Compliance and Risk

The SEC's New Enforcement Mandate

By Martin Wilczynski

In recent speeches, Mary Jo White, the new chairman of the Securities and Exchange Commission (SEC), has outlined what investors and registrants can expect from the SEC's Division of Enforcement as her tenure begins. White, a well-respected former prosecutor, has focused on ways in which the SEC will leverage its resources and technology to be perceived as a ubiquitous agency—one that is policing the little things in addition to the headline-grabbing cases.

Referencing *The Atlantic Monthly* article titled "Broken Windows," White has channeled a 1970s New Jersey law enforcement initiative in which police were visibly detailed to neighborhoods to maintain order and remediate a range of infractions. By doing so, a signal was sent that all rules—large and small—are important. Analogizing to the SEC's Division of Enforcement program, White has theorized that like neighborhood residents who draw comfort from local police presence, investors in our capital markets will experience an enhanced level of confidence if the SEC is perceived as monitoring and maintaining order in a similar fashion.

To leverage the SEC's presence, White has cited a number of tools and initiatives. These include existing examination programs; the use of technology resources to monitor everything from trading patterns to financial statement details; cooperation initiatives with other agencies; renewed expectations for gatekeepers such as auditors, board members, and company counsel; incentives for whistleblowers; and an increased concentration on accounting and financial statements. Perhaps most significant, White has signaled that like the "Broken Windows" example, the SEC will maintain order by promptly and uniformly enforcing all infractions, including those that may be thought of as relatively minor in nature.

So what will this approach mean to corporate directors striving to improve registrant compliance and minimize risk?

Attention to detail. First, corporate directors would be well served to appreciate—and to require management to adopt—the necessity of paying attention to compliance environment detail. Because cutting corners, ignoring weaknesses, or dismissing known errors or misconduct based on immateriality now will raise risks for registrants, management and board members, a mind-set of maintaining order should be a baseline for corporate conduct. Since the SEC will consider a focus on the little things as an essential indicator of a corporate director's interest in promoting a healthy compliance function, adoption of this perspective by all relevant parties should pay dividends in the event issues arise.

Proactive self-policing. Since the SEC will be tracking activity using sophisticated technological tools, corporate directors may benefit by encouraging management to install similar technology-driven monitoring. Various firms offer analysis of financial statement metrics by simulating computer-based programs utilized by the SEC. By pursuing these types of risk mitigation and detection tools, a proactive board would gain additional and earlier insight into potential problem areas, thus demonstrating to regulators an enhanced level of compliance activism in the boardroom.

Accounting is important again. By establishing the Financial Reporting and Audit Task Force, the SEC has reaffirmed its view of the need for increased vigilance in requiring reliable and accurate financial statement and disclosure information. Corporate directors can expect added skepticism by the SEC of maneuvers that shortcut or circumvent existing accounting rules. Potential areas of interest to the Division of Enforcement could include increased examination of "stealth restatements" or scrutiny of the accuracy of valuations applied to investment assets reported on a registrant's financial statements. Diligent and thorough accounting reviews and interaction with independent auditors will become critical undertakings for corporate boards to master.

Adopting the mind-set of a regulator, or at least appreciating his or her perspective, can be a valuable prism for a corporate director to build into one's fiduciary role. Even though a corporate director cannot be everywhere when it comes to monitoring and improving the compliance function, proactive involvement and an unwillingness to accept minor exceptions will be traits likely viewed positively by the SEC's Division of Enforcement administration.

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The views expressed herein are those of the author and do not necessarily represent the views of FTI Consulting or its other professionals.

KEY ISSUES FACING BOARDS OF DIRECTORS: NEW SEC ENFORCEMENT INITIATIVES AND CORPORATE GOVERNANCE RISKS

April 23, 2014

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APRIL 2014

COMMENTARY

Internal Investigations: Keys to Preparing an Effective Budget

Government prosecution of white collar crime has been on the rise in recent years. The uptick in enforcement activity is being felt across many industries and continues with, for instance, investigations into alleged violations of statutes carrying potentially devastating penalties, including the Foreign Corrupt Practices Act and the False Claims Act. The same trend can be seen on a global basis, with many international regulators focusing not only on local businesses but also on U.S. organizations with international operations. At the same time, organizations are increasingly relying on internal investigations to find the facts themselves and to assess any associated legal, financial, and reputational risks when evidence or an allegation of potential wrongdoing surfaces, whether or not a related government investigation is underway or anticipated. But investigation costs can escalate quickly, especially with investigations that cover much time and territory and that involve conduct that may expose the entity and individuals to serious criminal penalties and significant civil liability.

This Commentary summarizes the types of expenses that typically arise in an internal criminal investigation and offers guidance on how to budget for particular investigative activities. Although each budget will necessarily vary in its components and values, the hallmarks described below are relevant to setting the budget in virtually every internal investigation.[1] We conclude by offering a "checklist" of issues and tasks to consider in preparing an effective and efficient investigation budget.

Overview

To control costs without compromising the fundamental objectives of the investigation, corporations and their counsel may consider developing a budget at the outset of the investigation that—based on the best available information—makes appropriate assumptions about cost-influencing factors and assigns reasonable and realistic cost projections to the particular tasks that are expected to comprise the overall work plan. While developing a budget involves at least some measure of estimation, and may not be appropriate for every situation, companies frequently find budgeting helpful for understanding certain variables inherent in the investigative process, such as scope, timing, and resources, that can at times make the process seem unpredictable or even unsettling. Budgeting also facilitates communication between counsel and client about the client's specific goals.

Once developed, the budget should be reviewed regularly throughout the investigation. In this way, the initial assumptions and the task-based budgeted amounts (and therefore the aggregate budget) can be re-evaluated and modified as appropriate based on the actual conduct of the investigation and any unforeseen developments.[2]

Scoping and Planning

An effective internal investigation budget accounts for the costs of assessing the scope and goals of the investigation and developing a work plan to meet those goals. Time spent up-front gathering background information, identifying legal issues to be researched, and memorializing the scope and goals is critical to rightsizing the investigation—and budget—from the start. Like the budget, the work plan should be periodically evaluated and modified, if needed, as the investigation develops.

Data Preservation and Collection

In this age of emails, text messages, and other forms of electronic communication, the costs of identifying, preserving, and prioritizing relevant data are often major pieces of an internal investigation budget. In particular, the budget should account for the costs of issuing and monitoring a document hold, if applicable, and initial and ongoing collection, hosting, and storage costs. In many cases, it may be advisable to retain an external vendor to perform data collection and preservation tasks. Keep in mind that analyzing and navigating international privacy and state secret laws in foreign markets may drive up related costs—in some cases significantly.

Document Review

Depending on the nature of the investigation, the costs of reviewing and analyzing the data and hard-copy documents collected may constitute a large portion of the budget. Considerations here include (i) whether to use in-house resources, outside counsel, or contract attorneys to perform the various levels of the review, and (ii) whether the review presents foreign language challenges, such that foreign language reviewers or translators are required. In many cases, costs can be minimized by using contract attorneys to conduct the first-level review and by narrowing the universe of data by careful selection of custodians and the appropriate use of targeted terms, date ranges, and predictive coding.

Witness Interviews

Witness interviews are critical to extracting the facts in almost all investigations, and an effective budget accounts for the costs of preparing for, attending, and memorializing the interviews. "Scoping" interviews typically occur early and are primarily intended to discover sources and locations of relevant information, in addition to the nature and extent of the witnesses' own knowledge. These interviews typically entail less preparation than "substantive" interviews. While substantive interviews involve more intensive preparation, they are often critical to developing a comprehensive understanding of the conduct under investigation. The budget should reflect (i) the anticipated number of scoping and substantive interviews, and (ii) the total time expected to be devoted to preparation, participation, and memorialization. This information, coupled with individualized rate and fee information and any travel expenses, will enable a good-faith projection of interview-related costs.

Forensic Accounting Support and Subject Matter Experts

The budget should account for potential costs of involving other professionals and subject matter experts in the investigation, such as forensic accountants and computer forensic experts. Forensic accountants assist in identifying potentially problematic transactions, and the accounting treatment accorded thereto, and in reviewing related internal controls. Computer forensic experts are especially helpful when collecting and preserving large amounts of data and conducting analyses of computer data and systems. Forensic accountants and subject matter experts should be asked to prepare their own budgets in consultation with other members of the investigative team, consistent with the same principles and approach used in setting the overall investigation budget.[3]

Reporting and Recommendations

Preparing reports and recommendations and meeting with key stakeholders, including outside auditors and other outside counsel (e.g., the company's securities disclosure counsel and counsel for individual employees), are often key elements to conducting an internal investigation, and an effective budget accounts for associated costs. In this regard, considerations include the frequency and nature of the reporting, time and resources to prepare expected work product, and potential post-reporting follow-up items, including possible consideration and execution of self-disclosure.

Remediation and Personnel Matters

To the extent the investigative team is expected to be so involved, the budget should account for the costs of identifying, analyzing, and implementing remediation measures related to any wrongdoing uncovered, including enhancements to the corporate ethics and compliance program. In addition, personnel-related costs should also be included in the budget. These may consist of, for instance, time devoted by the investigative team (i) in connection with the discipline of or litigation with sanctioned employees, and (ii) to work with any counsel for individual directors, officers, and employees.

Cross-Border Considerations

Wherever an internal investigation extends into multiple jurisdictions, the budget should allow for specific costs that are needed to ensure that the investigation is conducted effectively, in compliance with local laws, and in such a way that any evidence collected can be properly relied on by the organization. Another key consideration is whether evidence collected can be protected from disclosure to the maximum extent permitted by local law.

Budgeting in these circumstances normally includes consideration of (i) the involvement of outside legal counsel, (ii) whether local laws require engagement with employee representatives (such as unions or works councils) as part of an investigation process, (iii) limitations on the processing and transfer of data from the local jurisdictions to the U.S. or elsewhere, and (iv) specific local laws that may affect the investigation process in certain jurisdictions. For example, compliance with state secret laws in certain jurisdictions (e.g., China) and the trend in Europe to tighten up data privacy regulations may be relevant factors in preparing an effective budget for cross-border investigations.

Tips for Containing Costs

If managed carefully from start to finish, an internal investigation—even a sizable, protracted one—does not have to devolve into a money pit. To the contrary, through some basic steps, internal personnel directly managing the investigation can instill appropriate discipline on the investigative process, and the organization as a whole can expect reasonable certainty as to budget projections.

Consider the potential advantages and disadvantages of engaging outside resources such as outside counsel, forensic accountants, and computer forensic experts. Depending on the circumstances, and assuming the availability of sufficiently capable internal resources, cost savings may be achieved by forgoing some or all outside resources. However, cost savings should not be dispositive in preparing a budget for a criminal internal investigation. The analysis should also involve a careful assessment of the nature and scope of the issues under investigation, the benefits of independent work product from outside resources, and privilege issues.[4]

- Have in place, and enforce, clear billing guidelines that cover, among other things, the manner in which outside professionals are to record time and expenses and the items for which billing is (and is not) permitted.
- Investigate in phases—identify priorities and key tasks at the outset of each phase, and ensure that the learning from one phase is considered when planning and budgeting for successive phases.
- Conduct scoping interviews early to understand the location of potentially relevant documents, data, and witnesses, and to protect against chasing what could be readily identified as false leads.
- Set priorities for electronically stored information (“ESI”) collection and review and witness interviews, and, if possible, stagger the review such that decisions about whether to collect and review additional ESI can be made on a rolling basis and unnecessary ESI work can be avoided.
- Use targeted search terms for ESI review and consider a database vendor that offers “predictive coding.”
- Consider using contract attorneys—with appropriate training and supervision—for first-level ESI review.

- Obtain periodic budget reports (e.g., time incurred versus budget).
- Frequently (re)evaluate the scope of the investigation and when to stop investigating (e.g., performing a "sampling" approach, instead of a review of all potentially relevant events or transactions, is often sufficient, as not all allegations that may hint at a possible violation of law or conduct standards necessarily merit the devotion of investigative time and effort).
- Consider the nature and extent of periodic substantive reporting on interviews and investigative findings or observations, balancing the need for information flow with the costs involved.
- Consider options on final substantive reporting from a cost perspective[5] (e.g., a narrative summary or slide deck, in lieu of the typically more expensive narrative report).

Budget Checklist

In sum, it is important for organizations to ensure not just that they get to the bottom of compliance concerns but also that this process is undertaken in a responsible, cost-effective way. In conjunction with the tips set forth above, a budget that touches on the items below can help achieve these ends.

Scoping and Planning
- Initial fact gathering (including scoping interviews)
- Legal research
- Developing work plan

Data Preservation and Collection
- Document hold
- Capturing ESI, hard drives, mobile devices, and servers
- Copying hard-copy documents
- Data archiving

Document Review
- First- and second-level reviews
- Training and monitoring
- Review platform
- Foreign language reviewers
- Translations

Witness Interviews
- Preparation and follow-up
- Foreign language translators
- Travel expenses

Subject Matter Experts
- Forensic accountants
- Computer forensic experts
- Industry experts

Reporting to the Client and Other Stakeholders
- Analysis and reporting to client and other stakeholders, including outside auditors
- Potential government disclosure analysis

Remediation
- Compliance program and training
- Personnel changes

Personnel Matters
- Individual or pool counsel for personnel
- Potential employee severance negotiations and parallel litigation

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Endnotes

1 Alternative fee arrangements (e.g., flat fees or "success" fees) should be evaluated with great care in the context of internal investigations and should generally be avoided if they reasonably may be viewed as inducing corner-cutting in the fact-gathering process or otherwise creating incentives inconsistent with the basic, truth-seeking objective of the investigation.

2 To ensure protection under the attorney-client privilege and work-product doctrine, the investigation should be undertaken by the corporation's legal team or outside counsel, and the investigation budget and supporting materials should clearly state that they have been prepared in anticipation of potential litigation and that the purpose of the investigation is to provide legal services and advice. Budgets that are prepared for investigations undertaken by a non-lawyer or undertaken in the ordinary course of business, regardless of whether legal advice is sought, may not be protected under the attorney-client privilege and work-product doctrine.

3 In attorney-client privileged investigations, external experts should be retained by counsel so as to maintain the privilege.

4 A full discussion of issues and circumstances that may be relevant to a determination of whether to engage outside counsel and other third-party vendors in a particular matter is beyond the scope of this Commentary.

5 Note that other considerations may also influence the format of final substantive reporting (e.g., privilege concerns and concerns over maintaining confidentiality generally).

Recent Order from D.C. District Court Forces Defendants to Produce Results of Internal Investigations Finding Attorney-Client and Attorney Work Product Privileges Not Applicable

March 2014

On March 6, a U.S. district court judge, sitting by designation in the District of Columbia, granted a relator's motion to compel and ordered defendants to produce documents constituting the results of the defendants' internal investigations, related to the subject matter of the relator's amended complaint.[1] In discovery, the defendants asserted attorney-client privilege and work product protection in response to relator's requests for "internal audits and investigations" into the alleged misconduct and the related subject matter.[2] The investigations were undertaken by a Director of the Code of Business Conduct ("COBC") and completed by a team of non-lawyers, following receipt of an employee tip about potential misconduct.[3] After the investigations were completed, summary reports were prepared and forwarded to the company's Law Department.

The district court reviewed the summary investigative reports *in camera* and noted that they were "eye-openers."[4] The court ruled that the reports were not protected by the attorney-client privilege nor the attorney work product doctrine. The court found that the investigations were "undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice."[5] Specifically, the court referred to the Department of Defense regulations that "require contractors to have internal control systems such as [defendants'] COBC program" so that reported instances of alleged misconduct can be investigated and reported.[6] Applying the *Upjohn* "but for" test used to determine the applicability of the attorney-client privilege, the court concluded that the implementation of these "routine corporate, and apparently ongoing, compliance investigation[s]" were nothing more than the company's implementation of DOD requirements.[7] Accordingly, the court found that the investigative reports "would have been conducted *regardless of whether legal advice were sought*."[8]

The court also found persuasive that employees interviewed by COBC investigators were never expressly advised that the purpose of these investigations was to obtain "legal advice." The absence of this express notice was, according to the court, further evidence that these reports were not protected under the attorney-client privilege. Finally, the court noted additional characteristics of the investigation that weighed against applying the attorney-client privilege, including that employees were asked to sign confidentiality statements that discussed only potential "adverse business impact" (as opposed to legal implications) if disclosures were made, and that the interviews were conducted by non-attorneys.[9]

Similarly, the court held that these documents were not protected under the work-product doctrine. In its analysis, the court again emphasized the fact that these investigations were conducted "in the ordinary course of business" pursuant to DOD regulatory requirements, and thus these documents were not prepared in anticipation of litigation. The court also highlighted the timing of these investigations, particularly the fact that the investigations were conducted years prior to the unsealing of the *qui tam* litigation.

In light of the many statutory requirements, such as the Affordable Care Act, that require strong internal and external controls to prevent any potential misconduct, as well as the highly regulated nature of the current business environment overall, this case has troubling implications for industry. The case teaches that entities should consider engaging counsel early in an investigation if there is likely to be a need to protect the results under privilege. Moreover, the work product of the investigation, such as memoranda, reports, and the like, should make clear that they were prepared for counsel to assist in providing legal advice.

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[1] *See United States ex rel. Harry Barko v. Halliburton Company, et al.*, No. 1:05-CV-1276 (D.D.C. Mar. 6, 2014)(Doc. No. 15).

[2] *Id.* at 2.

[3] *Id.* at 3.

[4] *Id.* at 2.

[5] *Id.* at 5.

[6] *Id.* at 5-6.

[7] *Id.* at 6.

[8] *Id.* (emphasis added)

[9] *Id.* at 7.

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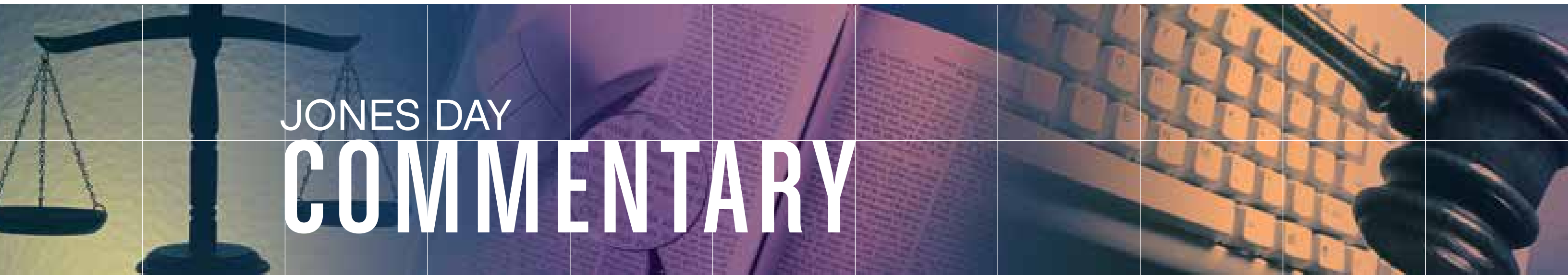

THE SEC'S FIRST DEFERRED PROSECUTION AGREEMENT INVOLVING AN INDIVIDUAL: QUESTIONS REMAIN

With much fanfare three years ago, the Securities and Exchange Commission ("SEC") announced a Cooperation Initiative as part of an overall effort to strengthen its enforcement program. Modeled on the 2001 "Seaboard Report," the Cooperation Initiative sought to encourage potentially culpable individuals to cooperate in SEC investigations in exchange for more lenient treatment by the agency. While offering cooperation agreements to a number of individuals, the agency only recently entered its first individual deferred prosecution agreement ("DPA"). The advantage of a DPA is the prospect of avoiding a formal SEC enforcement action altogether, rather than simply mitigating the charges and penalties in return for cooperation. Under the terms of the DPA, hedge fund manager Scott Herckis agreed to make certain admissions, including admitting to transferring money from a hedge fund to accounts owned and controlled by the general partner of the fund, and materially overstating the fund's monthly account statements and rates of returns.[1]

When the SEC first announced its individual Cooperation Initiative, it touted the initiative as a "game-changer" for its enforcement efforts, capitalizing on the "insiders' view into fraud and misconduct."[2] The initiative offers an incentive to those with unclean hands to be proactive, report violations, and offer assistance to the SEC as it pursues those violations. In determining whether and to what extent it should credit an individual's cooperation, the SEC will consider: (i) the assistance provided by the individual; (ii) the importance of the underlying matter; (iii) society's interest in ensuring the cooperating individual is held accountable for misconduct; and (iv) whether cooperation credit is appropriate based on the individual's risk profile (for example, whether he or she is a first-time offender).[3]

1 Press Release, Securities and Exchange Commission, "SEC Announces First Deferred Prosecution Agreement With Individual" (Nov. 12, 2013).
2 Press Release, Securities and Exchange Commission, "SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations" (Jan. 13, 2010).
3 *Id.*

While the Herckis DPA is the first between the SEC and an individual, the SEC reached DPAs in two prior instances with corporate entities that were also required to admit to wrongdoing. In 2011, global manufacturer Tenaris admitted to bribing Uzbekistan officials for government contracts.[4] After an internal investigation, Tenaris reported its violations to the SEC, and it agreed to cooperate with both the SEC and the Department of Justice in further investigations or proceedings. Tenaris also paid civil and criminal penalties and enhanced its internal compliance controls and policies. The SEC entered its second DPA in 2012 with Amish Helping Fund ("AHF"), a nonprofit organization that offers securities to fund home loans to Amish families.[5] AHF admitted that its offering memorandum was not kept up to date and contained material misrepresentations about both AHF and the securities it offered. Unlike Tenaris, AHF did not self-report, though it immediately cooperated with the SEC and took certain remedial steps.

Although DPAs are legally different from a traditional SEC enforcement action, which typically culminates in a court injunction or administrative cease-and-desist order against future violations, the Herckis DPA suggests there can be little if any practical difference in terms of sanctions and the burden on the respondent. In addition to offering full cooperation with any investigation or other proceeding initiated by the SEC and paying more than $50,000, Herckis agreed, by contract rather than by order of the SEC or a district court, to refrain from certain activities for five years, including: (i) associating with any broker, dealer, investment advisor, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; (ii) serving or acting as an employee, officer, director, member of an advisory board, investment adviser, or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter; and (iii) serving or acting as, or providing services to, any hedge fund or registered investment company.

Although Herckis was able to avoid the collateral consequences that can be triggered by an injunction or administrative order, it is otherwise difficult to discern how this DPA is substantively different from a traditional SEC enforcement action. As described above, in terms of sanctions and remedies, this may be a distinction without a substantial difference. In addition, like Tenaris and AHF, Herckis was obliged to admit the SEC's "findings" outlined in his DPA—including those detailing his involvement in fraudulent activity. These admissions can possibly be used against him by other governmental law enforcement agencies and private litigants. The SEC has indicated that, in contrast to its prior "no admit/no deny" policy, it will continue to seek these types of admissions—which have been required in *all* DPAs to date—in appropriate cases as it pursues its enforcement agenda.[6]

Another remaining question is what DPA-mandated cooperation will mean for individuals like Herckis. The Herckis DPA suggests that he is required to respond "fully and truthfully" to any inquiry—including those conducted by other law enforcement agencies—at the SEC's instruction. He must testify at trials or other judicial proceedings if so directed by the SEC. In short, it appears that Herckis may be deemed to have forfeited his Fifth Amendment privilege against self-incrimination regarding any ongoing or subsequent criminal investigation related to the subject of the DPA.

Notwithstanding the uncertainties raised by the SEC's limited use of DPAs to date and its overly general guidance on this subject, certain individuals and entities may find DPAs and other cooperation-oriented enforcement tools to be their best option. For example, individuals and entities in certain regulated industries, or those who engage in significant government procurement work, may find DPAs—even

4 Press Release, Securities and Exchange Commission, "Tenaris to Pay $5.4 Million in SEC's First-Ever Deferred Prosecution Agreement" (May 17, 2011).

5 Press Release, Securities and Exchange Commission, "SEC Announces Deferred Prosecution Agreement with Amish Fund" (July 18, 2012).

6 *See*, e.g., Mary Jo White, Chair, Securities and Exchange Commission, 5th Annual Judge Thomas A. Flannery Lecture, "The Importance of Trials to the Law and Public Accountability" (Nov. 14, 2013) (explaining why the SEC revisited its "no admit/no deny" policy, and noting her belief that "a public acknowledgment of the unlawful conduct" is "necessary to … ensure greater public accountability"); *see also* Alison Frankel, "SEC Enforcement co-director: We're bringing 'swagger' back" (Oct. 1, 2013), http://blogs.reuters.com/alison-frankel/2013/10/01/sec-enforcement-co-director-were-bringingswagger-back/ (citing SEC Co-Director of Enforcement Andrew Ceresney's comments on the agency's use of deferred prosecution agreements to require admissions when "'public airing of unambiguous facts serves an important public interest'").

with their flaws and ambiguities—preferable to traditional SEC enforcement actions that can trigger detrimental collateral consequences, such as government contractor debarment proceedings. It is critical that any individual or entity considering cooperation weigh both the benefits and risks of cooperation before deciding how to proceed.

Jones Day will continue to monitor developments regarding the SEC's implementation of its Cooperation Initiative.

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REGULATION FD IN THE TWITTER AGE

In its report on the use by the president of Netflix of his personal Facebook page to disclose important company news, the SEC disapproved of what was done, but made clear that companies can use social media channels to disseminate material non-public information to investors. The author discusses the Netflix case and suggests steps companies using such channels should take to avoid running afoul of the SEC and Reg FD.

By William S. Freeman *

Immediacy, spontaneity, and direct engagement with customers have made social media an essential tool for corporate communications. These very qualities, however, are potentially at odds with the SEC's Regulation Fair Disclosure ("Reg FD"), which requires companies discussing material information to use established channels of communication, and to announce such information in as broad and non-discriminatory a manner as possible.

Using social media to disclose material information, therefore, requires issuers to navigate a minefield. Unfortunately, the SEC has not been particularly generous with navigational aids. While it has repeatedly said that it would be "flexible" in interpreting its disclosure rules as new communications technologies emerged, it has also declined to issue bright-line guidance, instead referring to multi-factor tests that leave companies guessing whether particular practices might be acceptable.

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The SEC's recent Netflix investigation squarely raised – and partially answered – the question of whether social media posting could be FD-compliant. Soon after Netflix CEO Reed Hastings discussed important company news on his personal Facebook account in July 2012, the company's stock price jumped by 16%. Acknowledging general uncertainty about how the regulation applied to social media, the SEC decided not to sanction Hastings or Netflix, but issued a report suggesting that it disapproved of Hastings' actions, and that it would punish similar conduct in the future.[1]

The Netflix Report did not remove all of the uncertainty surrounding the use of social media for the dissemination of material information. It did, however,

[1] *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: Netflix, Inc., and Reed Hastings* ("Netflix Report"), Rel. No. 34-69279 (2013).

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stress the importance to public companies of developing policies and procedures that will insure compliance in a rapidly changing communications environment. In order to do this, it is necessary first to review the background of Reg FD and the SEC's efforts over the years to explain its contours.

THE GENESIS OF REG FD

The background to Reg FD is this: During the 1980s and 1990s, a systematic form of tipping became increasingly common as companies attempted to soften the impact of negative news by "guiding" individual analysts to change their projections of future performance, rather than making simultaneous disclosure to the market as a whole. Companies hoped to "walk the market down" artfully and gradually in order to avoid the kind of sudden stock drop that would invite a shareholder class action. Of course, selective disclosure could, and did, permit the analysts on the receiving end of the information to generate trading profits (or avoid losses) for their favored customers.

The SEC believed that such selective guidance was a form of tipping that eroded investor confidence in the integrity of the capital markets.[2] Some commentators, however, argued that it was not prohibited by Section 10(b).[3] The SEC eventually concluded that a new regulation was required to put an end to selective disclosure; the result was Reg FD, which was promulgated in 2000.

Meanwhile, during the 1990s, internet usage was exploding, and companies increasingly posted important news on their websites. Even at the end of the decade, however, the SEC did not believe that internet access was sufficiently widespread to permit companies to announce material news solely via the web. In 1999, for example, the SEC approved a Nasdaq Stock Market rule change that stated that "dissemination of news over the Internet is appropriate as long as it is *not* made available over the Internet before the same information is transmitted to, and received by, the traditional news services."[4]

REG FD: THE FIRST DECADE

Reg FD set forth the following basic framework for the disclosure of material information:

1. When an issuer *intentionally* discloses material, non-public information to investors or market professionals, it must make broad public disclosure of the information simultaneously to all market participants.

2. When an issuer *unintentionally* discloses material, non-public information (for example, when an officer gives an impromptu answer to an unanticipated question), it must make broad public disclosure "promptly" (generally, within 24 hours) after learning that the disclosure of material information has been made.[5]

In its disclosing release, the SEC made clear that the regulation was intended to restore investor confidence in the fairness of the markets by prohibiting companies from selectively providing "guidance" to favored audiences. If a piece of information, standing alone, was material, it must be disclosed to all market participants at the same time. The SEC took the definition of materiality from established case law: a fact is material if there is a "substantial likelihood" that a reasonable shareholder would consider it important.[6]

The SEC did not dictate what means companies must use to make material announcements. Rather, it placed the burden on the company to determine what method or combination of methods was "reasonably designed" to "effect broad and non-exclusionary distribution of information to the public." It acknowledged that as technology continued to evolve and more investors had

[2] *Final Rule: Selective Disclosure and Insider Trading*, Rel. No. 34-43154, (2000) ("Reg FD Release") at 2.

[3] *E.g.*, Paul B. Brountas, Jr., *Note: Rule 10b-5 and Voluntary Corporate Disclosures to Securities Analysts*, 92 Colum. L. Rev. 1517, 1529 (1992).

[4] Rel. No. 34-40988 (1999) (emphasis in original).

[5] 17 C.F.R. § 243.100(a)(1)-(2).

[6] *TSC Industries, Inc. v. Northway*, 426 U.S. 438, 448-49 (1976).

access to the internet, website-only posting might one day be a sufficient means of dissemination for some widely followed companies. It made clear, however, that this day was not yet at hand. It strongly suggested a disclosure paradigm that quickly became the industry standard: issue a press release, and if the press release is to be followed by a conference call, make the call generally available and provide adequate notice of it by press release and/or website posting.

When it issued Reg FD, the Commission stated that it would "monitor the impact of the regulation on information flow and assess whether the rule had chilled corporation communication or given rise to any other negative, unintended consequences."[7] One year later, a special study recommended that the Commission "should embrace technology to expand opportunities for issuers to disseminate information online," and "should make clear that options such as adequately noticed website postings, fully accessible webcasts, and electronic mail alerts would satisfy Regulation FD."[8]

Notwithstanding, it would be another seven years before the SEC's next pronouncement about the use of modern technologies to disclose information to investors. An August 2008 release stated that website-only disclosure might be sufficiently public "for some companies in certain circumstances," but still stopped short of an unqualified endorsement of this approach.[9] Whether website-only disclosure was sufficient would be analyzed on the basis of at least 13 non-exclusive factors, most of which dealt with the extent to which a company had designed and used its website to make it a "recognized channel of distribution," to keep important information current, and to make it as readily accessible to the securities marketplace as possible. As with the original dissemination of Reg FD, the key was whether website postings were "reasonably designed to provide broad, non-exclusionary distribution of the information to the public." Because the SEC was still not prepared to give a wholehearted endorsement of website-only posting of information, practitioners continued to recommend that companies use press releases, conference calls, and Forms 8-K as key components of their disclosure regimes.

THE ADVENT OF SOCIAL MEDIA

In 2008, Facebook and Twitter were each only two years old. "Social media" as a corporate communications tool was in its infancy and did not receive a mention in the SEC's August 2008 release. Today, Facebook claims to have in excess of one billion users, and Twitter claims more than 500 million. 97% of all businesses with marketing personnel use social media as part of their marketing platform, and 86% of such businesses consider social media important to their business.[10] Among Fortune 100 companies, 80% are active in one or more social media channels.[11] Consumer-oriented companies use Facebook posts and contests to cultivate fan loyalty, and even companies without a consumer focus create Facebook pages for their businesses that are akin to having a website on Facebook itself. Businesses regularly use Twitter's 140-character tweets to release news, market their products, and direct attention to special offers and new content.

As the landscape continued to evolve after 2008, the SEC's silence about the use of social media again left companies without official guidance. It is for this reason that the Netflix Report was so significant.

THE NETFLIX INVESTIGATION AND REPORT

Background Facts[12]

Netflix is an online entertainment service that provides movies and television programming to subscribers by streaming content through the internet and distributing DVDs through the mail. Recently, it has focused increasingly on its streaming business. In January 2012, it announced in a press release that it had streamed two billion hours of content in the fourth quarter of 2011. During year-end and fourth-quarter earnings calls, Reed Hastings, the CEO of Netflix, commented that this was important as a "measure of engagement and scale in terms of the adoption of our service …." Mr. Hastings also stated that he did not anticipate that Netflix would regularly report the number of hours streamed, but that the company would update

[7] Commissioner Laura S. Unger, *Special Study: Regulation Fair Disclosure Revisited*, December 2001, *available at*: http://www.sec.gov/news/studies/regfdstudy.htm.

[8] *Id.*

[9] *Commission Guidance on the Use of Company Web Sites*, Rel. No. 34-58288 (2008).

[10] Social Media Examiner, *2013 Social Media Marketing Industry Report* 7, *available at*: http://www.socialmediaexaminer.com/social-media-marketing-industry-report-2013/ (last visited Sept. 20, 2013).

[11] Funk, *Social Media Playbook for Business* 3 (2011).

[12] All of the facts in this section are taken from the Netflix Report, note 1 *supra*, except as noted.

that metric "on a milestone basis." Shortly thereafter, in a July 3, 2012 post on Mr. Hastings' personal Facebook page, he disclosed the news that for the first time, Netflix monthly viewing had exceeded one billion hours during the month of June, which was roughly a 50% increase over the streaming hours reported the previous January.

Netflix had not previously used Mr. Hastings' personal Facebook account to announce company information or milestones in the past, and, in fact, Mr. Hastings had previously stated that the company did not use social media to announce material non-public information, preferring instead to use investor letters, press releases, and SEC filings.

Netflix did not immediately distribute Mr. Hastings' comments via a press release, a post on the Netflix website, or a Form 8-K. However, the news contained in Mr. Hastings' personal post quickly reached the market over the next 24 hours, including through references in *The Los Angeles Times*, *Bloomberg News*, *Forbes*, *NBC News Online*, and *PCMag.com.*[13] As investors and news services became aware of the information, Netflix's stock price, which had been trading at $70.45 at the time of the posting, increased to $81.72 at the close of the following day. The SEC's Division of Enforcement opened an investigation.

The SEC's Report

In its report, the SEC acknowledged the emerging importance of social media as a tool for companies to communicate with the public, and public uncertainty over how Reg FD and the Commission's prior guidance would apply to social media disclosures. Ultimately, it stressed that the paradigm it had set forth in its 2008 guidance would continue to apply to any use of new communication technologies under Reg FD. It stated that the "central focus of this inquiry is whether the company has made investors, the market, and the media aware of the channels of distribution it expects to use, so these parties know where to look for disclosures of material information about the company and what they need to do to be in a position to receive this information."[14] The SEC stressed two fundamental points:

1. Company communications through social media require careful analysis under Reg FD, similar to the analysis applicable to the use of more traditional channels.

2. It is critically important that a company alert the public in advance regarding the social media channels of distribution it intends to use to disseminate material non-public information.

The report thus confirms that Reg FD's goal of ensuring broad, non-exclusionary distribution of material non-public information may be accomplished by the use of social media, so long as certain steps are followed. As with its past guidance, however, the SEC declined to state that any particular practices would or would not be permissible. It left it to companies to determine how to communicate information through social media, based on their own particular facts and circumstances.

HOW TO DISCLOSE VIA SOCIAL MEDIA AFTER *NETFLIX*

In light of the Netflix Report, the challenge for public companies is to take maximum advantage of the flexibility, customer engagement, and market penetration offered by social media, while at the same time disseminating material information in a simultaneous and non-discriminatory manner. This will require careful planning, rigorous training, and periodic re-examination of company policies. Anecdotal evidence suggests that public companies have not rushed to use social media platforms as preferred vehicles for disseminating material information, but there can be little doubt that social media will become an increasingly important part of the disclosure strategies of successful companies. Here are some important guidelines to observe.

- A company using social media as a means of disclosure should periodically review and update its corporate communications and Regulation FD policies. As new technologies emerge and gain market acceptance, companies must adapt to remain competitive. The expectations of investors looking for information will continue to evolve, and so long as companies meet investor expectations thoughtfully, systematically, and fairly, the SEC has indicated that Reg FD is flexible enough to accommodate these changes.

- The company should explicitly inform the marketplace that the company intends to use the selected media channel or channels and how it

[13] Joseph A. Grundfest, "Regulation FD in the Age of Facebook and Twitter: Should the SEC Sue Netflix?," Rock Center for Corporate Governance at Stanford University Working Paper No. 131, January 30, 2013.

[14] Netflix Report at 3.

intends to use those channels. The company should provide this information via traditional disclosure channels, such as press releases, current and periodic SEC reports, and the company's website.

- The company should determine which forms of social media are readily accessible by current or potential investors, and should confirm that any social media channels that are selected are up to date and that members of the public can easily navigate them to find posted company information.

- The company should only use outlets that are explicitly identified with the company. While the personal sites of company officers might be acceptable if the company has explicitly alerted investors in advance, the SEC has made clear that they are not a preferred vehicle for company communications. In any event, if a personal site is used, the content placed there must be subject to company review and control, so there is little advantage to the company in placing company information on a personal site, and there is additional administrative burden to both the company and the individual in doing so.

- If it alerts investors that it will use a particular social media channel, such as a corporate Twitter account, a company should use that channel regularly. If the SEC challenges a social media posting on a channel that has not been regularly used, the company will be hard pressed to show that investors have been alerted to the possibility that material company information will be disclosed through that channel.

- Companies should limit access to corporate social media channels to well-trained personnel only. All personnel who are authorized to communicate on behalf of the company should be comprehensively trained, and periodically retrained, to understand what they can and cannot say via social media. All others must be instructed not to use social media to communicate company information.

- Certain events will require more specific protocols and prohibitions in light of SEC rules and regulations. Among these are proxy contests, securities offerings, tender offers, and acquisitions, where extraneous communications could be viewed as offers or solicitations, or could violate prescribed "quiet periods."

- Companies should exercise caution with respect to spontaneous live-blogging or tweeting during a company event such as an earnings call, limiting access to trained personnel, as live communications could cause a carefully calibrated company message to go off script.

- Social media posts containing material company information should be treated like corporate press releases – that is, they should be circulated among appropriate gatekeepers and vetted by counsel.

- Finally, if, prior to alerting the public that a particular social media channel will be used, an unintentional disclosure of material non-public information has been made on a social media site, the error must be cured by promptly filing a Form 8-K or distributing a press release disclosing the information.

CONCLUSION

Since Reg FD was promulgated in 2000, technological innovation has revolutionized the ways in which companies communicate with their customers, their markets, and their investors. As new technologies continue to emerge, companies will continue to seek new ways to engage with their target audiences. The Netflix Report makes clear that companies can use social media channels to disseminate material non-public information to investors. It also makes clear, however, that doing so will require companies to be thoughtful and systematic. While this may seem antithetical to the seeming spontaneity of social media communications, it is key to staying on the right side of the SEC. ■

JONES DAY®

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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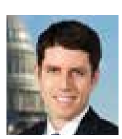

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CONTENTS

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.

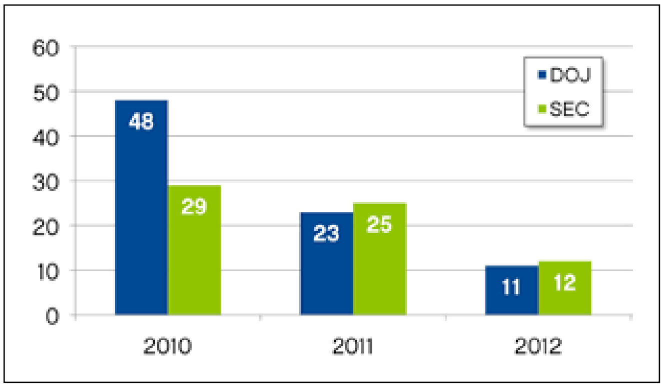
The raw number of Department of Justice ("DOJ") prosecutions and Securities and Exchange Commission ("SEC") enforcement actions involving FCPA violations declined from 2011 to 2012. Similarly, the aggregate amount of corporate fines and penalties collected by the U.S. government went down as well. Some 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

The last year of FCPA enforcement featured five noteworthy FCPA developments that demonstrate the continuing risk of FCPA enforcement and related civil actions.

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."

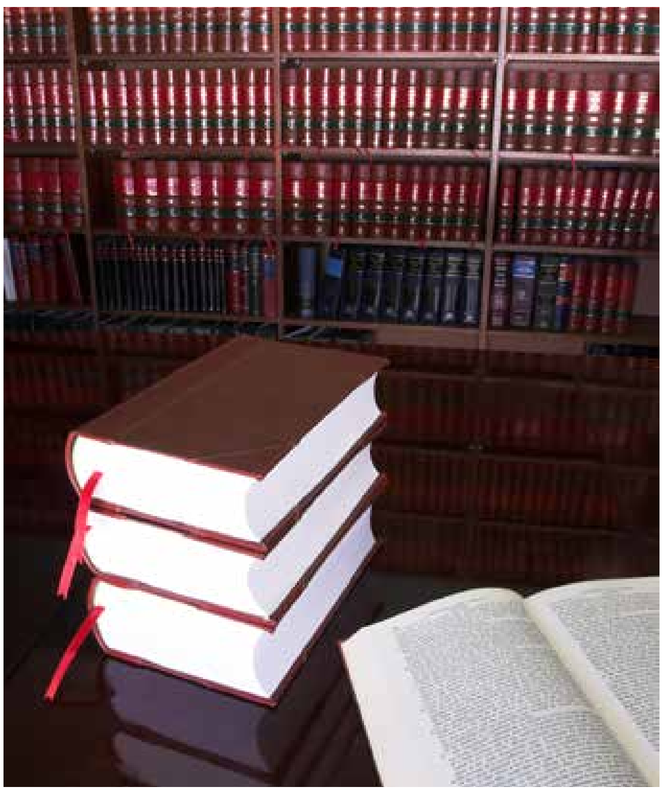
These two cases indicate that U.S. authorities may be willing to decline to prosecute FCPA violations where companies demonstrate robust and effective compliance programs and provide significant and meaningful cooperation to the authorities.

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

The prospect of concurrent or subsequent private litigation may become an increasingly likely collateral consequence for companies resolving FCPA allegations with U.S. authorities.



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.

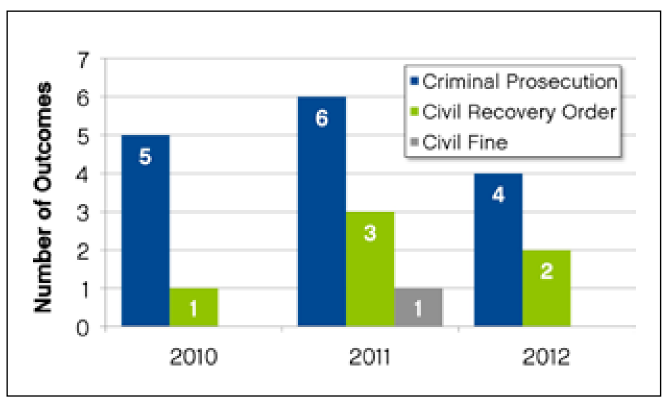
* * *

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.

BRIBERY AND CORRUPTION CASES, 2010-2012



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 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.

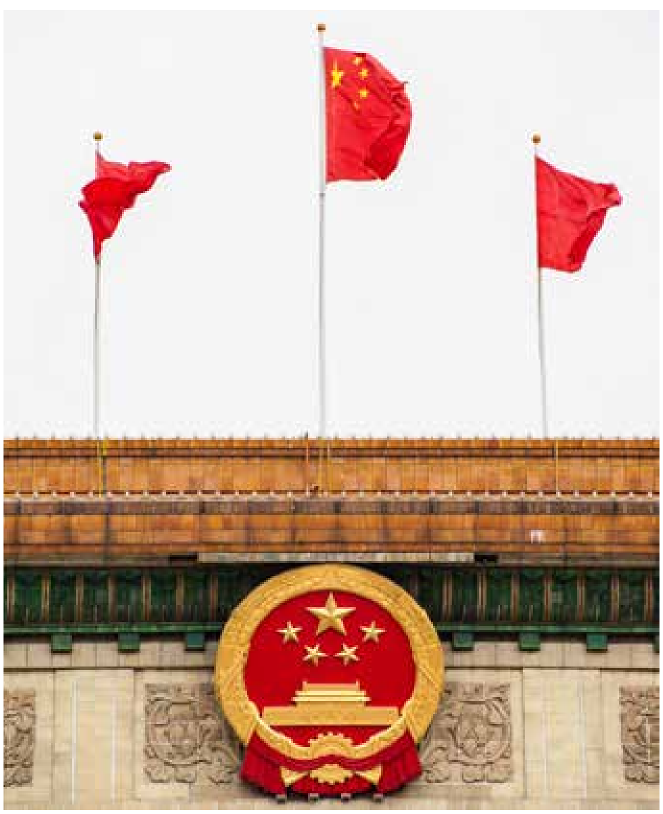
In contrast, in recent months, the Chinese government has shown how swiftly it can act when it comes to punishing foreign companies that have allegedly run afoul of Chinese anti-bribery or unfair competition laws. Indeed, administrative and criminal enforcement actions ensnared over a dozen multinationals 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.

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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 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 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.

> 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...

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

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]

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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 extraterritorial 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 extraterritorial 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, Surcurrency. 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.

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.

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 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 Electronik. 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

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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

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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.

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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.*

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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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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).

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Road to Resilience: Risk Management as a Key Board Leadership Responsibility

A Lockton Sponsored Report

MArch 2014

Background

Risk management is one of the most important responsibilities that individual Board members have in all companies, irrespective of their size, ownership, or sector. This responsibility must be fulfilled and be visible to all their stakeholders.

This is important on many levels to protect their license to operate, provide comfort to investors, and to ultimately satisfy their customers that they are a long-term partner.

The traditional risk management approach of relying on a process around the three lines of defence, namely risk and control in operations, centralised oversight functions, and independent verification was found in the previous report "Roads to Ruin" to be flawed when examining a number of the corporate failures that took place over the last ten years.

Of equal concern was that, in a number of organisations, there was a very apparent risk "glass ceiling" between employees, senior management, and boards, where risk management concerns were not communicated to and therefore not understood by those running the business.

The challenge of identifying how to overcome these potential shortfalls in corporate risk management robustness is being addressed by industry and regulators alike. For example, the U.K's Financial Reporting Council (FRC) has issued a consultation paper on changes to the U.K. governance code to address this very same challenge.

However, the truth is that although a number of companies did fail, or at least suffered significant setbacks through their risk management failures, many companies survived and thrived through the corporate challenges of the economic downturn.

This raises the questions:

- What did those companies do, and what did they know that ensured resilience and created opportunity?
- Are those characteristics of knowledge and action common across the companies, irrelevant of sector or ownership?

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"Roads to Resilience" the report

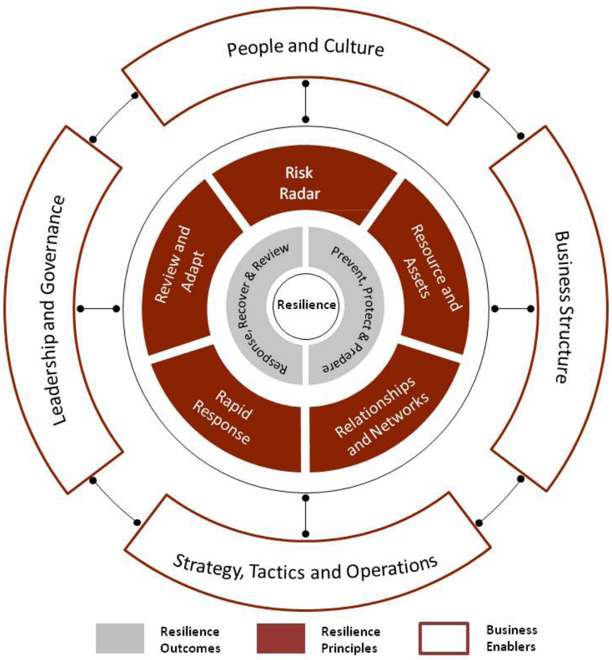
Lockton, along with PWC and Crawford, sponsored a report which was commissioned by Airmic and undertaken by Cranfield School of Management to answer these questions.

Cranfield undertook a detailed review of the process, cultures and behaviours of eight U.K. corporates to gain an understanding of what creates resilience in their organisations. This was achieved not by relying on publically available data, but through in-depth interviews throughout the organisation, not just senior management and risk professionals. This ensured what they were told was not aspirational, but how these companies ran their business on a day-to-day basis.

The findings

1. The report found firstly that whilst the companies (due to the product offering) had a lot of differences, what they all have in common are **five** clear principles of resilience. These allowed them to become and remain a resilient organisation. The report identified that it was not sufficient to have one or two of these principles; all five must be present to achieve true resilience
2. Secondly companies cannot just adopt these principles and become resilient overnight. The culture and behaviours of the organisation are absolutely key in ensuring success. These principals have been labelled as business enablers in the report and again were all present in each of the companies studied.

The model



The five principles of risk resilience

Resilient organisations have exceptional risk radar. Risk radar helps an organisation identify issues before they have developed into major incidents. It acts as an early warning, helps risks to be considered in aggregate, and allows different types of risk information to be collated. This is achieved by ensuring that everyone in the organisation is aware of the importance of risk and the need for vigilance in relation to strategy, tactics, and operations. No one individual and no single function (such as the risk management department) can be as effective at detecting risks as an organisation with high involvement.

Resilient organisations have resources and assets that are flexible and diversified. They establish clear operational risk appetite positions and then identify potential weaknesses through scenario analyses and stress-testing of strategy, tactics, and operations. They use the diversity of resources to reduce risk and develop the necessary skills for risk management throughout the organisation and beyond. This could include avoiding single points of failure or reducing dependence on single critical resources, including suppliers, markets, brands, products, investors, knowledge, and customers. Resilient organisations are aware of intangible assets, such as reputation, and develop proactive strategies to manage these assets.

Resilient organisations value and build strong relationships and networks. Resilient organisations do not just manage risk within their own organisational boundaries. They proactively manage risk throughout their networks of customers, suppliers, contractors, and business partners. A customer-centric approach is crucial, as it shapes the way all types of relationships are formed. Openness with all stakeholders engenders trust and loyalty, as well as a desire to collaborate and share information. This means that when adversity hits an organisation, all stakeholders communicate with each other.

Resilient organisations have the capability to ensure decisive and rapid response. A key characteristic of rapid response is that an organisation not only has defined processes for dealing with predictable risks, but (perhaps more importantly), also the ability to respond to and cope with the unexpected. To achieve this, employees must have the skills, structures, motivation and empowerment to respond appropriately. They are able to respond swiftly to an incident to ensure that it does not escalate into crisis or disaster and to restore the organisation to a perhaps new normal as quickly as possible.

Resilient organisations review and adapt to changes and adverse events. Risk management procedures and staff training are always being tested, refined, and enhanced. This results in employees being self-critical and willing to openly admit mistakes and report near-miss incidents in the knowledge that this openness will strengthen the resilience of the organisation. Every potential adverse event or circumstance is identified, analysed, and evaluated, so that lessons are learned and improvements made to strategy, tactics, processes, and capabilities.

Business Enablers

The business enablers identified across all organisations are:

- People and culture
- Business structure
- Strategy, tactics and operations
- Leadership and governance.

The manner in which the business enablers lead to increased resilience are context-specific, as they depend on the size, nature, and complexity of the organisation, as well as its business environment and wider capabilities.

All organisations have these enablers in place, but their differing nature indicates why there are different roads to resilience. Each business enabler can be enhanced to change the way an organisation views risk management and the achievement of increased resilience.

Through utilising these enablers, risk management becomes part of the culture of the organisation and reflects in the behaviours of all employees and others in their day-to-day actions.

Where are companies on the road to resilience?

Through analysing the eight companies studied and cross referencing to the earlier "Roads to Ruin" report, it was possible to identify four distinct points on the "Roads to Resilience" journey.

These were as follows:

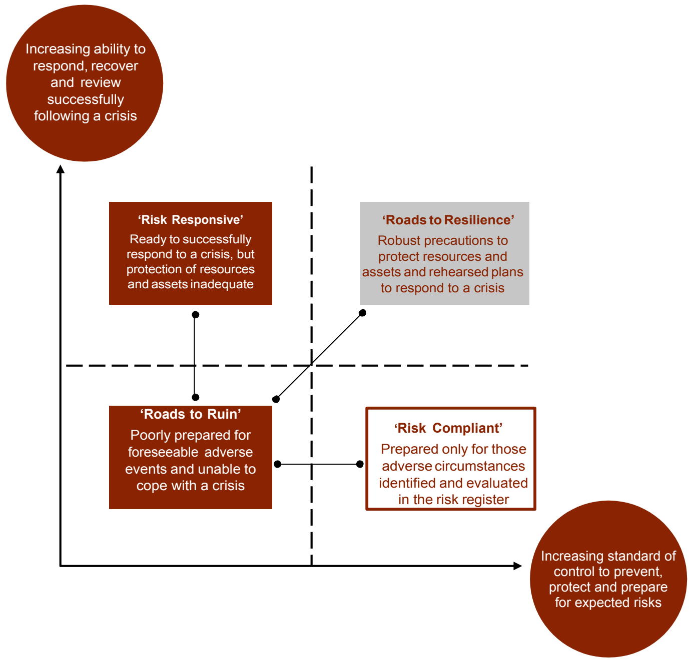
Roads to Ruin: Poorly prepared for foreseeable and adverse events and unable to cope with a crisis.

Risk Compliant: Prepared only for those adverse circumstances identified and evaluated in the risk register.

Risk Responsive: Ready to successfully respond to a crisis, but protection of resources and assets is inadequate.

Roads to Resilience: Robust precautions to protect resources and assets and rehearsed plans to use in a crisis.

The above points are not sequential as a Risk Resilient company will utilise both the risk-responsive and risk-compliant characteristics in a given circumstance where such an approach is required.



Do resilient companies gain from better insurance terms and conditions and pricing?

As stated at the start of this paper, through creating a more resilient organisation companies attract investment and customer loyalty and demonstrate the sustainability of their offering. However, do insurers recognise and value the broader risk management efforts?

This research is the first of its kind to so clearly identify the principles and enablers that create a resilient company. The idea of understanding those risk factors that may determine a company's financial success have long been understood and monitored by the investment community.

The level of clarity that "Roads to Resilience" provides, creates the same opportunity for insurers to differentiate those companies outside of market cycles that will consistently provide a risk that is better than their peers, therefore, allowing insurers to invest in their partnership with these well-managed companies.

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Christine Beliveau is a Senior Managing Director at FTI Consulting and is based in San Francisco. Ms. Beliveau has extensive experience in performing forensic accounting investigations of public companies, ranging from small to large Fortune 500 companies both domestically and internationally. She has aided companies with the typical fallout of such matters, like restatements of financial statements, aiding attorneys in responding to derivative and class actions suits, reporting to the special committee of board of directors or audit committees, presenting to the SEC and other regulatory bodies and interacting with the external auditors. Her experience includes technology, healthcare, manufacturing, professional services, and distribution industries.

Experience

Ms. Beliveau also has experience providing other finance advisory services including due diligence consulting, internal audit, assessments of internal control policies and aiding companies through complex accounting issues often related to restatements.

Prior to joining FTI Consulting, Ms. Beliveau was a Managing Director at Huron Consulting Group and was a Senior Managing Director at LECG in San Francisco and was a Senior Audit Manager with both KPMG and Arthur Andersen in Silicon Valley.

Ms. Beliveau holds BComm in accountancy (with distinction) from Concordia University and Graduate Diploma in accountancy from Concordia University. She is a Certified Public Accountant (inactive), a Chartered Accountant and is Certified in Financial Forensics. She is a member of the American Institute of CPAs and the Association of Certified Fraud Examiners.

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Expertise

- Corporate Fraud & Investigations
- Forensic Accounting & Investigations
- Foreign Corrupt Practices Act (FCPA)
- SEC Investigations
- White Collar Defense

Related Industries

- Healthcare & Life Sciences
- Retail & Consumer Products
- Telecom, Media & Technology

Certifications

CPA (inactive)
CFF
CA

Education

BComm, Accountancy, Concordia University

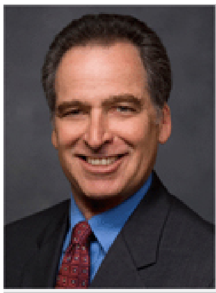
Graduate Diploma, Accountancy, Concordia University

Association

American Institute of Certified Public Accountants (AICPA)

American Bar Association (ABA)

Association of Certified Fraud Examiners (ACFE)



William S. Freeman

Partner

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Bill Freeman litigates securities and complex commercial cases. For over 30 years he has represented companies, officers, directors, and investors in a wide array of proceedings. He has served as lead defense counsel in more than 40 class action and derivative suits, litigated corporate control and merger-related cases, and defended dozens of investigations and enforcement actions by the SEC and other regulators. He has extensive jury trial experience and has led more than 25 internal investigations in the last five years.

Bill also advises public companies and their officers, directors, principal shareholders, and underwriters on a broad range of issues including public disclosure, fiduciary duties, insider trading, and litigation risk reduction.

Prior to joining Jones Day in 2010, Bill represented the former general counsel of McAfee in the successful defense of an SEC enforcement action alleging stock option backdating. The result obtained for the client was unprecedented in all of the SEC's backdating cases: the SEC voluntarily dismissed all charges against the general counsel with prejudice. He also secured numerous victories in securities cases on motions, in trial and on appeal, for a broad range of companies including BroadVision, Ditech Networks, First Virtual, InterMune, iPass, Peet's Coffee & Tea, Vans, Vaxgen, and Verity.

At the start of his career, Bill served with the U.S. Department of Justice, where he won significant monetary recoveries for the government in cases of official corruption, procurement fraud, and abuse of government programs.

Bill is a member of the American Bar Association, the State Bar of California, and the Santa Clara County Bar Association.

EXPERIENCE HIGHLIGHTS

Advising ethnic minority groups in Burma on peace negotiations with the government

Outsourcing company defends against shareholder class action alleging 10b-5 claim involving corporate governance disclosures

Audit committee of energy company involved in internal investigations

AREAS OF FOCUS

Securities Litigation & SEC Enforcement
Merger & Acquisition Litigation
SEC Investigations & Proceedings
Securities Fraud Class Actions
Shareholder Derivative Actions

HONORS & DISTINCTIONS

Named to *Northern California Super Lawyers* (2006-2013)

Named as one of "Silicon Valley's Top Legal Eagles" by *San Jose Magazine* (2005-2008)

Listed in *The Best Lawyers in America* for securities litigation and derivatives and futures law (2007-2014)

LANGUAGES

EDUCATION

Harvard University (J.D. cum laude 1978; Editor, Harvard Law Review; B.A. summa cum laude 1974; Phi Beta Kappa)

BAR ADMISSIONS

California; all California state courts; all U.S. District Courts in California; U.S. District Court for the District of Columbia; U.S. Supreme Court; U.S. Courts of Appeals for the First, Ninth, and Tenth Circuits; and U.S. Court of Federal Claims

GOVERNMENT SERVICE

Trial Attorney, Civil Division, U.S. Department of Justice (1978-1981)

GOVERNANCE RISK MANAGEMENT GROUP

LOCKTON®

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Professional Profile

Dana is a Senior Vice President with Lockton Companies, LLC, and the Director of the Governance Risk Management Group.

He has provided a broad range of governance and risk management consulting and transactional services to public, private, for-profit, and not-for-profit organizations for the past 31 years.

He is one of the country's leading D&O and professional liability brokers – a noted expert in the areas of directors' and officers' legal liability, investment management professional liability, governance infrastructure design, board effectiveness, director accountability, organizational compliance efficacy, and associated risk mitigation strategies.

Dana is also the co-chair of Lockton's Investment Management Advisory Group, advising international investment management, private equity, hedge funds, and mutual funds.

Prior to his career in risk and insurance management, Dana was a federal agent with the Office of Special Investigations (OSI) – criminal and counterintelligence.

Previous Positions

- Marsh and McLennan Companies
  Senior Vice President
  National Practice Leader – Advisory
  Chief Operating Officer – BoardWorks
  Principal – Mercer Delta

- Corroon & Black Corporation
  Region Head
  Public Entities National Company

Professional Designations and Affiliations

- Forum for Corporate Directors (FCD)
  Member, Board of Directors
  Chair, Governance Committee
- University of California, Irvine
  FCD Faculty Member
  Paul Mirage School of Business
  Governance Risk Management
- Corporate Directors Forum (CDF)
- Stanford University Directors College
- National Association of Corporate Directors
- Directors Roundtable
- Lecturer
  University of California, Los Angeles
  University of Texas
  Rice University
  Stanford University
  University of Delaware
  Directors Roundtable
  American Bar Association
  American Corporate Counsel
  Society of Corporate Secretaries
  Financial Executives International
  American Electronic Association
  California Biotechnology Summit
- Professional Liability Underwriters Society
- Certified Insurance Counselor (CIC)
- Associate in Risk Management (ARM)