The Banking Law Journal

VOLUME 127 NUMBER 9 OCTOBER 2010

THE BANKING LAW JOURNAL (ISSN 0005 5506) is published ten times a year by A.S. Pratt & Sons, 805 Fifteenth Street, NW., Third Floor, Washington, DC 20005-2207. Application to mail at Periodicals postage rates is pending at Washington, D.C. and at additional mailing offices.
POSTMASTER: Send address changes to THE BANKING LAW JOURNAL, A.S. Pratt & Sons, 805 Fifteenth Street, NW., Third Floor, Washington, DC 20005-2207.

A Renewed Focus on Foreign Corruption and Politically Exposed Persons

PAUL L. LEE

The author explains that financial institutions need to be alert to the findings of several recent reports on foreign corruption and the fact patterns revealed by the reports to minimize their own exposure to compliance and reputational risk in this area.

Over the last decade international efforts aimed at stemming official corruption and denying corrupt politically exposed persons ("PEPs") access to the international financial system have been prominently on display. These efforts have taken such forms as international conventions, mutual assistance arrangements and multilateral standard setting processes. Recent reports suggest, however, that these public pronouncements and exhortations have not necessarily been accompanied by effective action to restrict PEP access to the international financial system and that even where individual states have taken action to adopt appropriate legal regimes, PEPs regularly find ways to evade the regimes. Other recent reports on foreign corruption also indicate that basic enforcement mechanisms are still lacking in many jurisdictions. These reports will undoubtedly focus renewed attention on the problem of official corruption and access by corrupt PEPs to the international financial system. Financial institutions need to be alert to the findings of these reports and the fact patterns revealed by the reports to minimize their own exposure to compliance and reputational risk in this area.

The first report, "Stolen Asset Recovery: Politically Exposed Persons, A

Paul L. Lee, a partner in the New York office of Debevoise & Plimpton LLP, is co-chair of the firm's Banking Group and a member of the Financial Institutions Group. Mr. Lee, a member of the Board of Editors of *The Banking Law Journal*, can be reached at pllee@debevoise.com.

Published in the October 2010 issue of *The Banking Law Journal*.

Policy Paper on Strengthening Preventive Measures," was issued by the Stolen Asset Recovery (StAR) Initiative in November 2009 (the "StAR Report").[1] The StAR Initiative is a partnership effort of the World Bank and the United Nations Office on Drugs and Crime. In its opening pages, the StAR Report paints a stark picture of the political corruption problem, citing a World Bank estimate that more than $1 trillion in bribes are paid each year.[2] The purpose of the StAR Report is to survey compliance with internationally recommended measures for dealing with official corruption and PEPs. The StAR Report finds a wide gulf between stated commitments to address official corruption and effective implementation of preventive measures.[3] The second report, "Keeping Foreign Corruption Out of the United States: Four Case Histories," was issued by the United States Senate Permanent Subcommittee on Investigations in February 2010 (the "Senate Subcommittee Report").[4] The Senate Subcommittee Report deals in depth with four cases of PEP penetration of the U.S. financial system. In the course of its 325 pages, the Senate Subcommittee Report recounts a series of cautionary tales of U.S. banking institutions dealing with PEPs. These are tales that relate to large and small banking institutions alike. The third report, "2010 Progress Report: Enforcement of the OECD Anti-Bribery Convention," was issued by Transparency International in July 2010 (the "Transparency International Report").[5] The Transparency International Report does not focus specifically on PEPs, but instead on overall enforcement efforts aimed at curbing foreign bribery. It concluded, based on a methodology of its own design, that only seven of the 38 countries that are parties to the OECD Anti-Bribery Convention have implemented active enforcement programs directed at bribery and that twenty countries that are parties to the OECD Anti-Bribery Convention have taken little or no enforcement action against foreign bribery since the OECD Convention came into force. This article reviews the findings of these reports, highlights areas of business operation that financial institutions may wish to reassess in light of the reports, and discusses other recent enforcement responses to the PEP problem in the United States.

INTERNATIONAL MEASURES

There is widespread recognition of the dangers that official corruption

presents to individual countries as well as to the international system. This recognition is reflected in prominent international conventions and other programs aimed at the prevention of official corruption and of the laundering of the proceeds of such corruption. The forerunner of these international efforts was the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "OECD Convention").[6] It was adopted in November 1997 and came into force in February 1999. Thirty OECD member countries and eight non-member countries have adopted the convention. The OECD Convention provides that each signatory state will make it a criminal offense under its laws to bribe or attempt to bribe a foreign public official.[7] Among its other provisions the OECD Convention also provides that each signatory state that has made bribery of its own public official a predicate offense under its money laundering legislation shall do so on the same terms for bribery of a foreign public official without regard to the place where the bribery occurred.[8] The OECD has been a driving force behind international efforts aimed at curbing foreign bribery. An OECD Working Group on Bribery monitors implementation and enforcement efforts by signatory states, issues progress reports, and develops recommendations for strengthening enforcement efforts, such as its 2009 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions.[9]

The Basel Committee on Banking Supervision was an early mover in dealing with the proceeds of official corruption. In its 2001 guidance document, *Customer Due Diligence for Banks*, the Basel Committee recognized the importance of preventing the use of the international financial system to launder the proceeds of corruption.[10] The Basel Committee guidance document notes that various countries have amended their laws to criminalize the corruption of foreign public officials and to make foreign corruption a predicate offense under their money laundering laws.[11] Against that developing background, the Basel Committee document states that there is a compelling need for a bank considering a relationship with a person that is suspected of being a PEP to identify the person as well as people and companies that are clearly related to the person.[12] The Basel Committee document specifically advises banks to check publicly available information to determine whether a customer is a PEP, investigate the source of funds before accepting a PEP, and

make the decision whether to open an account for a PEP at a senior management level.[13]

The Financial Action Task Force ("FATF"), the leading inter-governmental body established to develop and promote international measures aimed at preventing money laundering, has incorporated PEP measures in its recommendations as well. In 2003 FATF updated and expanded its 40 Recommendations to include a specific recommendation on PEPs.[14] FATF Recommendation 6 calls for financial institutions to have appropriate systems to determine whether a customer is a PEP, to obtain senior management approval for establishing a business relationship with a PEP, to take reasonable steps to establish the source of wealth and the source of funds of a PEP, and to conduct enhanced ongoing monitoring of a PEP relationship.[15]

The United Nations Convention Against Corruption (the "UN Convention") adopted in 2003 and ratified by 141 countries is the broadest international measure directed at corruption and bribery. Like the OECD Convention, the UN Convention requires each state party to adopt legislation making it a criminal offense to bribe or offer a bribe to a foreign public official.[16] The UN Convention also requires each state party to institute a comprehensive regulatory and supervisory regime for bank and non-bank financial institutions to deter and detect all forms of money laundering.[17] The UN Convention requires each state party to adopt legislation or other measures to establish as a criminal offense the conversion or transfer of property for the purpose of concealing or disguising the illicit origin of the property or the concealment or disguise of the true nature, source, location, disposition, movement or ownership of property that is known to be the proceeds of crime.[18] Specifically with respect to public officials, the UN Convention provides that each state party shall take such measures as are necessary in accordance with domestic law to require financial institutions within its jurisdiction to verify the identity of customers and to take reasonable steps to determine the beneficial owners of funds deposited into high value accounts and to conduct enhanced scrutiny of accounts sought or maintained by or on behalf of individuals entrusted with prominent public functions and by their family members and close associates.[19] This enhanced scrutiny is to be designed to detect suspicious transactions for the purpose of reporting such transactions to the competent authorities.[20] In 2003 the Group of Eight

also adopted a declaration on fighting corruption and improving transparency.[21] Among the various commitments contained in the declaration was a commitment by the G8 countries to require their own financial institutions to establish procedures for enhanced due diligence on PEP accounts and to report transactions that may involve the proceeds of official corruption.[22]

The private sector quickly added its voice to that of the public sector aimed at combating corruption and denying corrupt PEPs access to banking services. In 2000, eleven of the largest international banking firms formed the Wolfsberg Group to develop industry standards for anti-money laundering practices.[23] The first product of the Wolfsberg Group was the Global Anti-Money Laundering Guidelines for Private Banking, initially issued in October 2000 and subsequently revised in May 2002.[24] One of the guidelines calls for a bank to adopt a policy defining categories of private banking customers "whose circumstances require additional diligence."[25] Under the guidelines one of the indicators of circumstances requiring additional due diligence is the customer's status as a PEP.[26] Another guideline provides that a relationship with a PEP should only be entered into with the approval of senior management. Still another guideline provides that senior management must be involved in periodic updates or reviews of PEP accounts. In 2003 the Wolfsberg Group issued a set of Frequently Asked Questions ("FAQs") on PEPs, which were subsequently revised and expanded in May 2008.[27] These FAQs provide detailed guidance on PEP issues, including a discussion of the definitional issues relating to PEPs. Expanding on these efforts, in May 2007 the Wolfsberg Group issued the Wolfsberg Statement Against Corruption.[28] The statement discusses the misuse of financial institutions by PEPs to further acts of corruption as well as measures that financial institutions can implement to mitigate activity involving corruption.

International efforts aimed at preventing official corruption took on a much more practical bent in September 2007 when the Stolen Asset Recovery (StAR) Initiative was launched by the World Bank and the United Nations Office on Drugs and Crime. The objective of StAR is to facilitate "more systematic and timely return of assets stolen by politically exposed persons through acts of corruption."[29] StAR's activities are directed at stemming the cross-border flow of corruptly acquired assets and at assisting individual countries in recovering stolen assets that are hidden in foreign jurisdictions.[30]

In the first instance StAR provides advisory services in drafting the legislative and regulatory framework for asset recovery, including national forfeiture, anti-money laundering, and income and asset declaration laws.[31] On a more concrete level, StAR provides technical assistance to individual countries in actual asset recovery proceedings.[32] StAR also promotes international policy development in critical areas. It has identified strengthening the standards related to the identification of beneficial ownership and the monitoring of PEPs as one of these critical areas.[33] The StAR Report on PEPs issued in November 2009 is a product of this broad ranging initiative.

STAR REPORT

Ineffective Implementation of PEP Standards

The widespread adoption of anti-corruption and PEP standards provides both the backdrop and the occasion for the StAR Report. The purpose of the StAR Report is to determine how effective the adoption of these international conventions and standards has been in addressing the PEP issue. The StAR Report was based on field work in eight jurisdictions and additional research in seven other jurisdictions.[34] The field work involved interviews with regulatory and law enforcement authorities, financial intelligence units, and banking institutions. In addition, the StAR team reviewed the mutual evaluation reports prepared by FATF and FATF-style regional bodies for 82 jurisdictions.

As the StAR Report notes, 141 countries have ratified the UN Convention and more than 170 jurisdictions have adopted the FATF Recommendations.[35] Yet, assessments over the years by FATF and other regional bodies have found — in the words of the StAR Report — a "surprisingly" low level of compliance with the FATF Recommendations, even among FATF members.[36] Of the 124 jurisdictions that have been evaluated for compliance with the FATF Recommendations relating to customer due diligence and PEPs, only three jurisdictions have been found fully compliant, with 17 largely compliant, 29 partially compliant, and 75 non-compliant.[37] Perhaps even more significantly, the StAR Report concludes that the compliance rates have been relatively worse for developed countries than for developing countries.[38]

The conclusions of the StAR Report with respect to the weak implementation of PEP measures among developed nations appear to align with the findings of another recent study, which analyzed the macro flows of so-called licit and illicit cash from developing nations. In May 2010 Global Financial Integrity, a not-for-profit research institute, published a study on the "absorption" of illicit financial flows from developing countries covering the period 2002-2006.[39] Using model simulations and various assumptions, the study projects that during that five year period, on average approximately 76 percent of the illicit cash flows were "absorbed" by banks in developed countries and the remaining 24 percent in offshore financial centers.[40] In the last year of the period the share of absorption by offshore financial centers increased substantially to 34 percent, perhaps as a result of enhanced PEP measures in developed countries. The figures nonetheless suggest that banks in developed countries play a significant role in absorbing illicit funds. The policy lesson drawn by the Director of Global Financial Integrity is that while developing countries need to implement policies to curtail illicit financial flows, their efforts will be thwarted as long as developed countries permit their banks and offshore financial centers to facilitate the absorption of illicit funds.[41]

Basic Findings

The StAR Report characterizes the situation in general as one of "an overall failure of effective implementation of international PEP standards."[42] There are several factors that have contributed to the failure of effective implementation of PEP measures. The StAR Report identifies one key factor as the lack of an enforceable legal or regulatory framework surrounding PEPs in many jurisdictions. In a review of mutual evaluation reports prepared by FATF and other regional bodies, the StAR team found that 40 percent of the jurisdictions did not have enforceable PEP legislation or regulations.[43] Moreover, even where PEP legislation or regulations had been adopted, they were often not applied to all financial sectors or were otherwise limited in their definitional elements, such as in the definition of a PEP or the definition of enhanced due diligence.[44] Further, information on the effectiveness of the actual implementation of the legislative or regulatory requirements even where they did exist was limited. The StAR

Report recognizes the technical challenges that PEP compliance presents, ranging from differences in the PEP definition to the difficulty of identifying a PEP as a beneficial owner in complex financial arrangements.[45] Nonetheless, the StAR Report identifies the principal cause for weak PEP compliance as a lack of political will and political mobilization.[46] This lack of political mobilization is evidenced not merely by the failure to enact legislation or to promulgate rules, but by the low priority generally accorded to PEP issues. As an indication of the low priority accorded to PEP issues, the StAR Report notes that in visits with various jurisdictions, none of the jurisdictions cited examples of recent regulatory sanctions against institutions for failure to comply with PEP requirements.[47]

The StAR Report concludes that another factor that has impeded PEP compliance is the lack of clarification and harmonization of international requirements or standards on PEPs. The variations in international approaches to PEP rules serve both as an excuse to action and as an impediment to the implementation of effective PEP controls. The StAR Report cites examples of these variations, such as differing approaches to including domestic individuals as PEPs, family and close associates as PEPS, and other categories such as military officers, diplomats and judges as PEPs.[48]

Perhaps the most challenging factor identified by the StAR Report is the new typology of PEP penetration of the international financial system. The StAR Report observes that the classic methodology of corrupt PEPs putting funds directly into accounts in their own name or in the name of immediate family members is increasingly a rarity.[49] Instead, PEPs are now using lesser known associates and more complex corporate and trust arrangements to conceal their identity. The task of identifying beneficial ownership by PEPs has been further complicated by the expanded role of formation agents, lawyers, accountants and financial advisors as intermediaries in PEP relationships.

Principle Recommendations

To enhance the effectiveness of PEP measures already promulgated by standard setters and adopted by regulatory authorities, the StAR Report provides five "principle" recommendations and a number of associated recommendations.[50] The principle recommendations are as follows:

- Laws and regulations should make no distinction between domestic and foreign PEPs and should require enhanced due diligence for all PEPs.
- At account opening, banks should require customers to complete a written declaration of identity and ultimate beneficial ownership as the first step in meeting beneficial ownership due diligence requirements. The declaration should have criminal liability attached to it. The StAR Report notes that this requirement is unlikely to deter a hardened prospect, but that it may give pause to intermediaries, family members and associates if they realize that they could face personal criminal liability for false statements.
- A public official should be asked to provide a copy of any asset and income declaration form filed with the public official's home country authorities. The StAR Report notes that more than 110 countries require their public officials to file asset and income disclosure forms. Only one bank in the StAR survey requested prospective public official customers to supply these forms. The StAR Report notes that verification by local authorities of the information on such forms is uneven across jurisdictions so banks must in any event remain cautious about the information.
- PEP customers should be reviewed by senior management or a committee, including at least one member of senior management, on an annual basis. The StAR Report notes that an annual review of the overall relationship with high risk PEPs was a common practice among the banks surveyed.
- When a person ceases to be entrusted with a prominent public function, there should not be a limit on the length of time the person, family members or close associates would continue to be treated as PEPs. The StAR Report recommends that banks consider the continuing status of a PEP on a case-by-case basis.

Other Observations and Recommendations

In addition to these five principle recommendations, the StAR Report makes a number of other observations and recommendations that may influence future policy making in the PEP area. In setting forth its recommenda-

tions, the StAR Report poses *en passant* a fundamental question: whether a risk-based approach to PEPs produces the best results.[51] The StAR Report of course recognizes that most jurisdictions employ a risk-based approach to anti-money laundering measures generally. Nonetheless, the StAR Report observes that a poorly or partially applied risk-based approach will leave gaps in control and will likely produce inferior results compared with more prescriptive approaches.[52] Accordingly, the StAR Report recommends that in assessing the use of a risk-based approach to PEP measures, a jurisdiction should consider the extent to which qualitative information to inform risk judgments is readily available, the ability of the regulator to supervise and guide the sector, and the extent to which banks are equipped with sufficient resources and expertise to identify and mitigate PEP risks.[53] As the StAR Report further observes, a risk in the risk-based approach is that a bank will tailor its approach to suit its business model rather than its risk model.[54] It appears that in this discussion the StAR Report may be laying the foundation for a more prescriptive approach to PEPs at least for those jurisdictions that do not have the demonstrated capacity or architecture for anti-money laundering compliance.

As noted above, the ineffective implementation of PEP standards may be attributed at least in part to the inconsistent definitions of PEPs and enhanced due diligence among the international conventions and standard setters. As a first step, the StAR Report recommends that FATF and the UN Convention adopt uniform definitions of these terms.[55] The StAR Report includes an appendix with a useful comparison of the PEP definitions and enhanced due diligence requirements from the FATF Recommendations, the UN Convention, the Third EU Directive, the Basel Committee and the Wolfsberg Group. With respect to the definition of a PEP, one major point of difference is whether the PEP definition covers both domestic and foreign PEPs. The StAR Report notes that the FATF Recommendation 6 applies by its terms only to foreign PEPs although an interpretative note encourages countries to extend the requirement to domestic PEPs.[56] The StAR Report notes that the UN Convention does not distinguish between foreign and domestic PEPs which has the effect of requiring that State Parties mandate the application of enhanced due diligence to both foreign and domestic PEPs.[57] Notwithstanding the apparent obligations of the UN Convention, many countries that have adopted PEP legislation apply the legislation only to foreign PEPs.[58]

Another important point of difference relates to the inclusion of family members and close associates in the definition of a PEP. The UN Convention includes as close associates both persons and companies clearly related to public officials while the FATF Recommendation is silent on the issue.[59] The Third EU Directive includes as a close associate any natural person "who is known to have joint beneficial ownership of legal entities or legal arrangements, or any other close business relations" with a PEP.[60] On the other hand, the Third EU Directive limits its PEP definition to members of the immediate family whereas the FATF Recommendation and the UN Convention do not expressly limit their definitions to immediate family members.[61] Focusing on immediate family members may not be sufficient in cultures where the extended family maintains very close ties according to the StAR Report.[62] But as the Senate Subcommittee Report suggests, banking institutions already face significant challenges in identifying immediate family members. Extending the PEP regime beyond immediate family members would likely only result in a further diffusion of compliance resources with little prospect of additional benefit. The StAR Report also notes other differences in approach to the definition of PEPs, but limits itself for the time being to the additional recommendation that standard setters and jurisdictions clarify that their definitions of PEPs include family members and close associates.

The StAR Report acknowledges that one of the persistent challenges of any PEP regime is the accurate identification of the beneficial owners of accounts. Coupled with this acknowledgment is the recognition by the StAR Report of the growing use of intermediaries to conceal the identity of PEPs. This development places even more strain on the process of identifying beneficial ownership. The StAR Report notes that some jurisdictions allow their banks to rely on intermediaries with little or no information required with respect to the underlying customer.[63] Other jurisdictions require the identification of beneficial ownership only for specified levels of ownership, *e.g.*, more than 25 percent of the account or entity.[64] These limitations provide PEPs ample room to conceal their involvement in an account. In response to these challenges, as noted above, the StAR Report includes as one of its principle recommendations that banks require a written declaration of the identity and beneficial ownership from an account holder as a first step in conducting customer due diligence.

The StAR Report also notes that there is confusion in some jurisdictions over whether there are requirements for due diligence on both the source of wealth and the source of funds.[65] The StAR Report recommends that the regulatory authorities provide clarity on the requirement for due diligence on both. In the PEP context, the StAR Report further recommends that banks request public officials to provide a copy of any asset and income declaration form that they have filed with the authorities in their home country as a helpful tool in establishing source of wealth and perhaps source of funds.[66] Information on the source of wealth and funds will also be useful for purposes of ongoing monitoring. Although the StAR Report emphasizes the importance of such monitoring, it provides little explication of what enhanced ongoing monitoring should entail beyond a yearly senior management review of PEP customers and a yearly update of customer profiles.[67] Only fleeting mention is made of transaction monitoring although such monitoring is necessarily an inherent part of ongoing monitoring.

In addition to recommendations directed to banking institutions, the StAR Report also includes recommendations directed to the regulatory authorities. The StAR Report finds a lack of focus by the regulatory authorities themselves on PEP issues. As an indication of this lack of focus, the StAR Report cites the relative lack of enforcement actions against banks for PEP issues.[68] Also indicative of this lack of focus is the observation made by the StAR Report that in its interviews of regulatory authorities only one regulatory authority had undertaken thematic reviews of its banks specifically focusing on PEP issues.[69] The StAR Report also points to the low number of PEP suspicious activity or transaction reports filed compared to the total number of such suspicious activity or transaction reports.[70] In response to these observations, the StAR Report urges a greater focus by regulatory authorities on PEP issues, including greater training and more detailed guidance on PEP issues. As one example, the StAR Report recommends that the regulatory authorities and the financial intelligence units disseminate typologies or red flags indicative of corruption to the banking industry and provide targeted training on the same.

The StAR Report serves as a reminder that despite all the public pronouncements, implementation of PEP measures is still far from effective in many jurisdictions. It serves too as a reminder of the many weak links in

the global compliance chain. Banking institutions even in jurisdictions with robust PEP regimes are exposed to significant risk in dealing with PEPs who come *from* or *through* jurisdictions with weak PEP controls.

U.S. EFFORTS

The Senate Subcommittee Report provides evidence of its own that banks in jurisdictions like the United States with relatively robust PEP regimes are regularly exposed to risk when dealing with foreign PEPs. Before describing the particular PEP methodologies unearthed in the Senate Subcommittee Report, it might be helpful to summarize briefly the requirements applicable to PEP customers under U.S. law and regulations.

The USA PATRIOT Act enacted in October 2001 significantly expanded anti-money laundering requirements applicable to U.S. banking institutions and other financial institutions. Of particular relevance to this discussion, the USA PATRIOT Act added to the list of "specified unlawful activities" that provide the predicate for a money laundering charge in the federal criminal code an "offense against a foreign nation involving…bribery of a public official or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official."[71] The addition of an offense against a foreign nation involving official bribery as a predicate offense significantly expanded the potential scope for criminal money laundering charges against PEPs in the United States.

As part of a general strengthening of anti-money laundering measures, the USA PATRIOT Act also required financial institutions to establish anti-money laundering, customer identification, and suspicious activity reporting programs.[72] The USA PATRIOT Act contains a specific requirement applicable to private banking accounts for a foreign person, and in particular, for a senior foreign political figure or any immediate family member or close associate of a senior foreign political figure. Section 312 of the USA PATRIOT Act requires that in respect of a private banking account maintained by or on behalf of a non-U.S. person, a financial institution must take reasonable steps

> [i] to ascertain the identity of the nominal and beneficial owners of, and the source of funds deposited into, such account as needed to guard

> against money laundering and report any suspicious transactions under subsection (g) [of 31 U.S.C. § 5318]; and
>
> [ii] to conduct enhanced scrutiny of any such account that is requested or maintained by, or on behalf of, a senior foreign political figure, or any immediate family member or close associate of a senior foreign political figure that is reasonably designed to detect and report transactions that may involve the proceeds of foreign corruption.[73]

The regulations implementing this provision in the USA PATRIOT Act provide further specificity as to certain of the statutory requirements.[74] The regulations require that a financial institution take reasonable steps to (i) ascertain the identity of all nominal and beneficial owners of a private banking account; (ii) ascertain whether any of the nominal or beneficial owners of the account is a senior foreign political figure; (iii) ascertain the source of funds deposited into the account and the purpose and expected use of the account; and (iv) review the activity in the account to ensure that it is consistent with the information obtained about the client's source of funds and the stated purpose and expected use of the account and to report in accordance with applicable law and regulation any known or suspected money laundering or suspicious activity conducted to, from, or through the account.[75] The regulations also require that with respect to a private banking account for which a senior foreign political figure is a nominal or beneficial owner, the due diligence program must include enhanced scrutiny of the account reasonably designed to detect and report transactions that may involve the proceeds of foreign corruption.[76] The regulations provide definitions of the terms "senior foreign political figure" and "immediate family member."[77] These definitions are based on the definitions of the same terms contained in the document, "Guidance on Enhanced Scrutiny for Transactions That May Involve the Proceeds of Foreign Official Corruption," issued by the Treasury and State Departments and the federal banking agencies in January 2001.[78] This document from 2001 provides relatively detailed guidance on the enhanced scrutiny of accounts for senior foreign political figures as recommended at the time and as now mandated by law pursuant to section 312 of the USA PATRIOT Act. This guidance is incorporated into the *Bank Secrecy Act/Anti-Money Laundering Examination Manual*, issued by the Federal Financial

Institutions Examination Council, which as updated in April 2010 provides current guidance on dealing with PEPs.[79]

SENATE SUBCOMMITTEE REPORT

The Senate Permanent Subcommittee on Investigations has a history of investigating PEP dealings with U.S. financial institutions. In 1999 the subcommittee released a report entitled, "Private Banking and Money Laundering: A Case Study of Opportunities and Vulnerabilities," discussing the case of four heads of state and their families who used Citibank Private Bank to deal in suspect funds.[80] In 2004 the subcommittee issued a report entitled, "Money Laundering and Foreign Corruption: Enforcement and Effectiveness of the Patriot Act," discussing the Riggs Bank involvement with the head or former head of state of Equatorial Guinea and Chile.[81] The Senate Subcommittee Report issued in February 2010 investigates four recent cases of PEP penetration of the U.S. financial system, involving PEPs from Equatorial Guinea, Gabon, Nigeria and Angola.

Obiang Case Study

The first case history in the Senate Subcommittee Report involves Teodoro Nguema Obiang Mangue, the son of the president of Equatorial Guinea, who was also one of the subjects of the 2004 subcommittee report.[82] Mr. Obiang has also been the subject of many press reports and a number of international investigations concerning his alleged involvement in embezzlement and bribes.[83] The Senate Subcommittee Report concludes that during the period from 2004 to 2008 Mr. Obiang used various U.S. intermediaries, including lawyers, real estate agents, insurance agents, and escrow companies, to move more than $110 million in suspect funds into the United States. At times the U.S. intermediaries acted openly on his behalf; at other times they concealed his involvement in transactions, particularly when dealing with U.S. banks.[84] The lawyers used attorney-client, law office and shell company accounts as conduits for Mr. Obiang's funds. According to the Senate Subcommittee Report, if a bank uncovered Mr. Obiang's involvement in an account and closed it, the lawyers simply opened an account at another bank, taking care to avoid any ref-

erence to Mr. Obiang in the opening of the new account.[85] One of the lawyers used law office and shell company accounts at Union Bank of California, Bank of America, and Citibank to move funds for Mr. Obiang.[86] The other lawyer used law office accounts, shell company accounts and in at least one instance a personal account in the name of Mr. Obiang at three smaller California banks to handle financial transactions for Mr. Obiang.[87] The fact patterns here indicate that smaller banks may also be at risk of inadvertently dealing with PEPs through local intermediaries. It appears that in the case of most of these accounts, there was no indication, at least initially, of Mr. Obiang's involvement in the accounts and when the banks eventually learned of his involvement, the banks closed the accounts. Indeed, the use of law office accounts to receive the funds and then to wire transfer the funds to a shell company account — in some instances at another bank — seemed designed to conceal the source of the funds and the link to Mr. Obiang. Nonetheless, the Senate Subcommittee Report cites as a compliance weakness the failure of certain of the banks to detect or investigate the fact that certain wire transfer instructions explicitly named Mr. Obiang and the fact that the transfers originated in Equatorial Guinea, a high risk jurisdiction.[88]

The Senate Subcommittee Report also describes how the real estate agents and a real estate escrow company provided services to Mr. Obiang in several large real estate transactions.[89] Although persons involved in real estate closings and settlements are subject to the USA PATRIOT Act requirement to establish an anti-money laundering program, the Treasury Department in 2002 issued a temporary exemption from that requirement for persons involved in real estate closings and settlements.[90] The Senate Subcommittee Report also recounts how Mr. Obiang used a shell corporation account to purchase a private jet with a $38.5 million wire transfer from Equatorial Guinea to a U.S. escrow agent.[91] Another escrow agent had previously refused to complete the transaction after learning of Mr. Obiang's involvement. A business engaged in vehicle sales, including airplanes, is subject to the USA PATRIOT Act requirement for an anti-money laundering program, but like persons involved in real estate closings and settlements, these businesses are currently exempt from the requirement under the temporary exemption granted in 2002.[92] The Senate Subcommittee Report is critical of the fact that the Treasury has taken no action since 2002 to reconsider the temporary exemption granted

to the real estate closing and vehicle sales industries at that time.[93]

As part of the overall Obiang story, the Senate Subcommittee Report is also critical of what it perceives to be weaknesses in the wire transfer monitoring of correspondent accounts at U.S. banks. It notes that during a two month period Mr. Obiang was able to move $73 million from Equatorial Guinea into the United States through a correspondent bank account at Wachovia Bank and over a four year period $37 million through a correspondent bank account at Citibank.[94] In the case of Wachovia transfers, the Senate Subcommittee Report states that notwithstanding the fact that each of the wire transfers referenced Mr. Obiang and showed the funds originating from a bank in Equatorial Guinea, the Wachovia interdiction software did not block any of the transfers.[95] Wachovia apparently relied on its customer, Banque de France (the central bank of France), to monitor the transactions in its correspondent account. Similarly, most of the $37 million in wire transfers at Citibank were made through a correspondent bank account of a bank from Equatorial Guinea maintained at Citibank. Citibank advised the Senate subcommittee that it screens all of its correspondent wire activity through a real time interdiction filter designed principally to screen against OFAC and other sanction lists.[96] The Senate Subcommittee Report is critical of the fact that the interdiction software programs at Wachovia and Citibank were not used to interdict PEP transactions. As the Senate Subcommittee Report recognizes, however, interdiction software is typically designed to detect and block wire transfers involving persons or entities on the OFAC list of Specially Designated Nationals or other persons or entities from sanctioned countries.[97] The interdiction software is generally not configured to apply to other broad categories of persons such as PEPs, although some banks do modify their interdiction software to cover certain specifically identified persons or parties. As a general matter, transaction monitoring for PEPs is done after the fact because it is simply not feasible to conduct a broad-based PEP screen before the fact on transactions.

Bongo Case Study

The Senate Subcommittee Report also recounts the picaresque tale of the now deceased president of Gabon, El Hadj Omar Bongo Ondimba, and his dealings and those of his daughter and one of his daughters-in-law, with

a number of U.S. banks and financial institutions. Omar Bongo's own accounts at Citibank Private Bank were one of the subjects of the Senate Subcommittee report in 1999.[98] According to the Senate Subcommittee Report, Omar Bongo had several wives and is reported to have fathered over 30 children, thereby giving new meaning to the term "immediate family."[99] Much of the text in this section of the Senate Subcommittee Report is devoted to the activities of a U.S. lobbyist for Omar Bongo in the purchase of armored cars and an attempted purchase of a C-130 aircraft.[100] More relevant to the concerns of banking institutions, the Senate Subcommittee Report discusses how a daughter of Omar Bongo, describing herself as a student, was able to maintain large personal accounts at HSBC Bank, Commerce Bank, and JP Morgan Chase, including in one case $1 million in cash in a safe deposit box.[101] None of the banks was initially aware of her PEP status although at least two of the banks had checked her name against PEP lists provided by third-party vendors.[102] The Senate Subcommittee Report also relates how in 1999 a daughter-in-law of Omar Bongo established a trust arrangement under her maiden name in the United States, which allowed her to engage in transactions with U.S. financial institutions, including Fidelity Investments and HSBC Bank, without disclosure of her PEP status.[103] The *Bongo* case study suggests that the rumors of the death of the classic PEP typology (*i.e.*, of corrupt PEPs putting funds directly into their own named accounts or those of immediate family members) are exaggerated. At the same time, the facts of the *Bongo* case study confirm the difficulties that banks continue to confront in identifying even immediate family members of PEPs.

Abubakar Case Study

This case study traces patterns generally similar to the two previous case studies. It involves Jennifer Douglas Abubakar, a U.S. citizen, who is the fourth wife of the former Vice President of Nigeria, Atiku Abubakar. According to the Senate Subcommittee Report, from 2000 to 2008 Ms. Douglas helped her husband bring over $40 million in suspect funds into the United States, including $25 million that were transferred from offshore corporations into U.S. bank accounts opened by Ms. Douglas.[104] In December 2008, the Securities and Exchange Commission alleged in a formal complaint against Siemens AG that Siemens transferred $2.8 million in bribe payments to a

U.S. bank account belonging to Ms. Douglas in 2001 and 2002. According to the Senate Subcommittee Report, during this period, Ms. Douglas maintained 18 accounts at Citibank, four at Chevy Chase Bank, six at Wachovia Bank, and three at Eagle Bank in Maryland.[105] It is not clear from the Senate Subcommittee Report how many of these accounts were opened under Ms. Douglas' prior married name with no reference to the Abubakar name. Her bank account opening documents described her variously as "student," "homemaker," and "unemployed."[106] From 2000 to 2007, Ms. Douglas received wire transfers totaling approximately $20 million from offshore corporations into her accounts at Citibank, including $2.2 million from Siemens in 2001 and 2002.[107] It appears that Citibank and Chevy Chase Bank did not know of Ms. Douglas' PEP status when the accounts were initially opened.[108] It appears that Wachovia was aware of Ms. Douglas' connection to Mr. Abubakar when the accounts were being opened, but relied on a third party vendor that screened customers against an external database.[109] That screening process did not identify Ms. Douglas as a PEP. The Senate Subcommittee Report is critical of the banks for not identifying Ms. Douglas sooner as a PEP attributing that failure to the use of incomplete PEP lists by third party vendors and to inadequate due diligence by the banks themselves and in any event for allowing large wire transfers from offshore corporations into her personal accounts over an extended period of time without appropriate scrutiny of the account.

Angola Case Study

The final case study actually involves three separate sets of PEP relationships with respect to Angola. The first PEP relationship involves Pierre Falcone who according to the Senate Subcommittee Report is a notorious arms dealer and known for his close association with Angolan President Jose Eduardo dos Santos.[110] Mr. Falcone was convicted in France in 2007and 2009 on charges of illegal arms dealing, tax fraud and money laundering and is currently incarcerated in France. From 1989 through 2007, Mr. Falcone, his wife, and other relatives maintained 29 accounts at Bank of America.[111] During the period from 1999 to 2007, the Senate subcommittee identified $60 million in suspect account activity in these accounts. For the first 15 years that the accounts were open, they received only routine account monitor-

ing.[112] In 2005 Bank of America compliance personnel conducted a review of certain of the accounts, but apparently concluded that the transactions reviewed were not suspicious.[113] In 2007 after being contacted by the Senate subcommittee staff, Bank of America commenced another review of the accounts and subsequently closed the accounts.

The second PEP relationship involved Dr. Aguinaldo Jaime, who was head of the Central Bank of Angola from 1999 through 2002, and who has subsequently served in other senior positions in the Angolan government. The Senate Subcommittee Report states that while head of the Central Bank of Angola, Dr. Jaime attempted on two occasions to transfer $50 million in government funds from the Central Bank to private bank accounts in the United States.[114] The funds were returned on both occasions by the U.S. financial institutions involved because of the unusual nature of the transfer. The Senate Subcommittee Report concludes that the attempted transfers were likely part of a fraudulent "prime bank" investment scheme. While the funds were returned to the Central Bank, the Senate Subcommittee Report cites these attempted transactions as illustrative of the fact that even central bank transactions require careful scrutiny.[115]

The third PEP relationship involved Banco Africano de Investimentos ("BAI"), a private bank in Angola, the largest shareholder of which is Sonangol, the Angolan state-owned oil company. The Senate Subcommittee Report states that the clientele of BAI is replete with Angolan PEPs.[116] BAI has had accounts at HSBC in New York since 1998. The Senate Subcommittee Report states that BAI has used its HSBC accounts primarily to make U.S. dollar wire transfers for BAI and its clients. According to the Senate Subcommittee Report, HSBC over the years had several concerns with the BAI accounts. Despite unanswered requests by HSBC for further information about certain ownership interests in BAI and for a copy of the BAI anti-money laundering procedures, the Senate Subcommittee Report indicates that HSBC allowed the BAI accounts to continue to operate.[117] The Senate Subcommittee Report is also critical of an HSBC decision in 2006 not to subject the BAI accounts to the kind of enhanced monitoring applied to PEP and other high risk customers. In 2008 HSBC, apparently based on questioning by the subcommittee staff, decided to subject the BAI accounts to enhanced monitoring.[118]

Senate Subcommittee Recommendations

The Senate Subcommittee Report highlights the risks that attend a financial institution's dealings with PEPs. It confirms the observations contained in the StAR Report that PEPs are increasingly using indirect means to access banking services in well-established jurisdictions. The use of lawyers, real estate agents, and other intermediaries by PEPs are prominent features in several of the case studies contained in the Senate Subcommittee Report. The Senate Subcommittee Report recommends that the existing "temporary" exemption from the anti-money laundering program requirement for real estate, escrow, and vehicle sales agents be rescinded.[119] The Seante Subcommittee Report also recommends that the Treasury adopt a rule requiring U.S. financial institutions to obtain a certification for each attorney-client and law office account that it will not be used to circumvent anti-money laundering or PEP controls.[120] The subcommittee also recommends that Congress enact legislation requiring the disclosure of the beneficial owners of all U.S. incorporated entities.[121]

The finding of the Senate Subcommittee Report with respect to the use of intermediaries does not surprise. What does surprise are the stories of the continued and relatively open use by PEPs of family members, in many cases immediate family members, to establish accounts. A recurring theme in these case studies is the failure to identify PEP family relationships. The Senate Subcommittee Report notes in this respect that some of the third party vendors that provide PEP screening for banks use "incomplete" or "unreliable" lists. "Incomplete" and "unreliable" may perforce be the operative terms to describe any effort to capture in a list the protean elements of PEP designation. In the end, the Senate Subcommittee Report is reduced to a basic refrain, *i.e.*, that the tactics used by PEPs in these cases demonstrate the need for U.S. financial institutions to strengthen their PEP controls.

TRANSPARENCY INTERNATIONAL REPORT

The most recent report dealing with international efforts to curb foreign bribery is the "Progress Report 2010: Enforcement of the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions" in July 2010.[122] This is the sixth such annual prog-

ress report prepared by Transparency International. The report is based on a questionnaire survey of experts working with Transparency International as supplemented by other sources, such as the OECD Working Group on Bribery annual reports. The survey focuses on enforcement actions (both cases and investigations) involving foreign bribery. For this purpose, an enforcement case includes either a criminal or civil case (involving allegations of foreign bribery). A bribery case includes a case involving alleged foreign bribery whether brought under laws dealing with corruption, money laundering, tax evasion, fraud, or accounting and disclosure.[123] The taxonomy used by Transparency International classifies the signatory countries to the OECD Convention into three categories: "Active Enforcement," "Moderate Enforcement," and "Little or No Enforcement." A country is classified under the heading of "Active Enforcement" if it has a share of world exports of over two percent and has had cumulatively at least 10 major cases (with at least three initiated in the last three years and at least three concluded with substantial sanctions) or if it has a share of world exports of less than two percent and has had at least three major cases (with at least one concluded with substantial sanctions and at least one pending that was initiated in the last three years). A country is classified under the heading of "Moderate Enforcement" if it has had at least one major case as well as active investigations.[124]

Based on its survey work for enforcement cases through the end of 2009, Transparency International ranks seven countries as having Active Enforcement, nine as having Moderate Enforcement and twenty as having Little or No Enforcement.[125] The conclusion of Transparency International is that

> With active enforcement in only seven of the 38 parties to the Convention, the Convention's goal of effectively curbing foreign bribery in international business transactions is still far from being achieved.[126]

It should be noted that the seven countries in the Active Enforcement category represent approximately 30 percent of the sources of world exports, the nine countries with Moderate Enforcement 21 percent, and the twenty countries with Little or No Enforcement only 15 percent.[127] The survey results for the seven countries (up from four in the 2009 annual report) that are classified under the Active Enforcement category are instructive in them-

selves. The survey results list the United States (with 10 percent of world exports) as the most active with 120 enforcement cases initiated through the end of 2008 and 168 cases through the end of 2009.[128] Germany (with 8.9 percent of world exports) is the second most active country with 110 cases through the end of 2008 and 117 cases through the end of 2009. The third most active is Italy (with 3.2 percent of world exports) with two cases through the end of 2008, but 39 cases through the end of 2009. Switzerland (with 1.6 percent of world exports) is the fourth most active with 16 cases through the end of 2008 and 30 cases through the end of 2009. Denmark (with one percent of world exports) is the fifth most active with 13 cases through the end of 2008 and 14 through the end of 2009. The United Kingdom (with 4.9 percent of world exports) is the sixth most active with four cases through the end of 2008 and 10 cases through the end of 2009. Norway (with one percent of world exports) is the seventh most active with five cases through the end of 2008 and six cases through the end of 2009. Thus, even within the Active Enforcement category, there is a substantial differential between the United States and Germany and the other five countries in the category.

Other findings from the survey results also provide cause for reflection. The survey results from 27 countries cited significant inadequacies in the individual country's legal framework for prohibiting foreign bribery, such as inadequate sanctions, insufficient definition of a foreign bribery offense, and jurisdictional limitations.[129] The survey results from 32 countries cited inadequacies in the operation of the country's enforcement system, such as inadequate resources or training, decentralized enforcement, and inadequate complaint and whistleblower systems.[130] Finally, the questionnaire results from 25 countries cited a concern that goes to the essence of the report itself, *i.e.*, a concern about insufficient access to information concerning judgments, settlements, prosecutions and investigations in the individual countries.[131] The inclusion for the first time of enforcement data in the "2009 Annual Report of the OECD Working Group on Bribery" reflects the accepted view that monitoring the adoption of legal requirements in individual countries is a necessary, but only incomplete measure of the real commitment of a country to the anti-bribery principles of the OECD Convention.[132] An increased focus on documented enforcement activities will dominate the evaluative process for OECD anti-bribery measures as it will for the evaluative process

for PEP measures as well. In reflecting on recent enforcement experience, the Transparency International Report makes an observation relevant to the thrust of this article. The Transparency International Report notes that some of the most prominent bribery investigations have been triggered by money laundering investigations, citing as examples the *Siemens* and *Alstom* cases.[133] The Transparency International Report further notes the role of financial institutions from a range of financial centers, including New York and Miami, in these cases.[134]

RECENT DEVELOPMENTS IN THE U.S.

The active enforcement environment in the United States for foreign bribery cases as noted in the Transparency International survey holds implications for enforcement efforts against PEPs as well. These implications arise in particular from recent prosecutorial actions under the Foreign Corrupt Practices Act (the "FCPA"). The FCPA is one of the original national statutes aimed at the bribery of foreign officials. Congress enacted the FCPA in 1977 following revelations during the "Watergate" political scandal in the mid-1970s concerning the widespread use of unauthorized "slush funds" to pay bribes to foreign officials and to make illicit campaign contributions in the United States.[135] In the mid-1970s, 400 U.S. companies admitted to paying an aggregate amount of approximately $300 million (in 1977 dollars) in bribes to foreign officials.[136] U.S. legislators concluded that, as a result of the payment of bribes overseas, "[t]he image of American democracy abroad has been tarnished. Confidence in the financial integrity of our corporations has been impaired. The efficient functioning of our capital markets has been hampered."[137] The FCPA was enacted to address these concerns and to combat the effects of bribery on the effective functioning of free market systems.[138]

The FCPA is comprised of two distinct but complementary provisions: the anti-bribery provisions[139] and the accounting provisions (which, in turn, are made up of the "books and records" and "internal controls" provisions).[140] The anti-bribery provisions generally prohibit corruptly giving or offering a bribe, directly or indirectly, to a foreign government official to obtain or retain business or secure an improper business advantage. The "books and records" provision requires issuers to "make and keep books, records, and accounts,

which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer;" and the "internal controls" provision requires issuers to create and maintain internal accounting controls sufficient to "provide reasonable assurances," generally, that transactions conform to general or specific management authorization, are recorded accurately, and are not used for illicit purposes.

The Securities and Exchange Commission ("SEC") and the Department of Justice ("DOJ") share responsibility for enforcing the FCPA. The SEC has jurisdiction for civil and administrative enforcement of the FCPA against issuers with a class of securities registered pursuant to section 12 of the Securities Exchange Act of 1934 or required to file reports under section 15(d) of that act, and against individuals associated with such issuers.[141] The DOJ is responsible for all criminal enforcement of the FCPA and has overlapping authority with the SEC for civil enforcement of the statute with respect to issuers, and sole authority for civil enforcement with respect to domestic concerns and other non-issuers.[142]

The FCPA applies only to bribe payers — not recipients of bribes — so corrupt foreign government officials have until recently found themselves outside of the scope of FCPA-related prosecutions.[143] In December 2009, however, the DOJ unsealed an indictment against a number of defendants, including two former foreign government officials, in connection with alleged bribes related to discounts on telecommunications services in the Republic of Haiti. In *U.S. v. Esquenazi*,[144] two former executives of a private telecommunications company based in Florida were charged with funneling bribes to two successive directors of international relations of Haiti's state-owned national telecommunications company, Telecommunications D'Haiti ("Haiti Teleco"), through a number of Florida-based shell companies and co-conspirators. The payments ostensibly were for consulting services, and were recorded as "commissions" and "consulting fees." One of the shell companies was operated by the sister of one of the foreign officials. The benefits obtained by the scheme for the Florida-based telecommunications company included preferred telecommunications rates, reduced number of minutes for which payment was owed and credits against amounts due.

The two executives and the foreign official's sister were charged with conspiracy to violate the FCPA and commit wire fraud, substantive FCPA and

money laundering violations, and money laundering conspiracy. The two former foreign officials were charged with money laundering conspiracy; one was also charged with substantive money laundering violations. The "specified unlawful activity" upon which the money laundering charges were based included wire fraud and violations of the FCPA and Haiti's anti-bribery laws. One of the individuals pleaded guilty to the charges and was sentenced to four years in prison, three years of supervised release following his prison term, and payment of almost $2 million in restitution and about $1.5 million in forfeiture.[145] The other individual awaits trial.

The Haiti Teleco case demonstrates that PEPs face increased exposure in the U.S. from their use of U.S. financial institutions to facilitate illicit activities. In a press release accompanying the guilty plea of the one individual, the U.S. government touted the conviction as "a warning to corrupt government officials everywhere that neither they nor their money will find any safe haven in the United States."[146] Indicating a trend in using FCPA-related prosecutions to recover illicit bribe payments from the foreign officials who receive them, in the month following the unsealing of these indictments, an indictment was unsealed against a former governor of Thailand's Tourism Authority and her daughter in connection with alleged bribes from two U.S. film producers in exchange for securing contracts related to the Bangkok International Film Festival and other tourism initiatives.[147] The U.S. film producers disguised the corrupt payments as "commissions" and inflated cost amounts submitted to tourism agencies in order to funnel bribes to the Thai official through her daughter and an unnamed friend. The charges against the Thai official and her daughter include money laundering and conspiracy to commit money laundering. The specified unlawful activity upon which the money laundering charges were based was a violation of the FCPA, bribery of a public official in violation of Thailand's penal code, and misappropriation, theft or embezzlement in violation of Thailand's penal code.[148]

The most recent example of the DOJ's use of money laundering statutes to pursue PEPs comes in the form of civil forfeiture actions filed by the DOJ in July 2010 against a former president of Taiwan and his wife.[149] The former president and his wife were convicted in Taiwan in September 2009 on bribery, embezzlement and money laundering charges. The civil complaints filed by the DOJ allege that the wife of the former president arranged for

the movement of the proceeds of bribes from Taiwan through shell companies that used Swiss bank accounts controlled by her son. A portion of the bribe proceeds was then transferred from the Switzerland bank account to the United States where the proceeds were used to buy real estate.[150] The civil forfeiture actions are based *inter alia* on the claim that the real estate property was purchased with funds traceable to the proceeds of a specified unlawful activity, the payment of bribes to a foreign official.[151]

In announcing these actions, the DOJ said in its press release that this was "another good example of the department's resolve not to allow criminals to profit from their crimes."[152] As these various actions indicate, the DOJ has now made enforcement of criminal and civil sanctions against corrupt PEPs a priority.[153] Increased scrutiny of PEP activities in the United States will undoubtedly lead to further enforcement actions against PEPs and possibly against intermediaries that assist PEPs in evading the anti-money laundering measures discussed in this article.

NOTES

[1] Theodore S. Greenberg, Larissa Gray, et al., Stolen Asset Recovery, Politically Exposed Persons: A Policy Paper on Strengthening Preventive Measures (2009), *available at* http://siteresources.worldbank.org/EXTSARI/Resources/5570284-1257172052492/PEPs-ful.pdf?resourceurlname=PEPs-ful.pdf (hereinafter "StAR Report").

[2] *Id*. at xiii.

[3] *Id*. at xv.

[4] S. Comm. on Homeland Security and Governmental Affairs, Permanent Subcomm. on Investigations, Keeping Foreign Corruption Out of the United States: Four Case Histories (2010), *available at* http://www.transparencyusa.org/ documents/FOREIGNCORRUPTIONREPORT.pdf (hereinafter "Senate Subcommittee Report").

[5] Transparency International, 2010 Progress Report: Enforcement of the OECD Anti-Bribery Convention (July 2010), *available at* http://www.transparency.org/news_room/latest_news/press_releases/2010/2010_07_28_oecd_progress_report (hereinafter "Transparency International Report").

[6] Organization for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. Treaty Doc. No. 105-43 (1997), 1997 U.S.T. LEXIS 105, 37

I.L.M. 1 (hereinafter "OECD Convention").

[7] OECD Convention, *supra* note 6, Art. 1, §1. The OECD Convention defines the term "foreign public official" to mean

> any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation. Art. 1. §4(a).

The OECD Convention defines the term "foreign country" to include all levels and subdivisions of government from national to local. Art. 1, §4(b).

[8] *Id*. Art. 7.

[9] OECD Working Group on Bribery in International Business Transactions, Recommendations of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (26 November 2009).

[10] Basel Committee on Banking Supervision, *Customer Due Diligence for Banks,* Basel Committee Publication No. 85 (October 2001) *available at* http://www.bis.org.publ/bcbs85.htm (hereinafter "Basel Guidance").

[11] *Id*. at ¶ 43.

[12] *Id*. The Basel Guidance defines PEPs as

> individuals who are or have been entrusted with prominent pubic functions, including heads of state or of government, senior politicians, senior government, judicial or military officials, senior executives of publicly owned corporations and important political party officials. Basel Guidance at ¶ 41.

[13] *Id*. at ¶ 44.

[14] Financial Action Task Force, FATF 40 Recommendations (2003), incorporating the amendments of 22 October 2004, *available at* http://www.fatf-gafi.org/dataoecd/7/40/34849567.pdf. FATF 40 Recommendations define PEPS as

> individuals who are or have been entrusted with prominent public functions in a foreign country, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials. Business relationships with family members or close associates of PEPs involve reputational risks similar to those with PEPs themselves. The definition is not intended to cover middle ranking or more junior individuals in the foregoing categories. FATF 40 Recommendations, Glossary at 7.

[15] FATF 40 Recommendations at 5-6.

[16] United Nations Convention Against Corruption, Art. 16(1), *adopted* Oct. 31, 2003, 43 I.L.M. 37 (hereinafter "UN Convention"). The UN Convention defines the term "foreign public official" to mean:

> any person holding a legislative, executive, administrative or judicial office of a

foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise. Art. 2(b).

[17] *Id.*, Art. 14(1)(a).

[18] *Id.*, Art. 23(a).

[19] *Id.*, Art. 52(1).

[20] *Id.*

[21] Group of 8, Fighting Corruption and Improving Transparency: A G8 Declaration (2003), *available at* http://www.g8.fr/evian/english/navigation/2003_g8_summit/summit_documents/fighting_corruption_and_improving_transparency_-_a_g8_declaration.html.

[22] *Id.*

[23] *See* The Wolfsberg Group, http://www.wolfsberg-principles.com.

[24] The Wolfsberg Group, Wolfsberg AML Principles (2002), *available at* http://www.wolfsberg-principles.com/privat-banking.html (hereinafter "Wolfsberg Guidelines").

[25] *Id.* Wolfsberg Guideline 2.1.

[26] The Wolfsberg Guidelines define "Politically Exposed Persons" as

individuals holding or having held positions of pubic trust, such as government officials, senior executives of government corporations, politicians, important political party officials, etc., as well as their families and close associates. Wolfsberg Guideline 2.2.

[27] The Wolfsberg Group, Wolfsburg Frequently Asked Questions ("FAQs") on Politically Exposed Persons ("PEPs") (2008), *available at* http://www.wolfsberg-principles.com/pdf/PEP-FAQ-052008.pdf.

[28] The Wolfsberg Group, The Wolfsberg Statement Against Corruption (2007), *available at* http://www.wolfsberg-principles.com/statement_against_corruption.html.

[29] Stolen Asset Recovery Initiative Partnership Charter, § 4 (2008), *available at* http://siteresources.worldbank.org/EXTSARI/Resources/StARCharter.pdf?resourceurlname=StARCharter.pdf.

[30] *Id.* § 3(ii).

[31] *Id.* § 7.

[32] *Id.* § 8.

[33] StAR, Progress Report July 2009, Executive Summary, *available at* http://siteresources.worldbank.org/EXTSARI/Resources/ProgressReport2009.pdf.

[34] The eight jurisdictions in which field work was done were Argentina, France, Hong Kong, Jersey, Liechtenstein, Switzerland, the United Kingdom, and the United States. The other seven jurisdictions that were the subject of research were Lebanon, Mexico, Nigeria, the Russian Federation, Singapore, South Africa, and the United

Arab Emirates. StAR Report, *supra* note 1, at 9 n.21 & n.22.
[35] StAR Report, *supra* note 1, at 7.
[36] *Id*. at xv.
[37] *Id*. at 7-8.
[38] *Id*. at 13.
[39] Dev Kar, Devon Cartwright-Smith, & Ann Hollingshead, Global Financial Integrity, Absorption of Illicit Financial Flows from Developing Countries: 2002-2006 (2010), *available at* http://www.gfip.org/storage/gfip/documents/ reports/ absorption_of_illicit_flows_web.pdf (hereinafter "2010 Global Financial Integrity Report"). For purposes of this study, illicit financial flows include proceeds from illicit activities such as corruption and criminal activities as well as the proceeds of licit business when transported across borders in contravention of applicable laws and regulations. *See* Dev Kar & Devon Cartwright-Smith, Global Financial Integrity, Illicit Financial Flows from Developing Countries: 2002-2006 (2008), *available at* http://www.gfip.org/storage/gfip/executive%20-%20final%20 version%201-5-09.pdf.
[40] 2010 Global Financial Integrity Report, *supra* note 39, at 22-23.
[41] *Id*. at iii.
[42] *Id*. at xv.
[43] *Id*. at 13.
[44] *Id*.
[45] *Id*. at 17.
[46] *Id*. at 17-18.
[47] *Id*. at 18.
[48] *Id*. at 19.
[49] *Id*.
[50] *Id*. at xv – xviii.
[51] *Id*. at 24.
[52] *Id*.
[53] *Id*.
[54] *Id*. at 23.
[55] *Id*. at 26.
[56] *Id*.
[57] *Id*.
[58] *Id*. For example, section 312 of the USA PATRIOT Act and the regulations issued thereunder require the application of enhanced scrutiny only to senior foreign political figures. *See* 31 U.S.C. § 5318(i); 31 C.F.R. § 103.178(c).
[59] *See* StAR Report, *supra* note 1, at 28.
[60] Commission Directive 2006/70/EC, art. 2, 2006 O.J. (L 214), *implementing*

Council Directive 2005/60/EC, 2005 O.J. (L 309).

[61] *Id*. The applicable U.S. rules likewise include immediate family members in the definition of a "senior foreign political figure." *See* 31 C.F.R. § 103.176(r).

[62] StAR Report, *supra* note 1, at 28.

[63] *Id*. at 36.

[64] *Id*.

[65] *Id*. at 47.

[66] *Id*. at 48.

[67] *Id*. at 55.

[68] *Id*. at 61.

[69] *Id*. at 59. The StAR Report does not identify the one jurisdiction in its survey that had undertaken a thematic review of its banks specifically focused on PEPs. Public sources suggest that it may be the Financial Services Authority in the United Kingdom. *See* FSA, Politically Exposed Persons (PEPs): Good Practice, *available at* http://www.fsa.gov.uk/Pages/About/What/financial_crime/money_laundering/peps/index.shtml.

[70] StAR Report, *supra* note 1, at 63.

[71] USA PATRIOT Act, Pub. L. No. 107-56, §315, 115 Stat. at 308-309 (codified at 18 U.S.C. §1956(c)(7)(B)(iv) (2006)). Section 315 added bribery of a public official or misappropriation or embezzlement of funds by a public official to the list of offenses against a foreign state that constitute a "specified unlawful activity" under § 1956(a) for a financial transaction "occurring in whole or in part in the United States."

[72] *Id*., § 352, 115 Stat. at 322 (codified at 31 U.S.C. § 5318(h)); § 326, 115 Stat. at 317 (codified at 31 U.S.C. § 5318 (l)); § 351, 115 Stat. at 320 (codified at 31 U.S.C. § 5318(g)(3)).

[73] *Id*., §312, 115 Stat. at 304 (codified 31 U.S.C. §5318(i)). Section 312 contains a special definition of the term "private banking account" to mean any account or combination of accounts that:

> (i) requires a minimum aggregate deposits (sic) of funds or other assets of not less than $1,000,000;
>
> (ii) is established on behalf of 1 or more individuals who have a direct or beneficial ownership interest in the account; and
>
> (iii) is assigned to, or is administered or managed by, in whole or in part, an officer, employee, or agent of a financial institution acting as a liaison between the financial institution and the direct or beneficial owner of the account. 31 U.S.C. § 5318(i)(4)(B).

[74] 31 C.F.R. §§ 103.175 & 103.178.

[75] 31 C.F.R. § 103.178(b).

[76] 31 C.F.R. § 103.178(c). For purposes of this regulation, the term "proceeds of foreign corruption" is defined to mean:

> any asset or property that is acquired by, through, or on behalf of a senior foreign political figure through misappropriation, theft, or embezzlement of public funds, the unlawful conversion of property of a foreign government, or through acts of bribery or extortion, and shall include any other property into which any such assets have been transformed or converted. 31 C.F.R.§ 103.178(c)(2).

Certain financial institutions are required to file Suspicious Activity Reports under applicable rules with the Financial Crimes Enforcement Network ("FinCEN"). *See* 31 C.F.R. § 103.15 (mutual funds); 31 C.F.R. 103.17 (futures commission merchants and introducing brokers in commodities); 31 C.F.R. § 103.18 (banks); and 31 C.F.R. § 103.17 (brokers or dealers in securities).

In 2006 the U.S. Department of Justice requested that FinCEN revise its Suspicious Activity Report form to include a specific box for identification of "suspicious activity involving a politically exposed person." *See* Letter of Lester M. Joseph, Principal Deputy Asset Forfeiture and Money Laundering Section, U.S. Department of Justice, to FinCEN, dated April 17, 2006. The current Suspicious Activity Report forms do not include a specific box for identification of suspicious activity involving a politically exposed person. Such identification would be done in the Part V of the form under the heading "Suspicious Activity Information Narrative." In 2008, FinCEN issued guidance requesting financial institutions to include the term "foreign corruption" in the narrative portion of the Suspicious Activities Report. *See* FinCEN, Guidance to Financial Institutions on Filing Suspicious Activity Reports regarding the Proceeds of Foreign Corruption (April 17, 2008), FIN-2008-G005.

[77] 31 C.F.R.§ 103.175(r) defines the term "senior foreign political figure" to mean:

> (i) A current or former:
>
> (A) Senior official in the executive, legislative, administrative, military, or judicial branches of a foreign government (whether elected or not);
>
> (B) Senior official of a major foreign political party; or
>
> (C) Senior executive of a foreign government-owned commercial enterprise;
>
> (ii) A corporation, business, or other entity that has been formed by, or for the benefit of, any such individual;
>
> (iii) An immediate family member of any such individual; and
>
> (iv) A person who is widely and publicly known (or is actually known by the relevant covered financial institution) to be a close associate of such individual.
>
> (2) For purposes of this definition:
>
> (i) *Senior official* or executive means an individual with substantial authority over policy, operations, or the use of government-owned resources; and
>
> (ii) *Immediate family member* means spouses, parents, siblings, children and a

spouse's parents and siblings.

[78] *See* Board of Governors of the Federal Reserve System, Division of Banking Supervision and Regulation, Supervisory Letter SR 01-03 (SUP) (Jan. 16, 2001): Guidance on Enhanced Scrutiny for Transactions That May Involve the Proceeds of Foreign Official Corruption, *available at* www.federalreserve.gov/boarddocs/srletters/2001/SR0103.htm.

[79] Bank Secrecy Act/Anti-Money Laundering Examination Manual (2010), *available at* http://www.ffiec.gov/bsa_aml_infobase/default.htm.

[80] Minority Staff Report for Permanent Subcommittee on Investigations Hearing on Private Banking and Money Laundering: A Case Study of Opportunities and Vulnerabilities (1999), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_senate_hearings&docid=f:61699.pdf.

[81] Minority Staff of the Permanent Subcommittee on Investigations, Money Laundering and Foreign Corruption: Enforcement and Effectiveness of the Patriot Act (2004), *available at* http://hsgac.senate.gov/public/_files/ACF5F8.pdf.

[82] Senate Subcommittee Report, *supra* note 4, at 21-22.

[83] *Id*. at 23-26.

[84] *Id*. at 16.

[85] *Id*. at 29-30.

[86] *Id*. at 31-46.

[87] *Id*. at 52-67.

[88] *Id*. at 72-75.

[89] *Id*. at 75-86.

[90] *See* 67 Fed. Reg. 21110 (April 29, 2002) (codified at 31 C.F.R. § 103.170).

[91] Senate Subcommittee Report, *supra* note 4, at 87-99.

[92] *See supra* note 90.

[93] Senate Subcommittee Report, *supra* note 4, at 75, 87-88. In testimony before the Permanent Subcommittee, James H. Freis, Jr., Director of FinCEN, explained the background of the current exemption for persons involved in real estate closings and FinCEN's continuing review of the area. *See* Statement of James H. Freis, Jr., Director Financial Crimes Enforcement Network, United States Department of the Treasury, Before the United States Senate Committee on Homeland Security and Government Affairs Permanent Subcommittee on Investigations, February 4, 2010, *available at* http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.histAll.

[94] Senate Subcommittee Report, *supra* note 4, at 100.

[95] *Id*. at 100-101.

[96] *Id*. at 106.

[97] *Id*. at 100.

[98] *Id*. at 110.

[99] *Id*. at 112.
[100] *Id*. at 112-144.
[101] *Id*. at 144-160.
[102] *Id*. at 148 & 160.
[103] *Id*. at 161-172.
[104] *Id*. at 189.
[105] *Id*.
[106] *Id*. at 185.
[107] *Id*. at 190.
[108] *Id*. at 190 & 203.
[109] *Id*. at 212-214.
[110] *Id*. at 244.
[111] *Id*.
[112] *Id*. at 254.
[113] *Id*. at 256. A representative of Bank of America provided an explanation of the handling of these accounts by Bank of America in testimony before the Permanent Subcommittee. *See* Prepared Statement of William J. Fox Delivered to the United States Senate Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affairs on February 4, 2010, *available at* http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.histAll.
[114] *Id*. at 270.
[115] *Id*.
[116] *Id*. at 301.
[117] *Id*. at 305 & 316-317.
[118] *Id*. at 321. A representative of HSBC Bank USA, N.A., provided an explanation of the handling of this account by HSBC in testimony before the Permanent Subcommittee. *See* Written Testimony of Wiecker Mandemaker, Director, General Compliance HSBC Bank USA, N.A., before the Senate Permanent Subcommittee on Investigations, February 4, 2010, *available at* http://hgsac.senate.gov/public/index.cfm?FuseAction=Hearings.histAll.
[119] *Id*. at 6.
[120] *Id*.
[121] *Id*.
[122] Transparency International Report, *supra* note 5.
[123] *Id*. at 7.
[124] *Id*.
[125] *Id*. at 8. Two signatory countries, Iceland and Luxembourg, were not covered by the survey.
[126] *Id*. at 8.

[127] *Id*.
[128] *Id*. at 11 (Table A listing the number of cases in each country surveyed).
[129] *Id*. at 13.
[130] *Id*.
[131] *Id*.
[132] OECD Working Group on Bribery Annual Report 2009, *available at* http://www.oecd.org/topic/0,3373,en_2649_37447_1_1_1_1_37447,00.html.
[133] Transparency International Report, *supra* note 5, at 16.
[134] *Id.*
[135] *See generally* H. Lowell Brown, *Parent-Subsidiary Liability Under the Foreign Corrupt Practices Act*, 50:1 Baylor Law Review 1, 2-3 (1998).
[136] U.S. Department of Justice, *Foreign Corrupt Practices Act Lay-Person's Guide*, at 1, *available at* http://www.justice.gov/criminal/fraud/fcpa/history.
[137] S. Rep. No. 95-114, at 3 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4101.
[138] *Id*. at 4.
[139] 15 U.S.C. §§ 78dd-1 (applicable to any issuer with a class of securities registered pursuant to § 12 of the Securities Exchange Act of 1934 (the "Exchange Act") or required to file reports under § 15(d) of the Exchange Act); 78dd-2 (applicable to any "domestic concern," which includes any U.S. citizen, national or resident as well as any business entity which has its principal place of business in the United States or which is organized under the laws of any state in the United States); and 78dd-3 (applicable to any person other than an issuer or a domestic concern).
[140] 15 U.S.C. § 78m(b)(2)(A) and (B).
[141] U.S. Department of Justice, *Foreign Corrupt Practices Act Lay-Person's Guide, supra* note 136, at 2.
[142] U.S.C. §§ 78dd-2(d), 78dd-3(d); see also U.S. Department of Justice, *Foreign Corrupt Practices Act Lay-Person's Guide*, *supra* note 136, at 2; SEC Lit. Rel. No. 17127 (Sept. 12, 2001) — SEC and Department of Justice File First-Ever Joint Civil Action Against KPMG Siddharta Siddharta & Harsono and Its Partner Sonny Harsono for Authorizing the Payment of a Bribe in Indonesia, *available at* http://www.sec.gov/litigation/litreleases/lr17127.htm.
[143] The Fifth Circuit has also foreclosed the ability to charge foreign officials with conspiracy to violate the FCPA. *See U.S. v. Castle*, 925 F.2d 831, 833 (5th Cir. 1991) (relying on *Gebardi v. U.S.*, 287 U.S. 112 (1932) to hold that where Congress chooses to criminalize the acts of only one party for transactions that inherently require the agreement of more than one party, the other parties cannot be charged with conspiracy for the same conduct).
[144] 09-CR-21010 (S.D. Fla. Dec. 4, 2009). The indictment is available at http://www.justice.gov/usao/fls/PressReleases/Attachments/091207-01.Indictment.pdf;

see also DOJ Press Release 09-1307, December 7, 2009 — Two Florida Executives, One Florida Intermediary and Two Former Haitian Government Officials Indicted for Their Alleged Participating in Foreign Bribery Scheme, *available at* http://www.justice.gov/opa/pr/2009/December/09-crm-1307.html.

[145] *See* DOJ Press Release June 2, 2010 — Former Haitian Government Official Sentenced to Prison for His Role in Money Laundering Conspiracy Related to Foreign Bribery Scheme, *available at* http://www.justice.gov/opa/pr/2010/June/10-crm-639.html.

[146] *See* DOJ Press Release March 12, 2010 — Former Haitian Government Official Pleads Guilty to Conspiracy to Commit Money Laundering in Foreign Bribery Scheme, *available at* http://www.justice.gov/opa/pr/2010/March/10-crm-260.html.

[147] *See Indictment, United States v. Siriwan*, Cr. No. 09-00081 (C.D. Cal. Jan 28, 2010), *available at* http://www.fcpablog.com/blog/2010/1/21/report-charges-against-thai-official-in-green-case.

[148] *Id*. at 7, 16.

[149] *See* DOJ Press Release July 14, 2010 — Forefeiture Complaint Seeks to Recover Bribery Proceeds Paid to Former Taiwan President and his Family, *available at* http://www.justice.gov/opa/pr/2010/July/10-crm-812.html.

[150] *Id*.

[151] *See Complaint*, *United States v. Real Property Known as Client 5B of The Onyx Chelsea Condominium*, No. 10 Civ. 5390, (S.D.N.Y. July 14, 2010), *available at* http://www.scribd.com/doc/34345266/SDNY-Dn1-Complaint; *Complaint*, *United States v. Real Property Known as 2291 Ferndown Lane*, No. 3:10-cv-00037-bwc (W.D. Va. July 14, 2010), *available at* http://www.scribd.com/doc/34345293/WDVA-Dn1-Complaint.

[152] *See supra* note 149.

[153] *See* Attorney General Holder Delivers Remarks at the Organization for Economic Co-Operation and Development May 31, 2010, *available at* http://www.justice.gov/ag/speeches/2010/ag-speech-100531.html.