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March 2011 ■ Vol. 2, No. 8

The U.K. Bribery Act 2010: Implementation and Guidance

On March 30, 2011, the Ministry of Justice released its much-delayed[1] and long-awaited guidance[2] ("MoJ Guidance") on adequate procedures to prevent bribery, pursuant to the U.K. Bribery Act 2010[3] (the "Act"). It also announced that the Act will come into force on July 1, 2011, thus allowing a three-month familiarization period to give businesses time to prepare.[4] As expected, the MoJ Guidance—which is not prescriptive and not a one-size-fits-all document—sets out six principles that should inform the procedures put in place by commercial organizations to prevent bribery. It also addresses a number of topics of importance to business, including facilitation payments, hospitality, the jurisdictional reach of the Act and the meaning of "associated persons," particularly in the context of joint ventures and supply chains. The MoJ Guidance also includes eleven hypothetical case studies containing illustrative examples to assist organizations in shaping their policies, procedures and specific responses in given situations. The case studies are merely intended to complement the guidance and are not formally part of it. They are said not to be standard-setting or establishing any presumption of minimum standards appropriate for all organizations, whatever their size.

The MoJ also published a "Quick-Start Guide" for small- and medium-sized enterprises ("SMEs"), which sets out what SMEs need to know about the Act to prepare for its implementation.[5]

In addition, the Director of Public Prosecutions and the Director of the Serious

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1 *See* Karolos Seeger and Matthew Getz, "Delayed Implementation of the U.K. Bribery Act," *FCPA Update* Vol. 2, No. 7 (Feb. 2011), http://www.debevoise.com/files/Publication/786913c9-e099-4d78-99f4-5c1f048477ce/Presentation/PublicationAttachment/7e7fc6ea-d8ce-48b6-b2d4-817f544f57ac/FCPAUpdateFebruary2011.pdf.

2 *See* Ministry of Justice, The Bribery Act 2010: Guidance (Mar. 30, 2011) (hereinafter "MoJ Guidance"), http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf.

3 *See* Bribery Act, 2010, c.23 (Eng.), http://www.legislation.gov.uk/ukpga/2010/23/contents.

4 *See* Ministry of Justice Press Rel., "U.K. clamps down on corruption with new Bribery Act" (Mar. 30, 2011), http://www.justice.gov.uk/news/newsrelease300311a.htm.

5 *See* Ministry of Justice, The Bribery Act 2010: Quick Start Guide (Mar. 30, 2011) (hereinafter "MoJ Quick Start Guide"), http://www.justice.gov.uk/guidance/docs/bribery-act-2010-quick-start-guide.pdf.

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Fraud Office—one of which will be required to consent to any prosecution under the Act—have also published the "Directors' Guidance" setting out, for each offense under the Act, what needs to be proved for a conviction, along with the public interest considerations prosecutors are required to take into account when deciding whether to bring a prosecution.[6] It specifically addresses facilitation payments as well as hospitality and promotional expenditure.[7]

Kenneth Clarke, Secretary of State for Justice, stressed that he had listened to business representatives very carefully to ensure that the Act was implemented in a "workable way—especially for small firms that have limited resources" and the MoJ Guidance clearly reflects the importance for organizations to adopt a risk-based and proportionate approach to assessing and updating their policies and procedures.[8] The MoJ Guidance also reiterates the government's policy to encourage organizations to self-report incidents of bribery to the SFO and points out that the willingness to cooperate with an SFO investigation under the Act will be taken into account in any decision as to whether to bring proceedings against the organization.[9]

The MoJ Guidance has already been praised by business representatives for providing greater clarity on the Act and adopting a common-sense approach, particularly for SMEs.[10]

The key features contained in the MoJ Guidance, the Quick-Start Guide and the Directors' Guidance are as follows:

- **Jurisdiction.** The MoJ Guidance starts by reiterating the broad jurisdictional reach of the section 7 corporate offense of failure to prevent bribery: as long as an organization carries on business or part of a business in the U.K., the U.K. courts would have jurisdiction under section 7 even where the underlying bribery was committed by a non-U.K. national or resident, and wholly outside the U.K.[11] However, and contrary to previous indications from the SFO, it refers to the requirement to show a "demonstrable business presence" in the U.K. and states the government's intention that the Act not apply simply by virtue of a foreign company's listing on the London Stock Exchange which does not, in itself, constitute "carrying on business" in the U.K.[12] Likewise,

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6 *See* Serious Fraud Office, Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions (Mar. 30, 2011) (hereinafter "Directors' Guidance"), http://www.sfo.gov.uk/media/167348/bribery%20act%20joint%20prosecution%20guidance.doc.

7 *See id.* at 8–10.

8 MoJ Guidance, Foreword at 2, note 2, *supra*.

9 *See* MoJ Guidance, ¶ 12, note 2, *supra*.

10 *See* Confederation of British Industry, "CBI Comments on Bribery Act Guidance" (Mar. 30, 2011), http://www.cbi.org.uk/ndbs/press.nsf/0363c1f07c6ca12a8025671c00381cc7/f6ede018f117b8bc802578630036da2a?OpenDocument.

11 *See* MoJ Guidance, ¶¶ 15-16, note 2, *supra*.

12 MoJ Guidance, ¶ 36, note 2, *supra*.

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Debevoise & Plimpton LLP

919 Third Avenue
New York, New York 10022
+1 212 909 6000

www.debevoise.com

Washington, D.C.
+1 202 383 8000

London
+44 20 7786 9000

Paris
+33 1 40 73 12 12

Frankfurt
+49 69 2097 5000

Moscow
+7 495 956 3858

Hong Kong
+852 2160 9800

Shanghai
+86 21 5047 1800

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

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

Sean Hecker
Associate Editor
+1 212 909 6052
shecker@debevoise.com

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

Erik C. Bierbauer
Deputy Managing Editor
+1 212 909 6793
ecbierbauer@debevoise.com

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

David M. Fuhr
Deputy Managing Editor
+1 202 383 8153
dmfuhr@debevoise.com

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

Elizabeth A. Kostrzewa
Assistant Editor
+1 212 909 6853
eakostrzewa@debevoise.com

Amanda M. Ulrich
Assistant Editor
+1 212 909 6950
amulrich@debevoise.com

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

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having a U.K. subsidiary does not necessarily mean that the foreign parent "carries on business" in the U.K. where such subsidiary acts independently of the parent.[13] The MoJ Guidance makes it clear that the final arbiters of the terms "carry on business or part of a business," and thus the jurisdictional scope of the Act, will be the courts.[14]

- **Facilitation payments.** Unsurprisingly, the MoJ Guidance confirms that the prohibition on facilitation payments will remain, although it stresses that prosecutors will look to all the surrounding circumstances to determine whether such a payment amounts to a bribe and, if so, whether a prosecution is in the public interest.[15] In one of the hypothetical case studies appended to the MoJ Guidance, the list of proportionate responses to a risk assessment identifying facilitation payments as a potential problem in effecting imports include, among others, requesting the organization's local agent company to train its staff on the requirements of local law and the Act, as well as informing those demanding payments that compliance with the demand may mean that the organization (and possibly the agent) would commit an offense under U.K. law.[16]

According to the Directors' Guidance, the chief public interest factors in favor of prosecution are: (i) large or repeated facilitation payments; (ii) payments that are accepted as a standard way of doing business and (iii) the fact that policies regarding facilitation payments have not been correctly followed.[17]

The chief factors tending against prosecution for facilitation payments are: (i) one-off small payments; (ii) the payments having come to light through self-reporting by the organization, with appropriate remedial action having been taken; (iii) the fact that policies regarding facilitation payments have been correctly followed and (iv) the fact that the payer was placed in a vulnerable position by the demand for payment.[18]

- **Hospitality.** Echoing MoJ and SFO pronouncements made in the past, the MoJ Guidance states that genuine hospitality that is reasonable and proportionate is not caught by the Act.[19] It specifically states that businesses can, within those confines, continue to provide tickets to sporting events such as the Grand Prix or Wimbledon, take clients to dinner, offer gifts to clients as a reflection of good relations or pay for reasonable travel expenses in order to demonstrate goods or services to clients. The real-life example provided is that of an invitation to a foreign client to attend a rugby match at Twickenham as part of a PR exercise to cement good relations. Such a case is said to be "extremely unlikely" to engage responsibility under the section 1 general bribery offense given the absence of any intention to induce "improper performance of a relevant function."[20]

> "[H]aving a U.K. subsidiary does not necessarily mean that the foreign parent 'carries on business' in the U.K. where such subsidiary acts independently of the parent."

Importantly, the MoJ Guidance makes it clear that the section 6 offense of bribing a foreign public official ("FPO")—which does not require proof of any intention to

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13 *Id.*

14 *Id.*

15 *Id.* at ¶¶ 45, 50.

16 *See* MoJ Guidance, Case Study 1 at 33, note 2, *supra*.

17 *See* Directors' Guidance at 9, note 6, *supra*.

18 *Id.*

19 *See* MoJ Guidance, ¶¶ 19, 26, note 2, *supra*.

20 *Id.* at ¶ 20.

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induce improper performance—is aimed at similar "mischief": "the need to prohibit the influencing of decision making in the context of publicly funded business opportunities by the inducement of personal enrichment of [FPOs]."[21] It clarifies that, in some circumstances, the provision of hospitality would not pass the threshold test under section 6 of constituting an "advantage" to the FPO, given that the costs would otherwise be borne by his/her government.[22] Examples of hospitality that does qualify as an "advantage" but does not provide a sufficient connection to the requisite intention to influence the FPO and secure business or a business advantage—and would thus not fall foul of section 6—include: (i) reasonable travel and accommodation provided by a U.K. mining company for FPOs to visit a distant mine and (ii) flights to and accommodation in New York to meet with executives of a U.K. organization, including "fine dining" and attendance at a baseball game for the FPO and his or her partner.[23] The second example may be viewed differently if the organization cannot demonstrate that the meeting was scheduled in New York by reason of genuine mutual convenience. Absent such objective justification of the hospitality provided, and depending on the lavishness of the hospitality, an inference might be raised that the advantage was bestowed on the FPO with an intention to influence him or her to grant business or a business advantage in return.[24]

The hypothetical case study on hospitality and promotional expenditure also underscores the importance of ensuring that expenditures over a certain limit are approved by an appropriately senior level of management, as well as the need for good record-keeping.

The Directors' Guidance states that prosecutors will be more likely to prosecute instances of hospitality if the person giving or receiving the hospitality is taking advantage of a position of trust or authority, or if the hospitality looks like it may facilitate more serious offenses. Conversely, prosecution is unlikely for a single incident or if the organization proactively self-reports and takes remedial action.[25]

As far as FPOs are concerned, the Directors' Guidance, consistent with the MoJ Guidance, confirms that the more lavish the hospitality provided, the greater the inference that the hospitality is intended to influence the FPO in order to obtain or retain business, which would render the payer liable for prosecution.[26]

- **Associated persons—supply chains.** The MoJ Guidance states that a mere supplier of goods is unlikely to qualify as an associated person under section 7 and that doing due diligence further down a supply chain is therefore very unlikely to be required. But where a supplier can properly be said to be performing services for an organization rather than simply acting as the seller of goods, it may qualify as an associated person.[27] The MoJ Guidance recognizes that in a more complex supply chain, an organization is likely only to exercise control over its contractual counterparty; the suggested way to deal with the bribery risks arising in such circumstances is to use risk-based due diligence and anti-bribery terms and conditions vis-à-vis the contractual counterparty, and, in turn, request that counterparty to adopt a similar approach with the next party in the chain.[28]
- **Associated persons—joint ventures.** The MoJ Guidance crucially points out that the question of adequacy of bribery prevention measures will

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21 *Id.* at ¶ 23.

22 *Id.* at ¶ 27.

23 *Id.* at ¶ 31.

24 *Id.*

25 *See* Directors' Guidance at 7, note 6, *supra*.

26 *Id.* at 10.

27 *See* MoJ Guidance, ¶ 38, note 2, *supra*.

28 *Id.* at ¶ 39.

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depend on all the facts of the case, including the level of control of an organization over the activities of the "associated person."[29] This goes some way to addressing the concerns of business that section 7 imposed strict liability for bribery by third parties acting independently. Specifically in the context of joint ventures, the MoJ Guidance distinguishes between (i) joint ventures operating through a separate legal entity and (ii) those operating through a contractual arrangement.[30]

In the former case, the questions of whether the joint venture entity was performing services for the member and engaged in bribery to benefit the member will be decisive in determining that member's potential liability under the Act. However, the existence of a joint venture does not of itself make the joint venture entity an "associated person" that will trigger member liability.[31] Possible practical anti-bribery measures that could be included in a joint venture arrangement are said to include, among others, insisting on the establishment of an audit committee with at least one representative from each member and the power to view accounts and certain expenditures, and extracting binding commitments from the joint venture partner to comply with the Act in relation to the operation of the joint venture entity, breach of which would constitute a breach of the agreement between the partners.[32] Importantly, in the second case, the degree of control exercised by an organization over the joint venture arrangement will be taken into account in determining whether bribery at the joint venture level will trigger section 7 liability. The example given is that of an agent engaged by one participant in a contractual joint venture who will, absent other evidence, likely be regarded as being an associated person of that participant, rather than the contractual joint venture as a whole.[33]

These are important clarifications regarding the extent to which the actions of joint ventures will engage the members' liability. The MoJ Guidance does not expressly state how this approach would effect private equity structures, although it does provide, still in the context of joint ventures, that section 7 liability will not accrue through simple corporate ownership or investment, even where the organization benefits indirectly from the bribe.[34]

More generally on steps required to rely on the adequate procedures defense enshrined in section 7, the MoJ Guidance sets out six principles[35] organizations need to consider:

- **Proportionality.** The MoJ Guidance puts significant emphasis on the fact that any action must be proportionate to the risks faced by the particular organization. It also specifically envisages situations where a risk assessment results in no anti-bribery measures being required at all.
- **Top Level Commitment.** The MoJ Guidance emphasizes the importance of an appropriate "tone at the top," including an active engagement by senior management to ensure that middle management understands the zero tolerance attitude to bribery.
- **Risk Assessment.** The MoJ Guidance provides practical advice on how a risk assessment should be performed (ranging from a simple internet search to the consultation of U.K. diplomatic posts or the engagement of external advisers) but also recognizes

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"[T]he existence of a joint venture does not of itself make the joint venture entity an 'associated person' that will trigger member liability."

29 *Id.* at ¶ 43.

30 *Id.* at ¶¶ 40–41.

31 *Id.* at ¶ 40.

32 *See* MoJ Guidance, Case Study 3 at 35, note 2, *supra*.

33 *Id.* at ¶ 41.

34 *Id.* at ¶ 42.

35 *Id.* at 20-31 and Case Studies 2, 5, and 9 at 34, 37, and 41, respectively.

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that many organizations will face little or no risk of bribery, especially if they operate primarily in the U.K.

- **Due Diligence.** Depending on the results of the risk assessment, appropriate due diligence steps can be anything from simply asking an agent for a CV, financial statements or accounts to more sophisticated techniques involving external advisers where the risks are higher. The Quick-Start Guide as well as the hypothetical case study on the issue also stress the desirability of personal contact and face-to-face meetings with third parties such as agents, in order to arrive at personal assessments about the risk of doing business with them. The case study also proposes such measures as requesting to see the agent's own anti-bribery policies or, where a corporate body, its reporting procedures and records, as well as making enquiries with local authorities in the country in question to verify the agent's responses to due diligence questionnaires.
- **Communication.** The MoJ Guidance reiterates the importance of clear communication of the organization's anti-bribery policies and procedures internally but also to associated persons. The greatest practical impact of this principle vis-à-vis third parties will be in circumstances where an organization has little to no actual control of an entity performing services for or on its behalf. The organization can go some way towards reducing its risks under the section 7 offense by communicating to that party its zero tolerance policy, explaining its systems and procedures and, where appropriate, even requiring that third party to attend anti-bribery training.
- **Monitoring and Review.** In addition to regular review and updating of policies and procedures, the MoJ Guidance also states that such reviews and updates may be appropriate in situations where, for example, there have been governmental changes in countries where an organization operates, or there have been incidents of bribery or negative press reports. The actual review procedures envisaged can include internal financial controls mechanisms, as well as staff surveys and training feedback. Formal periodic reviews and reports for senior management should also be considered, as well as drawing on information from trade associations or regulators which highlight good or bad practice examples. In addition, organizations may consider seeking external verification or assurance of the effectiveness of their anti-bribery procedures, although that will not necessarily render their procedures adequate for the purposes of section 7.

The importance of adequate procedures is repeated in the Directors' Guidance, which directs prosecutors to consider an organization's procedures before determining whether to bring a prosecution at all. It restates earlier advice that a single instance of bribery does not necessarily mean procedures are inadequate.[36] ■

Lord Goldsmith Q.C.
Karolos Seeger
Nicola C. Port
Matthew Howard Getz

Lord Goldsmith Q.C. is European Chair of Litigation, Karolos Seeger is a partner, and Matthew Howard Getz is an associate in the firm's London office. Nicola C. Port is international counsel in the firm's New York and London offices. They are members of the Litigation Department and International Corporate Investigations and Defense Group. The authors may be reached at phgoldsmith@debevoise.com, kseeger@debevoise.com, ncport@debevoise.com., and mgetz@debevoise.com. Full contact details for each author are available at www.debevoise.com.

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[36] *See* Directors' Guidance at 11, note 6, *supra*.

Prosecuting Foreign Middlemen:

Jeffrey Tesler's Plea and $150 Million Forfeiture, and DOJ Theories to Prosecute Non-U.S. Individuals

If there were any doubts about the seriousness of the U.S. Department of Justice ("DOJ") in prosecuting individuals for FCPA violations, they were resolved this month in the case against Jeffrey Tesler ("Tesler"), a U.K. solicitor, who pleaded guilty as a primary FCPA anti-bribery offender and co-conspirator.[1] Under the plea agreement, Tesler agreed to forfeit nearly $150 million held in various overseas accounts, the largest monetary resolution ever imposed in a case against an individual.[2]

The penalties and the number of individual FCPA enforcement actions have dramatically increased over the last few years: in 2004, the DOJ charged two individuals (both of whom were acquitted) and collected roughly $11 million from corporations; in 2005, it charged five individuals and collected approximately $16.5 million from corporations and individuals; in 2009 and 2010 combined, it charged over 50 individuals and collected nearly $2 billion from both corporations and individuals;[3] and in 2009 and 2010, the number of people charged and the individual penalties imposed were by far the largest in any similar period[4]—the DOJ collected nearly $10 million in fines and criminal forfeitures from individuals in FCPA cases in 2009 and 2010.[5] Yet Tesler's forfeiture under the plea agreement far exceeds the amounts collected from individuals in the last six years combined.

In the past, the DOJ has generally focused its enforcement on individuals who were executives or employees of the companies paying bribes abroad. Tesler, however, did not work directly for a bribe payer. Instead, he acted as a middleman, hired as a consultant to pass on bribe monies to foreign officials.[6] He is not the first middleman to be charged. Last summer, Juan Diaz pled guilty to serving as an intermediary for three private telecommunications companies which paid bribes to Haitian officials, and was ordered to pay a total of over $1.1 million in restitution and forfeiture.[7] Tesler, however, is the most significant case to date in the government's effort to crack down on middlemen, and illustrates the resources the government is prepared to devote to the prosecution of such individuals.

As Tesler stipulated in his plea agreement, he is a U.K. citizen and resident, who used his own company Tri-Star Investments Ltd. ("Tri-Star"), a Gibraltar corporation, to pay bribes to Nigerian officials on behalf of a joint venture that was created to bid and perform work on Bonny Island, Nigeria.[8] The joint venture had four partners, one of which was Kellogg, Brown & Root, Inc. ("KBR"), a company incorporated in

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1 *See United States v. Tesler*, No. H-09-098, Plea Agreement (S.D. Tex. Mar. 11, 2011), ¶ 1.

2 *See id*. at ¶ 7; *see also* DOJ Press Rel. 11-313, UK Solicitor Pleads Guilty for Role in Bribing Nigerian Government Officials as Part of KBR Joint Venture Scheme (Mar. 11, 2011), http://www.justice.gov/opa/pr/2011/March/11-crm-313.html.

3 *See* Lanny A. Breuer, Assistant Attorney General, Remarks at the 3rd Russia and Commonwealth of Independent States Summit on Anti-corruption (Mar. 16, 2011), http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-110316.html.

4 *See* Lanny A. Breuer, Assistant Attorney General, Remarks at the Annual Meeting of the Washington Metropolitan Area Corporate Counsel Association (Jan. 26, 2011), http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-110126.html.

5 *See United States v. Fourcand*, 10-CR-20062 (S.D. Fla. Feb. 1, 2010) (forfeiture of $18,500); *United States v. Warwick*, 09-CR-449 (E.D. Va. Dec. 15, 2009) (forfeiture of $331,000); *United States v. Esquenazi, et al.*, 09-CR-21010 (S.D. Fla. Dec. 4, 2009) (Robert Antoine—restitution of $1,852,209, penalty of $1,580,771); *United States v. Basurto*, 09-CR-325 (S.D. Tex. Jun. 9, 2009) (forfeiture of $2,030,076); *United States v. Perez*, 09-CR-20347 (S.D. Fla. Apr. 22, 2009) (forfeiture of $36,375); *United States v. Diaz*, 09-CR-20346 (S.D. Fla. Apr. 22, 2009) (restitution of $73,824, forfeiture of $1,028,952); *United States v. Chodan*, 09-CR-00098 (S.D. Tex. Feb. 17, 2009) (forfeiture of $726,885); *United States v. Gerald & Patricia Green*, 08-CR-00059 (C.D. Cal. Jan. 16, 2008) (forfeiture of $1,049,465 each). These figures do not include settlements with the SEC.

6 Plea Agreement, ¶ 18(a), note 1, *supra*.

7 DOJ Press Rel. 10-883, Florida Businessman Sentenced to 57 Months in Prison for Role in Foreign Bribery Scheme (Jul. 30, 2010), http://www.justice.gov/opa/pr/2010/July/10-crm-883.html.

8 Plea Agreement, note 1, ¶ 18(a)–(b), *supra*.

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Delaware and headquartered in Houston, Texas, which the DOJ considered to be a "domestic concern."[9] Two of the remaining three partners were issuers under the Securities Exchange Act of 1934.[10] The fourth partner was deemed a "person" subject to the FCPA under 15 U.S.C. § 78dd-3(f)(1), because it was a company headquartered in Japan that allegedly committed an act in the United States, even though it was neither a "domestic concern" nor an issuer.[11] As stipulated in his plea agreement, Tesler and Tri-Star were "agents" of the joint venture and each of its partners, and Tri-Star received more than $130 million for use in bribing Nigerian officials between December 1995 and January 2004.[12] In the same period, the joint venture was awarded four contracts valued at over $6 billion to build on Bonny Island.[13] Tesler ultimately pleaded guilty to conspiracy to violate the FCPA by entering into agreements with others that the joint venture would hire Tri-Star to pay bribes, and by transferring money among different bank accounts for that purpose.[14] Tesler also pleaded guilty to being a primary offender under the FCPA by offering or paying bribes to foreign officials.[15]

Although most of the relevant activities took place outside the United States, Tesler stipulated in his plea agreement to several contacts with the United States: a total of approximately $132 million was sent from one of the joint venture's operating companies in Portugal to bank accounts in New York, to be further credited to accounts controlled by Tesler overseas.[16] In addition, one of Tesler's co-conspirators sent to Tesler, through Houston, Texas, an email about the bribery scheme and a paid golfing trip to the United States for a top level Nigerian official.[17]

Tesler attempted to fight his extradition to the United States before the London High Court, albeit unsuccessfully.[18] He argued that his activities did not take place in the United States, and hence there was no substantial connection with the United States to justify extradition.[19] In addition, Tesler argued that the fact that his alleged acts dated as far back as 1994 would compromise his access to a fair trial because of the passage of time.[20] The London High Court rejected these arguments and ordered his extradition.[21] The court reasoned that, even though Nigerian officials were bribed outside the United States, this did not undermine the U.S. connection because the FCPA targets bribery of foreign officials to benefit a U.S. company—one of the joint venture's partners, KBR, was incorporated and headquartered in the U.S.—and Tesler participated in a scheme to make money for it.[22] It also rejected the passage of time argument, and ruled that a conspirator such as Tesler could not escape liability by

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9 *Id.* at ¶ 18(a); *see United States v. Tesler*, No. H-09-098, Indictment (S.D. Tex. Feb. 17, 2009), ¶ 6. The FCPA anti-bribery prohibition applies to "domestic concerns" defined as "any corporation…which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States." 15 U.S.C.A. § 78dd-2(a), 78dd-2(h)(1). KBR has pleaded guilty and agreed to pay $402 million in criminal fines. *See* DOJ Press Rel. 09-112, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $402 Million Criminal Fine (Feb. 11, 2009), http://www.justice.gov/opa/pr/2009/February/09-crm-112.html.

10 *United States v. Tesler*, No. H-09-098, Indictment (S.D. Tex. Feb. 17, 2009), ¶¶ 6–8.

11 *Id.* at ¶ 9.

12 Plea Agreement, ¶ 18(d), note 1, *supra*.

13 *Id.* at ¶ 18(b).

14 *See* Plea Agreement, ¶¶ 1, 18, note 1, *supra*; *see also* Indictment, ¶ 20, note 10, *supra*.

15 *See* Plea Agreement, ¶¶ 1, 18, note 1, *supra*; *see also* Indictment, ¶ 22-25, note 10, *supra*.

16 *See* Plea Agreement, ¶ 18(d), note 1, *supra*.

17 *See id.* at ¶ 18(j).

18 *See Jeffrey Tesler v. Government of the United States of America*, [2011] EWHC 52 (Admin) (Eng.); *see also* "Jeffrey Tesler Court Bid to Block Extradition Fails," *BBC News U.K.* (Jan. 20, 2011), http://www.bbc.co.uk/news/uk-12237991.

19 *See Jeffrey Tesler v. Government of the United States of America*, [2011] EWHC 52 (Admin), ¶¶ 16, 20–22, 42–44 (Eng.).

20 *Id.* While the statute of limitations for primary FCPA violations is five years, 18 U.S.C. § 3282, the statute of limitations for conspiracy does not run until the date of the last overt act. *See* U.S. Attorneys Criminal Resource Manual, Statute of Limitations for Conspiracy, Section 652, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00652.htm.

21 *See Tesler v. Government of the United States*, ¶¶ 34–38, note 19, *supra*.

22 *Id.*

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remaining physically outside of the United States.[23]

The enforcement action against Tesler exemplifies the government's efforts to expand the jurisdictional reach of the FCPA's anti-bribery provisions under the theory that the defendant was acting as an agent of those clearly subject to the FCPA, such as a "domestic concern," an issuer, or a foreign entity that is neither a "domestic concern" nor an issuer but which committed an act in the United States.[24] The agency theory is expressly authorized by the statute, and, in this instance, the DOJ argued that Tesler was an agent of the joint venture and its partners, consisting of a U.S. company regarded as a "domestic concern," two issuers, and a Japanese company subject to the FCPA because it committed an act in the United States.[25]

It is not the first time that the government has used an agency theory to reach non-U.S. persons who do not live in the United States, or entities that are non-issuers, and whose illegal acts were committed abroad. In actions brought against Panalpina World Transport (Holding) Ltd. ("Panalpina"), the DOJ (and the Securities and Exchange Commission ("SEC")) took the position that, Panalpina, a Swiss freight company and non-issuer, was an agent of its issuer customers (some of whom were also "domestic concerns") and that Panalpina paid bribes on behalf of these customers.[26]

It also appears from the Panalpina case that the government is looking to expand the territorial reach of the accounting and controls provisions by use of aiding and abetting theories. The government alleged that *Panalpina* aided and abetted its issuer customers to violate the accounting and controls provisions of the FCPA, by disguising the bribes in the invoices issued to its customers.[27] Although the merits of this theory have yet to be contested in a litigated criminal matter, Panalpina settled with the DOJ.[28]

Although the agency theory for primary anti-bribery liability has textual support in the statute, it remains to be seen how far the courts will permit its use in particular cases in which the U.S.-nexus of the agent is tenuous. Even more substantial challenges might be brought against the use of aiding and abetting liability. Because the aider and abettor statute, 18 U.S.C. § 2, applies to any federal criminal statute, cases construing the extraterritorial reach of the statute, even outside the FCPA context, are instructive.[29] In recent years, the D.C. Circuit has limited the extraterritorial reach of the aider and abettor statute to that of the underlying substantive offense, unless Congress indicates otherwise.[30] In *United States v. Yakou*, the underlying offense was a weapon broker's failure "to register with the State Department and to obtain a license before engaging in brokering activities," a requirement that the court held applies only to U.S. persons, or to any foreign persons located in the United States or otherwise subject to the jurisdiction of the United States.[31] The court held that aider and abettor liability also applies only to the three classes of persons above—an individual not within one of these three categories could not be charged as an aider and abettor.[32] The defendant in that case was held not to be a U.S. person; he also lived in Iraq, and his brokering activities occurred in Iraq.[33] Without any U.S. nexus, the court held that there could be no aider and abettor liability.[34]

Similarly, under *Yakou* it could be argued that, because the FCPA does not

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23 *Id.* at ¶¶ 45–51.

24 *See* 15 U.S.C.A. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

25 *See* Indictment, ¶¶ 11–13, note 10, *supra*.

26 *See United States v. Panalpina World Transport (Holding) Ltd.*, No. 4:10-cr-769, Deferred Prosecution Agreement, Attachment B, Statement of Facts, ¶¶ 2–3 (S.D. Tex. 2010).

27 *Id.* at ¶¶ 64–69.

28 *See United States v. Panalpina World Transport (Holding) Ltd.*, No. 4:10-cr-769, Deferred Prosecution Agreement (S.D. Tex. 2010).

29 *See, e.g., United States v. Yakou*, 428 F.3d 241 (D.C. Cir. 2005).

30 *Id.* at 252.

31 *Id.* at 243, 254.

32 *Id.* at 254.

33 *Id.* at 244, 251.

34 *Id.* at 254.

Prosecuting Foreign Middlemen ■ Continued from page 9

reach the wholly foreign conduct of any non-U.S. persons living abroad, the government cannot prosecute these individuals as aiders and abettors. The FCPA's anti-bribery provisions apply to "domestic concerns," which include U.S. citizens, nationals, and residents, as well as U.S. companies.[35] The anti-bribery provisions also apply to non-U.S. nationals, if they committed an act in the United States in furtherance of a violation.[36] The accounting and controls provisions apply only to issuers as defined by the 1934 Act.[37] It would seem that the FCPA requires at least some U.S. nexus, without which there is no basis to impose liability, whether as a primary substantive offense or under the agency and aiding and abetting theories.

The government has employed conspiracy theories, under 18 U.S.C. § 371, to assert jurisdiction over potentially exempt individuals or entities. A conspiracy theory is favorable to the government because the conduct of a co-conspirator is imputed to the other co-conspirators, and, as long as one of the alleged co-conspirators committed an act in the U.S., all others are deemed to have committed the same U.S. act.[38] Yet for reasons somewhat similar to *Yakou*'s rejection of aider and abettor liability, a court has rejected the use of the conspiracy theory to assert jurisdiction over foreign individuals in the FCPA context, if the individuals cannot be prosecuted under the primary substantive FCPA offense.[39] In *United States v. Castle*, the Fifth Circuit held that two Canadian officials could not be prosecuted as co-conspirators to violate the FCPA, when they were exempt under the FCPA as primary offenders.[40] *Castle*, however, has not stopped the government from alleging conspiracy; indeed the DOJ alleged jurisdiction over Tesler by imputing to him his alleged co-conspirators' acts, including wire transfers and email communications, that were connected to the U.S[41]—acts to which Tesler ultimately stipulated to in his plea agreement.[42] Last year, the DOJ also used the theory of conspiracy to commit money laundering against a Haitian official, Robert Antoine, and collected nearly $3.5 million in restitution and forfeiture after the official pleaded guilty.[43]

The Tesler case evidences the government's intention to continue to aggressively prosecute violators of the FCPA, particularly individual offenders. The size of the restitution order in Tesler is daunting, and could well motivate other defendants to challenge the government on some of the broader theories being used against individuals, including not only aiding and abetting and conspiracy, but also the agency theory itself in cases in which the jurisdictional nexus to the United States is arguably tenuous. Absent controlling court decisions, however, and given the importance to the government of pursuing middlemen in bribery schemes, it is likely that the government will continue to assert the broad theories of criminal liability that brought down Jeffrey Tesler. ■

Sean Hecker
Steven S. Michaels
Pou-I "Bonnie" Lee
Amanda M. Ulrich

Sean Hecker is a partner, Steven S. Michaels is a counsel, and Pou-I "Bonnie" Lee and Amanda M. Ulrich are associates in the firm's New York office. They are members of the Litigation Department and White Collar Litigation Practice Group. The authors may be reached at shecker@debevoise.com, ssmichaels@debevoise.com, blee@debevoise.com, and amulrich@debevoise.com. Full contact details for each author are available at www.debevoise.com.

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35 *See* 15 U.S.C. § 78dd-2(h)(1).

36 *See* 15 U.S.C. § 78dd-3(a).

37 *See* 15 U.S.C. § 78m.

38 *See Pinkerton v. United States*, 328 U.S. 640, 646-47 (1946) ("so long as the partnership in crime continues, the partners act for each other in carrying it forward. It is settled that an 'overt act of one partner may be the act of all'") (internal quotation omitted).

39 *See United States v. Castle*, 925 F.2d 831 (5th Cir. 1991).

40 *Id.* at 831.

41 *See* Indictment, ¶ 21, note 10, *supra*.

42 *See* Plea Agreement, ¶ 18, note 1, *supra*.

43 *See* DOJ Press Rel. 10-639, Former Haitian Government Official Sentenced to Prison for His Role in Money Laundering Conspiracy Related to Foreign Bribery Scheme (June 2, 2010), http://www.justice.gov/opa/pr/2010/June/10-crm-639.html.

NEWS FROM THE BRICS

China's New Push to Combat Foreign Bribery

Following President Obama's efforts with his Chinese counterpart in late January and early February to re-set relations between the two superpowers,[1] China has moved swiftly ahead with a significant new anti-corruption measure—an effort to punish bribery of government officials outside China when committed by Chinese citizens or entities. The new law is a noticeable step forward for China's efforts to align its legal regime with international standards, and poses yet another round of challenges for companies doing business in the People's Republic of China ("PRC") and around the world.

The new provision, hailed by some as "China's FCPA," is a one-sentence supplement to Article 164 of the PRC Criminal Law, which previously addressed only commercial domestic bribery; bribery of public officials within China is dealt with elsewhere in the PRC Criminal Law. The new measure, which takes effect on May 1 of this year, criminalizes the giving of money or property to a foreign (*i.e.*, non-Chinese) public official or an official of an international public organization for the purpose of seeking illegitimate commercial benefit.

Although Article 164 does not specifically state to whom its mandate is directed, the PRC Criminal Law as a whole is generally applicable to:

- Chinese citizens and entities incorporated or established under Chinese law, for crimes committed both within and outside Chinese territory, and
- Foreign citizens and entities not established under Chinese law, with respect to crimes committed within Chinese territory.

Article 164 uses both the terms "person" and "unit," with the latter term broadly defined in the PRC Criminal Law to include companies, enterprises, institutions, state organs, and other organizations.[2] With respect to liability for the actions of agents, joint venture partners, or other third parties, it is unclear how the relevant authorities may proceed. In the domestic official bribery context, third parties or agents may be prosecuted for "introducing a bribe" to government officials, and are subject to imprisonment of no more than three years.[3] The PRC Criminal Law is silent as to how third parties or agents may be treated for paying bribes to people other than government officials, and there is no provision that specifically deals with joint venture partners.

The new provision is clearly a significant development, but raises important questions as to its meaning and how it will be enforced. One key ambiguity is the lack of a definition of either a "foreign public official" or an "official of an international public organization." China's laws regarding public corruption in the domestic context define state officials to include those who perform public service in a state organization, as well as those who work for state-owned companies such as hospitals or banks—and their relatives and others with whom they share a "close relationship."[4] It is not yet clear whether Chinese authorities will view foreign public officials through the same lens as they do issues arising under domestic bribery laws.

Also missing from Article 164 is a definition of the term "property." One source of potential guidance is a November 2008 opinion of the Supreme People's Court and the Supreme People's Procuratorate ("2008 Opinion"), which construed "property" in the commercial domestic bribery context (previously, Article 164's only domain) to include material gifts and cash, as well as benefits with monetary value, including home décor, membership cards, tickets to sporting or theater events, and travel expenses.[5] In addition, the statute does

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1 *See* Michael Wines, "Subtle Signs of Progress in U.S.-China Relations," *The New York Times* (Jan. 19, 2011), http://www.nytimes.com/2011/01/20/world/asia/20assess.html; *see also* Bob Davis, "Rivals Seek New Balance: Obama, Hu Emphasize Common Ground, Gloss Over Lasting Disputes at Summit," *The Wall Street Journal* (Jan. 20, 2011), http://online.wsj.com/article/SB10001424052748704590704576091773003541508.html.

2 PRC Criminal Law, art. 30.

3 *See* PRC Criminal Law, art. 392.

4 *See* PRC Criminal Law, art. 93; *see also* 7th Amendment of Criminal Law.

5 Joint Opinion of the Sup. People's Ct. and Sup. People's Procuratorate, Opinion on Some Issues Concerning the Applicable Laws for Handling Criminal Cases of Commercial Bribery, art. 7 (Nov. 20, 2008).

China's New Push to Combat Foreign Bribery ■ Continued from page 11

not define "illegitimate commercial benefit," but the 2008 Opinion may shed some light in its interpretation of the related term "illegitimate benefit" as including benefits in violation of relevant laws, regulations, rules or policies.[6] Both as modified and in its previous form, Article 164 does not set forth specific monetary thresholds corresponding to the applicable prison terms. Individual violators are subject to three years' imprisonment for smaller-scale bribes, and three to ten years' imprisonment for large amounts.[7] With respect to corporate liability, entities are themselves subject to fines, while the employees responsible for the act of making improper payments or transfers face criminal liability, as do their direct supervisors.[8]

Finally, the new statutory provision lacks exceptions and affirmative defenses. Similarly, there are no affirmative defenses to domestic commercial bribery, and the only exception arises when the person or entity making the bribe has been blackmailed into doing so, without gaining an illegitimate benefit.[9] This does not mean that companies that discover violations are without any recourse, however: A person or entity that pays a bribe to a foreign official (as in the domestic commercial bribery context) may receive lesser punishment—or no punishment at all—by voluntarily disclosing the bribe to the relevant authorities prior to prosecution.[10] It will be vital, going forward, for those companies subject to the new provision to learn what they can about how Chinese prosecutors view those who self-report. Adequate internal controls are a crucial way to prevent improper payments, as well as to detect violations. At present, internal controls are not necessarily thought of in China as encompassing anti-bribery controls, and unlike the FCPA, Article 164 does not contain an internal controls provision—nor does the foreign bribery provision apply to companies solely because they are listed on a Chinese exchange. China's current internal controls rules, which nevertheless echo the requirements of the Sarbanes-Oxley Act of 2002, were first introduced in 2008 by China's Ministry of Finance and the China Securities Regulatory Commission, along with several other financial regulators.[11] The 2008 Rules establish requirements for companies listed on either of the two Chinese exchanges (in Shanghai and Shenzhen)[12] in the areas of internal environment, risk assessment, control activities, information and communication, and internal monitoring. Pursuant to the Rules, companies must establish an internal whistle-blowing system as well as a whistleblower protection system.[13] Supplemental instructions issued in 2010 provide additional guidance regarding the establishment of internal mechanisms by which employees may report instances of

"With respect to corporate liability, entities are themselves subject to fines, while the employees responsible for the act of making improper payments or transfers face criminal liability, as do their direct supervisors."

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6 *Id.*, art. 9.

7 The monetary thresholds that determine prison terms for domestic commercial bribery vary by province.

8 PRC Criminal Law, art. 164.

9 *Id.*, art. 389.

10 *Id.*, art. 164.

11 Ministry of Finance, China Securities Regulatory Commission, National Audit Office, China Banking Regulatory Commission, and China Insurance Regulatory Commission, *Basic Rules for Enterprise Internal Control* (Cai Kuai [2008] No. 7) (issued on May 22, 2008; effective July 1, 2009).

12 According to Article 2 of the *Basic Rules for Enterprise Internal Control*, the Rules "apply to any medium and large-size enterprise established within the territory of China." The subsequently-issued *Notice of the Ministry of Finance, China Securities Regulatory Commission, National Audit Office, China Banking Regulatory Commission and China Insurance Regulatory Commission on Issuing the Basic Rules for Enterprise Internal Control* (Cai Kuai [2008] No. 7) clarifies that the Rules apply to listed companies and that their implementation in non-listed mid-size and large enterprises is also encouraged.

13 *Basic Rules for Enterprise Internal Control*, art. 43, note 11, *supra*.

China's New Push to Combat Foreign Bribery ■ Continued from page 12

fraud or noncompliance, such as through an employee mailbox or a complaint hotline.[14]

Even those companies not subject to the existing Chinese internal controls requirements are advised to examine their existing compliance programs in order to guard against potential violations of the new anti-bribery law. Multinational companies also within the jurisdiction of the FCPA and the U.K. Bribery Act should seek to harmonize their compliance programs and training, to the extent possible, in order to bring them in line with all three anti-bribery regimes. It is important to be mindful of key differences, however. Unlike the FCPA,[15] the U.K. Bribery Act and Chinese law both criminalize commercial bribery in addition to corrupt payments paid to foreign officials. As far as scope, the U.K. Bribery Act is potentially more sweeping jurisdictionally than Chinese law or the FCPA (which covers "issuers" as defined by the Securities Exchange Act of 1934 and "domestic concerns"). The U.K. Bribery Act reaches even a non-U.K.-incorporated business with respect to acts committed outside the U.K.'s borders, so long as the company "carries on" at least some part of its business within the U.K.[16] In addition, although whistleblowers receive significant protection under U.K. and U.S. law,[17] the Chinese internal controls rules are not as robust. When formulating whistleblower policies, companies must be mindful of E.U. data protection rules with respect to the U.K. Bribery Act, as well as the potential that data transfers may implicate China's broad "state secrets" laws.[18]

At this time, it is not clear what resources will be devoted to enforcing the new Chinese law, or what shape additional guidance from Chinese authorities may take. Until China develops a track record for enforcing the new anti-bribery provision, policies and programs developed under the FCPA and U.K. Bribery Act will be relevant as companies covered by the Chinese law look to enhance compliance programs. ■

Paul R. Berger
Bruce E. Yannett
Niping Wu
Tingting Wu
Noelle Duarte Grohmann

Paul R. Berger is a partner in the firm's Washington, D.C. office and Bruce E. Yannett is a partner in the New York office. Noelle Duarte Grohmann is an associate in the firm's New York office. They are members of the Litigation Department and White Collar Litigation Practice Group. Niping Wu is an international counsel and Tingting Wu is an associate in the firm's Shanghai office. They are members of the firm's Corporate Department. The authors may be reached at prberger@debevoise.com, beyannett@debevoise.com, nwu@debevoise.com, twu@debevoise.com, and ndgrohmann@debevoise.com. Full contact details for each author are available at www.debevoise.com.

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14 Ministry of Finance, China Securities Regulatory Commission, National Audit Office, China Banking Regulatory Commission, and China Insurance Regulatory Commission, *Supplemental Instructions of the Internal Control Rules* (No. 17), art. 8 (issued on April 15, 2010 and applicable to Chinese companies listed on both Chinese and foreign exchanges since January 1, 2011 and companies listed only on the main board of the Shanghai or Shenzhen stock exchanges as of January 1, 2012).

15 Although the FCPA does not itself criminalize commercial bribery, the U.S. Department of Justice ("DOJ") and the U.S. Securities and Exchange Commission ("SEC") have prosecuted commercial bribery under alternative theories, such as the FCPA's books and records provision (both agencies) and the Travel Act and the mail and wire fraud statutes (DOJ only). *See* Sean Hecker and Noelle Duarte Grohmann, "The Growing Importance of China's Private Sector and What It Means for FCPA Compliance," *FCPA Update* Vol. 2, No. 3 (Oct. 2010), http://www.debevoise.com/files/Publication/049586e2-e8a1-4d9f-9db9-1fc982130d00/Presentation/PublicationAttachment/2a550ec8-8f14-4624-897d-518129e51d9d/FCPAUpdateOctober2010.pdf.

16 This possibility arises under the new corporate offense of "failing to prevent bribery." Bribery Act, 2010, c.23 (Eng.), § 7(5), http://www.legislation.gov.uk/ukpga/2010/23/section/7.

17 *See* Public Interest Disclosure Act, 1998, c. 23 (Eng.), http://www.legislation.gov.uk/ukpga/1998/23/contents; 18 U.S.C. §§ 1514A, 1513(e). In the United States, whistleblowers may receive a "bounty" if they voluntarily provide the SEC with original information that leads to a successful enforcement action yielding monetary sanctions of over $1 million. These whistleblower provisions were part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which created a new Section 21F of the Securities Exchange Act of 1934, 15 U.S.C. 78a, *et seq*. For more, see Paul R. Berger, Ed Schallert, et al., "The SEC's Draft Rules Implementing Dodd-Frank's Whistleblower Program," *FCPA Update* Vol. 2, No. 4 (Nov. 2010), http://www.debevoise.com/files/Publication/ad10aedb-1582-4e2e-b4bb-983a55cd6736/Presentation/PublicationAttachment/40a912f9-485a-45ef-89ca-be27b63b9ba6/FCPAUpdateNovember2010.pdf.

18 *See* PRC State Secrets Law, art. 9 (containing potentially expansive language bringing "secrets in economic and social development" and "secrets concerning science and technology" within the definition of "state secrets"); *see also* PRC Criminal Law, art. 111 (criminal penalties where state secrets unlawfully provided to entity outside China's borders).

NEWS FROM THE BRICS

Assistant Attorney General Breuer Hails New Russia Anti-Bribery Proposals

Speaking at the American Conference Institute's third Russia and Commonwealth of Independent States Anti-Corruption Summit, U.S. Department of Justice ("DOJ") Assistant Attorney General Lanny A. Breuer on March 16, 2011 directly confronted some harsh facts about the conduct of business in the former Soviet Union, in a diplomatic but frank effort to rally support for President Medvedev's February 16, 2011 submission of important new anti-bribery legislation to the Duma.[1] The remarks follow in the now-familiar pattern of public remarks by Obama Administration officials publicizing the role the United States seeks to play through its enforcement of the FCPA and related statutes in remedying official corruption outside the United States, while at the same time strongly supporting efforts by non-U.S. governments around the world to improve their own anti-bribery enforcement as the first line of defense against corrupt conduct abroad.

Noting that the United States itself has its own problems with official corruption, Assistant Attorney General Breuer nevertheless identified some of the challenges facing multi-national companies seeking to do business in, as well as in competition with the companies headquartered in, the former Soviet Union, citing among other things Russia's latest ranking of 154 out of 178 nations in the Transparency International ("TI") Corruption Perceptions Index, and dead-last ranking (22 out of 22) in TI's so-called Bribe Payers Index, which purports to rank the propensity of the companies of 22 major trading nations to pay bribes when conducting business outside their home countries.[2]

With those realities as background, Assistant Attorney General Breuer catalogued the ways in which the FCPA could be brought to bear to combat corruption in Russia and the Commonwealth of Independent States as a whole, including prosecution of U.S. nationals involved in corruption, and of companies that are issuers under the Securities Exchange Act of 1934 and their executives and employees, regardless of citizenship. He also noted the DOJ's recent use of U.S. anti-money laundering statutes to prosecute non-U.S. officials who solicit and/or receive corrupt payments, even thought such solicitation or receipt is not specifically proscribed by the FCPA. But after noting these possibilities, Mr. Breuer spent the remainder of his remarks praising President Medvedev's recent legislative proposal and expressing the hope not only that Russia would enact the new measures but follow up with vigorous—and evenhanded—enforcement of local law.

Attorney General Breuer's remarks reflect the underlying reality of anti-bribery enforcement from the perspective of the United States government, namely, that the United States, whose foreign anti-bribery legislation, the FCPA, has been on the books far longer and has resulted in many more cases being brought than under the laws of all other nations, has finite resources and must of necessity rely on the law enforcement efforts of other nations if the battle against corruption of government purchasing and other decision-making activities is to have any hope of ultimate success.

Indeed, companies seeking to understand the U.S. government's abiding interest in strong law enforcement by co-signatories, such as Russia,[3] to one or more of the various anti-bribery conventions need look no farther than the Principles of

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1 *See* Lanny A. Breuer, Assistant Attorney General, Remarks at the 3rd Russia and Commonwealth of Independent States Summit on Anti-corruption (Mar. 16, 2011), http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-110316.html.

2 *See id.*; *see also* Transparency International, Results of 2010 Corruption Perceptions Index (last visited Mar. 29, 2011), http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results; Transparency International, 2008 Bribe Payers Index, http://www.transparency.org/policy_research/surveys_indices/bpi.

3 As noted by Assistant Attorney General Breuer, Russia is a signatory to the United Nations Convention Against Corruption. *See* note 1, *supra*; *see also U.N. Convention Against Corruption*, G.A. Res. 58/4 (Oct. 31, 2003), http://www.unodc.org/unodc/en/treaties/CAC/index.html.

Assistant Attorney General Breuer Hails Russia Anti-Bribery Proposals ■ Continued from page 14

Federal Prosecution of Business Organizations ("Federal Principles"),[4] which make explicit reference to global resolutions of criminal matters as often necessary to obtain adequate remediation whether or not a guilty plea and conviction are sought under U.S. law.[5] Moreover, although not expressly stated in the Federal Principles, notions of international comity and diplomatic considerations undoubtedly play a role when the United States decides whether to bring charges in the face of a corporation's home country's government's determination vigorously to prosecute a company for misconduct. A highly vigorous non-U.S. government prosecution of misconduct (particularly misconduct on its own soil) is unquestionably a factor that is likely weighed by U.S. prosecutors as they exercise their discretion to bring charges, which ones, and the remedies to seek, if the FCPA or other U.S. laws with extraterritorial effect are in play. Whether the Russian government will take the next step in terms of enacting legislation and by allocating resources for law enforcement remains an item for in-house counsel and compliance staff to monitor closely if their companies do business in Russia. ■

— the Editors

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4 U.S. Attorneys' Manual, Principles of Federal Prosecution of Business Organizations, Title 9, Chapter 28, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm.

5 *Id.* at section 9-28.1000, n. 8 ("Prosecutors should note that in the case of national or multi-national corporations, multi-district or global agreements may be necessary.").

FINRA Reminds Members of FCPA Compliance Obligations

In March of 2009, the Financial Industry Regulatory Authority, Inc. ("FINRA"), which was formed in 2007 through the merger of the National Association of Securities Dealers and the NYSE, Inc.,[1] set forth its examination priorities for 2009 and noted its determination that FCPA compliance would be one of the "areas of particular significance to FINRA's examination program."[2] In a regulatory notice (Regulatory Notice 11-12) issued earlier this month, FINRA considerably expanded upon its 2009 one-paragraph recitation of the FCPA's principal anti-bribery, books and records, and internal controls provisions, and has provided six detailed pages of guidance for firms subject to FINRA jurisdiction.[3]

The Regulatory Notice reminded FINRA members that "[a] member firm's failure to comply with its FCPA obligations will be considered conduct inconsistent with high standards of commercial honor and just and equitable principles of trade in violation of FINRA Rule 2010 (Standards of Commercial Honor and Principles of Trade)."[4]

After canvassing the provisions of the FCPA, the Regulatory Notice articulates how FINRA understands the FCPA to apply to member firms. Member firms, as well as officers, directors, employees, agents, and shareholders acting on their behalf, which are issuers under the

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1 *See* SEC Rel. No. 34-56145, "Order Approving Proposed Rule Change to Amend the By-Laws of NASD to Improve Governance and Related Changes to Accommodate of the Member Firm Regulatory Functions of NASD and NYSE Regulation, Inc." (Jul. 2007), http://www.sec.gov/rules/sro/nasd/2007/34-56145.pdf.

2 *See* Letter from R. Errico, Executive President Member Regulation and Sales Practice, Grace B. Vogel, Executive Vice President Member Regulation, Risk Oversight and Operational Regulation, and Thomas R. Gira, Executive President, Market Regulation to Executive Representatives (Mar. 9, 2009), http://www.finra.org/web/groups/industry/@ip/@reg/@guide/documents/industry/p118113.pdf; FINRA and the FCPA: Risk Areas for the Fincanial Services Firms, *FCPA Update,* Vol.1, No. 2 (Sept. 2009).

3 *See* Regulatory Notice 11-12, "FINRA Reminds Firms of Their Obligations Under the Foreign Corrupt Practices Act" (Mar. 2011), http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p123357.pdf.

4 *Id.*

FCPA Compliance Obligations ■ Continued from page 15

Securities Exchange Act of 1934 are subject to the FCPA's anti-bribery, books and records, and internal controls provisions, while all other firms (those that are not issuers under the '34 Act), as well as their officers, directors, employees, agents, and shareholders acting on their behalf are subject to the anti-bribery provisions. The FINRA notice makes clear that anti-bribery provisions attach to "domestic concerns" and those who act on their behalf as defined by the FCPA for misconduct anywhere in the world, while foreign broker dealers registered with the SEC and those acting on their behalf may be subject to the FCPA for any misconduct that involves activity that takes place in the territory of the United States.[5]

Beyond this, though, the FINRA statement is notable for its reminder that member firms, irrespective of whether they are issuers under the '34 Act, "must comply with FINRA's books and records obligations," including NASD Rule 3110, and SEA Rules 17a-3, and 17a-4.[6] These additional books and records provisions, like those applicable to Registered Investment Advisers pursuant to Section 204 of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-4 (2006), offer regulators yet another basis for pursuing corrupt conduct both overseas and domestically, as those who pay or authorize bribes relying on the assets of a regulated company almost uniformly create false and misleading entries that seek to mask bribes as "fees," "commissions," or other legitimate expenses. Entities that are subject to these "non-issuer" books and records provisions may not appreciate the long history of successful prosecutions of companies engaged in inappropriate behavior through a focus on books and records issues. To the extent that a perception that a company's status as an "issuer" is what triggers books and records liability, the FINRA Regulatory Notice is a critical warning that that is not always true. ■

— the Editors

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5 *Id.* at 4.

6 *Id.* at 6 n.19 (also noting the impending promulgation of consolidated books and records rules, as set forth in Securities Exchange Act Release No. 63784 (Jan. 27, 2011), 76 FR 5850 (Feb. 2, 2011) (Order approving the adoption of certain paragraphs of NASD Rule 3110 as FINRA Rules in the Consolidated FINRA Rulebook; File No. SR-FINRA-2010-052).

Upcoming Speaking Engagements

April 16, 2011
Karolos Seeger
"Corporate Compliance Committee Presentation: Compliance and Ethics Programs Refreshed in Light of the UK's Bribery Act of 2010 and the Dodd-Frank Act"
ABA Business Law Section Spring Meeting
Boston
Conference brochure:
http://www2.americanbar.org/calendar/business-law-section-2011-spring-meeting/Documents/brochure.pdf

May 17, 2011
Sean Hecker
"Detecting Facilitating Payments in Your Global Supply Chain and Distribution Operations: Strategies for Embedding Risk Assessment and Monitoring Activities"
ACI's Fifth National Conference on the FCPA & Anti-Corruption for the Life Sciences Industry
New York
Conference brochure:
http://www.americanconference.com/PharmaFCPA

May 24, 2011
Steven S. Michaels
Risk and Corruption Symposium 2011
Hong Kong
For more information
contact Wendy Chan at
wendy.chan@inhousecommunity.com

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