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FCPA Update

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FCPA Settlement with Tenaris Includes SEC's First-Ever Deferred Prosecution Agreement

On May 17, 2011, the Securities and Exchange Commission ("SEC") announced that it had resolved an investigation of FCPA violations by Tenaris, S.A., a Luxembourg-based manufacturer and supplier of steel pipe products whose American Depositary Shares trade on the New York Stock Exchange. As part of the settlement, Tenaris entered into a deferred prosecution agreement ("DPA") with the SEC, representing the first time that the SEC has used that form of resolution in any enforcement context.[1] Tenaris also settled a parallel criminal investigation by the Department of Justice ("DOJ") by entering into a non-prosecution agreement ("NPA").[2]

As part of the settlements, Tenaris admitted that in 2006 and 2007, when bidding on a series of supply contracts with an oil and gas production company that was wholly owned by the government of Uzbekistan, OJSC O'ztashqineftgaz ("OAO"), it had offered and made payments to officials of OAO and failed to record those payments properly in its books and records.[3] The offers and payments were made through an agent retained by Tenaris. The agent obtained confidential information regarding competitors' bids, which Tenaris then used to revise its own bids. Tenaris admitted that it had agreed to pay the agent 3 to 3.5% of the value of the contracts and was "aware or substantially certain" that the agent would pay at least a portion of that amount to employees of OAO and that certain of the payments would be routed through a New York bank account.[4] Tenaris subsequently won the contracts and received nearly $5 million in profits from them.[5]

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1 *SEC v. Tenaris*, Deferred Prosecution Agreement (SEC 2011) (hereinafter "SEC DPA").

2 *United States v. Tenaris*, Non-Prosecution Agreement (DOJ 2011) (hereinafter "DOJ NPA").

3 DOJ NPA at 1, A1-A4 (Tenaris "admits, accepts, and acknowledges responsibility for the conduct" described in the NPA's detailed statement of facts); SEC DPA at ¶¶ 1, 6, 9, 15 (Tenaris "accept[s] responsibility for its conduct" and "agrees not to contest or contradict in any future Commission enforcement action" the detailed statement of facts contained in the DPA).

4 DOJ NPA at A2-A3.

5 SEC DPA at ¶ 6(i), (k), (v).

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FCPA Settlement with Tenaris ■ Continued from page 1

Under the terms of its DPA with the SEC, Tenaris agreed to pay $5.4 million in disgorgement and prejudgment interest, but no penalty.[6] Tenaris also agreed not to deny in any public statement or to contest in any future SEC enforcement proceeding a detailed statement of facts reciting the history of the bribe scheme. In addition, it agreed to enhance its compliance policies and procedures and internal controls, implement additional due diligence requirements, provide detailed training to its employees regarding the FCPA and other anti-corruption compliance, and fully cooperate with the SEC's investigation.[7] In exchange, the SEC agreed to defer an enforcement action against the company for violations of the anti-bribery, books-and-records and internal controls provisions of the FCPA.[8]

In order to resolve the related criminal investigation by the DOJ, Tenaris entered into a non-prosecution agreement and agreed to pay a $3.5 million penalty. Under the terms of the non-prosecution agreement, Tenaris admitted responsibility for conduct described in a detailed statement of facts and agreed not to contest that account of events. The DOJ lauded Tenaris's prompt and voluntary disclosures to the government, its "thorough, real-time cooperation" and its "extensive remediation, including voluntary enhancements to its compliance program."[9] The DOJ stated that the monetary penalty imposed on Tenaris had been "substantially reduced" to "provid[e] meaningful credit to Tenaris for its extraordinary cooperation…."[10]

Similarly, the SEC emphasized that it had used the deferred prosecution approach "to facilitate and reward cooperation" by Tenaris.[11] Robert Khuzami, Director of the SEC's Enforcement Division, stated that, although Tenaris's conduct was unlawful, "the company's response demonstrated high levels of corporate accountability and cooperation…. The company's immediate self-reporting, thorough internal investigation, full cooperation with SEC staff, enhanced anti-corruption procedures, and enhanced training made it an appropriate candidate for the Enforcement Division's first deferred prosecution agreement. Effective enforcement of the securities laws includes acknowledging and providing credit to those who fully and completely support our investigations and who display an exemplary commitment to compliance, cooperation, and

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6 SEC DPA at ¶ 8(c).

7 SEC DPA at ¶¶ 3, 4, 8, 9; *see also* DOJ NPA at 2, B1-B4.

8 SEC DPA at ¶¶ 1-2, 13-16.

9 DOJ Press Rel. 11-629, Tenaris S.A. Agrees to Pay $3.5 Million Criminal Penalty to Resolve Violations of the Foreign Corrupt Practices Act (May 17, 2011), http://www.justice.gov/opa/pr/2011/May/11-crm-629.html.

10 *Id.*

11 SEC Press Rel. 2011-112, Tenaris to Pay $5.4 Million in SEC's First-Ever Deferred Prosecution Agreement (May 17, 2011), http://sec.gov/news/press/2011/2011-112.htm.

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remediation."[12] Khuzami had announced in January 2010 that the SEC would be adopting a number of policy changes, including the use of deferred prosecution agreements, to further incentivize self-reporting and cooperation.[13] As the revisions to the SEC's Enforcement Manual make clear, "[a]n admission or an agreement not to contest the relevant facts underlying the alleged offenses" is central to the SEC's determination of whether a company should receive a DPA.[14]

However, the nature and circumstances of the settlement call into question how beneficial the settlement overall, and particularly the SEC's novel form of resolution, actually was for Tenaris. The company, even by the government's account, did everything right after discovering potentially improper conduct:[15] It immediately and voluntarily disclosed the conduct at issue, retained outside counsel to conduct a worldwide investigation, cooperated extensively and in "real time" with the SEC and DOJ, and implemented substantial remedial measures and compliance enhancements.[16] Yet Tenaris still had to pay millions in disgorgement and fines, adopt wide-ranging compliance requirements (including certification by all directors and members of management regarding compliance with a revised code of conduct) on top of the extensive reforms and enhancements the company had already implemented, commit to notify the DOJ during the two-year term of the NPA of any conduct by any Tenaris employee that violates U.S. federal or state criminal law or any non-U.S. fraud or anticorruption law (or even any investigation of such conduct) that comes to the attention of the company's senior management, and, perhaps most significantly, agree not to dispute detailed accounts of the company's conduct that include express statements that the conduct was "illegal" and "improper."[17] For example, although the DPA includes a pro forma recitation that Tenaris was not "admitting or denying" the SEC's allegations, Tenaris agreed not to dispute a statement of facts that describes the payments as "illegal payments to OAO officials" and identifies those OAO employees as "'foreign officials' within the meaning of [the FCPA]."[18] The SEC's resolution of the Tenaris investigation by means of a DPA reflects the adoption by the SEC of aggressive techniques and practices employed by the DOJ in criminal matters – a trend that may continue as the SEC increases the vigor of its FCPA enforcement efforts. ■

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12 *Id.*

13 SEC Press Rel. 2010-6, SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations (Jan. 13, 2010), http://sec.gov/news/press/2010/2010-6.htm.

14 SEC Division of Enforcement, Enforcement Manual, at 132 (Feb. 8, 2011), http://sec.gov/divisions/enforce/enforcementmanual.pdf.

15 Interestingly, the original self-reporting by Tenaris to the SEC and DOJ did not involve the conduct in Uzbekistan that became the subject of the settlement, but rather involved improper payments in a different country. The discovery of those other payments prompted Tenaris's Audit Committee to retain outside counsel, who conducted a global investigation and reported their factual findings, including regarding the transactions in Uzbekistan, to the SEC and DOJ. *See* SEC DPA at ¶ 6(z)-(bb); DOJ NPA at A5.

16 SEC Press Rel. 2011-112, note 11, *supra*; DOJ Press Rel. 11-629, note 9, *supra*.

17 *See generally* SEC DPA; DOJ NPA.

18 Compare SEC DPA ¶ 1 *with* SEC DPA ¶ 6(e), (y).

Carson Ruling on Defendants' Challenge to the DOJ's Definition of "Foreign Official": A Fact-Based Approach

As reported in our April 2011 *FCPA Update*,[1] defendants in three recent or on-going FCPA cases have filed pre-trial motions to dismiss, arguing that employees of state-owned enterprises ("SOEs") are not "foreign officials" under the FCPA. On April 1, 2011, Judge A. Howard Matz of the Central District of California denied the first of these motions in the case now known as *United States v. Lindsey*,[2] discussed in our last issue. On May 18, 2011, a second judge in the Central District of California, Judge James V. Selna, denied a similar motion in *United States v. Carson*.[3] Although the two rulings are similar, Judge Selna's ruling in Carson sets out a framework for determining the circumstances under which an SOE is not an "instrumentality" of a foreign government, and, in turn, when employees of an SOE are not "foreign officials" under the FCPA,[4] situations the government argued were within the contemplation of the statute. The arguments in *Lindsey* and *Carson* were explored in our last issue. This article highlights the portions of Judge Selna's ruling which, if adopted by other courts, could provide much needed guidance on how to treat the myriad SOEs (especially in BRIC jurisdictions) operating largely or entirely within the commercial sphere.

Introduction

As we have previously discussed, the government has historically interpreted "foreign official" broadly to include employees of SOEs, even if such employees do not directly perform a traditional government function.[5] In their motion, the *Carson* defendants challenged the government's position, noting that "if the Government's view were adopted, even the janitor of a state-owned commercial enterprise would be considered a foreign official."[6] This dilemma is most commonly encountered not by defendants in an FCPA prosecution, but by compliance officers and in-house counsel at corporations doing business around the world. For example, what to do about a publicly listed corporation operating in a competitive market, the majority of whose shares are owned by a foreign government? As a result of this uncertainty, practitioners have long counseled corporations that, in designing a compliance program, it is best presumptively to treat, for example, any worker among China's 1.3 billion inhabitants as "foreign officials" for FCPA purposes.[7]

In opposing defendants' motion, the government stated clearly that it did not consider defendants' extreme examples as falling within the scope of "foreign official" definition:

> [T]he Government's position is not that all SOEs are, as a matter of law, agencies and instrumentalities. Some SOEs may be instrumentalities – depending on the *facts* related to the entity, but the terms are not coextensive.[8]

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1 *See* Sean Hecker, Bruce E. Yannett and Michael A. Janson, "Defendants Contest DOJ's Definition of 'Foreign Official,'" *FCPA Update* Vol. 2, No. 9 (Apr. 2011), http://tinyurl.com/April2011*FCPAUpdate*.

2 *United States v. Noreiga, et al.*, No. 02:10-cr-01031-AHM, Criminal Minutes – General (C.D. Cal. Apr. 20, 2011), ECF No. 474.

3 *United States v. Carson, et al.*, No. 08:09-cr-00077-JVS, Criminal Minutes – General (C.D. Cal. May 18, 2011), ECF No. 373.

4 15 U.S.C. § 78dd-1(f)(1)(A).

5 Colby Smith, "DOJ Challenged on Meaning of 'Foreign Official,'" *FCPA Update*, Vol. 2, No. 4 (Nov. 2010), http://tinyurl.com/Nov2010FCPAUpdate.

6 *United States v. Carson, et al.*, No. 08:09-cr-00077, Defendants' Notice of Motion and Motion to Dismiss Counts One Through Ten of the Indictment, Memorandum of Points and Authorities in Support Thereof at 16 (C.D. Cal. Feb. 21, 2011), ECF No. 304.

7 *See, e.g.*, "Greetings, Comrade," *FCPA Blog* (Oct. 10, 2007), http://www.fcpablog.com/blog/2007/10/11/greetings-comrade.html ("[W]e believe the prudent approach in a communist state or any country where the government dominates the economy is to consider everyone a foreign official, until proven otherwise.").

8 *United States v. Carson, et al.*, No. 08:09-cr-00077-JVS, Government's Opposition to Defendants' Amended Motion to Dismiss Counts One Through Ten of the Indictment; Memorandum of Points and Authorities at 12 (C.D. Cal. Apr. 18, 2011), ECF No. 332.

Carson Ruling on Defendants' Challenge ■ Continued from page 4

The government, however, did not provide guidance[9] about when it believed an SOE would not be coextensive with an "instrumentality" under the statute, essentially continuing to take the position that the government "knows it when it sees it," without further elaboration. Judge Selna's ruling, while providing some guidance, does not contain definitive rules for corporations doing business in jurisdictions with a significant number of SOEs.

Judge Selna's Ruling

In rejecting defendants' motion to dismiss, Judge Selna agreed with the government that whether an SOE qualifies as an instrumentality is a question of fact.[10] The decision makes clear, however, that mere ownership or control by a foreign state is insufficient to render an SOE an 'instrumentality' of a foreign state:

> [S]imply assuming that a company is wholly owned by the state is insufficient for the Court to determine as a matter of law whether the company constitutes a government "instrumentality."[11]
>
> . . .
>
> [A] mere monetary investment in a business entity by the government may not be sufficient to transform that entity into a governmental instrumentality. But when a monetary investment is combined with additional facts that objectively indicate the entity is being used as an instrument to carry out governmental objectives, that business entity would qualify as a governmental instrumentality.[12]

Judge Selna provided a non-exclusive list of categories of "additional facts" to be considered, noting that "no single factor is dispositive."

- The foreign state's characterization of the entity and its employees;
- The foreign state's degree of control over the entity;
- The purpose of the entity's activities;
- The entity's obligations and privileges under the foreign state's law, including whether the entity exercises exclusive or controlling power to administer its designated functions;
- The circumstances surrounding the entity's creation; and
- The foreign state's extent of ownership of the entity, including the level of financial support by the state (*e.g.*, subsidies, special tax treatment, and loans).[13]

Conclusion

Judge Selna's non-exclusive list of factors is unlikely to be the last word on this issue. His ruling does not bind other courts and it is unclear why these particular factors are more relevant than others (or why the final factor ought not be considered as two distinct factors (ownership and level of funding)). Multi-factor tests are also subject to inconsistent application. Without clear guidance as to how factors should be weighted in the calculus, it is entirely possible that, when five out of six factors point to an SOE not being an "instrumentality," the sixth factor could push a fact finder to determine the opposite. Moreover, as the goal of a good compliance program is to avoid becoming a defendant in the first instance, the relevance of Judge Selna's analysis to the practicalities of framing compliance policies is limited.

But there is certainly a benefit to Judge Selna's effort to categorize some of the possible considerations. And some aspects of the factors listed above, if adopted by other courts or the government, could lead to practical guidance on the question of who is a "foreign official," as well as providing

"In rejecting defendants' motion to dismiss, Judge Selna agreed with the government that whether an SOE qualifies as an instrumentality is a question of fact."

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9 The government did provide a detailed factual description of each of the SOEs at issue in the *Carson* case. *See United States v. Carson, et al.*, No. 8:09-00077-JVS, Declaration of Special Agent Brian Smith (C.D. Cal. Apr. 18, 2011), ECF No. 334. But the declaration offered no clue as to when SOE and instrumentality are not co-extensive.

10 *United States v. Carson, et al.*, No. 08:09-cr-00077-JVS, Criminal Minutes – General at 5 (C.D. Cal. May 18, 2011), note 3, *supra*.

11 *Id.*

12 *Id.* at 7.

13 *Id.* at 5.

Carson Ruling on Defendants' Challenge ■ Continued from page 5

protection for defendants in certain cases.

As Judge Selna's list of factors makes clear, ownership and/or control should not be the only factors to consider in determining whether an SOE is an instrumentality of a foreign government. The government conceded this fact in its motion papers, but in a widely-reported speech by Nathaniel Edmonds, the Assistant Chief of the Fraud Section of the Criminal Division of the Department of Justice, the government seems to have back-tracked as a practical matter. Mr. Edmonds is reported to have stated that "quibbling over the percentage ownership or control of a company is not going to be particularly helpful as a defense."[14] Although statements by DOJ employees outside of the courtroom are typically prefaced by the caveat that they represent only the employee's individual's views, these remarks suggest that even within the DOJ there is not a settled approach to this issue.

More importantly, at least according to Judge Selna, hypothetical control does not turn an SOE into an "instrumentality" of a foreign government. Judge Selna used the present tense, not the conditional, to describe "additional facts that objectively indicate the entity *is being used* as an instrument to carry out governmental objectives" (emphasis added). If followed, this approach could require a court to focus on commercial reality and lay to rest the "golden share" hypothetical (i.e., a circumstance in which a minority investor nevertheless had certain important positive or negative control rights), complicating even a percentage ownership analysis of a possible "instrumentality."

While Judge Selna's ruling is an important step towards the development of a common law interpretation of "foreign official," it is still an early step. Future defendants may well use the opinion as a starting point (as least where the factors prove helpful), but courts and/or Congress have much work yet to do to provide additional clarity to businesses and compliance officers seeking to frame policies governing dealings with employees of SOEs and address specific interactions with such persons. ■

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[14] Christopher M. Matthews, "DOJ Official Warns Against Challenging Foreign Official Definition in FCPA Cases," *Main Justice: Just Anti-Corruption* (May 4, 2011), http://mainjustice.com/justanticorruption/2011/05/04/doj-official-warns-against-challenging-foreign-official-definition-in-fcpa-cases, attached as Exhibit A to *United States v. Carson, et al.*, No. 08:09-cr-00077-JVS, Supplement to Defendants' Reply in Support of Amended Motion to Dismiss Counts One Through Ten of the Indictment (C.D. Cal. May 5, 2011), ECF No. 358.

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NEWS FROM THE BRICS

Avon's FCPA Investigation in China and Beyond

In its recent quarterly filing with the Securities and Exchange Commission ("SEC"), Avon Products, Inc. ("Avon") made news by providing an update on the status and ever-growing costs of its ongoing FCPA investigation, which has grown into a review of Avon's global beauty products business – which brings in $10 billion in annual revenue from sales in more than 100 countries.[1]

The Avon investigation began in June 2008, when an employee wrote a letter to CEO Andrea Jung raising allegations regarding travel by Chinese government officials to locales including France, New York, Canada, and Hawaii.[2] The investigation has expanded far beyond these issues and geographies, and Avon has apparently identified questionable payments that total in the millions of dollars that were made to officials in Brazil, Mexico, Argentina, India and Japan.[3] Further, in its recent SEC filing, Avon disclosed that the "internal investigation and compliance reviews are focused on reviewing certain expenses and books and records processes, including, but not limited to, travel, entertainment, gifts, use of third party vendors and consultants and related due diligence, joint ventures and acquisitions, and payments to third-party agents and others, in connection with our business dealings, directly or indirectly, with foreign governments and their employees."[4]

Avon's internal investigation began only two years after Avon obtained a direct sales license from the Chinese Ministry of Commerce, which permitted Avon to employ its signature door-to-door sales model (which includes 6.5 million salespeople worldwide[5]) with the goal of increasing sales in China. Previously, Avon had been forced to sell products through boutiques due to a 1998 ban on direct sales aimed at preventing domestic pyramid schemes.[6] Avon voluntarily contacted the SEC and DOJ in 2008, and has been cooperating with document requests and interviews since then.[7] Although the amount of any enforcement action has yet to be determined, the investigation has generated many millions of dollars in legal expenses for the company, including $59 million in 2009, $95 million in 2010, and $22.5 million in the first quarter of 2011.[8]

Earlier this month, Avon announced that it had terminated four executives in connection with the investigation – three with China-specific roles, and one who had earlier served as the global head of internal audit and security and the head of finance for Asia Pacific.[9] All four had been placed on administrative leave in 2010.[10] In February of this year, the former senior vice president with responsibility for Western Europe, the Middle East, Asia Pacific, and China left Avon after being with the company more than 30 years; he had previously been suspended as a result of the investigation.[11]

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1 Avon, Inc., Quarterly Report (Form 10-Q), May 3, 2011 ("Avon 10-Q"); Peter J. Henning, "The High Price of Internal Inquiries," *The New York Times DealBook* (blog) (May 6, 2011), http://dealbook.nytimes.com/2011/05/06/the-high-price-of-internal-investigations/; Hillary Russ, "Avon Widens In-House Cleanup Over FCPA Violations," *Law360* (May 5, 2011), http://www.law360.com/internationaltrade/articles/243436 (subscription required).

2 Amir Efrati, "Next Stop on FCPA Train: China?," *The Wall Street Journal Law Blog* (Apr. 13, 2010), http://blogs.wsj.com/law/2010/04/13/next-stop-on-fcpa-train-china.

3 Ellen Byron, "Avon Investigation Widens Beyond China," *The Wall Street Journal* (May 5, 2011), http://tinyurl.com/3ocgo2l (subscription required).

4 Avon 10-Q at 9.

5 Russ, note 1, *supra*.

6 Jessica Wohl & Donny Kwok, "UPDATE 2-Avon Suspends Four Execs in China Bribery Probe," *Reuters* (Apr. 13, 2010), http://www.reuters.com/article/2010/04/13/avon-china-idUSN1318680420100413; Russ, note 1, *supra*.

7 Avon 10-Q at 9.

8 Henning, note 1, *supra*; Avon 10-Q at 29.

9 Avon 10-Q at 9.

10 *See id.*; *see also* Wohl & Kwok, note 6, *supra*

11 *See* Ellen Byron & Michael Rothfeld, "Feds Look at Avon Bribery Investigation," *The Wall Street Journal* (May 25, 2011), http://tinyurl.com/3nod9om (subscription required); Ellen Byron & Paul Ziobro, "Avon Shuffles Managers," *The Wall Street Journal* (Feb. 25, 2011), http://tinyurl.com/3qxkebc (subscription required); *see also* Avon: Bennett R. Gallina; http://www.avoncompany.com/aboutavon/executiveleadership/bennett_gallina.html.

Avon's FCPA Investigation in China and Beyond ■ Continued from page 7

Avon has warned that additional personnel actions may be on the way.[12] Recent reports indicate that federal prosecutors are investigating several former Avon employees, and may be focusing on the role of personnel at the company's headquarters in New York.[13] These former employees might serve as the targets of individual prosecutions if the government decides to go that route.[14]

The internal investigation and government inquiries are not the only matters resulting from the possible misconduct. Not surprisingly, the recent news of the apparent growing complexity of the Avon investigation was followed by a sharp drop in share prices,[15] and the 2010 suspension of the four executives discussed above was followed by an 8% drop in the company's share price.[16] In addition, Avon's current or former officers and/or directors are facing a number of shareholder derivative suits relating to FCPA compliance, some including allegations of "abuse of control, waste of corporate assets, unjust enrichment and/or proxy disclosure violations,"[17] and that the investigation contributed to a Fitch Inc. credit rating downgrade from A to A- in 2010.[18] The derivative suits include three consolidated actions in federal court and two state court actions.[19]

A notable aspect of the Avon investigation is that it began as a result of allegations that were limited to alleged wrongdoing in China alone. Jung, the CEO, made this clear in a statement last year, when she said she "want[ed] to emphasize again the allegation that triggered our investigation was in China only." With respect to the widening scope of the inquiry, Jung stated that "[c]onducting compliance reviews in these additional markets is the appropriate thing to do in investigations of this type."[20] The U.S. government is likely to be quite interested in – if it did not insist upon – the expanded investigation and compliance review as it considers the form and magnitude of an eventual enforcement action. It remains to be seen how the government might consider Avon's expenses in calculating penalties, and whether any other countries might seek to enforce their own anti-corruption laws against Avon. ■

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"The U.S. government is likely to be quite interested in -- if it did not insist upon -- the expanded investigation and compliance review[.]"

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12 Avon 10-Q at 9.

13 Byron & Rothfeld, note 11, *supra*

14 *See* Henning, note 1, *supra*.

15 Ellen Byron, "Avon's Stock Is Hit by New Worries About a Widening Bribery Probe," *The Wall Street Journal* (May 6, 2011), http://tinyurl.com/6cfchnh (subscription required).

16 Wohl & Kwok, note 6, *supra*.

17 Avon 10-Q at 9.

18 Russ, note 1, *supra*.

19 Avon 10-Q at 9.

20 "Avon: A Pound of Cure," *FCPA Blog* (May 3, 2010), http://www.fcpablog.com/blog/2010/5/3/avon-a-pound-of-cure.html.

NEWS FROM THE BRICS

Developments in Russian Anti-Corruption Laws

Despite Russia's recent reputation for corruption – it is ranked 154 out of 178 countries on Transparency International's ("TI's") 2010 Global Corruption Perception Index[1] – Russia has a long history of anti-corruption legislation. One of its earliest anti-corruption laws can be traced back to the 15th century,[2] and Russia continued to pass significant anti-corruption legislation throughout the Soviet era.[3] These laws, however, were not always enforced, and over the last twenty years corruption in Russia became an increasingly worse problem as the country struggled to transition into a new political system and recover from economic turmoil.[4]

In an attempt to bring its anti-corruption law enforcement regime back up to international standards, the Russian government ratified the U.N. Convention Against Corruption ("UNCAC") in 2006[5] and joined the Group of States Against Corruption in 2007. Most recently, President Dmitry Medvedev launched an ambitious anti-corruption campaign, proposing a new strategy – the National Strategy for Counteracting Corruption[6] (the "National Strategy"), approved by presidential order on April 13, 2010 – and introducing a host of anti-corruption measures, including, most recently, a law criminalizing the payment of a bribe by a Russian to an official of a foreign (*i.e.*, non-Russian) government and instituting a new system of steep fines.

New Law Criminalizing Foreign Bribery and Increasing Penalties

The new anti-bribery law, which President Medvedev signed on May 5, 2011, and which Deputy Attorney General Lanny Breuer hailed as "an extremely important step forward" for Russia,[7] is Federal Law No. 97-FZ to amend the Russian Criminal Code ("Law No. 97-FZ"). The bill outlaws bribery of foreign (*i.e.*, non-Russian) and Russian officials by Russian individuals and Russian companies, and completely revamps the system of fines for bribery violations. The criminal provisions of Law No. 97-FZ give Russian authorities jurisdiction over (1) all crimes committed in the territory of the Russian Federation,[8] and (2) all crimes committed by Russian citizens anywhere in the world.[9] The provisions concerning administrative fines are applicable to acts committed on Russian territory; acts committed outside of Russian territory are subject to administrative action only if such an outcome is set forth in a treaty between Russia and respective jurisdiction.[10]

In addition to punishing bribe recipients, Law No. 97-FZ also prohibits bribery of non-Russian officials, defined as "any person, whether elected or appointed, who holds any position at the legislative, executive, administrative or judiciary body of a foreign state, and any person performing a public function for a foreign state, including any public agency or

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1 Transparency International, Results of 2010 Corruption Perceptions Index, http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results. Russia is also ranked 22 out of 22 countries on TI's Bribe Payers Index, which ranks the propensity of companies in the 22 major trading nations to pay bribes when conducting business outside their home countries. Transparency International, 2008 Bribe Payers Index, http://www.transparency.org/policy_research/surveys_indices/bpi.

2 Anti-bribery provisions can be found in Pskov Court Charter of 1467, Law Codes of 1550 and later legislation.

3 *See, e.g.*, Romashina E.V., "Legal Mechanism of Counteracting Corruption in Soviet Russia," *History of Law and State*, 2010, No. 17, p. 42-44.

4 According to the All-Russian Public Opinion Research Center (WCIOM), in 2008, 74% of the Russian population noted "high" or "very high" level of corruption. *See* http://wciom.ru/index.php?id=268&uid=10707. Recently, Russia's chief military prosecutor stated that one-fifth of Russia's defense spending is stolen each year by corrupt officials. *See* Guy Faulconbridge, "Russia Says a Fifth of Defense Budget Stolen," *Reuters* (May 24, 2011), http://www.reuters.com/article/2011/05/24/us-russia-defence-idUSTRE74N1YX20110524.

5 However, in the face of much international and domestic criticism, Russia ratified the UNCAC without one of its most important provisions – Article 20, which criminalizes illicit enrichment, defined as "a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income."

6 According to the National Strategy, the main Russian anti-corruption priorities include further development of legislative framework, enforcement of anti-corruption laws, and enforcement of strict penalties. *See* Section II of the National Anti-Corruption Strategy, approved with the Presidential Order No. 460, dated April 13, 2010.

7 *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.

8 *See* Section 1, Article 11 of the Criminal Code.

9 *See* Section 1, Article 12 of the Criminal Code.

10 *See* Article 1.8 of the Code of Administrative Violations.

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public enterprise."[11] Indeed, previously, the Russian Criminal Code immunized non-Russian officials and officers of public international organizations from liability for engaging in an act of bribery, or any other criminal act, in the absence of an international agreement that would allow Russian officials to prosecute such non-Russian officials,[12] lending some indirect support to the practice. Article 204 of the Criminal Code (as amended) also broadens the definition of a "bribe" – it previously defined a bribe as including money, securities, or other property and material favor; the definition is now expanded to include "other proprietary rights," which the Russian legislative and judicial bodies will need to define further. Law No. 97-FZ creates a four-tier system of fines for bribing (including bribing a non-Russian official): (1) small bribes – up to 25,000 rubles (or about $1000) – are punishable by a fine up to 50 times the amount of the bribe or, alternatively, a prison term of up to 3 years and a fine up to 20 times the amount of the bribe; (2) medium bribes – from 25,000 to 150,000 rubles (or about $5,500) – are punishable by a fine up to 60 times the amount of the bribe or, alternatively, a prison term of up to 6 years and a fine up to 30 times the amount of the bribe; (3) large bribes – from 150,000 to 1 million rubles (or about $36,500) – are punishable by a fine up to 90 times the amount of the bribe or, alternatively, a prison term of up to 12 years and a fine up to 60 times the amount of the bribe; and (4) a very large bribe – any bribe over 1 million rubles – are punishable by a fine up to 100 times the amount of the bribe or, alternatively, a prison term of up to 15 years and a fine up to 70 times the amount of the bribe.[13] The maximum fine cannot exceed 500 million rubles (or about $18.3 million).[14] The same tough penalty structure also applies to intermediaries who convey the bribes, such as consultants and other third parties.

Similarly to Russian officials, non-Russian officials who accept bribes can be punished with fines up to 100 times the amount of the bribe or, alternatively, a prison term of up to 15 years and a fine up to 70 times the amount of the bribe.[15] Judges will ultimately determine the multipliers for penalties in specific cases. The law also punishes companies that pay bribes to Russian or non-Russian officials with administrative fines up to 100 times the amount of the bribe (and for very large bribes this fine cannot be less than 100 million rubles or about $3.5 million), with simultaneous appropriation of the money, property or rights offered or given as a bribe.[16] Under the corporate fines structure, the largest category of bribes are those over 20 million rubles (or about $703,000). A fine at the top end of the spectrum could be extremely costly to a corporation. Companies are not, however, subject to criminal sanctions.[17] In the context of the new legislative framework on administrative responsibility it is also important to mention that Law No. 97-FZ provides for a legal mechanism for imposing such measures on those committing administrative violations outside of Russia (provided that there exists an international treaty between Russia and respective country). New chapter 29.1 of the Russian Code of Administrative Violations (*Judicial Co-Operation On Administrative Offences*) provides for a set of effective tools both for requesting legal aid from abroad and processing such requests in Russia. In addition, it facilitates administrative procedures by establishing clear rules and procedures as concerning evidence obtained in the foreign territory[18] and involvement of witnesses, experts, or wronged persons who are abroad at the time of administrative proceedings.[19]

Unlike the U.S. FCPA, the Russian

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11 Section 2 of Art. 290 of the Russian Criminal Code (as amended).

12 The wording of Section 5 Art. 285 of the Criminal Code previously provided that "foreign officials and officials of public international organizations shall be subject to criminal liability for the crimes referred to in this Chapter [Chapter 23, Crimes against service in commercial and other organizations] only to the extent provided for in the respective international agreements."

13 Art. 290 of the Russian Criminal Code (as amended).

14 Section 2 of Art. 46 of the Russian Criminal Code.

15 Section 1 of Art. 290 of the Russian Criminal Code.

16 Art. 19.28 of the Russian Code on Administrative Violations.

17 Art. 19 of the Russian Criminal Code.

18 Art. 29.1.3 of the Russian Code on Administrative Violations.

19 Art. 29.1.4 of the Russian Code on Administrative Violations.

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Criminal Code provides two complete statutory defenses – one for extortion[20] and one for voluntary reporting the violation. An individual who can demonstrate that an official (including non-Russian officials) extorted a bribe can be completely released from liability. Similarly, an individual who voluntarily reports a violation will also be totally released from liability. In both situations, full cooperation with the subsequent investigation is a prerequisite to such a release.[21]

Because this new law clearly criminalizes foreign bribery and significantly increases penalties for violations, on May 25, 2011, Russia was invited to join the OECD's Working Group on Bribery and to accede to the OECD's Anti-Bribery Convention.[22] It is expected the State Duma will soon consider Russia's accession to the Convention.[23]

New Laws Promoting Better Government Transparency and Anti-Corruption Organization

The Russian President also has proposed a law that will amend a number of existing laws to create a more effective system for enforcing anti-corruption legislation and impose new restrictions on state employees.[24] On April 28, 2011, Draft Law No. 539159-5 was introduced in the State Duma.[25] The law would amend a wide range of legislative acts affecting banks, public prosecutors offices, bodies of interior affairs, deputies of the State Duma, registration of rights and transactions in property, and military and civil service. The Ministry of Justice will be the primary authority for anti-corruption expertise for bills and regulations: It will have the power to review and prevent the passage of any laws or regulations that do not comply with all anti-corruption laws.

In addition, if the draft law passes unchanged, every person who holds – or is applying for – a state or municipal office, including judges, heads of Russian regions and regional bodies, heads of state corporations and their deputies, heads of municipalities, as well as spouses and minor children of such officials, will be required to disclose extensive financial and real estate information, including bank transactions, accounts, deposits and other financial obligations, on an annual basis. Banks will be obliged to provide transaction and account statements to certain state bodies specifically designated by the President, and tax authorities will process the information and provide it to the President and both chambers of the Russian Federal Assembly each year.[26] Deputies of the Russian Federal Assembly and regional assemblies will report that financial and real estate information to special parliamentary commissions, which will determine the correctness of information disclosed.[27] Any public employee who falls under the proposed law and who fails to observe the disclosure requirements will be terminated.[28] The draft law also imposes the following restrictions on public employees: (1) for two years after state or municipal officials leave public office they may not be employed by a commercial or non-commercial organization that they were responsible for regulating while in office, except with specific consent of a state conflict commission;[29] (2) state officials are not allowed to hold office if they directly report to close relatives, which include children's spouses[30]; and (3) state officials are obliged to report any situations in which they are approached with offers of

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20 Although the FCPA does not contain an express statutory extortion defense, Judge Shira Scheindlin has suggested in dicta the possibility of an affirmative extortion or duress defense as a matter of general U.S. criminal law. *See United States v. Kozeny, et. al.*, 582 F. Supp. 2d 535 (S.D.N.Y. 2008) (stating that "true extortion" could be a viable defense to counteract the corrupt intent requirement of the FCPA).

21 Note to Art. 291 of the Russian Criminal Code.

22 Andrew E. Kramer, "Russia Invited to Join O.E.C.D. Anti-Bribery Pact," *The New York Times*, http://www.nytimes.com/2011/05/26/business/global/26bribery.html.

23 OECD Invites Russia to Join Anti-Bribery Convention, http://www.oecd.org/document/24/0,3746,en_21571361_44315115_47983768_1_1_1_1,00.html.

24 President Medvedev addressed the necessity of such a law at the meeting of Anti-Corruption Council (a consultative body), the respective minutes can be found at http://www.korupcii.net/index.php?s=4&id=64.

25 Information on processing of the bill and consideration thereof can be found at http://www.duma.gov.ru/systems/law/?number=539159-5+&sort=date.

26 Proposed wording of Art. 26 of the Federal Law on Banks and Banking Activity No. 395-1, dated Dec. 2, 1990 and Art. 32 of the Russian Tax Code.

27 Proposed wording of Art. 10 of the Federal Law On the Status of a Member of the Federal Council and of a Deputy of State Duma No. 3-FZ, dated May 8, 1994; proposed wording of Art. 12 of the Federal Law On General Principles of Organizing Regional Legislative and Executive Bodies No. 184-FZ, dated Oct. 6, 1999.

28 Art. 20 of the Federal Law On Civil Service No. 79-FZ, dated July 27, 2004.

29 Proposed wording of Art. 64.1 of the Russian Labor Code, proposed wording of Art. 17 of the Federal Law on Civil Service No. 79-FZ, dated July 27, 2004.

30 Proposed wording of Art. 16 of the Federal Law On Civil Service No. 79-FZ, dated July 27, 2004.

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improper payments or other corruption.[31] In addition, President Medvedev requested that the Russian parliament pass legislation by October 1, 2011 that would prohibit government officials from taking office as directors on the boards of large state companies.[32]

Reforming State Procurement

Russia is also seeking to reform regulation of state and municipal purchasing of goods, works and services, an area that President Medvedev criticized as being plagued by corruption. On April 24, 2011, a number of amendments were introduced to the "Federal Law on Placing Orders for Supply of Goods, Works and Services for State and Municipal Needs"[33] (the "Law on State Supplies"). The Law on State Supplies provides crucial information and participation guarantees with respect to state supply agreements. The amendments aim, among other things, to minimize the use of artificially inflated prices by obligating state buyers to substantiate the maximum starting prices announced for the bidding.[34] Further significant amendments may be introduced into the law later this year.

Another notable initiative designed to combat corruption in the area of state procurement is draft law No. 520154-5 "On the Purchase of Goods, Works or Services by State Corporations, Natural Monopolies and Public Utilities."[35] The law, if passed, will introduce procurement rules applicable to state corporations (including natural monopolies and utility companies), companies in which the state or municipalities own more than 50%, and their subsidiaries (with indirect state ownership of more than 50%). This area is presently largely unregulated and non-transparent, although state-owned companies control significant parts of the Russian economy. The law will create a requirement to publicize information on the Internet regarding all state purchases exceeding 100,000 rubles (or about $3,600) and introduce guarantees regarding rights of access by potential bidders. The law, which passed the first reading in the State Duma,[36] will enter into force on January 1, 2012 if successfully adopted.

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The Russian anti-corruption law enforcement regime is poised to change dramatically over the coming years if Russian authorities follow through with effective enforcement of the new laws and passage of additional measures. In a clear effort to draw international investment to the Russian markets and facilitate Russia's joining the OECD, President Medvedev has articulated a commitment to bring Russia alongside other western countries in the global crackdown on corruption. The latest Russian law – Law No. 97-FZ – takes a different tactic in fighting corruption; it threatens would-be violators in their pocketbooks rather than with jail time. Companies doing business in Russia now face an administrative fine of up to 100 times the amount of a bribe paid by any company employee to a non-Russian official – a potential penalty to be taken seriously. ■

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31 Proposed wording of Art. 201 of the Federal Law on Civil Service No. 79-FZ, dated July 27, 2004.

32 Henry Meyer, "Medvedev Bid to Oust Officials From Boards Is 'Small Revolution,'" *Bloomberg* (Apr. 3, 2011), http://www.bloomberg.com/news/2011-04-03/medvedev-bid-to-oust-officials-from-boards-is-small-revolution-.html

33 Federal Law No 94-FZ, dated July 21, 2005.

34 Art. 19.1 of the Law on State Supplies.

35 Official information about the consideration of this bill by the Duma can be found at http://asozd.duma.gov.ru/main.nsf/(Spravka)?OpenAgent&RN=520154-5&02.

36 State Duma Resolution No.5249-5 ГД, dated May 11, 2011.