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Anti-Bribery Compliance in Russia: One Step Forward, Two Steps Back?

As President Medvedev's anti-corruption initiatives struggle to take root, a Russian federal administrative decision from earlier this year has caught the attention of companies doing business in Russia that are concerned about compliance with anti-corruption obligations. The action by Russia's anti-monopoly enforcement agency against a non-Russian company seeking to police its sales channel's compliance with anti-corruption standards shows at a minimum the complex legal landscape facing companies as the anti-corruption message from high levels within a government, in Russia's case from its President and legislature, begins to permeate all levels of the bureaucracy. With an appeal of the decision pending and negotiations of a possible settlement afoot, time will tell whether this is an instance of the bureaucracy's "right hand not knowing what the left is doing" or a true example of "one step forward, two steps back."

In September 2010, a Danish pharmaceutical company, Novo Nordisk Ltd. ("Novo Nordisk"), was found liable for violating Russian anti-monopoly laws by Russia's Federal Anti-Monopoly Service ("FAS").[1] In January 2011, the FAS confirmed the verdict "for unlawfully evading contracts" with properly licensed distributors that, among other things, failed anti-corruption screening based on company-mandated compliance standards.[2] FAS held that, by arbitrarily reducing its distributor ranks, Novo Nordisk used its industry dominance improperly to alter the price of its medicines. FAS fined the company more than 85 million Rubles (approximately U.S. $3 million). Earlier, FAS had warned that it could impose a fine that was 10 times higher, up to 15% of the company's Russian revenues.[3] As a further remedy, FAS issued a Directive which, among other things, directed Novo Nordisk to remove from its distributor contracts all requirements with respect to (1) the conduct of anti-corruption audits, and (2) the

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1 Federal Antimonopoly Service of Russian Federation Press Rel., FAS Russia Fined "Novo Nordisk" Over 85 million Rubles for Unlawfully Evading Contracts for Supplies of Medicines (Jan. 24, 2011), http://en.fas.gov.ru/news/news_31180.html. For the full text of the Sept. 23, 2010 decision in Russian, see http://www.fas.gov.ru/solutions/solutions_31980.html?isNaked=1.

2 For the full text of the Jan. 20, 2011 decision in Russian, see http://www.fas.gov.ru/solutions/solutions_31981.html?isNaked=1.

3 *See* "Novo Nordisk A/S To Challenge Russian Anti-Trust Charges In Court-DJ," *Reuters* (Sept. 27, 2010), http://www.reuters.com/finance/stocks/NOVOb.CO/key-developments/article/1986015.

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implementation of extensive compliance procedures, to the extent those procedures are not required by Russian law. Novo Nordisk appealed the FAS decision to the Moscow Arbitrazh Court.[4]

Novo Nordisk was penalized for its distributor selection policies, including those respecting technical requirements, audits, facilities inspections, as well as compliance with Novo Nordisk's anti-corruption standards and participation in anti-corruption training. For such selection policies to comport with Russian anti-monopoly laws, they must be justified "economically or technologically" or somehow be mandated by the Russian government. FAS cited three primary faults with Novo Nordisk's selection policies: (1) Novo Nordisk improperly usurped the role of Russian certification authorities, which have sole authority to license qualified distributors; (2) Novo Nordisk's policies were too onerous because compliance with the specified requirements was usually "not practiced in Russia" and not required by Russian law; and (3) Novo Nordisk did not clearly articulate the criteria that distributors had to meet and made case-by-case and possibly arbitrary decisions.

The *Novo Nordisk* decision raises the spectre that, for companies in Russia that are defined as "dominant" in their industry,[5] the FAS may challenge the company's discretion to exclude a distributor based on anti-corruption standards.[6] Furthermore, the FAS's reasoning could potentially apply to distributor-selection practices of all manufacturers, not just to the practices of those with a dominant market position.[7] Technically, the *Novo Nordisk* decision is of significant importance for the pharmaceutical industry only, but it may also reveal how the FAS may reconcile anti-monopoly laws and anti-corruption practices in other industries.[8]

After *Novo Nordisk*, the first lingering 85-million-Ruble question is: Can any anti-corruption compliance standards be used to exclude a distributor without running afoul of the Russian anti-monopoly laws? The second is whether a company that follows the *Novo Nordisk* decision is afforded any protection from FCPA enforcement.

Both the reasoning of the decision and the Directive issued by the FAS fault Novo Nordisk for – among other things – applying anti-corruption compliance requirements that exceeded Russian law requirements and were poorly implemented. In this way, *Novo Nordisk* offers some comfort that compliance

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4 The appellate hearing is currently scheduled for July 28, 2011. *See* http://www.msk.arbitr.ru/index.asp?id_sec=381&id_ac=36&a=2&ID=399c343b-7921-40a9-86d6-e7fb14261cd2&caseid=1fbbde25-0d8c-4001-bbf7-a7f899dbd9fa. (Rus.).

5 Under the Russian Competition law, a company is presumed to have a dominant market position if it holds 50% or more market share, is presumed not to have such position if it holds less than 35%, and is evaluated on a case-by-case basis if it holds between 35% and 50%. *See* Federal Law on Protection of Competition, Article 5 (2006) (Rus.).

6 *See* Maxim Boulba, "Federal Antimonopoly Service Fines Novo Nordisk Nearly RUB 86 mln for Avoidance of Contracting a Number of Distributors," *CMS Bureau Francis Lefebvre* (Jan. 2, 2011), http://www.cms-bfl.com/Federal-Antimonopoly-Service-fines-Novo-Nordisk-nearly-RUB-86-mln-for-avoidance-of-contracting-a-number-of-distributors-02-01-2011.

7 *See* Igor Panshensky and Alexander Egorushkin, "The Novo Nordisk case: selection of distributors," *Lexology* (June 13, 2011), http://www.lexology.com/library/detail.aspx?g=9cddb7d7-0270-4ee3-8fa8-b26225a53236.

8 *See* FAS Press Rel., note 1, *supra*. ("'This is the first turnover fine imposed by FAS upon a pharmaceutical company that dominates the Russian market of medicines. We are convinced that *this will be an indicative case* for all pharmaceutical companies operating in Russia,' stated Deputy Head of the Department for Control over Social Sphere and Trade, Mr. Mikhail Fedoryenko." (emphasis added)).

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standards for selecting distributors, if implemented appropriately, may reach at least as far as Russian anti-corruption laws. But how is that maximum or "ceiling" to be interpreted?

At least as far as the particulars of the Novo Nordisk case are concerned, the decision suggests the FAS was motivated to intervene because of its view that Novo Nordisk's anti-bribery policies were arbitrarily applied and ambiguous. For example, Novo Nordisk's policy was to contract with five approved distributors and then steer others into subcontracts with those distributors. Thus, after failing a lengthy and amorphous due diligence process, the allegedly substandard distributors could still become sub-distributors. The FAS also took issue with Novo Nordisk's procedure for approving the distributors, which considered "reputational risks," assessed by Novo Nordisk in part based on Internet sources of uncertain reliability. This may have triggered the FAS's sensitivity to the Russian problem of "black PR" – the phenomenon whereby a company buys media articles that disparage its competitors in various ways, including by making unfounded corruption allegations that can cause a company to fail a reputational risk assessment.[9] All of these facts appear to have led the FAS to discount the sincerity of Novo Nordisk's anti-corruption motives.

The optimistic view is that the FAS would uphold a set of truly objective sales-channel compliance criteria that were well defined, clearly articulated, and consistently applied. A pessimistic read of the situation is that, under *Novo Nordisk*, unless a company actually has been convicted of bribery in Russia, one cannot refuse to do business with it – at least not without the risk of later facing an adverse FAS enforcement action. The Directive issued by the FAS may be seen to support the latter view, because it ordered Novo Nordisk to *remove* the anti-corruption compliance requirements to the extent they exceeded Russian law requirements, rather than ordering clarifications to and fair application of Novo Nordisk's policies. It also could be that the FAS simply preferred the blunt remedy of excising problematic provisions over assuming responsibility for revamping a flawed policy and ensuring its effective implementation. The final resolution of this case on appeal or via settlement may shed more light on what is permissible.

Even less clear is whether, under Russian anti-monopoly law, any company policy – even if well defined and articulated and fairly applied – may extend beyond the mandates of Russian anti-corruption law. The obvious question for multinational companies seeking to do business in Russia is how to comply with anti-bribery standards set forth in the FCPA and the U.K. Bribery Act without running afoul of the FAS.

The *Novo Nordisk* decision adds another dimension to the challenges of avoiding dealings with corrupt actors as U.S. law strongly counsels, if not requires as a practical matter, and, increasingly, as does Russian law. The stark realities of corruption in Russia are well known. Transparency International's most recent Corruption Perceptions Index ranks Russia 154th out of 178 nations, and the Russian government itself estimates that corruption and ineffectiveness in state and local procurement siphons off as much as $33 billion per year.[10] Since 2008, concerted efforts to fight corruption have been central to Mr. Medvedev's presidency. Yet even he has been forced to acknowledge their shortfalls.[11]

Against this somber reality, recent legislative developments give rise to hope that FAS's interest in enforcing fair competition laws will not undermine anti-corruption compliance. A new anti-bribery law signed on May 5, 2011, Federal Law No. 97-FZ to amend the Russian Criminal Code ("Law No. 97-FZ"), outlaws bribery of Russian or non-Russian officials by Russian individuals or companies and implements a revamped system of increased fines for bribery violations.[12] In response to this ambitious measure, Russia earned invitations to join the OECD's Anti-Bribery Convention and OECD's Working

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9 *See, e.g.*, Thomas Firestone, *Criminal Corporate Raiding in Russia*, 42 Int'l Law. 1207, 1216-17 (2008); Vadim Levin, "Black PR vs. Russian Business," *Komsomolskaya Pravda* (Dec. 14, 2006), http://english.stopcrime.ru/international/213/250.html.

10 *See* Transparency International, Results of 2010 Corruption Perceptions Index (last visited July 19, 2011), http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results. *See also* Konstantin Rozhnov, "Russia's Bid to Stop Kickbacks Worth $33bn a Year," *BBC News* (Nov. 4, 2010), http://www.bbc.co.uk/news/business-11694114.

11 *See* Denis Dyomkin, "Medvedev Acknowledges Graft Progress Scant, Seeks Law," *Reuters* (Jan. 13, 2011), http://www.reuters.com/article/2011/01/13/us-russia-medvedev-corruption-idUSTRE70C5WS20110113.

12 *See* Sean Hecker, Bruce E. Yannett, Anna S. Dulova, Aaron M. Tidman, and Alexey L. Konovalov, "Developments in Russian Anti-Corruption Laws," *FCPA Update,* Vol. 2, No. 10 (May 2011), http://www.debevoise.com/files/Publication/064c31c9-70b6-4a0a-b4e1-370afcc230a3/Presentation/PublicationAttachment/f60f5be2-b084-4a53-8d00-636653e479e3/FCPAUpdateMay2011.pdf.

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Group on Bribery, while President Medvedev won praise from the U.S. Department of Justice.[13]

One significant reason for thinking that the *Novo Nordisk* case will be a one-time event is that the new Law No. 97-FZ sets forth a new tactic for fighting corruption in Russia: namely, threatening the pocketbooks of would-be violators with dramatic fines – up to 100 times the amount of a bribe paid by a company. Importantly, the system of tough fines and penalties also applies to intermediaries who convey the bribes, such as consultants and other third parties.[14] By focusing on economic incentives, the new law aims to motivate companies operating in Russia to take their anti-corruption obligations seriously and to pay attention to the company they keep.

The *Novo Nordisk* decision could nevertheless undermine these efforts in two significant ways. First, the decision places a new spin on the familiar criticism of Russian anti-corruption efforts, *i.e.*, that anti-bribery laws are not enforced. To be effective, efforts to advance compliance with anti-corruption laws must be integrated throughout the bureaucracy. Yet, the FAS has now punished a company for what some will construe as over-compliance, citing Russian law as a maximum standard. One challenge will be to explain to the FAS the anti-corruption policies such as the FCPA and the U.K. Bribery Act, as well as the economic and technological justifications behind anti-corruption compliance policies which may otherwise violate the anti-monopoly law.

Second, the decision could raise a new fear among companies that, by seeking to comply with anti-corruption laws, companies will expose themselves to prosecution under Russian anti-monopoly law. One lesson of *Novo Nordisk* is that a plea of "good faith" will not excuse anti-bribery policies that lack clarity and transparency or are implemented arbitrarily and ambiguously. While this may be correct under the anti-monopoly laws, the threat of facing a multi-million dollar fine as a reward for anti-bribery efforts creates a palpable disincentive to anti-corruption compliance.

Finally, the *Novo Nordisk* decision raises important legal questions under U.S. law, which provides a defense to companies subject to the FCPA that engage in acts or omissions punishable under the U.S. primary anti-bribery provisions that are nevertheless clearly permitted under the written laws of a foreign jurisdiction.[15] Although the so-called "local law" defense has become all but moribund in recent years as the OECD Convention and other anti-bribery initiatives have taken hold globally, the *Novo Nordisk* decision might re-invigorate this issue (as well as similar issues under the U.K. Bribery Act). Given that the *Novo Nordisk* decision does not spell out all of the facts that gave rise to the anti-competition law violation, it is not a clear predictor of how Russian anti-competition law would apply in other cases. Further, because the *Novo Nordisk* decision technically affects only the pharmaceutical industry, companies cannot expect U.S. (or, for example, U.K.) anti-corruption enforcement agencies to be particularly sympathetic to company pleas for leniency on *Novo Nordisk* grounds in the face of clear cases of bribery facilitated by an agent or distributor in a company's sales channel. But if the FAS extends the *Novo Nordisk* rationale to companies in other cases, the situation could ripen into a conflict between Russian law and U.S. (and U.K.) anti-corruption law to the point that litigation over the "local law" exceptions might be required to clarify the legal issue.

> "One significant reason for thinking that the Novo Nordisk case will be a one-time event is that the new Law No. 97-FZ sets forth a new tactic for fighting corruption in Russia: namely, threatening the pocketbooks of would-be violators."

It therefore remains to be seen how effectively Russia's new anti-bribery laws will be enforced and bribery violations prosecuted. In the meantime, companies

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13 *See* 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; Andrew E. Kramer, "Russia Invited to Join O.E.C.D. Anti-Bribery Pact," *The New York Times* (May 25, 2011), http://www.nytimes.com/2011/05/26/business/global/26bribery.html; 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.

14 Hecker et al., note 12, *supra*.

15 *See* 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1) (2006); *see also* Bribery Act, 2010, c.23 (Eng.) §§ 5(2)-(3), 6(3)(b), 6(7), http://www.legislation.gov.uk/ukpga/2010/23/contents.

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that are serious about anti-bribery compliance may face the prospect of vigorous enforcement of Russia's anti-monopoly laws. To arm themselves against possible anti-monopoly challenges, companies would be well advised to revise their anti-corruption policies by establishing clear and transparent requirements that distributors and other counterparties must meet. If *Novo Nordisk* is any guide, an unfortunate fear could arise that, in Russia, compliance with anti-bribery obligations could give rise to a state-generated risk. ■

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Debevoise Announces the Publication of "Defending Corporations and Individuals in Government Investigations"

We are pleased to announce the publication of "Defending Corporations and Individuals in Government Investigations," a valuable new resource for white collar lawyers compiled and edited by Mark P. Goodman (http://www.debevoise.com/attorneys/detail.aspx?id=0d903f0e-fe29-4d94-bb1f-ac18b161375c&type=showfullbio) of Debevoise & Plimpton LLP and Daniel J. Fetterman (http://www.kasowitz.com/daniel-j-fetterman/) of Kasowitz, Benson, Torres & Friedman LLP. The book contains chapters authored by Mr. Goodman, Mr. Fetterman and prominent former prosecutors and leading white collar defense lawyers who share an insider's perspective gained from years of prosecuting and defending significant, high-profile and complex criminal and regulatory cases. This treatise provides in-house lawyers, outside counsel and compliance professionals with a practical, accessible guide to representing corporate and individual clients in white collar matters.

"Defending Corporations and Individuals in Government Investigations" has received high praise: on the book's cover, former U.S. Attorney for the Southern District of New York John Martin says, "[b]oth in-house lawyers and outside counsel will benefit from the wisdom and experience of the outstanding group of lawyers who contributed to this exhaustive review of how to effectively defend companies and individuals in white collar matters"; Mary Jo White, former U.S. Attorney for the Southern District of New York, describes the book as "a must-have resource and reference for any lawyer involved in white collar matters"; and Bruce Green, the Louis Stein Professor of Law at Fordham Law School and the Chair of the American Bar Association's Criminal Justice Section, calls it "an extraordinary contribution to the white collar bar" and "[a] practical and comprehensive guide to analyzing and negotiating the difficult issues faced by clients in government investigations from the perspective of an all-star group of former prosecutors."

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The book is now available from West at www.west.thomson.com (http://west.thomson.com/defending-corporations-individuals-in-government-investigations-2011/161391/40824893/productdetail). A series of topic-specific Continuing Legal Education seminars and webcasts based on the book is scheduled for the fall. ■

FCPA Opinion Release No. 11-01

At a time when the U.S. Department of Justice's ("DOJ") lack of practical guidance as to practices with respect to the provision of travel, meals, hospitality, and entertainment benefits to foreign officials has come under scrutiny in Congress, it was somewhat mystifying that the first DOJ FCPA Opinion Release of 2011 provided so little assistance to companies working to right-size their compliance guidance as to these recurring issues under the FCPA. In FCPA Opinion Release No. 11-01,[1] the DOJ addressed a request from an adoption service provider related to providing travel-related expenses for certain foreign officials to visit the provider's U.S. offices. The DOJ provided a "no action" opinion on the proposed travel expenditures, but the nature of the opinion only highlights the structural problems with the way that the DOJ handles such requests.

The factual predicate for the opinion identified a number of best practices that in-house compliance personnel are well familiar with, including requiring the foreign government entity to choose the representatives who will travel. Although the proposed benefits included reimbursement for local lodging and meals, the proposal that the adoption agency made to DOJ stated that there would be no side-trips and no payments of cash to the officials for incidentals or otherwise. The requester stipulated that the travel would come at a time at which the requester (a domestic concern) would have no non-routine business before the agency. The requester further stated that there would be no leisure activities or entertainment, and that all paid air travel would be economy class.

Not surprisingly on these facts, the DOJ stated that it would take no action if the travel benefits were provided as stated. Because the DOJ hewed to its traditional practice of opining only on the facts presented, the Department did not address the practical issues of supporting travel by foreign officials incident to legitimate product-education or service-education activities that fall within the FCPA's express affirmative defense in the case of visits focused on a tender-related inspection of facilities or company personnel in connection with a specific project. Such expenditures, if modest and otherwise appropriate, should fall well within the FCPA's affirmative defense.

Likewise, the Opinion Release did not address the legitimate issues presented by the appropriateness of business class airfare on long-haul flights, or the kinds of entertainment, if any, that might be provided on longer stays (in the case at hand the on-ground time for the visiting officials was only two days). Indeed, of the Opinion Releases that address travel-related expenditures,[2] none has given a no-action determination for business class airfare under any circumstances, and only one, so far as we have been able to determine, Opinion Release No. 07-02, which was cited in Opinion Release No. 11-01, approved specific leisure activities, in that case a four-hour sightseeing trip during a five-day visit.

The inherent conservative nature of the DOJ Opinion Releases addressing recurring issues such as travel, entertainment, meals, and hospitality derives in no small measure from the fact that DOJ opines solely on the facts presented. This practice reduces the effectiveness of the Opinion Release process considerably given that ever more aggressive enforcement activity, in which even relatively small expenditures have found their way into a DOJ or SEC charging instrument, has led requesters to hesitate to bring any but the most conservative proposals to DOJ for an opinion.

Although the 1988 amendments to the FCPA authorized DOJ to provide more general guidance, the Department determined not to do so in 1990, stating that, "[a]fter consideration of the comments received, and after consultation with the appropriate agencies, the Attorney General has determined that no guidelines are necessary."[3]

The DOJ's Opinion Release process and its releases stand in sharp contrast to the relatively robust and practical guidance provided by the United Kingdom Ministry of Justice in its March 30, 2011 commentary on the U.K. Bribery Act and its scope.

The MOJ Guidance states that "[b]ona fide hospitality and promotional, or other business expenditure which seeks to improve the image of a commercial organisation, better to present products

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1 DOJ Opinion Rel. No. 11-01, Foreign Corrupt Practices Act Review (June 30, 2011), http://www.justice.gov/criminal/fraud/fcpa/opinion/2011/11-01.pdf.

2 *See, e.g.*, Review Procedure Rel. Nos. 81-01, 83-02, 83-03, 85-01, 92-01, and Opinion Rel. Nos. 04-01, 04-03; 07-01, 07-02. Review Procedure releases from 1980-1992 are available for download at http://www.justice.gov/criminal/fraud/fcpa/review/, and opinion releases from 1993 onward are available at http://www.justice.gov/criminal/fraud/fcpa/opinion/.

3 55 Fed. Reg. 28,694 (July 12, 1990); *see also* 54 Fed. Reg. 40,918 (Oct. 4, 1989) (providing notice that "all interested persons are invited to submit their views concerning the extent to which compliance with 15 U.S.C. 78dd-1 and 78dd-2 would be enhanced and the business community assisted by further clarification of the provisions of the anti-bribery provisions through the issuance of guidelines").

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and services, or establish cordial relations, is recognized as an established and important part of doing business and it is not the intention of the Act to criminalise such behaviour."[4] The MOJ Guidance identifies a practical test that can be applied by covered entities: "all of the surrounding circumstances" of travel, hospitality and entertainment, including "the type and level of advantage offered, the manner and form in which the advantage is provided, and the level of influence the particular foreign public official has over awarding the business," with "the more lavish the hospitality or the higher the expenditure in relation to travel, accommodation or other similar business expenditure," the more likely that impropriety will be found.[5] Hospitality is to be judged by "the reasonable and proportionate norms for the particular industry"; "fine dining and attendance at a baseball [game] are facts that are, in themselves, unlikely to raise the necessary inferences"; this language, fairly read, would seem to support the common sense notion that provision of business class airfare can be appropriate in certain cases.[6]

For the law enforcement agency charged with administering a statute – the U.K. Bribery Act – that has no express defense for reasonable educational expenses, such practical guidance that allows companies to focus on much more serious anti-bribery compliance issues than whether a $75 bottle of wine is too much is most welcome. At the same time, the Ministry of Justice Guidance for the U.K. Bribery Act shines an intense spotlight on the DOJ's seeming inability to provide more definitive assistance that would permit compliance departments to direct resources away from routine areas with a lower risk to core anti-corruption goals and towards those areas where more serious risks may lie. ■

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4 *See* Ministry of Justice, The Bribery Act 2010: Guidance ¶ 26 (Mar. 30, 2011) ("MoJ Guidance"), http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf.

5 MoJ Guidance ¶ 28; *see also* Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions, at 10 (discussion regarding hospitality and promotional expenditures), http://www.sfo.gov.uk/media/167348/bribery%20act%20joint%20prosecution%20guidance.pdf.

6 MoJ Guidance ¶¶ 30-31.

Upcoming Speaking Engagements

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