heinous Crime Law, is making their way through the Brazilian legislature.[2]

3. The Pre-Existing Anti-Corruption Landscape

Prior to adoption of the Anti-Corruption Law, there already were a number of laws on the books in Brazil that held individuals, such as employees and managers of corporate entities, criminally liable for bribery and other corrupt acts involving companies with which they are affiliated. For example:

- The crime of "trafficking in influence" ("crime de tráfico de influência") has prohibited individuals from soliciting any advantage or benefit in order to influence a public official (and from public officials obtaining such benefits), regardless of whether the benefit is actually received or whether the official is aware that he or she is the recipient of the benefit. Individuals found guilty of this crime are subject to two to five years in prison and monetary fines.[3]
- Brazilian criminal law also has prohibited both passive and active corruption, explicitly barring payment of bribes to public officials and the receipt of such bribes, with potential penalties ranging from two to twelve years in prison and monetary fines.[4]
- In addition, the Brazilian criminal code has prohibited individuals from bribing foreign (non-Brazilian) officials or third parties with regard to official acts related to international commercial transactions, with guilty parties subject to prison terms of one to eight years, as well as monetary fines.[5]

In the administrative and civil law spheres, there previously have been two notable anti-corruption laws applicable both to individuals and corporate entities:

- Federal Law No. 8.429/1992 ("Lei de Improbidade Administrativa") has prohibited the illicit enrichment of public officials and infliction of damage to the public finances. It applies to recipients of illicit enrichment and also to individuals or entities that contribute to or participate in such action.[6]
- Federal Law No. 8.666/1993 has established rules for public tenders and contracts with the public administration, providing criminal and civil sanctions for violating such rules.[7]

Finally, although there is no Brazilian law akin to the "books and records" provisions of the FCPA, various Brazilian tax laws already oblige corporate entities to keep their books and records in an accurate manner and those laws remain fully in force in Brazil.[8]

4. Scope of the New Anti-Corruption Law

a. Overview

As a signatory to the OECD's Anti-Bribery Convention, Brazil previously agreed to adopt laws to comply with the Convention and to subject itself to periodic OECD review of such compliance. In prior reviews, the OECD criticized Brazil for, among other things, not holding corporate entities criminally liable for corrupt conduct.[9] The Anti-Corruption Law still does not do so, but addresses other notable OECD criticisms and supplements Brazil's anti-corruption laws in several important regards.

First, the Anti-Corruption Law provides for corporate civil and administrative liability for bribery of domestic and foreign

CONTINUED ON PAGE 7

2. Federal Bill No. 2.489/2011 includes the crime of corruption among the list of crimes considered heinous and enhances the minimum prison term from two to four years. It would modify both the Heinous Crime Law (Federal Law No. 8.072/1990), which includes the list of heinous crimes, and the Brazilian Criminal Code, which provides the penalties for their infractions. Federal Bill No. 2.489/2011 already has been approved by the Senate and is currently before the House of Representatives. Further, the government enacted a new anti-money laundering law last year, which is also part of Brazil's efforts to fight corruption. *See* Federal Law No. 9.613/1998 (Mar. 3, 1998), as modified by Federal Law No. 12.683/2012 (July 9, 2012), http://www.planalto.gov.br/ccivil_03/_Ato2011-2014/2012/Lei/L12683.htm.
3. Brazilian Criminal Code, Art. 332.
4. *Id.*, Arts. 317 and 333.
5. *Id.*, Art. 337-B & C.
6. Federal Law No. 8.429 (June 2, 1992), Art. 3.
7. Federal Law No. 8.666 (June 21, 1993).
8. *See generally* the Brazilian Tax Code.
9. OECD Working Group on Bribery, "Brazil: Phase II Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions" (Dec. 7, 2007), http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/39801089.pdf.

Brazil Enacts Long-Pending Anti-Corruption Legislation ■ Continued from page 6

public officials under one law, establishing steep monetary sanctions for offending entities, and holding corporate entities to stricter standards of liability than those found in the current laws – an approach identified under the OECD's Anti-Bribery Convention as an acceptable alternative to imposing corporate criminal liability.[10] The civil and administrative prohibitions encompass promising, offering, or giving a bribe to a domestic or foreign public official, or to a party related to such an official, for the purpose of improperly influencing government action, and financing, sponsoring or subsidizing such misconduct.[11]

Second, with regard to tenders and contracts, the law prohibits corporate entities from frustrating or defrauding the public tender process in any way; gaining an undue advantage or benefit from fraudulent modifications or manipulations of government contracts, bid specifications or the public tender process; or hindering the government's investigation or auditing activities.[12]

Third, by formally incorporating principles of cooperation and compliance into the new law, the Brazilian government has also brought its anti-corruption policies more in line with those of the United States and the United Kingdom.

Fourth, the Anti-Corruption Law authorizes the Brazilian courts to consider an entity's compliance program as a factor in assessing the severity of sanctions to be levied against an entity found liable and also significantly increases the penalties corporate entities face when committing bribery and other corrupt acts.

"[B]y formally incorporating principles of cooperation and compliance into the new law, the Brazilian government has also brought its anti-corruption policies more in line with those of the United States and the United Kingdom."

b. Covered Legal Entities

The Anti-Corruption Law covers corporations, partnerships, and proprietorships, both for-profit and non-profit. It also subjects to its terms non-Brazilian legal entities that operate through an office, branch, or representation office in Brazil, even if only temporarily.[13] The extraterritorial reach of the law appears to be limited to the actions of Brazilian corporate entities abroad, thus leaving the actions of non-Brazilian entities acting outside of Brazil beyond the scope of the law, even if they have a representative office, branch, or subsidiary in Brazil.[14]

In addition, the Anti-Corruption Law provides for successor liability in the case of amendments to the articles of incorporation, change of corporate form of the company, mergers, acquisitions, or spin-offs.[15]

Although the Anti-Corruption Law applies only to corporate entities and partnerships, it includes a savings clause that provides that the law does not preempt the personal liability of individuals who participate in the illegal conduct at issue, to the extent of their culpability, under other relevant Brazilian laws.[16]

c. Definition of "Official"

The Anti-Corruption Law does not define domestic public officials, but instead follows the definition used elsewhere in the Brazilian legal system, and which includes anyone who, even if temporarily and without remuneration, works for any government level or branch, for any government agency, or for any government controlled entity.[17] The definition of domestic public official

CONTINUED ON PAGE 8

10. *See* OECD Convention on Combating Bribery of Foreign Public Officials in International Transactions, Art. 3(2) (2011), http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/ConvCombatBribery_ENG.pdf ("In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.").
11. Federal Law No. 12.846/2013, Art. 5.
12. *Id.*
13. *Id.*, Art. 1.
14. *See id.*, Art. 28.
15. *Id.*, Art. 4.
16. *Id.*, Art. 3; *see also* Section 3 of this article, which describes the most relevant Brazilian anti-corruption and anti-bribery legislation applicable to individuals.
17. *See, e.g.*, Brazilian Criminal Code, Art. 327; Administrative Improbity Law (Law No. 8.492/1992). For purposes of the Anti-Corruption Law, "government controlled entities" are likely to be interpreted to include entities as to which the government has either ownership control and/or management control.

Brazil Enacts Long-Pending Anti-Corruption Legislation ■ Continued from page 7

under Brazilian law also includes those who work for a private entity but are contracted to provide a public service.[18]

The Anti-Corruption Law does define foreign (that is, non-Brazilian) public officials. Similar to the definition of a domestic public official found in other Brazilian laws, the definition of foreign public officials includes individuals who, with or without remuneration, work in any capacity for a foreign government (at any government level), including its diplomatic missions; for corporate entities controlled by a foreign government; or for public international organizations, such as the World Bank or the United Nations.[19]

d. Strict Liability

The Anti-Corruption Law provides for administrative and civil strict liability.[20] In other words, to be able to levy administrative and judicial sanctions against an offending entity, the government will need to prove only that the illegal act was committed for the benefit or interest of the entity, without the need to prove that the management or board of directors of the entity was at fault or that either had a corrupt intent. Specifically, the Anti-Corruption Law provides that corporate entities will be held liable for any illegal conduct committed on their behalf, by its employees, directors, officers, agents, or third parties.[21]

This is unlike the U.S. Foreign Corrupt Practices Act ("FCPA"), under which the government must prove the existence of a corrupt intent, and is more akin to the U.K. Bribery Act 2010 ("UKBA"), under which with respect to the "corporate offence" authorities are not required to show that the board of directors or management knew or was involved in the illegal conduct. Under the Anti-Corruption Law, the government nevertheless must establish that an undue advantage was gained on behalf of the entity as a result of the illegal conduct, which includes improper payments and offers of the same.[22]

Significantly, one of President Rousseff's vetoes concerned the application of strict liability to all facets of the law, both administrative and civil. The original text of the legislation presented to the President for signature provided for strict liability only with regard to administrative sanctions and with regard to one specific form of judicial sanctions, namely that of stripping an entity of assets, rights, or valuables representing the advantage gained from illegal conduct. For the remaining judicial sanctions at the government's disposal, absent the President's veto, authorities would have had to prove fault or corrupt intent of senior managers or the board of directors. With her veto, President Rousseff eliminated this distinction, facilitating potential application of the law.[23]

5. Enforcement of the Anti-Corruption Law

As noted above, the Anti-Corruption Law provides for both administrative and civil judicial enforcement. The statute of limitations (both for administrative and judicial proceedings) is the longer of five years from the date on which the illegal conduct was discovered, or, if the illegal conduct is ongoing, five years from the date it ceases.[24]

a. Administrative Enforcement

The jurisdiction to investigate, enforce, and adjudicate administrative cases will vary among agencies, depending on the level of government at which the illegal conduct occurred (municipal, state, or federal) and what government entity was involved. The Federal Comptroller's Office (the Controladoria Geral da União, or "CGU") will have authority to prosecute all illegal conduct involving misconduct vis-à-vis officials of or otherwise implicating the Brazilian federal government or any foreign government.[25] If the alleged misconduct concerns the officials of or otherwise implicates a Brazilian state or municipality, the competent prosecuting authority will be the highest authority of the relevant Brazilian state or municipal agency where the alleged illegality occurred.[26] For example, if the allegedly illegal conduct involved fraud with respect to a public

CONTINUED ON PAGE 9

18. *See id.*
19. *See* Federal Law No. 12.846/2013, Art. 5.
20. *Id.*, Art. 2.
21. *Id.*, Art. 3.
22. *Id.*, Art. 5.
23. August 2 Gazette, note 1, *supra*, at 3.
24. Federal Law No. 12.846/2013, Art. 25.
25. *Id.*, Arts. 8 & 9.
26. *Id.*, Art. 8.

Brazil Enacts Long-Pending Anti-Corruption Legislation ■ Continued from page 8

tender by a São Paulo state public hospital, the Health Secretariat of the State of São Paulo would have authority to conduct the process to levy administrative sanctions because the Secretariat is the highest authority relative to the public hospital.

"The Anti-Corruption Law provides for three different types of administrative sanctions: monetary fines (the most significant), restitution of damages caused by illegal conduct, and widespread announcement of condemnatory decisions[.]"

Similarly, if the illegal conduct involved a bribe paid to an employee of the Rio de Janeiro Municipal Transportation Office, the City Hall of Rio de Janeiro, the highest authority over the Municipal Transportation Office, would have authority to conduct the administrative action.

The administrative procedure will be conducted by a commission designated by the relevant authority and composed of two or more civil servants.[27] With appropriate judicial authorization, the relevant administrative authority will be permitted to make use of any judicial measures needed to conduct its investigation, such as search and seizure and access to information otherwise protected by the Brazilian bank secrecy law.[28] The commission must complete the administrative proceeding within 180 days, at which point it must present the facts of the case and its decision, including any sanctions it determines should be imposed against the offending entity.[29] Any entity charged under this process will be provided 30 days from notice of the proceeding to make its defense.[30] The commission's decision, once finalized, will then be sent to the relevant authority for adjudication.[31] An entity found liable on the administrative level will be entitled to appeal the administrative decision to the Brazilian courts.

The Anti-Corruption Law provides for three different types of administrative sanctions: monetary fines (the most significant), restitution of damages caused by illegal conduct, and widespread announcement of condemnatory decisions in various industrial or national publications.[32] Fines are designated to range from 0.1% to 20% of an entity's gross revenues in the year prior to the initiation of administrative proceedings.[33] In situations in which it is not possible to calculate the company's gross revenues, and therefore the 0.1% to 20% rule cannot be applied, entities will be subject to fines ranging from a minimum of 6,000 to a maximum of 60 million Brazilian *reais* (or approximately US$ 2,640 to US$ 26.4 million).[34] The law also provides that fines cannot be less than the value of the advantage or benefit conferred, if that figure is possible to calculate.[35] Significantly, in approving the law, President Rousseff vetoed a provision that would have capped fines at the total value of goods or services contracted for, effectively barring some companies from being fined 20% of gross revenues from the year prior to the administrative proceeding.[36] In doing so, the President eliminated a provision that would have weakened the government's ability to penalize some entities for illegal conduct.

The new law specifies a number of factors that must be considered in levying administrative sanctions against an offending

CONTINUED ON PAGE 10

27. *Id.*, Art. 10.
28. *See id.*; Brazilian Code of Criminal Procedure, Arts. 240-250; Supplemental Law No. 105 (Jan. 10, 2001), Art. 4.
29. Federal Law No. 12.846/2013, Art. 10.
30. *Id.*, Art. 11.
31. *Id.*, Art. 12.
32. *Id.*, Art. 6.
33. *Id.*
34. *Id.*
35. *Id.*
36. August 2 Gazette, note 1, *supra*, at 2.

Brazil Enacts Long-Pending Anti-Corruption Legislation ■ Continued from page 9

entity. These include the gravity of the infraction; the advantage or benefit sought by the entity and whether the entity had the opportunity to utilize or receive such advantage or benefit; the negative effect of the infraction; and the economic circumstances of the offending entity.[37] In line with U.S. and U.K. law and practice, the government also will give weight to the existence of a generally effective compliance program, that is, the existence of mechanisms and internal procedures to assure the integrity of transactions and employee conduct as a general matter, auditing and incentives to denounce irregularities, and the effective application of the entity's code of ethics and code of conduct.[38] Other factors include the extent to which the entity cooperates with the government and the value of the contracts that the entity has with the government.[39]

The original text of the law had also included as a factor to be used in levying sanctions the extent to which a public official contributed to the illegal conduct. In another veto, President Rousseff eliminated this provision from the law,[40] thus ensuring that entities are fully responsible for their conduct vis-à-vis the government, even when confronted with demands from public officials (at least in cases where these do not rise to a level that would afford a defense of extortion under Brazilian law).

There undoubtedly will be certain administrative challenges to overcome along the way, such as the highly decentralized nature of the administrative process, a subject of public criticism. At least some authorities with limited relevant training and expertise likely will have responsibility for certain administrative enforcement efforts.

b. Civil Judicial Enforcement

The existence of an administrative proceeding against a corporate entity does not preclude the bringing of judicial proceedings against the same entity based on the same alleged illegal conduct.[41] Judicial proceedings must be commenced by the Public Attorney's Office of the relevant level of government harmed by the illegal conduct (*i.e.*, the federal, state or municipal governments) in accordance with the rules of Brazilian civil procedure.[42]

If the offending entity is found civilly liable under the Anti-Corruption Law, it may be subject to various judicial sanctions. These include loss of assets, rights, or valuables representing, directly or indirectly, the advantage or benefit gained from the infringement; suspension or partial interdiction of the entity's activities; compulsory dissolution of the entity; and prohibition on receiving government financing (including from any institution controlled by the government) for a period of one to five years.[43] The law conditions the government's power to order compulsory dissolution of a corporate entity so as to limit such dissolutions to cases in which the entity was used routinely to facilitate or promote the illegal conduct or was created for the purpose of concealing or disguising the illegal conduct or the beneficiaries of that conduct.[44]

In actions brought by the Public Attorney's Office, if no administrative action has been brought against the corporate entity, the Public Attorney may also impose administrative sanctions on the offending entity.[45]

Unlike the civil versus criminal distinctions in the FCPA, under the Anti-Corruption Law, there is no substantive difference between what types of actions can be enforced in administrative versus civil proceedings. In other words, any type of violation of the law can be enforced either administratively or civilly. Nonetheless, given the lengthy delays and inefficiencies of the Brazilian legal system, most enforcement actions are likely to be brought as administrative proceedings. The government is most likely to commence a civil action when it intends to request the dissolution of a corporate entity, since this is a judicial remedy only available in civil proceedings.[46]

c. Leniency Agreements

The Anti-Corruption Law authorizes regulators to enter into leniency agreements

---

37. Federal Law No. 12.846/2013, Art. 7.
38. *Id.*
39. *Id.*
40. August 2 Gazette, note 1, *supra*, at 2.
41. Federal Law No. 12.846/2013, Art. 18.
42. *Id.*, Arts. 19 & 20; *see also* Brazilian Code of Civil Procedure Law No. 7.347 of July 24, 1985.
43. Federal Law No. 12.846/2013, Art. 19.
44. *Id.*, Art. 19.
45. *Id.*, Art. 20.
46. *Id.*, Art. 19.

Brazil Enacts Long-Pending Anti-Corruption Legislation ■ Continued from page 10

– akin to deferred prosecution and non-prosecution agreements under U.S. law – with offending entities. Leniency agreements will be permitted only if collaboration with the government will result in both the identification of other guilty parties involved and the swift acquisition of information and documents proving the illegal act(s).[47] The law does not specify how such collaboration with respect to the identification of other guilty parties is intended to work in practice with regard to a number of concrete details, including whether the identification required is intended to include private individuals (within and without the company), entities, and/or government officials. To be eligible for leniency the offending entity must approach the government about its desire to cooperate (and not vice-versa); immediately cease involvement in the infraction; admit to participation in the illegal conduct; and agree fully and permanently to cooperate with the government's investigation, including appearing, whenever requested and at its own expense, at any relevant judicial or administrative proceedings.[48]

Entering into a leniency agreement will reduce the amount of the applicable fine by as much as two-thirds and exempt the offending entity from all other administrative sanctions.[49] With regard to judicial sanctions, a leniency agreement will exempt the offending entity only from the prohibition against receiving government financing but will not exempt it from the remaining judicial sanctions at the government's disposal.[50]

> "Leniency agreements will be permitted only if collaboration with the government will result in both the identification of other guilty parties involved and the swift acquisition of information and documents proving the illegal act(s)."

d. National Registry

The Anti-Corruption Law also provides for the creation of a National Registry of Punished Entities (Cadastro Nacional de Empresas Punidas or "CNEP").[51] The registry will include a list of offending entities, the sanctions levied against them and the existence of leniency agreements, if any.[52] At the request of the sanctioning authority, the names of the offending entities will be excluded from the registry once the relevant sanctions or leniency agreement has been complied with and full restitution has been paid.[53]

6. Conclusion

For companies already subject to the FCPA or UKBA (or both), the Anti-Corruption Law provides yet another compelling reason to implement and maintain a robust anti-bribery compliance program. At least in the short run, the new law likely will require such companies to devote greater on-the-ground compliance resources to activities in Brazil, and exert additional pressure to have personnel who can understand and speak Portuguese in both local and non-Brazilian locations. In addition, it will be important to consider and address the ways in which Brazilian laws – both the Anti-Corruption Law and laws already on the books – supplement obligations under the FCPA and UKBA, such as with respect to public tenders.

For companies largely not already subject to a major transnational anti-corruption regime, including companies operating exclusively in Latin America, or mainly in the Middle East and Africa, Eastern Europe, or Asia (especially China, which is Brazil's largest trading partner), the new law presents additional legal risks that merit careful consideration. Such entities must ensure that they adopt and maintain an effective anti-corruption compliance program, including risk-based policies and meaningful procedures to ensure and test compliance with these policies. This is especially the case for Brazilian corporate entities (including branches and subsidiaries

CONTINUED ON PAGE 12

47. *Id.*, Art. 16.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*, Art. 22.
52. *Id.*
53. *Id.*

Brazil Enacts Long-Pending Anti-Corruption Legislation ■ Continued from page 11

of multinationals) that engage in significant interactions with the government, such as in construction, oil and gas, mining, and other infrastructure sectors, all often involving public bidding, government contracts, and permitting and licenses.

> "Some commentators have speculated that the government, as the CGU has previously, will follow the standards for an effective compliance program established in the U.S. Sentencing Guidelines."

With the Anti-Corruption Law not yet in effect, the Brazilian government has not promulgated guidelines for evaluating the effectiveness of company compliance programs under the new law. Some commentators have speculated that the government, as the CGU has previously,[54] will follow the standards for an effective compliance program established in the U.S. Sentencing Guidelines,[55] such as strong tone at the top, effective adoption of a code of conduct, existence of internal controls to prevent corruption, training, and discipline. Others expect that the Brazilian government will go even further by adopting the supplemental steps identified in the OECD Good Practice Guidance on Internal Controls, Ethics, and Compliance, such as establishing an effective internal audit program and escalation process as well as conducting due diligence of third parties.[56]

In any event, it will be imperative to monitor further legal developments in Brazil and especially how the Brazilian authorities monitor and enforce compliance with the Anti-Corruption Law. Under U.S. law and the principles utilized by U.S. authorities in bringing enforcement actions, the existence of a robust anti-bribery regime in Brazil could affect whether the U.S. government will bring certain Brazil-related charges and could even lead the U.S. to defer entirely to an anti-bribery prosecution taking place in Brazil.

Andrew M. Levine
Bruce E. Yannett
Renata Muzzi Gomes de Almeida
Steven S. Michaels
Ana L. Frischtak

Andrew M. Levine and Bruce E. Yannett are partners, Steven S. Michaels is a counsel, and Ana Frischtak is an associate in the New York office. They are members of the Litigation Department and the White Collar Practice Group. They may be reached at amlevine@debevoise.com, beyannett@debevoise.com, ssmichaels@debevoise.com, and alfrischtak@debevoise.com. Full contact details for each Debevoise author are available at www.debevoise.com.

Renata Muzzi Gomes de Almeida is a partner in the Corporate Law and Foreign Investment, Mergers and Acquisitions and Compliance practice groups at TozziniFreire Advogados, based in its São Paulo office. She may be reached at rmuzzi@tozzinifreire.com.br, and her full contact details are available at www.tozzinifreire.com.br.

54. In 2011, the CGU created the National Registry of Ethical Entities (Cadastro Empresa Pró-Ética), a collection of entities that voluntarily submit their compliance programs to the CGU for evaluation. Controladoria Geral da União (CGU), Cadastro Empresa Pró-Ética, http://www.cgu.gov.br/empresaproetica/cadastro-pro-etica/lista-empresas.asp. Currently, there are only fifteen entities registered, eight of which are Brazilian subsidiaries of multinationals and seven of which are Brazilian private or public entities.

55. United States Sentencing Commission, 2010 Federal Sentencing Guidelines Manual, § 8B2.1., http://www.ussc.gov/Guidelines/2010_guidelines/Manual_HTML/8b2_1.htm.

56. *See* OECD Good Practice Guidance on Internal Controls, Ethics, and Compliance (Feb. 18, 2010), http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/44884389.pdf.

NEWS FROM THE BRICs

Russia's Answer to the DOJ/SEC FCPA Guidance: The Russian Supreme Court's Resolution on Court Practice in Bribery Cases and Other Corruption Crimes

In a move reminiscent of the recent FCPA Guidance issued by the DOJ and the SEC, Russia's Supreme Court last month offered guidance on the interpretation and enforcement of Russian anticorruption law, the first such guidance issued in thirteen years.

The July 9, 2013 Resolution No. 24 on Court Practice in Bribery Cases and Other Corruption Crimes ("Resolution"), which replaces an earlier resolution dating from February 1, 2000, is aimed at unifying court practice in bribery and other anticorruption cases.[1] Although the Resolution's *de jure* status is that of a guideline, *de facto* it is considered to be binding on lower courts.[2]

The adoption of the Resolution was driven in part by significant developments in Russian anticorruption legislation since 2000, including the adoption of federal laws on counteracting money laundering and corruption in 2001 and 2008, respectively,[3] and Russia's ratification of the U.N. Convention Against Corruption in 2006 and of the OECD Convention on Combating Bribery of Foreign Public Officials in 2012. The Resolution was also needed to answer the frequent questions raised by lower courts in the course of their consideration of cases relating to bribery, including questions about the legal status of kickbacks,[4] payments in the form of property services, and remuneration to government officials made in connection with their professional but not official activities.[5]

The Resolution provides important guidance to Russian courts and to the companies and individuals subject to their jurisdiction. From the perspective of multinational companies operating in Russia, two of the most significant aspects of the Resolution are likely to be its guidance on what qualifies as a bribe under the Russian law and its expanded definition of an extortion defense. Those provisions of the Resolution are analyzed below, but companies operating in Russia are well advised carefully to review the Resolution in its entirety and, in consultation with counsel, to consider whether it necessitates changes to their compliance programs in Russia.

What Qualifies As A Bribe Under Russian Law?

As a threshold matter, the Resolution makes it clear that the Russian Anticorruption Law outlaws not only corrupt conduct that involves exchange of money, securities, or other property, but also those involving unlawful provision of "property services or property rights."[6] By doing so, the Supreme Court has resolved an uncertainty as to whether Russian law prohibits exchanges of benefits such as the provision of an interest-free or reduced-rate loan, debt write-off, or title to property without the transfer of the property itself.

CONTINUED ON PAGE 14

1. Adopted pursuant to Article 126 of the Constitution of the Russian Federation and Article 14 of Federal Constitutional Law No. 1-FKZ on Courts of General Jurisdiction of the Russian Federation, Feb. 7, 2011.
2. Article 14 of the Federal Constitutional Law No. 1-FKZ on Courts of General Jurisdiction of the Russian Federation, dated February 7, 2011, refers to Supreme Court Plenum resolutions as legal clarifications. Their *de facto* force as binding on lower courts, however, is widely recognized. *See, e.g.*, Malko A.V. & Tutynina E.G., "Acts of the Supreme Court of the Russian Federation as Crucial Means of Judicial Policy," *Russian Justice*, No. 2, 2012.
3. Federal Law No. 115-FZ on Counteracting Money Laundering and the Financing of Terrorism, (Aug. 7, 2001); Federal Law No. 273-FZ on Counteracting Corruption (Dec. 25, 2008).
4. "Supreme Court of Russian Federation Developed Recommendations on the Consideration of Cases of 'Kickbacks,'" RAPSI (Mar. 28, 2013), http://rapsinews.ru/anticorruption_news/20130328/266851422.html.
5. Aleksey Sokovnin, "Bribes Have Been Included in the Resolution: Supreme Court Plenum Highlighted the Key Points in Corruption Cases," *Kommersant* (June 16, 2013), http://www.kommersant.ru/doc/2211004.
6. Resolution, Art. 9.

Russia's Answer to the DOJ/SEC FCPA Guidance ■ Continued from page 13

All such exchanges, as well as kickbacks (*i.e.*, a payments to government officials made in connection with an improperly inflated price of a government contract),[7] have been brought unequivocally within the ambit of Russian Anticorruption Law.

The Resolution also provides a broad definition of the term "foreign official" – which now explicitly includes any appointed or elected persons occupying any position in the legislative, executive, administrative, or judicial authority of a foreign state *as well as* any person performing any public function for the foreign state or foreign state-owned company – making it consistent with the way the term is used in other anticorruption regimes.[8]

> "The Resolution also provides a broad definition of the term 'foreign official' . . . – making it consistent with the way the term is used in other anticorruption regimes."

In other respects, however, the Resolution's conception of what constitutes a bribe is narrower than that employed in other anticorruption regimes, including the U.S. Foreign Corrupt Practices Act ("FCPA") and the U.K. Bribery Act ("UKBA"), and may complicate compliance programs for multinational companies operating in Russia.

First, the Resolution does not categorize as bribes those payments (or other benefits) to third parties that are not designed ultimately to be received by a government official, even if the payments are made at the behest of the official in exchange for that official's action or inaction.[9] That is, a company's donation to an organization where a government official works, or to another organization, to support the activities of that organization is not considered a bribe even if the donation was made at the request of the official in exchange for that official's action, as long as the official or his/her relatives do not personally profit from the donated funds. In light of the Resolution's guidance, Russian officials may feel less constrained to request charitable contributions from companies, which can put companies subject to the FCPA or the UKBA in a difficult position.

Second, the Resolution draws a distinction between the crimes of bribe-taking, on the one hand, and fraud, on the other, by a government official (or, in cases of commercial bribery, manager of a commercial organization). This distinction may have implications for companies or individuals accused of bribe-giving. If a government official or a commercial manager receives an improper benefit for an action (or inaction) that is within his authority to take (or refrain from taking), that official or manager is guilty of bribe-taking even if he intended to take (or refrain from taking) the action at issue in any case.[10] The individual or company that provided the improper benefit, conversely, could be accused of bribe-giving. If a government official or commercial manager receives an improper benefit for an action he did not have the authority to take, however, he is guilty of fraud rather than bribe-taking. The Resolution is silent on the impact of that distinction on the accused bribe-giver but, arguably, if there is no crime of bribe-taking, there can be no crime of bribe-giving.

Third, the Resolution draws a distinction between the receipt by officials of benefits for actions or inactions that, while related to their "professional responsibilities," are not related to their "authority as representatives of the state" or their "organizational or administrative functions."[11] This distinction, although further elaborated elsewhere,[12] is sufficiently vague that it leaves open the possibility that payments can lawfully be made to government officials for actions that relate in some way to their official duties. For example, in the area of product certifications, this aspect of the Resolution may allow state certification officials to provide consulting services to companies at fair market value without running afoul of Russia's anticorruption laws.

CONTINUED ON PAGE 15

7. *Id.*, Art. 25.
8. *Id.*, Art. 1.
9. *Id.*, Art. 23.
10. *Id.*, Art. 24.
11. *Id.*, Art. 7.
12. Supreme Court Resolution No. 19 on Court Practice on Abuse of Official Duties and Exceeding Official Duties (Oct. 16, 2009).

Russia's Answer to the DOJ/SEC FCPA Guidance ■ Continued from page 14

Broad Extortion Defense

In an important development for companies operating in Russia, the Resolution provides a broad definition of "extortion," which can serve as a defense for companies or individuals accused of bribe-giving.[13] The Resolution defines "extortion" not only as a threat by a government official or commercial manager to harm the legal rights of a company or individual if a bribe is not paid, but also as "purposeful establishment of conditions" forcing a company or individual to pay a bribe in order to avoid harmful consequences to its legal rights.[14] Thus, an explicit threat of adverse action is no longer required; rather such threat can be inferred from attendant conditions, which presumably may include, for example, undue delays in customs clearance.

It should be noted that companies or individuals from whom a bribe was extorted will be able successfully to assert the extortion defense only if they provide active assistance to the prosecuting authority. They are not, however, required to report the extortion to the authorities in order to avail themselves of the extortion defense.[15]

The Resolution clarifies that a successful extortion defense in a criminal case does not qualify the "victim" of extortion as a "victim of a crime." That company or individual, therefore, is not entitled to restitution of the bribe amount, unless the bribe was paid (1) under the circumstances of "extreme duress or mental coercion," or (2) in cooperation with the law enforcement authorities as part of an undercover operation.[16]

Conclusion

In deliberating on, drafting, and ratifying the Resolution, Russia's Supreme Court has expended significant resources and taken an important additional step to demonstrate Russia's interest in establishing a robust anticorruption regime. Although it will take time to assess whether this regime, as clarified by the Resolution, is operating both rigorously and even-handedly, companies doing business in Russia would do well to review the Resolution, and, if appropriate, consult with counsel on its implications.

Dmitri V. Nikiforov
Bruce E. Yannett
Jane Shvets
Anna V. Maximenko

Dmitri V. Nikiforov is a partner and Anna V. Maximenko is an associate in the firm's Moscow office. They are members of the Corporate Department. Bruce E. Yannett is a partner and Jane Shvets is an associate in the firm's New York office. They are members of the Litigation Department and the White Collar Practice Group. The authors may be reached at dvnikiforov@debevoise.com, beyannett@debevoise.com, jshvets@debevoise.com, and avmaximenko@debevoise.com. Full contact details for each author are available at www.debevoise.com.

13. Criminal Code of the Russian Federation, Art. 291.
14. Resolution, Art. 18.
15. Criminal Code of the Russian Federation, Art. 291.
16. Resolution, Art. 30.

TI-UK Risk Assessment Guide

The UK chapter of Transparency International ("TI"), the non-governmental anti-corruption organization, has recently released guidance for conducting an effective bribery risk assessment, entitled *Diagnosing Bribery Risk: Guidance for the Conduct of Effective Bribery Risk Assessment* (the "TI Guidance").[1] Given the emphasis placed on bribery risk assessment and risk management by legislators, law enforcement agencies and regulators around the world, and the emergence of risk assessment as a cornerstone of anti-corruption best practices, the TI Guidance will prove both helpful and timely. Organizations, regardless of their size and whether or not they already have risk assessment procedures in place, will find certain aspects of the TI Guidance particularly useful, such as the check lists and illustrative risk assessment case studies.

Importance of Risk Assessment

Regulatory guidance confirms that effective risk assessment is now a critical component in an organization's anti-bribery program. The "Resource Guide to the US Foreign Corrupt Practices Act" (the "FCPA Guidance") provided by the US Department of Justice and Securities and Exchange Commission notes that "[a]ssessment of risk is fundamental to developing a strong compliance program."[2] Similarly, the UK's Ministry of Justice Bribery Act 2010 Guidance (the "MoJ Guidance"), lists risk assessment as one of the six key elements of an effective anti-bribery program.[3] The MoJ Guidance states, as an example of best practice: "The commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented."[4] *The Business Principles for Countering Bribery* and the *Adequate Procedures – Guidance to the UK Bribery Act 2010*, both issued by TI, also support a comprehensive bribery risk assessment.[5]

Further, the reviews by the UK Financial Services Authority[6] in 2010 and 2012 of the anti-bribery programs of insurance brokers and investment banks highlighted the importance of good bribery risk assessment as a pre-requisite for effective anti-bribery controls.

The TI Guidance focuses on active bribery[7] given that this has drawn the attention of policy makers and enforcement authorities. Nonetheless, the principles included in the TI Guidance may be applied equally to assessing the risk of passive bribery.

Ultimately, organizations must bear in mind that the purpose of the risk assessment process is not only to identify risks but also to enable the organization to determine the appropriate response to a given risk.

Substance of the TI Guidance

The TI Guidance is confined to the risk assessment process itself. It first sets out the legal and regulatory context, then provides an outline of the risk assessment process. The latter is then dealt with in two separate parts covering risk identification and risk evaluation. Finally, the Guidance covers the use to which the risk assessment can be applied and recommends certain follow-up, monitoring and reporting procedures. The TI Guidance also includes a list of ten Good Practice Principles for Bribery Risk Assessment (set out at the end of this article) which provide an overview of the key considerations organizations should bear in mind during all phases of a bribery risk assessment.

Risk Assessment Process

The TI Guidance breaks risk assessment into (i) risk identification and (ii) risk evaluation (though it acknowledges that in practice the two elements may be approached in a more integrated fashion). It is critical to remember that risk assessment is not a theoretical undertaking: it must be adapted to suit the particular needs of the organization and the documented risk assessment program should demonstrate

CONTINUED ON PAGE 17

1. The TI Guidance is available at http://www.transparency.org.uk/component/cckjseblod/?task=download&file=publication_file&id=678
2. FCPA Guidance at 58, http://www.justice.gov/criminal/fraud/fcpa/guide.pdf.
3. MoJ Guidance at 20-31, http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf. The MoJ Guidance is issued pursuant to section 9 of the Bribery Act 2010.
4. *Id.* at 25.
5. These documents are available at http://www.transparency.org/whatwedo/pub/business_principles_for_countering_bribery and http://www.transparency.org.uk/our-work/bribery-act/adequate-procedures.
6. Now the Financial Conduct Authority ("FCA").
7. Active bribery occurs where the organization and/or persons connected with it pay a bribe. Passive bribery occurs where an individual receives a bribe.

TI-UK Risk Assessment Guide ■ Continued from page 16

how this has been achieved.[8] The TI Guidance, which rightly emphasizes the importance of documentation, includes a sample approach to documenting the risk assessment process.[9]

Risk Identification

Risk identification involves considering the key risk areas: country risk, sector risk, transaction risk, business opportunity risk and business partnership risk.[10] The TI Guidance outlines several questions to assist in identifying the risks faced by the organization. The questions cover the type of business, its interactions with third parties and governmental bodies, interactions with intermediaries, and the local customs and practices of regions in which the business operates.[11] In large organizations, management is encouraged to increase engagement by staff in the risk identification process through "appropriate messages" and anti-bribery awareness training.[12]

Risk Evaluation

Once the risks are identified, organizations must evaluate those risks and determine which have the most significance to operations. The TI Guidance establishes two key parameters for the evaluation stage: likelihood (i.e., probability of occurrence) and impact.

"Likelihood" is driven by the presence of risk factors: the more significant and/or numerous the risk factors associated with an activity, the higher the likelihood that an adverse event might occur.[13] "Impact" is more difficult to analyze because the financial, legal, regulatory, commercial and reputational effects of bribery allegations are hard to predict.[14] Consequently, there may be a number of ways to assess the potential adverse effect of certain events on business operations.

While this component of the risk assessment process involves a degree of quantitative assessment, much of it requires the exercise of judgment. The TI Guidance acknowledges a degree of flexibility at this level and states that there is "no single right answer" to the question of whether likelihood or impact should be given greater weight.[15]

Organizations must, of course, conduct an overall evaluation of all bribery risks; but it is reasonable and sensible to focus the risk evaluation on particular businesses or market units. This phase of evaluation may assist in targeting efforts in areas such as internal audit and training and/or identifying the need for new or improved policies based on the level of risk faced by certain businesses or market units. For instance, an organization may rank business units according to the extent to which they are associated with risky activities and jurisdictions. By way of a simple example, an organization could be split into the geographic regions in which it operates and further analysed by how much government business it transacts in each area.

Output of the Risk Assessment

One of the key messages from the TI Guidance is that "an effective anti-bribery programme must operate in practice, not just in theory."[16] With that in mind, it sets out suggested steps to be taken following the risk assessment process:

Planning and putting in place an appropriate response to the risk assessment

This includes mapping risks to existing controls, identifying gaps in existing controls in terms of risks not adequately addressed, and designing and implementing appropriate remedial actions.

An output of the planning process may be a "risk matrix," with mitigating controls set out against corresponding risks.[17] The TI Guidance notes that certain existing controls may be adapted as anti-bribery controls, such as controls over payment transactions.

This process will often identify gaps for which there are inadequate anti-bribery controls, necessitating remedial action. Key features of a remediation program include designing specific procedures tailored to responding to certain risks; creating the

CONTINUED ON PAGE 18

8. The FCPA Guidance makes this point clear: "One-size-fits-all compliance programs are generally ill-conceived and ineffective: …" FCPA Guidance at 58.
9. TI Guidance, Annex 2.
10. The TI Guidance defines risk as "the possibility that an event will occur and adversely affect the achievement of objectives," adopting the definition used by the Committee of Sponsoring Organizations of the Treadway Commission, in the *Internal Control – Integrated Framework* issued in May 2013. TI Guidance at 8.
11. *Id.* at 16.
12. *Id.* at 17.
13. *Id.* at 33-34.
14. *Id.* at 35.
15. *Id.* at 36.
16. *Id.* at 41.
17. The TI Guidance provides a sample risk matrix at Annex 3.

TI-UK Risk Assessment Guide ■ Continued from page 17

necessary documentation and guidance; introducing new policies and procedures; and properly implementing those policies and procedures.

Follow-up, monitoring and enforcement

Management must monitor the effectiveness of the anti-bribery program. Specifically, implementation, training and awareness, high risk transactions, and responses to bribery or other non-compliant behaviour should be actively managed.[18] Enforcement should also, to the extent possible, extend to third parties acting on behalf of the organization.

Reporting

Both internal and external reporting is suggested. For example, periodic internal updates should be provided to the board on evolving risks and the status of implementation of the anti-bribery program, as well as any alleged or actual breaches and the results of any investigations. External reporting may include reporting on an organization's risk assessment and its anti-bribery program. Generally, the TI Guidance does not address to whom reports may be made, though it does acknowledge that any alleged or actual breaches may be reported to "relevant authorities."

Good Risk Assessment Requires Adequate Resources

The TI Guidance emphasizes the importance of the right tone from the top to adequately conduct a risk assessment.[19] As the TI Guidance makes clear, a risk assessment policy will only be effective if it can draw from experiences across the organization in order to present a reasonably comprehensive understanding of what the business does, how and where it does it, and how those characteristics may give rise to bribery risk.

The TI Guidance undoubtedly demonstrates that an effective risk assessment process will take time, skill and effort, but in light of the US and UK authorities' emphasis on and expectation of periodic, institutionalized risk assessments, the importance of a properly thought-out, well-documented process cannot be overstated.

TRANSPARENCY INTERNATIONAL UK'S "GOOD PRACTICE PRINCIPLES FOR BRIBERY RISK ASSESSMENT"[20]

Effective risk assessment will:

1. Have the full **support and commitment** from the Board and other senior management.
2. **Involve the right people** to ensure a sufficiently informed and complete overview of the business and its risks.
3. Be **comprehensive**, taking account of all activities of the business which may create significant bribery risk.
4. **Avoid preconceptions** about the effectiveness of controls or the integrity of employees and third parties, and therefore focus on inherent risk.
5. **Identify and describe** bribery risks in appropriate detail.
6. **Evaluate** bribery risks by reference to a realistic assessment of likelihood and impact.
7. **Prioritize** bribery risks to the extent that this is practical and meaningful.
8. Be **documented** in such a way as to demonstrate that an effective risk assessment process has been carried out.
9. Be **regular**, performed at appropriate intervals and otherwise in the event of significant changes affecting the business.
10. Be **communicated** effectively, and designed in a way that facilitates effective communication and the design of appropriate policies, programs and controls.

Karolos Seeger
Matthew H. Getz
Alexander McKinnon

Karolos Seeger is a partner, Matthew H. Getz is an international counsel, and Alexander McKinnon is an associate in the firm's London office. They are members of the Litigation Department and the International Corporate Investigations and Defence Group. The authors may be reached at kseeger@debevoise.com, mgetz@debevoise.com, and amckinnon@debevoise.com. Full contact details for each author are available at www.debevoise.com.

18. As to follow-up, it is noted that the MoJ Guidance indicates that the risk assessment should be "periodic" and the FCPA Guidance emphasises that periodic testing and review of the compliance program is necessary. MoJ Guidance at 25; FCPA Guidance at 61-62.
19. Indeed the first "Good Practice Principle" states that an effective risk assessment will "[h]ave the full *support and commitment from the Board* and other senior management." TI Guidance at 4 (emphasis in original).
20. TI Guidance at 4.

Upcoming Speaking Engagements and Recent Publication

Upcoming Speaking Engagements

September 16-19, 2013
Christopher K. Tahbaz
Phillip Rohlik
"Examining Anti-Corruption Issues in South East Asia for Asian Private Equity Firms"
Eighth Annual SuperReturn Asia 2013
ICBI
Hong Kong

For more information:
http://www.superreturnasia.com/

September 18-20, 2013
Frederick T. Davis
"International Anti-Corruption Enforcement: Examining the Legal, Political and Practical Landscape of Bribery Investigation and Prosecution Across Jurisdictions"
Foreign Corrupt Practices Act 2013
American Bar Association
Washington, DC

For more information:
http://www.americanbar.org/calendar/2013/09/fcpa2013.html

October 7, 2013
Frederick T. Davis
"Journalism, the Media, and Criminality,"
IBA Annual Meeting
Boston

For more information:
http://www.int-bar.org

October 24-25, 2013
Paul R. Berger
Pratin Vallabhaneni
"AML/OFAC/FCPA Updates"
2013 Treasury and Capital Markets Legal and Legislative Issues Conference
Financial Markets Association

For more information:
http://www.fmaweb.org/

Recent Publication

August 2013
Antoine Kirry
FrederickK T. Davis
The International Investigations Review, Third Edition, 2013
Law Business Research
www.debevoise.com/files/Publication/34b50885-e7b5-4c8a-9dce-47029668df0b/Presentation/PublicationAttachment/7cb0fa7c-9de7-4ce2-9297-906177bad5ec/France pdf.pdf