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Telia Company AB Reaches $965 Million Corruption Settlement Arising from Telephone Operations in Uzbekistan

In a second resolution arising from the operation of the telecommunications industry in Uzbekistan, Telia Company AB and its Uzbek subsidiary, Coscom LLC, have agreed to pay a total of $965 million to regulators in the United States, Sweden, and the Netherlands for making a number of allegedly improper payments to the daughter of the now-deceased former President of Uzbekistan.[1] The Telia resolution follows a similar settlement by VimpelCom Limited (now known as Veon), with the same

Continued on page 2

1. *See* United States Department of Justice, Press Release No. 17-1035, "Telia Company AB and Its Uzbek Subsidiary Enter into a Global Bribery Resolution of More than $965 Million for Corrupt Payments in Uzbekistan," Sept. 21, 2017. Although the settlement documents refer to the recipient of the payments as "an Uzbek government official and a relative of a high-ranking Uzbek government official," during his allocution related to Coscom's guilty plea, Telia's general counsel acknowledged that the recipient was Gulnara Karimova, the daughter of the now-deceased Uzbek President, Islam Karimov.

Telia Company AB Reaches $965 Million Corruption Settlement Arising from Telephone Operations in Uzbekistan

Continued from page 1

US and the Dutch on February 18, 2016.[2] VimpelCom paid a total of $795 million to resolve allegations related to the operation of its Uzbek subsidiary, Unitel LLC, also arising from alleged payments to the daughter of the former Uzbek President.

The Telia settlement followed the same pattern as the VimpelCom resolution. Telia's agreement with the U.S. Department of Justice ("DOJ") was based upon the entry of a deferred prosecution agreement for allegedly conspiring to violate the Foreign Corrupt Practices Act ("FCPA").[3] DOJ charged the company with conspiracy to violate the anti-bribery provisions. As in VimpelCom, Telia's Uzbek subsidiary was required to plead guilty to the same conspiracy allegation. Based upon these criminal violations, Telia agreed to pay criminal penalties to the United States totaling $274.6 million, including the payment by Telia of a $500,000 criminal fine for Coscom and an additional $40 million in forfeiture for the subsidiary.[4] The U.S. Securities and Exchange Commission ("SEC") separately entered into a settled cease and desist order based upon the same underlying conduct and required Telia to pay disgorgement in the amount of $457 million.[5] The SEC order found that Telia had violated the anti-bribery and internal controls provisions of the FCPA. Of the SEC's disgorgement amount, $208.5 million has been allocated to the Swedish Prosecution Service. However, to collect that amount, Sweden must first prove criminal corporate liability; if the Swedish authorities do not collect that amount, then it will be paid to the SEC. In separate proceedings, Sweden is prosecuting three individuals including the former Telia CEO, Lars Nyberg, and the former Eurasia head Tero Kivisaari. Telia also entered into a settlement with the Public Prosecutor Service of the Netherlands, pursuant to which it agreed to pay an additional $247 million.[6] As a result of adjustments and credits among the various prosecutors, the total payments by Telia came to $965 million.[7] The total amount of the settlement made it the fourth largest FCPA resolution in history.[8]

Continued on page 3

2. *See* United States Department of Justice, Press Release No. 16-194, "VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More Than $795 Million; United States Seeks $850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme," Feb. 18, 2016.
3. Letter from United States Department of Justice to Counsel for Telia, dated Sept. 21, 2017. Available at https://www.justice.gov/usao-sdny/press-release/file/997851/download.
4. *Id.* at 8-9.
5. *In the Matter of Telia Company AB,* Order Instituting Cease-and-Desist Proceedings, Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order, Securities Exchange Act Rel. No. 81669, Accounting and Auditing Enforcement Rel. No. 3898, Admin. Proc. File No. 3-18195 (Sept. 21, 2017).
6. United States Department of Justice, Press Rel. No. 17-1035.
7. *Id.*
8. *See* The FCPA Blog, "Telia Tops Our New Top Ten List (After Doing Some Math)," Sept. 22, 2017 (explaining that the Telia settlement is the fourth largest in history, if the $965 million figure is discounted by the amounts that will be paid to the Netherlands authorities, rather than to the U.S.; if the total amount were paid to the U.S., then it would be the largest FCPA settlement in history).

Telia Company AB Reaches $965 Million Corruption Settlement Arising from Telephone Operations in Uzbekistan

Continued from page 2

The underlying allegations against Telia and Coscom involved a series of payments between 2007 and 2010 that totaled $331 million. These payments allegedly arose from a "corrupt partnership" with the Uzbek President's daughter, Gulnara Karimova, that began in 2007 with Telia's initial investment in Coscom and continued with additional payments in the form of a $2 million cash payment, a $30 million payment for communication frequencies, a $220 million payment for an interest in Coscom that allegedly had been gifted to Karimova, and an additional $70 million in payments in 2010 for additional frequencies.[9]

The DOJ found that as a result of these payments, Telia had realized a gain of $457 million from its Uzbek operations.[10] This amount became the basis for the SEC's disgorgement figure and also was the base amount for the sentencing guideline calculations by the DOJ. For the DOJ, the calculation yielded a penalty range of $731 million to $1.462 billion.[11] Telia had not self-reported to the DOJ,

"The total amount of the settlement made it the fourth largest FCPA resolution in history."

but received a 25 percent departure below the bottom of the fine range based upon full cooperation and extensive remedial measures, an enhanced compliance program and other factors.[12] The DOJ therefore agreed to a total criminal penalty of $548.6 million.[13] In addition, the DOJ gave Telia full credit for its $274 million payment to the Netherlands authorities – effectively reducing the DOJ's portion of the criminal penalty to $274.6 million.[14] Finally, based upon the remedial measures and compliance program implemented by the Telia, the DOJ concluded that no monitor needed to be appointed and Telia has no periodic reporting requirements

Continued on page 4

9. *United States v. Telia Company AB*, Information, ¶¶ 18-58, 17 Cr. 581 (GBD) (S.D.N.Y. Sept. 21, 2017).
10. Letter from United States Department of Justice to Counsel for Telia, ¶ 7.
11. *Id.*
12. *Id.* ¶ 4.i.
13. *Id.* ¶ 7.
14. *Id.*

Telia Company AB Reaches $965 Million Corruption Settlement Arising from Telephone Operations in Uzbekistan

Continued from page 3

regarding the remediation and implementation of its compliance measures.[15] Telia nevertheless is required to report "any evidence or allegations of conduct that may constitute a violation of the FCPA anti-bribery provisions" during the next three years.[16]

Continued on page 5

15. *Id.* ¶ 4.e.

16. *Id.* ¶ 6.

U.S. Appellate Decision Limits Use of Foreign Compelled Testimony in Cross-Border Investigations

A recent appellate decision in the United States is likely to impact a wide range of cross-border investigations by restricting the ability of U.S. prosecutors to use testimony compelled in other jurisdictions.

On July 19, 2017, in *United States v. Allen,* the U.S. Court of Appeals for the Second Circuit reversed the fraud convictions of two defendants arising out of their attempts to manipulate the London Interbank Offered Rate (the "LIBOR").[1] Judge José Cabranes, writing for a unanimous panel, held that the Fifth Amendment's prohibition on the use of compelled testimony in criminal proceedings applies even when a foreign sovereign has compelled the testimony. This article provides guidance on what the *Allen* decision may mean for future cross-border investigations.

I. The Second Circuit's *Allen* Decision

A. Background

Anthony Allen and Anthony Conti, citizens and residents of the UK, worked at the London office of Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A. ("Rabobank") in the 2000s. They were responsible for the bank's U.S. dollar LIBOR submissions. By 2013, UK and U.S. enforcement agencies were investigating Allen and Conti for their roles in suspected manipulation of LIBOR.[2]

The UK Financial Conduct Authority ("FCA") interviewed Allen and Conti using powers of compulsion under the Financial Services and Markets Act 2000 ("FSMA").[3] The FCA also compelled testimony from one of Allen and Conti's co-workers, Paul Robson.[4] Under the FSMA, failure to testify could result in imprisonment,[5] and compelled interviewees are granted only "direct use" – but not "derivative use" – immunity.[6] In November 2013, the FCA initiated a regulatory enforcement action against Robson, who had denied any improper conduct during

Continued on page 6

1. *United States v. Allen,* No. 16 Cr. 898, 2017 WL 3040201 (2d Cir. July 19, 2017).
2. *Id.* at *8.
3. *Id.* at *1, 9. The FCA replaced the U.K.'s Financial Services Authority in April 2013.
4. *Id.* at *5.
5. *Id.* at *1, 9.
6. *Id.*

U.S. Appellate Decision Limits Use of Foreign Compelled Testimony in Cross-Border Investigations

Continued from page 5

his testimony.[7] Following its standard procedures, the FCA disclosed to Robson the relevant evidence against him, including Allen and Conti's compelled testimony.[8] Robson closely reviewed transcripts of that testimony, annotating certain passages and taking copious handwritten notes.[9]

Shortly thereafter, the FCA stayed its case against Robson.[10] In April 2014, a grand jury in the Southern District of New York charged Robson.[11] Three months later, Robson pleaded guilty and became an important cooperator, substantially assisting the DOJ with developing its case against other suspects.[12]

In October 2014, Allen and Conti were charged with one count of conspiring to commit wire fraud and bank fraud, in violation of 18 U.S.C. § 1349, as well as several counts of wire fraud, in violation of 18 U.S.C. § 1343.[13] Robson served as the sole source of certain material information supplied to the grand jury that indicted Allen and Conti.[14] In particular, an FBI Special Agent relayed to the grand jury the information derived from Robson. Prior to trial, Allen and Conti moved under *United States v. Kastigar*[15] to dismiss the indictment or suppress Robson's testimony[16]; the district court, however, declined to address any *Kastigar* issues before trial.[17]

The government then called Robson to the witness stand during Allen and Conti's trial, and Robson provided significant testimony inculpating them.[18] The jury ultimately convicted Allen and Conti on all counts, finding that they had illegally adjusted their LIBOR submissions to benefit the trading positions of Rabobank derivatives traders during the period of roughly 2006 through 2008.[19]

Following trial, the district court held a two-day hearing on *Kastigar* issues, during which Robson and the FBI Special Agent testified.[20] Notably, Robson agreed at the

Continued on page 7

7. *Id.* at *8, 9.
8. *Id.* at *9.
9. *Id.*
10. *Id.* at *1, 9.
11. *Id.*; *see also* FCA Final Notice against Paul Robson, February 27, 2015.
12. *Id.* at *9–10.
13. *Id.* at *10.
14. *Id.* at *8, 10.
15. *Kastigar v. United States*, 406 U.S. 441 (1972).
16. *Allen*, 2017 WL 3040201, at *10.
17. *Id.*
18. *Id.* at *8.
19. *Id.* at *10.
20. *Id.*

U.S. Appellate Decision Limits Use of Foreign Compelled Testimony in Cross-Border Investigations

Continued from page 6

hearing that the testimony that he gave to the FCA – prior to his exposure to Allen and Conti's compelled testimony – differed markedly from his trial testimony.[21]

Nonetheless, the district court held that Robson's review of the defendants' compelled testimony did not taint the evidence he later provided.[22] The government, explained the district court, had shown an independent source for such evidence: Robson's "personal experience and observations."[23] Ultimately, the district court sentenced Allen to two years' imprisonment and Conti to a year-and-a-day's imprisonment.[24]

"[T]he Court held that the Fifth Amendment's prohibition on the use of a defendant's compelled testimony in U.S. criminal proceedings applies even when a foreign power has compelled the testimony."

B. Appeal

On appeal, the Second Circuit reversed the defendants' convictions and dismissed the indictment.[25] First, the Court held that the Fifth Amendment's prohibition on the use of a defendant's compelled testimony in U.S. criminal proceedings applies even when a foreign power has compelled the testimony.[26]

The Court distinguished the Fifth Amendment's protection against self-incrimination from the Fourth Amendment's protections.[27] In contrast to the exclusionary rules, which were crafted as remedies to deter U.S. officers' unconstitutional actions on the field, the self-incrimination clause's prohibition on the use of compelled testimony arises from the text of the Constitution itself and directly addresses what occurs in American courtrooms.[28] In addition, the clause's proscription is not premised upon the misconduct or illegality of the agency that compelled the testimony, but upon the testimony's use in American courts.[29]

Continued on page 8

21. *Id.* at *21.
22. *Id.* at *11.
23. *Id.*
24. *Id.* at *2.
25. *Allen*, 2017 WL 3040201, *1, 27.
26. *Id.* at *13.
27. *Id.* at *12–13.
28. *Id.* at *13.
29. *Id.*

U.S. Appellate Decision Limits Use of Foreign Compelled Testimony in Cross-Border Investigations

Continued from page 7

Furthermore, the Court rejected the government's concerns that the prohibition on foreign compelled testimony's use could scuttle the U.S. prosecution of criminal conduct that traverses international borders.[30]

Next, the Court held that the district court had erred in finding that the government had satisfied its heavy *Kastigar* burden.[31] In *Kastigar*, the Supreme Court upheld the constitutionality of compelling testimony in exchange for "use and derivative use" immunity, finding that the scope of the protection afforded was "coextensive with the scope of the [Fifth Amendment] privilege."[32] The *Kastigar* Court highlighted the breadth of use and derivative use protection, observing that the "total prohibition on use provides a comprehensive safeguard."[33] *Kastigar* also provided teeth to enforce this protection; the government bears "the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."[34]

Here, the district court had determined that the evidence Robson supplied was untainted based on Robson's assertion to this effect, as well as the existence of corroborating evidence for his trial testimony.[35] But this, the Second Circuit explained, did not satisfy *Kastigar's* demands. Following in the D.C. Circuit's footsteps, the Second Circuit held that when the government uses a witness who has had substantial exposure to a defendant's compelled testimony, it is required to prove – at a minimum – that the witness's review of the testimony did not shape, alter, or affect the evidence used by the government.[36]

Moreover, the Court held that a bare, generalized denial of taint from a witness who has materially altered his testimony after being substantially exposed to defendant's testimony does not suffice to prove that the testimony was derived from a wholly independent source.[37] The government failed to meet its burden of proof here through Robson's conclusory denial responses to its leading questions during the *Kastigar* hearing.[38]

Continued on page 9

30. *Id.* at *16–17.
31. *Id.* at *21.
32. *Kastigar*, 406 U.S. at 453.
33. *Allen*, 2017 WL 3040201, *20 (quoting *Kastigar*, 406 U.S. at 460).
34. *Id.*
35. *Allen*, 2017 WL 3040201, *21.
36. *Id.*
37. *Id.* at *24.
38. *Id.* at *23, 27.

U.S. Appellate Decision Limits Use of Foreign Compelled Testimony in Cross-Border Investigations

Continued from page 8

Lastly, the Second Circuit held that the impermissible use of the defendants' compelled testimony before the petit and grand juries was not harmless beyond a reasonable doubt.[39] After all, Robson, the sole LIBOR submitter to testify on behalf of the government at trial, was the unique source of particularly damning evidence.[40] The significance of Robson's testimony was underscored by the fact that the DOJ did not charge Allen and Conti until Robson became a cooperator.[41]

II. Impact on Cross-Border Investigations

A. What Types of Cases Would Be Affected?

The *Allen* decision is likely to have a wide-ranging impact given how broadly the DOJ, the SEC, and the Commodities Futures Trading Commission ("CFTC") construe their jurisdiction. The same day the *Allen* decision was issued, Acting Assistant Attorney General Kenneth A. Blanco delivered a speech reaffirming that the DOJ's "biggest investigations are increasingly transnational, often involving multiple foreign jurisdictions."[42] As a result, Acting Assistant Attorney General Blanco explained that, from the DOJ's perspective, "we increasingly find ourselves looking across the globe to collect evidence and identify witnesses necessary to build cases, requiring greater and closer collaboration with our foreign counterparts."[43]

In *Allen*, the Second Circuit recognized the same trend, noting that cross-border prosecutions have become more common and that "[t]he rise in non-prosecution agreements and deferred prosecution agreements between the U.S. and foreign entities for misconduct occurring abroad attests to this new reality."[44] The Court highlighted three areas where U.S. law enforcement agencies frequently cooperate with their counterparts in other jurisdictions, including: (i) investigations into the manipulation of foreign exchange rates; (ii) investigations into U.S. tax evasion at Swiss banks; and (iii) FCPA enforcement actions.

As Acting Assistant Attorney General Blanco has noted, "[i]n light of the increasingly international scope of the Criminal Division's white collar enforcement efforts", and the efforts by countries around the world to strengthen anti-bribery laws, the DOJ is more frequently cooperating with international

Continued on page 10

39. *Id.* at *24.
40. *Id.*
41. *Id.* at *27.
42. Kenneth A. Blanco, Acting Assistant Attorney General, U.S. Department of Justice, Speaks at the Atlantic Council Inter-American Dialogue Event on Lessons From Brazil: Crisis, Corruption and Global Cooperation, Washington, DC (July 19, 2017), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-kenneth-blanco-speaks-atlantic-council-inter-american-1.
43. *Id.*
44. *Allen*, 2017 WL 3040201 at *52 n. 112.

U.S. Appellate Decision Limits Use of Foreign Compelled Testimony in Cross-Border Investigations

Continued from page 9

partners in investigations and in reaching global resolutions.[45] While this cooperation helps to ensure that corporations are not unfairly penalized for the same conduct by multiple law enforcement agencies,[46] it presents challenges when the various jurisdictions involved in an investigation are subject to different rules.

B. What Foreign Jurisdictions Would Be Affected?

The *Allen* decision may apply to U.S. prosecutions linked to investigations by authorities in jurisdictions where various forms of compelled testimony can be obtained under local laws and regulations.

In the UK, the statutory limitations on the use of compelled testimony are derived from the seminal case of *Saunders v. UK*,[47] where the failure by the UK legislator to provide for direct use immunity led to the UK's conviction by the European Court of Human Rights for violating the fair trial provisions of Article 6 of the European Convention on Human Rights.

Following *Saunders,* the UK statutory model is that investigating authorities are empowered to compel testimony, but in exchange for direct use immunity. In that vein, the SFO has extensive powers to obtain evidence for the purposes of investigating serious or complex fraud. Section 2 of the Criminal Justice Act 1987 (the "CJA") confers on the SFO the power to compel any individual or entity to attend an interview with SFO staff to answer questions and produce documents understood to be relevant to a matter under investigation. A court order is not required for these purposes, and the SFO can exercise its powers at the request of an overseas authority.

The SFO's powers are known as "compulsory powers," as compelled witnesses are generally deprived of their right to silence, including if their answers would be self-incriminatory, and despite a duty of confidence owed to third parties. However, one significant safeguard available to witnesses against self-incrimination is that answers provided during section 2 interviews cannot be used in a subsequent prosecution of the witness for the offense under investigation. Failure to attend a section 2 interview without reasonable excuse, or providing false or misleading information, is a criminal offense, punishable by up to two years' imprisonment and/or a fine of up to £5,000.[48]

Continued on page 11

45. Kenneth A. Blanco, Acting Assistant Attorney General, U.S. Department of Justice, Speaks at the American Bar Association National Institute on White Collar Crime (Mar. 10, 2017), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-kenneth-blanco-speaks-american-bar-association-national.
46. *Id.*
47. *Saunders v. UK,* 43/1994/490/572, European Court of Human Rights, Grand Chamber judgment of Dec. 17, 1996.
48. CJA Section 2(14).

U.S. Appellate Decision Limits Use of Foreign Compelled Testimony in Cross-Border Investigations

Continued from page 10

Given the safeguards in place against self-incrimination, the SFO tends to restrict the exercise of its section 2 powers to compel answers from individuals not considered to be suspects in the matter under investigation. As a practical consequence, therefore, the very use of a compelled interview effectively means that the interviewee is merely a witness whom the authorities do not, at the time of the interview, plan to prosecute.

As reflected in the *Allen* decision, the FCA is another UK authority with the power to compel witness testimony.[49] Specifically, the FSMA provides that FCA-appointed investigators may compel testimony or the production of documents from a witness.[50] The FSMA also permits the FCA to appoint an investigator to look into certain matters in support of an overseas regulator, with the power to compel testimony.[51] Refusal to comply with any of these demands may result in imprisonment for up to two years.[52]

"The *Allen* decision may apply to U.S. prosecutions linked to investigations by authorities in jurisdictions where various forms of compelled testimony can be obtained under local laws and regulations."

As with the SFO, any evidence gathered by the FCA under compelled testimony may not be used in criminal proceedings against the interviewee (unless the proceedings relate to perjury and false statement-related offenses) due to the suspect's right to silence. English procedural rules also provide for the summonsing of witnesses to testify in civil[53] and criminal trials[54] under threat of arrest and being held in contempt. Though a summonsed witness can refuse to provide evidence that might incriminate him or herself in the UK, the protection is less absolute if the risk of prosecution is abroad. U.S. prosecutors may find themselves, therefore, put to their *Kastigar* burden if they want to prosecute an individual who is formerly a reluctant witness in English court proceedings.

Continued on page 12

49. *Allen*, 2017 WL 3040201 at *5.
50. FSMA section 165, *et seq.*
51. *Id.* section 169.
52. *Id.* section 177.
53. Senior Courts Act 1981, section 36.
54. Criminal Procedure (Attendance of Witnesses) Act 1965, section 2.

U.S. Appellate Decision Limits Use of Foreign Compelled Testimony in Cross-Border Investigations

Continued from page 11

The *Allen* case may have presented an unusual situation in that it involved UK procedures that were to some degree comparable to U.S. ones. They recognized a right to be protected from compelled self-incrimination and provided a procedure to deal with the situation – namely, a form of immunity that, the *Allen* court ultimately found, failed to provide sufficient protection to an interviewed witness who is ultimately prosecuted in the United States. As a result, the case squarely presented the question of the use a U.S. prosecutor can make of testimony compelled abroad under a statute which removes the right against self-incrimination in exchange for direct use immunity. It will be interesting to see variants on this situation that may arise from jurisdictions where the procedures are less clearly parallel to U.S. ones.

For example, in French criminal investigations, a witness can be summoned to appear for a formal interview with either a police officer or an investigating magistrate in a proceeding known as a *"garde à vue."* At such an interview, at least where the witness may be subject to criminal liability, he or she has a right to remain silent and must be apprised of this right.[55] Further, there is no equivalent to a U.S. immunity procedure that would permit the investigating authority to force the witness to testify over the invocation of the right to silence. At trial, the presence of a defendant is generally required, and the court can (and frequently does) ask the defendant to respond to evidence against him or her, to which the defendant can decline to respond. Both during the investigative phase and at trial, however, there is as a practical matter a strong negative inference that authorities (or the court) will draw from the invocation of silence. For this reason, the invocation of this right is relatively rare.

A witness whose testimony in France is used against him or her in the United States could presumably claim that it was "compelled" because of pressure caused by the foreseeably severe consequences of an adverse inference. More likely, however, to meet the *Allen* test for compulsion are situations that can arise in administrative proceedings, such as those commenced by the *French Autorité des Marchés Financiers,* the rough equivalent of the SEC, or the *Agence Française Anticorruption,* the French Anti-Corruption Agency. Such agencies, which are empowered to impose significant penalties for "obstructing" their investigations, may interpret failure to cooperate with the agency as obstruction.[56]

In addition to France, it remains to be seen how testimony from other jurisdictions – such as Brazil, Russia, and India – will be affected. The question of whether the "compulsion" in such jurisdictions passes muster under *Kastigar* is far more nuanced than in the UK.

Continued on page 13

55. Code De Procedure Penale [C. Pr. Pén] [Code of Criminal Procedure]art. 63-1 (Fr.).

56. Code De Commerce [C. Com.][Commercial Code] arts. L. 642-2 & L. 621-15, II, f (Fr.); Loi Sapin II, 2016-1691 art. 4 du 9 Décembre 2016 [Law 2016-1691 art. 4 of Dec. 9, 2016].

U.S. Appellate Decision Limits Use of Foreign Compelled Testimony in Cross-Border Investigations

Continued from page 12

In Brazil, various provisions of the Code of Criminal Procedure (the "BCCP") and other Brazilian statutes contemplate the so-called "coercive conduction," a practice through which local authorities can seek to compel individuals to testify by taking them into temporary custody or detention. For instance, article 201 of the BCCP provides that "[i]f a properly summoned witness fails to appear [before court] for no justified reason," the judge can request that police or court officials bring the witness to court. Similarly, article 260 of the BCCP states that "[i]f the accused party fails to comply with a summons for an interrogatory, recognition or any other act that cannot be performed without his or her presence, the authority may order that he or she be brought to his presence." Coercive conductions gained substantial publicity in Brazil within the context of the Operation *Lava Jato*, where it was employed 210 times.[57] The coercive conduction of former president Luiz Inacio Lula da Silva in March 2016,[58] in particular, sparked a public debate about the parameters for the use of this tool.[59]

In Russia, in turn, witnesses and victims of crimes may be compelled to testify under the penalty of criminal liability in the course of an investigation or if ordered by the court.[60] The investigators are also required to question a suspect within 24 hours of the suspect's arrest or the initiation of a criminal case,[61] and an accused must be questioned "immediately after the charges are presented to him."[62] Unlike witnesses and victims, however, the suspect or accused is not warned of criminal liability for refusing to testify or testifying falsely, and is warned about the right against self-incrimination.[63]

Finally, in India, a police officer may interview "any person supposed to be acquainted with the facts and circumstances of the case."[64] The witness is "bound to answer truthfully all questions relating to such case," unless the answers would expose them to potential criminal liability.[65] Article 20(3) of the Indian Constitution

Continued on page 14

57. *A Lava Jato em Numeros,* http://lavajato.mpf.mp.br/atuacao-na-1a-instancia/resultados/a-lava-jato-em-numeros (last visited Aug. 7, 2017).
58. *Polícia Federal Faz Operação na Casa do Ex-Presidente Lula, na Grande SP,* Folha de S.Paulo (Apr. 3, 2016), http://www1.folha.uol.com.br/poder/2016/03/1746231-policia-federal-faz-operacao-na-casa-do-ex-presidente-lula-na-grande-sp.shtml.
59. *Nota de Esclarecimento da Força-tarefa Lava Jato do MPF em Curitiba,* MPF (Mar. 5, 2016), http://www.mpf.mp.br/pr/sala-de-imprensa/noticias-pr/nota-de-esclarecimento-da-forca-tarefa-lava-jato-do-mpf-em-curitiba; *Condução Coercitiva de Lula Foi Decidida Para Evitar Tumulto, Diz Moro,* Folha de S.Paulo (Apr. 3, 2016), http://www1.folha.uol.com.br/poder/2016/03/1746437-conducao-coercitiva-de-lula-foi-decidida-para-evitar-tumulto-diz-moro.shtml.
60. Ugolovno-Protsessual'nyi Kodeks Rossiiskoi Federatsii [UPK RF] [Criminal Procedure Code] art. 164(5) (Russ.); *see also id.,* art. 56(6)(2); art. 42(5).
61. *Id.,* art. 42(6).
62. *Id.,* art. 173(1).
63. *Id.,* art. 173(2).
64. Code Crim. Proc., Section 161(1) (India).
65. *Id.,* Section 161(2).

Continued from page 13

further provides that no person accused of any offense shall be compelled to be a witness against him or herself.

Future U.S. prosecutions involving direct or indirect use of evidence first obtained overseas will thus present variants of the *Allen* situation where the outcome is difficult to predict. Among the variables is whether the overseas testimony was "compelled," and in particular whether a U.S. court will deem that evidence given under pressure of an adverse inference should be barred.

III. Next Steps in Future Cases

A. What Does This Mean for U.S. Law Enforcement?

Following the *Allen* decision, the DOJ will likely need to further tighten its procedures in cross-border investigations and prosecutions.

"While *Allen* simplifies matters for defendants by ensuring that their compelled testimony cannot be used against them in U.S. proceedings, a defendant who wishes to cooperate with the DOJ risks being unable to cooperate if he or she reviews compelled testimony in a foreign jurisdiction."

In the investigation leading to the *Allen* case, the DOJ followed standard procedures and "took care to conduct their interviews wholly independently of the FCA's interviews and their fruits."[66] Specifically, the FCA and DOJ agreed to maintain a "wall" between their investigations, including by instituting a "day one/day two" interview procedure in which the DOJ interviewed witnesses prior to the FCA.[67]

In the wake of *Allen*, the DOJ now has a greater interest in coordinating closely with foreign authorities on who takes the lead in relation to enforcement actions against particular individuals. A key issue in *Allen* was that the FCA commenced an enforcement action against Robson prior to the DOJ bringing criminal charges against him, which meant that he received disclosure of Allen and Conti's compelled evidence as part of the case against him.[68] The *Allen* Court determined that Robson's post-exposure testimony was materially different than his pre-exposure testimony

Continued on page 15

66. *Allen*, 2017 WL 3040201 at *9.
67. *Id.*
68. *Id.*

U.S. Appellate Decision Limits Use of Foreign Compelled Testimony in Cross-Border Investigations

Continued from page 14

to the FCA, demonstrating that his testimony was infected by his review of the compelled statements.[69] If the DOJ had coordinated earlier with the FCA so that the FCA did not commence the enforcement action against those the DOJ wished to charge, the DOJ would have avoided them being exposed to the compelled testimony of other suspects.

These changes may also require a larger shift in the DOJ's approach to these cases. In *Allen,* the Second Circuit appeared critical of the DOJ's tack, specifically questioning its prosecution of lower-level individuals like Allen and Conti whom the UK authorities had decided not to pursue, and its use of a cooperating witness as the sole source of certain material information in the case. The DOJ's approach of pursuing cases against individuals who were already investigated, subject to enforcement actions, or faced criminal charges in foreign jurisdictions – or relying on cooperating witnesses who were in the same position – increases the chances that those individuals have already given or reviewed compelled testimony. Relying heavily on those cooperating witnesses compounds that damage; if their testimony is considered tainted and is excluded, it may prove fatal to the entire case. Given the potential pitfalls, if the DOJ is not able to take the lead on these cases from the beginning, it may opt not to pursue them at all.

B. What Does This Mean for Individual and Corporate Defendants?

Individuals and corporations that are the subjects of cross-border investigations and prosecutions will have to navigate an increasingly complicated legal landscape. While *Allen* simplifies matters for defendants by ensuring that their compelled testimony cannot be used against them in U.S. proceedings, a defendant who wishes to cooperate with the DOJ risks being unable to cooperate if he or she reviews compelled testimony in a foreign jurisdiction. Therefore, individuals caught in the cross-hairs of cross-border investigations may be faced with a dilemma: whether to steer clear of accessing compelled testimony to leave open the door to cooperating with U.S. authorities, or whether to review that testimony in the hopes of gaining some benefit in their home jurisdictions.

Defendants may also be unsure about what constitutes compelled testimony. *Allen* specified that, unlike private employers who may question employees under threat of discharge without Fifth Amendment consequences, a sovereign power's threat to deprive a person of their liberty would constitute coercion.[70] The Court did not, however, address jurisdictions other than the UK where witnesses and defendants may be subject to varying degrees of compulsion that do not rise to the

Continued on page 16

69. *Id.* at *26-27.

70. *Id.* at *15.

U.S. Appellate Decision Limits Use of Foreign Compelled Testimony in Cross-Border Investigations

Continued from page 15

level of producing compelled testimony. Moreover, even in jurisdictions which permit compelled testimony, the Court noted that the testimony must be the product of a genuine threat to liberty as part of a *bona fide* investigation; "should the circumstances in a particular case indicate that a foreign defendant had faced no real threat of sanctions by his foreign government for not testifying, then that defendant's testimony might well not be considered involuntary."[71]

Allen also presents a potential challenge for corporations operating in multiple jurisdictions in circumstances where they have received disclosure of compelled testimony in one or more of those jurisdictions. Inadvertently sharing such testimony with employees, for example in the context of an internal investigation, could clearly affect the corporation's perceived cooperation with the U.S. authorities. Corporations should therefore keep careful watch over any compelled testimony they may receive by way of disclosure in any jurisdiction in which they operate.

IV. Conclusion

The *Allen* decision may have far-reaching consequences for cross-border investigations and prosecutions, particularly given how broadly the DOJ construes its jurisdiction and how many jurisdictions accept compelled testimony. To respond to these changes, the DOJ may alter its procedures or approach to these cases.

Defendants, in turn, will have to be careful as to how they navigate the complex and uncharted waters of cross-border investigations in the wake of *Allen*.

Sean Hecker

Karolos Seeger

Robin Lööf

Elizabeth Nielsen

Eileen C. Zelek

Sean Hecker is a partner in the New York office. Karolos Seeger is a partner in the London office. Robin Lööf is an associate in the London office. Elizabeth Nielsen and Eileen C. Zelek are associates in the New York office. The authors may be reached at shecker@debevoise.com, kseeger@debevoise.com, rloof@debevoise.com, enielsen@debevoise.com, and eczelek@debevoise.com. Full contact details for each author are available at www.debevoise.com. A version of this article previously appeared in the International Comparative Legal Guide to Business Crime 2018, available online at https://iclg.com/practice-areas/business-crime-laws-and-regulations/3-the-use-of-foreign-compelled-testimony-in-cross-border-investigations-the-impact-of-the-second-circuit-s-allen-decision.

Continued on page 17

71. *Id.* at *17.

New Leniency Regulations and Rules Affecting Financial Institutions Change the Anti-Corruption Landscape in Brazil

2017 has been another eventful year in Latin America on the anti-corruption front, with a growing number of significant investigations and legislative developments. In addition to increased anti-corruption enforcement activity generally – including matters spanning multiple jurisdictions – several Latin American countries introduced legislative initiatives and other new tools for combating corruption.

In Brazil, as Operation *Lava Jato* (Operation Carwash) and other anti-corruption investigations continue to unfold, the government, regulators, and courts have issued rules, guidelines, and decisions that significantly impact the anti-corruption enforcement landscape. These include a recent federal court ruling mandating leniency agreements to include participation of all concerned agencies, not only the Federal Prosecutor's Office (known in Brazil as the "MPF"), and an MPF instruction to prosecutors on negotiating and executing such agreements. Additionally, Brazil's Central Bank and its Securities and Exchange Commission now possess expanded powers to investigate and sanction administrative wrongdoing, and the Central Bank issued new regulations on the compliance programs of financial institutions.

This article provides an overview of these recent developments in Brazil.

Court of Appeals Conditions Full Validity and Effects of Leniency Agreement on Participation of All Concerned Agencies

As we have written previously, Brazil established a landmark anti-corruption framework by enacting and subsequently issuing regulations in support of Law No. 12,486 (the so-called "Clean Company Act").[1] The Clean Company Act imposes strict civil and administrative liability on corporate entities for corruption or bribery of local or foreign public officials and fraud in connection with public tenders.[2]

While the Clean Company Act provides expressly for leniency agreements, it does not definitively resolve how to allocate this prerogative among the many Brazilian authorities that recently have been playing a role in leniency negotiations stemming from *Lava Jato* and beyond. The potentially relevant agencies include the MPF,

Continued on page 18

1. *See* Bruce E. Yannett, Andrew M. Levine, Daniel Aun, Bernardo Becker Fontana, et al., "Brazil Issues Long-Awaited Decree Implementing the Clean Company Act," FCPA Update, Vol. 6, No. 8 (Mar. 2015); Sean Hecker, Andrew M. Levine, Daniel Aun, and Bernardo Becker Fontana, "Brazil Further Regulates Its Anti-Corruption Framework," FCPA Update, Vol. 6, No. 9 (Apr. 2015); Sean Hecker, Andrew M. Levine, Daniel Aun, and Bernardo Becker Fontana, "Brazil Issues Guidelines for Compliance Programs," FCPA Update, Vol. 7, No. 3 (Oct. 2015).
2. *Id.*

New Leniency Regulations and Rules Affecting Financial Institutions Change the Anti-Corruption Landscape in Brazil

Continued from page 17

the Ministry of Transparency ("CGU"), the Federal Attorney's Office ("AGU"), the Federal Court of Accounts ("TCU"), the antitrust agency (known in Brazil as "CADE"), and the federal police. Unsurprisingly, companies are often uncertain as to which agency to approach, and whether their agreements with one or more of them will be recognized and respected by the others.

The Federal Court of Appeals for the 4th Region (the "Court of Appeals") in Southern Brazil highlighted the need for greater clarity with respect to this issue in an August 2017 decision. The decision required that the MPF, CGU, AGU, and TCU take part in the relevant leniency agreement in order for it to be fully valid and effective under applicable laws.[3]

The case stems from a 2016 administrative lawsuit filed by the Brazilian federal government against various companies, including Odebrecht (the "Company"), which was subject to a related asset freeze order. A few months later, the Company entered into a leniency agreement with the MPF (the "Agreement"), which included the Company's payment of a substantial fine and the MPF's agreement not to seek further penalties and to request a reversal of the asset freeze.

As agreed, the MPF secured a court order unfreezing the Company's assets and stating that its Agreement was valid and binding on the entire Brazilian administration, regardless of the "disagreements among its agencies."[4] The government appealed, arguing that the Agreement did not bind other agencies because it was executed by the MPF "in an isolated manner" and also that the asset freeze was necessary to ensure the vindication of the state's claims.[5] The MPF argued, in turn, that it would be improper and unfair for the state to undermine an agreement executed by one of its agencies and that the Company must be able to operate in order to generate cash and pay the fine.[6]

The Court of Appeals ultimately ruled in favor of requiring additional coordination. It concluded that the "participation of all concerned agencies" – in this case, the MPF, CGU, AGU, and TCU – "is necessary for the allocation of liability to be unique and integral."[7] The Court's finding was grounded on two main bases. *First,* under the Clean Company Act, the CGU is, in principle, the competent authority to execute a leniency agreement within the Federal Executive Branch,

Continued on page 19

3. Interlocutory Appeal (*Agravo de Instrumento*) No. 5023972-66.2017.4.04.0000/PR, available at https://www2.trf4.jus.br/trf4/.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*

New Leniency Regulations and Rules Affecting Financial Institutions Change the Anti-Corruption Landscape in Brazil

Continued from page 18

though this does not prevent the participation of other agencies, including the AGU, MPF, and TCU, which the court sees as "advisable."[8] Because, in the Court's view, various statutes and norms extending beyond the Clean Company Act give each of these agencies legitimate roles and interests in this process,[9] they must act "harmoniously and collaboratively . . . in the public interest."[10]

Second, the Clean Company Act allows collaborating companies to decrease fines through leniency agreements, but requires that they fully compensate the state for the damages caused by their wrongdoing. As a result, the Court of Appeals concluded that all concerned agencies must participate in the agreement to ensure that the state is fully compensated for the harm.[11]

"[Developments in Brazil] include a recent federal court ruling mandating leniency agreements to include participation of all concerned agencies, not only the Federal Prosecutor's Office . . . ."

More specifically, the Court of Appeals held that the Agreement was defective because it was executed with the MPF alone, and the lack of a clear breakdown of financial obligations led to "serious doubts" about the state's full reparation.[12] While the Court refused to declare the Agreement null and void in view of the Company's legitimate expectations, it ruled that the Company's assets must remain frozen until the Agreement is "ratified or re-ratified" by the other agencies. Only then will it become fully valid and effective.[13]

Continued on page 20

8. *Id.*
9. In the Court's view, the Clean Company Act gives CGU a central role in connection with the execution of leniency agreements within the federal executive branch, but also assigns certain functions to the MPF, which under Brazilian law has exclusive competence to investigate and prosecute wrongdoing involving individuals from a criminal angle. In addition, the Court of Appeals noted that the TCU is empowered to review leniency agreements signed by the Government and can investigate separately and punish related wrongdoing, and that the AGU is one of the agencies empowered to file administrative improbity lawsuits in connection with corrupt acts. *See* Interlocutory Appeal (*Agravo de Instrumento*) No. 5023972-66.2017.4.04.0000/PR.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*

New Leniency Regulations and Rules Affecting Financial Institutions Change the Anti-Corruption Landscape in Brazil

Continued from page 19

Although this ruling is not final, it establishes a challenging precedent for companies collaborating or wishing to collaborate with Brazilian authorities (as well as for the MPF itself). The lack of legislative clarity regarding this issue suggests a need for the various agencies concerned to try to reach some common ground as soon as possible. The establishment of a TCU-sponsored committee comprising several agencies earlier this year may be a first step towards that goal.[14]

MPF Issues New Instruction on Leniency Agreements

On August 24, 2017, the 5th Chamber of Coordination and Review of the MPF – which oversees and approves the MPF's leniency agreements – issued Instruction No. 07/2017 (the "Instruction"). This includes detailed guidelines instructing prosecutors on the negotiation, drafting, and execution of leniency agreements with companies.[15] The Instruction takes stock of recent debates by courts and also within the MPF regarding the requirements for leniency agreements and arguably aims to shield such agreements from challenges in court.

The Instruction states that any negotiations must be kept confidential.[16] They also must occur "concurrently with or after" the negotiation of any related plea bargains or collaboration agreement in the relevant criminal proceedings.[17] If negotiations are conducted jointly with other entities – such as the CGU, AGU, CADE, or TCU – each resulting leniency agreement must be formalized in a separate instrument.[18]

Under the Instruction, at a minimum, leniency agreements must contain clauses addressing the following issues:

- legal basis;
- description of the parties involved (including, if applicable, provisions regarding the possibility of affiliated entities, officers, employees, and representatives adhering to the agreement);
- demonstration of the public interest involved;
- object of the agreement;
- company's minimum obligations;
- commitments by the MPF;

Continued on page 21

14. *See* Lais Lis, "TCU aprova criacao de comite para discutirs acordos de leniencia," G1 (July 12, 2017), https://g1.globo.com/politica/noticia/tcu-aprova-criacao-de-comite-para-discutir-acordos-de-leniencia.ghtml.
15. The Portuguese version of Instruction No 7 is available at www.mpf.mp.br/pgr/documentos/ORIENTAO7_2017.pdf.
16. Section 3.
17. Section 2.
18. Section 5.1.

New Leniency Regulations and Rules Affecting Financial Institutions Change the Anti-Corruption Landscape in Brazil

Continued from page 20

- adhesion by other regulators and sharing of evidence;
- cooperation with foreign authorities;
- provisions on the disposal of assets;
- secrecy;
- waiver of the privilege against self-incrimination and the right to remain silent;
- hypotheses and consequences for termination of the agreement; and
- approval of the agreement by the 5th Chamber.[19]

With respect to the "demonstration of the public interest," the Instruction requires that the interested entity must be the first to report on facts that are *unknown* to the investigation and provide "concrete elements that may serve as evidence," including on the specific wrongdoing and involved individuals.[20] With regards to the "object of the agreement," the Instruction requires a high level description of the facts, with further details to be described in annexes to the agreement.[21] Notably, the Instruction specifies that "it is not enough for the facts and evidence to be new;" rather, such facts and evidence "must also be able to reveal and dismantle the criminal organization."[22]

Regarding obligations by collaborating companies, leniency agreements must include the following requirements:

- provide relevant evidence;
- cease any illicit conduct;
- implement a compliance program and submit to external audit, if applicable;
- fully collaborate in good faith;
- pay any amounts due as an advance for the restitution of damages;
- pay any applicable fines under Brazil's Improbity Law or the Clean Company Act, depending on the case; and
- provide guarantees for the payment of fines and the advance of restitution of damages.[23]

Continued on page 22

19. Section 7.
20. Section 7.3.
21. Section 7.4.
22. *Id.*
23. Section 7.5.

New Leniency Regulations and Rules Affecting Financial Institutions Change the Anti-Corruption Landscape in Brazil

Continued from page 21

In turn, the MPF will commit to do the following: (i) liaise with other agencies to have them join the MPF in the leniency agreement or have them formalize their own agreements, as long as compatible with MPF's; (ii) specify any benefits for the company and, if applicable, refrain from initiating any actions, or request the suspension of any existing ones; and (iii) defend the validity and effectiveness of all the terms and conditions of the agreement before any third parties.[24]

Recognizing the cross-border nature of many corruption-related investigations in Brazil, the Instruction also states that leniency negotiations must include commitments regarding "transnational corruption practices," when applicable.[25] Such recommendation is in line with Brazil's obligations under the OECD, OAS, and UN anti-corruption conventions, in order to prevent having the same company punished twice for the very same conduct in different jurisdictions (*bis in idem*).[26]

By shedding some light on what it expects in a successful leniency negotiation, the MPF has informed not only its prosecutors, but also other interested parties. As the MPF begins to follow the steps outlined, the expectation is that leniency agreements will be more robust and better able to withstand court scrutiny, and also help decrease uncertainty for companies interested in entering into such agreements with authorities.

Provisional Measure Expands Powers of Banking and Capital Markets Regulators to Investigate, Punish, and Resolve Administrative Wrongdoing

On June 7, 2017, Brazil issued Provisional Measure No. 784 ("PM 784") expanding the power of the Central Bank and the Securities and Exchange Commission (known as "CVM") to investigate, sanction, and resolve administrative infractions of banking and capital markets laws and regulations.[27] Among other things, PM 784 significantly increased the fines that the Central Bank and CVM can impose, empowered both to resolve potential infractions through leniency agreements, and allowed the Central Bank to resort to settlement agreements that already were available to CVM.[28]

Continued on page 23

24. Section 7.6.
25. Section 13.
26. *Id.*
27. Brazil's Constitution allows the President to enact provisional measures under "relevant and urgent" circumstances. These decrees are initially valid for 60 days and can be renewed for the same period, but cease to have any effects if not converted into law by Congress within that period. The text of PM 784 can be found in Portuguese at http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2017/Mpv/mpv784.htm.
28. Settlement agreements differ from leniency agreements in their nature and effects. The Central Bank may only enter into settlement agreements while there is still no first instance decision in the administrative proceedings. Meanwhile, there is no time limit for leniency agreements. Similarly, whereas in the case of a leniency agreement, a party must admit its guilt and identify any involved parties, no such requirements exist for settlement agreements. The Central Bank is expected to further regulate leniency and settlement agreements going forward.

New Leniency Regulations and Rules Affecting Financial Institutions Change the Anti-Corruption Landscape in Brazil

Continued from page 22

PM 784's Central Bank-related provisions include a series of pre-existing "punishable infractions," introduce the concept of "serious infractions," increase the sanctions for their breach, and empower the Central Bank to use alternative tools to resolve related issues. The new rules apply to financial institutions and other types of entities overseen by the Central Bank or otherwise participating in the Brazilian payments' system,[29] as well as their independent auditors, administrators, managers, directors, fiscal board members, and audit committee members.[30]

Under PM 784, "punishable infractions" by financial institutions encompass multiple types of conduct including breaching banking laws and regulations (including with respect to accounting, internal controls, risk management and corporate governance issues), engaging in prohibited transactions, and false or inaccurate book-keeping, among other things.[31] The new rules also make punishable the conduct of an individual that fails to act with "diligence and prudence" in handling an institution's interests.[32] "Serious infractions" include conduct that may jeopardize the regular functioning of the country's financial market or conduct that may damage an institution's liquidity, among other things.[33]

"[Brazil's Provisional Measure No. 784] expand[s] the power of the Central Bank and Securities and Exchange Commission . . . to investigate, sanction, and resolve administrative infractions of banking and capital markets laws and regulations."

Punishment for related infractions includes public admonishment, fines, prohibition to carry out certain activities, and revocation of an entity's license to operate – the last two of which are reserved for "serious infractions."[34] Notably, PM 784 substantially increased the Central Bank's fines from R$250,000 to the

Continued on page 24

29. According to Brazil's Central Bank, the payments system "consists of the entities, systems and procedures related to the clearing and settlement of funds transfer, foreign currency operations, financial assets, and securities transactions." *See* "Overview of the Brazilian Payments System," Banco Central do Brasil, https://www.bcb.gov.br/Pom/Spb/Ing/Introduction.asp.
30. PM 784, article 2.
31. PM 784, article 3 contains a full list of "punishable infractions."
32. *Id.*
33. PM 784, article 4.
34. PM 784, article 5. The penalties do not apply to money laundering crimes. See PM 784, article 11.

New Leniency Regulations and Rules Affecting Financial Institutions Change the Anti-Corruption Landscape in Brazil

Continued from page 23

greater of R$2 billion or 0.5% of the financial institution's revenue.[35] These increased penalties will apply only to conduct post-dating the issuance of PM 784. In deciding what punishment to apply, the Central Bank will consider the seriousness and length of the infraction, the degree of potential or actual danger to the financial system and others, the advantage sought or obtained, the amounts at stake, the wrongdoer's economic power, reoccurrence, and collaboration.[36]

PM 784's CVM-related provisions further regulate its power to investigate and punish wrongdoing involving the capital markets. The most noteworthy change was the increase of the fines that CVM can impose to R$500 million (from R$500,000), or twice the value of the relevant transaction (where it previously was half of it), or three times the economic advantage obtained or losses avoided through the relevant acts, or 20% of the wrongdoer's total individual or consolidated profits.[37] In addition, PM 784 now allows CVM to bar wrongdoers from contracting with government-owned financial institutions or participating in government bids for five years.[38]

PM 784 also addresses the agencies' ability to negotiate the resolution of administrative infractions through settlement and leniency agreements. In particular, the PM further regulated CVM's ability to enter into settlement agreements and introduced the Central Bank's ability to use its discretion to resort to a similar tool if this is in the public interest.[39] The collaborator will be required to cease the conduct at stake, rectify irregularities, compensate for resulting damages, and comply with other obligations contained in the agreement, but will not be required to admit to any facts or to acknowledge the unlawfulness of its conduct.[40] The settlement agreements will be made public unless this will risk the "stability and strength" of the financial or payments systems or of a financial institution.[41]

In addition, PM 784 permits the Central Bank and CVM to enter into leniency agreements with individuals and entities who cease the conduct at stake, acknowledge their involvement in wrongdoing, and collaborate fully throughout the investigations, when the agencies do not already have evidence "sufficient to ensure their conviction."[42] The benefits of a leniency agreement may include

Continued on page 25

35. PM 784, article 6.
36. PM 784, article 10.
37. PM 784, article 37.
38. PM 784, article 37.
39. PM 784, article 12.
40. PM 784, articles 12 and 15.
41. PM 784, article 14.
42. PM 784, articles 30 and 35.

New Leniency Regulations and Rules Affecting Financial Institutions Change the Anti-Corruption Landscape in Brazil

Continued from page 24

"the extinguishment of [the administrative] punitive action or a one- to two-thirds reduction in the applicable fine," where the relevant party "effectively, fully, and permanently" collaborates with the investigations and its assistance leads to the identification of other wrongdoers and the seizure of information and documents demonstrating the conduct at stake.[43] Entities will not be entitled to more than a one-third reduction in the applicable fine unless they are the first to "qualify with respect to the infraction."[44] Although the penalties established in the measure apply only to infractions that post-date its issuance, parties can enter into leniency agreements regarding infractions that pre-date its issuance.

In a Q&A section on its website, the Central Bank noted that financial obligations agreed as part of settlement or leniency agreements are not fines *per se,* but rather contractual provisions, as a result of which they can actually be higher than the maximum fines established by PM 784.[45]

PM 784 does not address criminal wrongdoing involving the financial and capital markets sectors (*e.g.,* corruption and money laundering), which continue to be handled by public prosecutors under other applicable legislation.

PM 784 became effective immediately, but is awaiting deliberation in Congress to be converted into law, edited, or dropped altogether. As it moves through Congress, PM 784's wording is potentially subject to amendments. Changes proposed by the House of Representatives would require the full publicity of settlement agreements in every instance and the admission of administrative wrongdoing to execute settlement agreements, expressly preserve the public prosecutor's office ability to tackle related criminal wrongdoing, and address coordination across concerned agencies, among other things.

Central Bank Regulates Compliance Programs of Financial Institutions

On August 28, 2017, Brazil's Central Bank passed Resolution No. 4,595 (the "Resolution")[46] regulating the compliance policies applicable to financial institutions and other institutions that operate in Brazil.[47] The Resolution, which is effective immediately, requires these institutions "to implement and maintain compliance policies compatible with their nature, size, complexity, structure,

Continued on page 26

43. PM 784, article 30.
44. PM 784, article 30, paragraph 3.
45. *See* "Perguntas e respostas sobre a MP 784," Banco Central do Brasil, https://www.bcb.gov.br/pre/bc_atende/port/faqmp784.asp?idpai=FAQCIDADAO.
46. The Resolution is available in Portuguese at http://www.bcb.gov.br/pre/normativos/busca/normativo.asp?numero=4595&tipo=Resolu%C3%A7%C3%A3o&data=28/8/2017.
47. Resolution, article 1.

New Leniency Regulations and Rules Affecting Financial Institutions Change the Anti-Corruption Landscape in Brazil

Continued from page 25

risk profile and business plan, in order to ensure the effective management of their compliance risks."[48] At a minimum, the compliance policies must:

- define the goal and scope of the compliance department;
- address the allocation of responsibilities, training of personnel, and funds to support the department;
- ensure the independence and authority of the department;
- ensure that the department has free access to the information it needs and a direct channel to communicate with management, the board, and the audit committee; and
- establish coordination mechanisms regarding the risk management and internal audit teams, from which compliance must be segregated.[49]

"The Resolution, which is effective immediately, requires [financial] institutions 'to implement and maintain compliance policies compatible with their nature, size, complexity, structure, risk profile and business plan . . .'"

Among other duties, the Resolution specifies that compliance departments will be in charge of the following:

- "testing and assessing" the compliance policy against applicable laws and regulations;
- supporting the board of directors and management in connection with relevant compliance issues;
- assisting in the dissemination of the compliance policies to and training of all relevant employees and third-party service providers;
- revising and monitoring the resolution of legal violations flagged by the independent auditor's report;

Continued on page 27

48. Resolution, article 2.
49. Resolution, article 5.

New Leniency Regulations and Rules Affecting Financial Institutions Change the Anti-Corruption Landscape in Brazil
Continued from page 26

- drafting compliance reports summarizing the compliance department's activities, findings, and recommendations at least once every year; and
- systematically and timely reporting of compliance issues to the board of directors.

The compliance policies must be approved by the board of directors, which is required to play a key role in ensuring their effectiveness and continuity of their application, their communication to all relevant employees and third party service providers, the dissemination of ethical standards, and the application of corrective measures in the event compliance flaws are identified, among other things.[50]

Brazil's recent changes in rules affecting leniency agreements and the compliance framework applicable to financial institutions have the potential to bring significant changes to the country's anti-corruption landscape. While applicable rules continue to evolve and new developments on the enforcement front unfold almost daily, companies should take stock of recent changes and seek advice from professionals with first-hand experience in the region to evaluate potential risks and how best to mitigate them.

Andrew M. Levine

Daniel Aun

Bernardo Becker Fontana

Carolina Kupferman

Isabela Garcez

Andrew M. Levine is a partner in the New York office. Daniel Aun, Bernardo Becker Fontana, Carolina Kupferman, and Isabela Garcez are associates in the New York office. The authors may be reached at amlevine@debevoise.com, daun@debevoise.com, bbeckerf@debevoise.com, ckupferm@debevoise.com, and imgarcez@debevoise.com. Full contact details for each author are available at www.debevoise.com.

50. Resolution, articles 4 and 9.

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Debevoise & Plimpton LLP

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

Washington, D.C.
+1 202 383 8000

London
+44 20 7786 9000

Paris
+33 1 40 73 12 12

Frankfurt
+49 69 2097 5000

Moscow
+7 495 956 3858

Hong Kong
+852 2160 9800

Shanghai
+86 21 5047 1800

Tokyo
+81 3 4570 6680

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

Andrew J. Ceresney
Co-Editor-in-Chief
+1 212 909 6947
aceresney@debevoise.com

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

Karolos Seeger
Co-Editor-in-Chief
+44 20 7786 9042
kseeger@debevoise.com

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

Jil Simon
Associate Editor
+1 202 383 8227
jsimon@debevoise.com

Kara Brockmeyer
Co-Editor-in-Chief
+1 202 383 8120
kbrockmeyer@debevoise.com

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

David A. O'Neil
Co-Editor-in-Chief
+1 202 383 8040
daoneil@debevoise.com

Jane Shvets
Co-Editor-in-Chief
+44 20 7786 9163
jshvets@debevoise.com

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

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

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