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Transparency International's 2010 Corruption Perceptions Index

On October 26, 2010, Transparency International released the 2010 edition of its annual Corruption Perception Index ("TI CPI"), a ranking of 178 nations according to "the perceived levels of public sector corruption."[1] The TI CPI is a composite of 13 different expert and business surveys by 10 independent institutions that purport to measure perceptions of the overall extent of corruption in the public and political sectors.[2]

The TI CPI – as its title openly acknowledges – is only an index of "perceptions" based on survey data rather than a measure of actual corrupt activity and has met with some criticisms as a result.[3] Nevertheless, the TI CPI is still a critical benchmark and tool for allocating scarce compliance, prosecutorial and regulatory resources. It is also a key measure to consult when designing or refining anti-bribery programs. This includes due diligence, both in the review of the potential engagement of agents and other third parties, and by buy-side and sell-side managers overseeing M&A activity.

A key development in this year's rankings is the continuing decline of Russia, which dropped from 146th to 154th place, where it is tied with Haiti and Kenya. Russia's score makes it the worst-ranked member of the G-20, Europe, and the BRIC nations. Of the other BRICs, China improved one notch from 2008, to 78th, while Brazil improved from 75th to 69th and India dropped by three spots to 87th.

Mexico, second largest trade partner of the United States for U.S. exports and third largest trade partner overall,[4] continued its steep downward drop, from 72nd in 2008 to 89th in 2009, reaching 98th in 2010. Greece declined 7 spots from 71st

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1 *See* http://www.transparency.org/policy_research/surveys_indices/cpi/2010.

2 *See* "Short Methodological Note," *Transparency International* (2010), http://www.transparency.org/content/download/55893/892545/CPI2010_short+method_EN.pdf.

3 *See* Christine Arndt and Charles Orman, "Uses and Abuses of Governance Indicators," OECD Development Centre (2006) (noting general concerns arising from government indicators relating to transparency, economic growth and other standards of measuring development), http://www.oecd.org/document/25/0,2340,en_2649_33935_37081881_1_1_1_1,00.html; *see also* Nathanial Heller, "Hey Experts, Stop Abusing the Corruption Perceptions Index!" *Global Integrity Commons* (Feb. 4, 2009) (noting inconsistencies in the TI-CPI over time due to changes in the nature of the data considered, among other factors), http://commons.globalintegrity.org/2009/02/hey-experts-stop-abusing-corruption.html.

4 *See* U.S. Census, Top Trading Partners - Total Trade, Exports, Imports, http://www.census.gov/foreign-trade/statistics/highlights/top/top1008yr.html, (current through August 2010).

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place to 78th, a position it shares with China, Colombia, Lesotho, Peru, Serbia, and Thailand. Italy fell four spots, from 63rd to 67th, where it is 11 spots behind Turkey and also trails Latvia (59th) and Rwanda (66th).

Other leading OECD countries did not change significantly from the 2009 rankings. The United States dropped out of the top 20, down three spots to 22nd. Germany dropped one spot to 15th, Japan remained steady at 17th, the United Kingdom declined by three spots to 20th, and France dropped four positions to 25th.

The United States's decline places it outside the top 20 for the first time since TI began publishing the CPI in 1995. This drop is consistent with the overall theme from this year's index: The countries that fell the most in the 2010 index were also, by and large, those that significantly suffered from the recent global financial crisis. This list includes, most notably, the United States, Greece, the United Kingdom, Italy, France, and Mexico, all of which dropped several spots, as noted above.

The wealthiest countries in the Middle East, which generally felt little impact from the financial crisis, rose in the rankings, including Saudi Arabia (63rd to 50th), Qatar (22nd to 19th), Kuwait (66th to 54th) and the United Arab Emirates (30th to 28th). China, which also continued to prosper during the global financial crisis, only dropped one spot, but continues to remain highly susceptible to corruption.

Like last year, the countries at the bottom of the index have been ravaged by continual war or civil unrest. Iraq, Afghanistan, Myanmar and Somalia all rank last at 175th and 176th. The United States has a significant military presence in several of these countries, which poses an increased risk for military contractors and suppliers. Conversely, conflict-free nations Denmark, New Zealand and Singapore are tied for first place in this year's rankings, followed closely by Finland and Sweden.

In addition, although Chile (25th to 21st) is high on the list—one position better than the United States—and Ecuador (146th to 127th) has made a marked improvement, Latin America is still perceived as one of the more corrupt regions of the world, with Honduras (ranked 134th, down from 130th), Nicaragua (ranked 127th, up from 130th), Paraguay (ranked 146th, up from 154th), and Venezuela (ranked 164th, down from 162nd). Haiti, which has received a great deal of international assistance in response to January's devastating earthquake, rose in the rankings from 168th to 146th. Africa remains a region perceived to be high-risk, with 28 countries ranked in the bottom third.

In light of the 2010 CPI, companies should carefully review the jurisdictions in which they conduct business, particularly if those countries rank in the bottom three quarters of the index. As described in the TI CPI Report, "nearly three quarters of the 178 countries in the index score below five, on a scale from 10 (very clean) to 0 (highly corrupt). These results indicate a serious corruption problem."[5]

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5 *See* "Corruption Perceptions Index," *Transparency International* (2010), http://www.transparency.org/content/download/55725/890310.

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Governments in these countries are highly susceptible to corruption, and corrupt payments may be expected as a way of life.

Pharmaceutical companies and other companies in the health care industry should be particularly mindful of low-ranking countries, including those in the Asia Pacific region. The U.S. Department of Justice has been investigating pharmaceutical companies that conduct drug trials abroad,[6] and in June 2010, the Chinese Ministry of Health launched a nationwide initiative to blacklist companies found guilty of commercial bribery in the purchase and sale of pharmaceutical products.[7] ■

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6 *See* Gardiner Harris, "U.S. Inquiry of Drug Makers Is Widened," *The New York Times* (Aug. 13, 2010), at B1, http://www.nytimes.com/2010/08/14/health/policy/14drug.html.

7 See Weng Shuping, "China Launches Nationwide Investigation into Medical Industry Corruption," *Econ. Observer* (Jun. 28, 2010), http://www.eeo.com.cn/ens/Industry/2010/06/30/174201.shtml.

OECD Phase III Report Commends U.S. Anti-Bribery Enforcement and Notes Areas for Further Attention

On October 15, 2010, the Working Group on Bribery in International Business Transactions of the Organization for Economic Cooperation and Development ("OECD Working Group") approved and adopted its Phase III report on the United States government's compliance with the OECD Convention on Combating Bribery of Foreign Public Officials in International Transactions.[1]

The OECD Working Group lauded the U.S. Department of Justice ("DOJ"), the Securities and Exchange Commission ("SEC"), and associated agencies, for their "visible and high level of support for the fight against the bribery of foreign public officials, including engagement with the private sector, substantial enforcement, and stated commitment by the highest echelon of the Government."[2]

The DOJ and SEC issued press statements noting the very positive portrayal of the United States anti-bribery program by the OECD Working Group.[3]

For in-house counsel and compliance personnel, the OECD Working Group report provides a trove of statistics about and descriptions of U.S. enforcement of anti-bribery laws, with discussion of the sources of allegations that fuel the U.S. government's investigations (including self-reports, industry-wide sweeps, whistle-blower reports, mutual legal assistance requests, U.S. embassy staff reports, and anti-money laundering reports),[4] the factors that govern the exercise of prosecutorial discretion, including the impact of non-U.S. prosecutions,[5] debarment practices,[6] and related enforcement based on U.S. tax, accounting, and internal controls provisions.[7]

The report also notes the resources devoted by the U.S. government to outreach and training of U.S. government employees around the world, to maximize knowledge about and enforcement of the statute,[8] and provides a useful description of the Department of Commerce's Foreign Commercial Service, which for a fee of between $500 and $900 will provide detailed financial reports to U.S. companies on prospective overseas sales representatives or partners, an often-useful component of due diligence review, although

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1 "Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions," [hereinafter "OECD Report"], *Organization for Economic Cooperation and Development*, http://www.oecd.org/dataoecd/10/49/46213841.pdf.

2 *Id.* at 4.

3 "United States Commended for Its Efforts to Fight Transnational Bribery," *The Justice Blog* (Oct. 20, 2010), http://blogs.usdoj.gov/blog/archives/1020; SEC Press Rel. 2010-200, OECD Commends U.S. Regulators for Efforts to Fight Transnational Bribery (Oct. 20, 2010), http://www.sec.gov/news/press/2010/2010-200.htm.

4 *Id.* at 19-20.

5 *Id.* at 21-22.

6 *Id.* at 39-42.

7 *Id.* at 46-53.

8 *Id.* at 57-58.

OECD Phase III Repor ■ Continued from page 3

not, as the report states, a substitute for a company's separate due diligence steps to review the background of foreign partners.[9]

Among other suggestions, the report recommends, consistent with the OECD's previous recommendations that such exceptions to anti-bribery liability be eliminated, that the U.S. government reconsider the current U.S. legal regime's policy of not subjecting so-called "facilitating payments" to civil and criminal sanctions.[10]

In addition, the report urged the United States government to do a better job of summarizing "publicly available information on the application of the FCPA," including "the affirmative defen[s]e for reasonable and *bona fide* expenses."[11] Neither recommendation is surprising given the significant compliance costs that attend the monitoring of travel, entertainment, and hospitality expenses, and the vexing issue for corporate managers of defining permitted facilitating payments in a way that does not encourage employees to misconstrue the exception as one permitting corrupt payments that facilitate the conferral of benefits to which the payor is not entitled.

Beyond these points, the report is significant for the private sector in two key respects. First, it provides yet another confirmation that the United States has by far the most broad-reaching anti-bribery enforcement program of any party to the OECD Convention, having brought the most cases and obtained the most convictions, and the largest penalties, and negotiated sanctions of any signatory, with more than $1 billion in asserted foreign bribery proceeds recovered through disgorgement actions alone since 2004.[12] Second, the report commended the United States for its "innovative" use of plea agreements ("PAs"), deferred prosecution agreements ("DPAs"), and non-prosecution agreements ("NPAs"), and the appointment of corporate monitors,[13] implicitly endorsing the continued use of these sometimes controversial enforcement tools by DOJ and the SEC. The OECD Working Group applauded DOJ's action to "increase transparency by informing the public of settlements" by publishing PAs, DPAs, and NPAs as well as sentencing memoranda on its website, noting that making available even "more detailed reasons for entering into DPAs and NPAs would give more insight into the DOJ's choice of settlement agreements and thus enhance accountability and transparency of the process."[14] The OECD Working Group similarly praised DOJ's new "detailed guidance" for the selection of monitors.[15]

The report's support for U.S. regulators' use of negotiated agreements and appointment of independent monitors, in those FCPA cases where the regulators do not decline prosecution, is a significant development that in-house compliance and legal staff should note, as it may help the regulators counter criticism that the informal system for negotiating resolutions is not sufficiently transparent and avoids judicial review of the regulators' interpretations of the FCPA. At the same time, the safeguards cited by the report, from provisions of the United States Attorney's Manual and the SEC's new cooperation guidance, to reforms of the method for appointing corporate monitors, must also be viewed as part of the system that motivated the OECD working group's praise. ■

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9 *Id.* at 58.

10 *Id.* at 61-62.

11 *Id.*

12 *Id.* at 10-11.

13 *Id.* at 4.

14 *Id.* at 33.

15 *Id.* at 36.

News From the BRICs

The Growing Importance of China's Private Sector and What It Means for FCPA Compliance

The All-China Federation of Industry & Commerce ("ACFIC"), a non-governmental business association with ties to the Communist Party, reported last month that private enterprises now produce over half of China's GDP and account for 80 percent of job creation in urban areas.[1] This news might incline companies subject to the FCPA and other nations' anti-bribery regimes, and that do substantial business in or with China, to take comfort in learning of the growing importance of private enterprises, as the FCPA and many other anti-bribery regimes do not extend to private commercial bribery.

The current enforcement environment in the United States and elsewhere is more complicated, however, and companies should be aware of the continuing risks posed by business activities in the PRC. As China's share of the global economy grows—in the second quarter of this year, China surpassed Japan as the world's second largest economy behind the United States in terms of Gross Domestic Product[2]—companies will do more business with public and private Chinese enterprises, and will be exposed to potential enforcement actions on both of those fronts. It is no surprise that U.S. regulators are focusing their efforts on high-risk, high-growth jurisdictions, such as China (and India). Indeed, roughly twenty-five percent of all United States FCPA or FCPA-related enforcement actions in the past five years have been based in whole or in part on improper conduct in China. For global business enterprises, almost all of which have some China operations, the anti-bribery risk in China has not abated.

Prosecution of Commercial Bribery Under Alternative Theories

In the past several years, the U.S. Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC") have used the FCPA's books and records provision and the DOJ has used the Travel Act and the mail and wire fraud statutes to take action against companies in part for improper payments made to employees of private companies in China. For example, the 2006 charges against Schnitzer Steel and its South Korea-based subsidiary included allegation that payments to managers of government-owned as well as *private* customers in China and South Korea were not accurately reflected in Schnitzer's consolidated financial statements, in violation of the FCPA's books and records provision (applicable to "issuers," which, as defined in the statute, are companies whose securities are publicly traded in the United States, regardless of where they are based). Schnitzer and individual executives charged reached settlements with the DOJ and SEC that included a criminal fine, disgorgement, and civil penalties.[3]

The DOJ took a different approach in its prosecution of Control Components Inc. ("CCI"), which in July 2009 entered a guilty plea regarding corrupt payments made in thirty-six countries, including China. Most of the payments were made to employees of state-owned customers, in violation of the FCPA's anti-bribery provisions. Notably, though, one count of the CCI information was in part based on conspiracy to violate the Travel Act—for $1.95 million in corrupt payments to employees of private companies. CCI's settlement with the DOJ included the appointment of an independent compliance monitor for three years and a criminal fine of over $18 million. Some individual defendants are cooperating with the government, while others await trial.[4]

The Travel Act (18 U.S.C. § 1952) prohibits the use of interstate and foreign commerce to facilitate the violation of a federal or state criminal statute. Most states have commercial bribery statutes, including California (where CCI is headquartered, and under whose anti-bribery law CCI was charged), New York, and Delaware.[5] As the CCI enforcement action illustrates, if there is a jurisdictional nexus between the improper activity and a state that has a commercial bribery statute, violators may be

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1 *See* All-China Federation of Industry and Commerce, "Bigger and Stronger" (Sept. 1, 2010), http://www.chinachamber.org.cn/publicfiles/business/htmlfiles/qleng/s2585/201009/22186.html. The report also noted, however, that the net 2009 profits of just two of China's major SOEs, China Mobile and PetroChina, were higher than those of the top 500 private firms put together. *See* "China State Giants Far Outstrip Private Firms: Report," *Agence Foreign Presse* (Aug. 30, 2010).

2 *See* David Barboza, "China Passes Japan as Second-Largest Economy," *The New York Times* (Aug. 15, 2010), http://www.nytimes.com/2010/08/16/business/global/16yuan.html.

3 The parent company reached a deferred prosecution agreement with the DOJ, while its subsidiary pleaded guilty. DOJ Press Rel. 07-474, Former Senior Officer of Schnitzer Steel Industries Inc. Subsidiary Pleads Guilty to Foreign Bribes (Jun. 29, 2007), http://www.justice.gov/opa/pr/2007/June/07_crm_474.html.

4 DOJ Press Rel. 09-754, Control Components Inc. Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $18.2 Million Criminal Fine (Jul. 31, 2009), http://www.justice.gov/opa/pr/2009/July/09-crm-754.html (describing two former executives' pleas); *United States v. Carson*, No. 09-cr-77, Docket (C.D. Cal. 2009) (other former executives' trial currently scheduled for November 2010).

5 CAL. PENAL CODE § 641.3; N.Y. PENAL LAW §§ 180.00, 180.03; DEL. CODE ANN. tit. 11, § 881(1).

News From the BRICs ■ Continued from page 5

subject to federal prosecution under the Travel Act. The CCI prosecution is a cautionary tale that U.S. authorities are watching both public and private bribery closely, and widening the scope of anti-bribery enforcement activities. Compliance programs should be sufficiently robust to withstand heightened scrutiny of business dealings with private enterprises.

The "Princeling" Risk

An additional risk factor in China, notwithstanding the increasing privatization of the economy, is the growing prominence of "princelings," the sons or other relatives of Communist Party and government officials who are playing an increasingly important role in the burgeoning private sector. In the private equity and general investment arena, for example, princelings lead large RMB-denominated funds whose connections, as the *Financial Times* has observed, "can help clear the murky and opaque regulatory path to a local listing in a way that foreign funds will never be able to."[6]

The FCPA does not explicitly classify foreign officials' family members as "foreign officials," but that does not mean that business dealings with officials' relatives are without risk. Dealings with officials' family members have been cited in the facts underlying several FCPA enforcement actions, including those against Paradigm B.V. (involving the brother of a decision maker at Pemex, Mexico's state-owned petroleum company) and Baker Hughes Inc. (involving the brother of a senior-level employee of Sonangol, a parastatal oil and gas company in Angola).[7]

As companies subject to the FCPA enter into partnerships or other business dealings with private companies in China, they should be aware of the "princeling" risk and take appropriate precautions.

A 1982 DOJ opinion release provides one example of a form these safeguards can take.[8] In that instance, a U.S. company had entered into a consulting agreement with a foreign businessman whose brother was an employee of a foreign government with whom the company concluded an equipment sale.[9] The DOJ stated in the opinion release that it would take no enforcement action against the company with respect to its compensation of the consultant for his role in promoting the very same equipment sale to that government. The company had obtained separate affidavits from both the consultant and his brother, the government employee, in which they pledged to adhere to the FCPA's anti-bribery provisions.

Although the opinion release is not recent and is binding only as to the parties to the request, it remains useful guidance for a company facing a similar situation.

Enforcement by Authorities Outside the United States

Companies doing business in China should also be aware that local law prohibits private commercial bribery. Moreover, the Rio Tinto case demonstrates that Chinese authorities will not hesitate to prosecute the employees of foreign companies—even foreign citizens—in the corruption context. Further, the UK Bribery Act (scheduled to be implemented in April 2011) is broader than the FCPA in that it covers commercial bribery overseas.

As business with China's private sector grows, evolving and broadening anti-corruption enforcement efforts in the United States and other jurisdictions underscore the need for continued or increased vigilance on compliance. In China, in particular, this requires that managers, notwithstanding language barriers, have a true understanding of how business is conducted, and adopt, implement, train on, audit compliance with, and enforce, through appropriate disciplinary action, robust anti-bribery company policies. Further, appropriate and reasonable steps should be taken vis-à-vis third parties with which the company deals to assure that the company does not become ensnared (or found guilty of procuring) ■

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6 "Local Buy-out Firms Defy US Groups in China," *Financial Times* (Feb. 8, 2010), http://www.ft.com/cms/s/0/13b1d6b2-14da-11df-8f1d-00144feab49a.html.

7 *See* Paradigm B.V., Non-Prosecution Agreement (Sept. 21, 2007), http://www.justice.gov/criminal/fraud/fcpa/cases/docs/09-21-07paradigm-agree.pdf; *SEC v. Baker Huges, Inc.*, H-07-1408, Complaint (S.D. Tex., Apr. 26, 2007), http://www.sec.gov/litigation/complaints/2007/comp20094.pdf.

8 "Domestic concerns" or "issuers" under the FCPA may request guidance from the DOJ in the form of an "opinion release" or "opinion procedure release" regarding possible enforcement action for specific conduct in which the company plans to engage. See 28 C.F.R. pt. 80.4. (Foreign Corrupt Practices Act Opinion Procedure, Issuer or Domestic Concern). For a discussion of a recent opinion release, see the September 2010 issue of FCPA Update.

9 DOJ Opinion Procedure Rel. 82-04 (Nov. 11, 1982), http://www.justice.gov/criminal/fraud/fcpa/review/1982/r8204.pdf.

FCPA-Related Legislative and Regulatory Developments: Debarment Bill's House Passage and the Anticipated Dodd-Frank Rules

Increasing speculation over whether Democrats or Republicans will control the next Congress inevitably raises issues over what the legislative agenda for anti-bribery legislation may look like over the next two years. If recent action in the House of Representatives is any indication, however, there is strong bipartisan consensus for certain kinds of amendments to the FCPA and related statutes, principally in the area of debarment of those judged guilty of anti-bribery offenses. Not all proposals, including proposals for FCPA compliance certification as a condition of eligibility for federal contracting, as well as a private right of action to enforce the FCPA, have similar support.

Earlier this year, *FCPA Update* reported on the May 2010 introduction by Rep. Peter Welch (D-Vt.) of H.R. 5366, the Overseas Contractor Reform Act ("The Reform Act").[1] On September 15, 2010, the Reform Act was passed in the House by a 409-0 vote, and is now pending before the Senate's Committee on Homeland Security and Governmental Affairs.[2] If passed in the Senate and signed into law, the legislation would prevent any person convicted of violating certain provisions of the FCPA from receiving United States government contracts or grants. The required debarment would also sever ongoing contracts with the federal government.[3] The law in significant respects would require by statute debarment procedures that are already in existence by reason of executive branch rules in relevant procurement regulations.[4] But the express requirement by Congress for debarment would undoubtedly give the executive branch further incentive to pursue debarments in appropriate cases in order to demonstrate vigorous enforcement in subsequent legislative oversight processes.

The Reform Act has several provisions that may limit its effect in the majority of FCPA-related cases. First, the Reform Act provides that the head of a federal agency may waive the requirement of debarment, if the waiver and an accompanying justification are reported to Congress within thirty days.[5] The Reform Act also applies only to violations of the FCPA's anti-bribery provisions, and to persons "found to be in violation" of those provisions by reason of a "final judgment."[6]

As we have noted, companies under scrutiny for violations of the FCPA have significant motivation vigorously to contest and heavily to negotiate against the bringing of FCPA anti-bribery charges in order to steer clear of rule-based debarment in the United States and potentially more stringent regimes in the EU and at development banks.[7] Many of the highest profile FCPA-related cases from recent history were not premised directly on the anti-bribery provisions of the FCPA. These cases include those settled enforcement actions involving BAE Systems plc, Daimler AG, and Siemens AG.[8]

For example, in its 2010 guilty plea, BAE Systems plc agreed to pay $400 million for conspiring to impair and impede lawful government functions and to violations of the False Claims Act related to statements about its FCPA

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1 Paul R. Berger and Erin W. Sheehy, "FCPA-Related Legislative Developments," *FCPA Update* (Jun. 2010), http://www.debevoise.com/files/Publication/e9c6eb6b-ee67-4ba1-b0ed-232721c5367a/Presentation/PublicationAttachment/5b8a02dc-43e1-45cf-afc7-315d3cbcf1e4/FCPAUpdateJune2010.pdf.

2 Bill Summary and Status, Overseas Contractor Reform Act, H.R. 5366 (introduced May 20, 2010), http://www.govtrack.us/congress/bill.xpd?bill=h111-5366.

3 "Welch Introduces Bill to Ban Federal Contractors Convicted of Bribing Foreign Officials," Official Website of Rep. Peter Welch (May 24, 2010) http://welch.house.gov/index.php?option=com_content&task=view&id=987&Itemid=32 (hereinafter "Welch Press Rel.")

4 *See* 48 C.F.R. §§ 9.406-1(b), 9.406-2(a)(3), (5) (2010). *See also Final Rule on Mandatory Disclosure and Contractor Business Ethics*, 73 Fed. Reg. 67,064 (Nov. 12, 2008).

5 H.R. 5366 § 2(b), http://www.govtrack.us/congress/billtext.xpd?bill=h111-5366.

6 *Id*. at § 2(a).

7 Berger and Sheehy, note 1, *supra*.

8 Mike Koehler, "FCPA Debarment Bill Introduced," *Corporate Compliance Insights* (May 25, 2010), http://www.corporatecomplianceinsights.com/2010/fcpa-debarment-bill-introduced-overseas-contractor-reform-act/.

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compliance policy.[9] In its criminal information, the United States Department of Justice ("DOJ") alleged that BAE made payments to "certain advisors" through offshore shell companies to ensure "that BAE was favored in foreign government decisions regarding the sales of defense articles."[10] Furthermore, BAE provided "substantial benefits," including travel and accommodations, real estate, security services, automobiles, and personal items to a Saudi Arabian official in the discharge of what it regarded as its obligations under a Letter of Offer and Acceptance with Saudi Arabia and the UK.[11] Nevertheless, rather than accusing BAE of violations of the FCPA's anti-bribery provisions, the information stated that BAE failed to "subject these payments and benefits to the type of internal scrutiny and review" that BAE had promised.[12]

The DOJ conceivably could have pursued charges under the anti-bribery provisions of the FCPA, which prohibit, with a corrupt intent, conferring or promising to confer a benefit to a foreign public official for the purpose of securing business or an unfair business advantage. Instead, BAE pled guilty to violations of the False Claims Act, which would not have triggered the pending debarment legislation if it had been law.

Moreover, the DOJ frequently enters into deferred prosecution agreements ("DPAs") or non-prosecution agreements ("NPAs") as an alternative to pursuing guilty pleas or a conviction after trial. These are private agreements between individuals or corporations and the DOJ, which outline conditions that the individual or corporation must satisfy over a period of time in exchange for the DOJ dropping its charges.[13] These agreements would not appear to qualify as "final judgments" under the terms of the Reform Act.[14] Although a company could not be debarred under the Reform Act as a result of its entry into an NPA or a DPA, the threat of debarment would give the DOJ additional leverage to impose more stringent conditions in an NPA or DPA to induce a company to avoid debarment or the risk of not obtaining a waiver of debarment.

Indeed, a central irony underlying the Reform Act is that Congressman Welch ostensibly introduced his bill in response to allegations that defense contractor Xe Services, LLC formerly Blackwater Worldwide, bribed Iraqi government officials to suppress an investigation into Blackwater's involvement in the deaths of 17 Iraqis during a shootout in Baghdad, in order to allow the contractor to continue doing business in Iraq.[15] However, when executives of Xe were indicted in April 2010 related to these matters, they were charged not with anti-bribery offenses, but with making false statements about firearms dealers records and illegally possessing unregistered machine guns and other weapons.[16] In June 2010, the government confirmed that it would honor Xe's most recent government contract, reportedly worth $100 million for providing protection to CIA bases in Afghanistan. In addition, Xe is apparently performing an ongoing contract with the State Department to protect U.S. Officials in Afghanistan.[17]

Other legislation relating to the FCPA is currently pending before the House Government and Oversight Committee. On July 22, 2010, Rep. Raymond Green (D-Tex.) introduced H.R. 5837,[18] which is

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9 *United States v. BAE Systems plc*, 10-CR-035, Plea Agreement at 2 (D.D.C.Mar. 1, 2010), http://www.justice.gov/criminal/pr/documents/03-01-10bae-plea- agreement.pdf; DOJ Press Rel. 10-209, BAE Systems PLC Pleads Guilty and Ordered to Pay $400 Million Criminal Fine (Mar. 1, 2010) http://www.justice.gov/opa/pr/2010/March/10-crm-209.html.

10 *United States v. BAE Systems plc*, 10-CR-035, Information ¶ 29 (D.D.C. Feb. 4, 2010), http://www.justice.gov/criminal/pr/documents/03-01-10BAE-information.pdf.

11 *Id.* ¶¶ 43-44.

12 *Id.* ¶¶ 41-47.

13 *See generally* Eugene Illovsky, "Corporate Deferred Prosecution Agreements: The Brewing Debate," *Criminal Justice Magazine* (Summer 2006), http://www.abanet.org/crimjust/cjmag/21-2/corporatedeferred.pdf.

14 H.R. 5366 defines "Final Judgment" as "when all appeals of the judgment have finally been determined, or all time for filing such appeals has expired." Overseas Contractor Reform Act, § 2(c), note 2, *supra*.

15 Welch Press Rel., note 3, *supra*.

16 DOJ Press Rel., Five Blackwater Employees Indicted (Apr. 16, 2010), http://charlotte.fbi.gov/dojpressrel/pressrel10/ce041610.htm

17 Samuel Rubenfeld, "Contractor Debarment Bill Clears House Committee," *Wall Street Journal* (Aug. 4, 2010), http://online.wsj.com/article/BT-CO-20100804-713910.html.

18 To require persons to certify that they have not violated foreign corrupt practices statutes before being awarded Government contracts, and for other purposes, H.R. 5837 (introduced Jul. 22, 2010), http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.5837.IH:.

FCPA-Related Legislative and Regulatory Developments ■ Continued from page 9

aimed at preventing the award of government contracts to those who have been involved in violations of the FCPA. The proposed legislation requires persons to certify that they have not violated the FCPA before being awarded a contract by an executive agency. Rep. Green introduced the same bill in 2007, but it died in committee, and appears headed to that fate again.[19] A similar fate appears to await the private right of action bill advocated by Rep. Ed Perlmutter (D-Colo.), which has remained in committee since its introduction.[20]

The unanimous vote in favor of the Reform Act in the House of Representatives shows that there is substantial support for further legislation to restrict, punish and deter foreign corrupt practices. In-house counsel and compliance staff need to be mindful of the risks that new legislative requirements and remedies could pose for business units that are not properly controlled via robust global anti-bribery compliance programs.

The Emerging Impact of the Dodd-Frank Bounty Payments Provisions

Even if there are no new amendments to the FCPA this year, companies must address and digest the new risk environment presented by the FCPA-related provisions in the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Dodd-Frank was signed into law by President Obama on July 21, 2010,[21] and contains a so-called "bounty" provision, awarding whistleblowers who voluntarily provide the SEC with "original information" about FCPA violations up to 30 percent of the amount the SEC recoups in prosecuting federal securities law violations that result in monetary sanctions of more than $1 million.[22] As The Wall Street Journal recently reported, the SEC has been receiving approximately one FCPA related tip-off per day since the institution of the bounty provision, yielding a growing pile of new allegations for regulators to sort, assess and investigate.[23] The SEC has declined to comment on the volume or nature of those tips, but indicated that rules to govern the whistleblower bounty program will be introduced by the end of the year.[24] The SEC has also posted a job opening for an associate director to head its new whistleblower office.[25]

These developments portend even greater SEC enforcement in the months ahead, and warrant continued vigilance in the implementation of rigorous compliance programs. ■

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19 To require persons to certify that they have not violated foreign corrupt practices statutes before being awarded Government contracts, and for other purposes, H.R. 3405 (introduced Aug. 3, 2007), http://www.govtrack.us/congress/bill.xpd?bill=h110-3405.

20 *See* Foreign Business Bribery Prohibition Act, H.R. 2152, (introduced Apr. 28, 2009), http://www.govtrack.us/congress/bill.xpd?bill=h111-2152. The bill was referred to the Energy and Commerce Committee and the Judiciary Committee in June 2009 and has not passed out of those committees.

21 Joe Palazzolo, "After Dodd-Frank, SEC getting at least one tip a day," *The Wall Street Journal Corruption Currents Blog* (Sept. 30, 2010), http://blogs.wsj.com/corruption-currents/2010/09/30/after-dodd-frank-sec-getting-at-least-one-fcpa-tip-a-day/.

22 The Wall Street Reform and Consumer Protection Act, H.R. 4173, Pub. L. 111-203 § 922 (Jul. 21, 2010), http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.4173:.

23 *See Palazzolo*, note 21, supra.

24 *Id.*

25 *Id.*

Upcoming Speaking Engagements

November 12, 2010
Bruce E. Yannett
Mary Jo White (MODERATOR)

Forty-second Annual Institute on Securities Regulation

"The Government Enforcement Agenda and Practical Handling of Enforcement Issues"

Practising Law Institute
New York
Conference Brochure:
http://www.pli.edu/product/seminar_detail.asp?id=62533

January 25-26, 2011
Steven S. Michaels

Clinical Trials Conference

"Minimizing Risk and Adhering to the Mandates of the Foreign Corrupt Practices Act When Conducting Clinical Trials Abroad at State-Run Hospitals and Trial Sites"

American Conference Institute
Philadelphia
Conference Brochure:
http://www.americanconference.com/pharma_bio_lifescience/ClinicalTrials.htm