DEBEVOISE & PLIMPTON LLP

FCPA Update

December 2012 ■ Vol. 4, No. 5

Transparency International's 2012 Corruption Perceptions Index

Despite the advent of global anti-corruption enforcement efforts, Transparency International's ("TI") latest Corruption Perceptions Index ("CPI"), which ranks countries based upon "perceived levels of public sector corruption," found that two-thirds of the 176 countries ranked in 2012 scored below 50 on a scale of 0 ("highly corrupt") to 100 ("very clean").[1] TI concluded that "public institutions need to be more transparent, and powerful officials more accountable."[2]

The CPI is not a measure of actual corruption activity. Rather, as its title suggests, the CPI is an index of "perceptions" based upon data from 13 international surveys that consider factors such as the accountability of national and local governments, effective enforcement of anti-corruption laws, access to government information and abuse of government ethics and conflict of interest rules.[3]

This year, TI updated the methodology used to calculate the CPI in order to better capture changes in perception in each country over time.[4] The updated methodology is reflected in a revised scoring scale from the 0 to 10 scale used in previous years to the 0 to 100 scale described above.[5] Despite these changes, the CPI's year-to-year comparative ranking of countries (as opposed to individual scores) remains a useful tool and benchmark for allocating compliance, prosecutorial, and regulatory resources. The CPI's annual rankings are a key measure for private actors to consult when designing or refining anti-bribery programs.

Bearing in mind the inherent limitations involved in such year-to-year comparisons, a number of trends are worth noting.

A key development in this year's rankings was the "underperform[ance]" of many of the Eurozone countries affected by the recent financial and economic crisis.[6] Greece, the

CONTINUED ON PAGE 2

1. *See* Transparency International, "Corruption Perceptions Index 2012" at 2 (2012), http://www.transparency.org/whatwedo/pub/corruption_perceptions_index_2012.
2. *Id.*
3. Transparency International Press Rel., Corruption Still Widely Perceived as Pervasive – Transparency and Accountability are Focal Points for United States (Dec. 5, 2012), http://www.transparency.org/news/pressrelease/20121205_corruption_still_widely_perceived_as_pervasive.
4. Transparency International, "Corruption Perceptions Index 2012: An Updated Methodology" (2012), http://www.transparency.org/files/content/pressrelease/2012_CPIUpdatedMethodology_EMBARGO_EN.pdf.
5. Transparency International Press Rel., Governments Should Hear the Global Outcry against Corruption (Dec. 5, 2012), http://www.transparency.org/news/pressrelease/20121205_governments_should_hear_the_global_outcry_against_corruption [hereinafter TI Press Release].
6. *See id.*

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Also in this issue:

Debevoise's recent Client Update "U.S. Enforcement Agencies Issue Extensive New FCPA Guidance" is now available in Mandarin, Portuguese and Russian. Click here to read the Update in those languages.

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Transparency International Rankings ■ Continued from page 1

Eurozone's lowest-ranked country, experienced a significant decline from 80th place in 2011 to 90th place in 2012, a position it now shares with Colombia, Djibouti, India, Moldova, Mongolia, and Senegal. Among other Eurozone countries, Italy fell three places from 69th to 72nd, Austria and Ireland tied for 25th place (down from 16th and 19th, respectively), and Malta dropped from 39th to 43rd. In light of this marked and continued increase in the perception of corruption among Eurozone countries, TI has "consistently warned Europe to address corruption risks in the public sector to tackle the financial crisis…."[7]

Also of significance this year, none of the BRIC countries, representing some of the world's largest emerging economies, scored above 50 out of 100. In terms of rankings, Brazil slightly improved, climbing from 73rd to 69th place (tying South Africa, which fell five spots). China also fell from 75th to 80th place, notwithstanding its recent adoption of anti-bribery legislation.[8] India and Russia trailed the group, with India moving from 95th to 94th place. Russia, another BRIC country that recently adopted anti-bribery legislation,[9] seems to have reversed its decline over the past several years, moving from 143rd to 133rd, where it is tied with Comoros, Guyana, Honduras, Iran, and Kazakhstan.

Among the other leading OECD countries, the United States improved slightly from 24th to 19th place, marking its first appearance among the top 20 countries since 2009. Germany, Japan, and the United Kingdom all ranked above the United States, with Germany at 13th (up from 14th), and Japan and the United Kingdom tied at 17th (down from 14th and 16th, respectively). Mexico, the United States' third largest trading partner,[10] continued its downward trend, sliding from 100th to 105th, despite also having enacted anti-bribery legislation.[11]

The rankings of perceived corruption for several South East Asian countries declined markedly over the past year. Indonesia fell 18 places, from 100th to 118th, where it is now tied with the Dominican Republic, Ecuador, Egypt, and Madagascar. Similarly, Vietnam slid 11 places from 112th to 123rd, tied with Belarus, Mauritania, Mozambique, and Sierra Leone. Thailand also fell eight places from 80th to 88th, tied with Malawi, Morocco, Suriname, Swaziland, and Zambia. Singapore, by contrast, remained stable, ranking fifth.

CONTINUED ON PAGE 3

7. *Id.*
8. *See* PRC Criminal Law art. 164.
9. *See* "Executive Order on National Anti-Corruption Plan for 2012–2013: Dmitry Medvedev signed Executive Order *On the National Anti-Corruption Plan for 2012–2013 and Amendments to Certain Acts of the President of the Russian Federation on Countering Corruption*" (Mar. 13, 2012), http://eng.kremlin.ru/news/3539; *see also* Bruce E. Yannett, Alyona N. Kucher, Anna V. Maximenko & Michael T. Leigh, "News from the BRICs: Russia's Turn Toward Anti-Corruption Enforcement?" Vol. 3, No. 7 (Feb. 2012), http://www.debevoise.com/files/Publication/f1606dac-62eb-4299-9bfa-5de993090940/Presentation/PublicationAttachment/db0149b4-0ec7-4633-87b6-69b728577aa1/FCPA_Update_Feb_2012.pdf.
10. U.S. Census Bureau, "Top Trading Partners – Total Trade, Exports, Imports" (Oct. 2012), http://www.census.gov/foreign-trade/statistics/highlights/top/top1210yr.html.
11. *See* Federal Law against Corruption in Public Procurement (June 11, 2012) (Mex.), http://www.diputados.gob.mx/LeyesBiblio/doc/LFACP.doc [Spanish]; *see also* Sean Hecker, Bruce E. Yannett, & María Luisa Romero, "Mexico Catches Up: A New Law Against Corruption in Government Procurement," *FCPA Update*, Vol. 3, No. 11 (June 2012), http://www.debevoise.com/files/Publication/c97a52f6-8d35-425d-ac8a-a222d7f2c8af/Presentation/PublicationAttachment/06a0bdee-0a9b-46ca-8cc0-d6f9becfa517/FCPA_Update_June_2012.pdf.

FCPA Update

FCPA Update is a publication of Debevoise & Plimpton LLP

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Transparency International Rankings ■ Continued from page 2

The Middle East and Central Asia continue to be extremely high-risk, with Kazakhstan (continuing its decline from 120th to 133rd), Kyrgyzstan (improving from 164th to 154th), Tajikistan (moving from 152nd to 157th), Turkmenistan (moving from 177th to 170th), Uzbekistan (also moving from 177th to 170th), and Afghanistan (moving from 180th to 174th) all ranking in the bottom third of the CPI. Although Iran and Pakistan both improved in the rankings last year, both declined this year and remained in the bottom third of the CPI. Iran fell from 120th to 133rd, tied with Kazakhstan and Russia, while Pakistan fell from 134th to 139th, tied with Azerbaijan, Kenya, Nepal, and Nigeria.

> "Overall, the countries perceived to be the most corrupt were Afghanistan, North Korea, and Somalia, whose rankings TI attributed to 'the lack of accountable leadership and effective public institutions...'"

Africa remained the region perceived to be the most high-risk, with 25 countries ranked in the bottom third. Notable outliers were Botswana and Rwanda, which ranked in the top third of the CPI at 30th and 50th, respectively (from 32nd and 49th).

Overall, the countries perceived to be the most corrupt were Afghanistan, North Korea, and Somalia, whose rankings TI attributed to "the lack of accountable leadership and effective public institutions…."[12] Rounding out the bottom ten were Haiti, Venezuela, Iraq, Turkmenistan, Uzbekistan, Myanmar, and Sudan.

Conversely, the countries perceived to be the least corrupt were Denmark, Finland, and New Zealand, a fact that TI attributed to "strong access to information systems and rules governing the behavior of those in public positions."[13] Sweden, Singapore, Switzerland, Australia, Norway, Canada, and the Netherlands were also ranked among the top ten countries.

In light of the 2012 CPI, companies should carefully review the jurisdictions in which they conduct business, particularly if those countries rank in the lower end of the CPI. In considering whether to conduct business in a particular jurisdiction, companies should take note of TI's warning that "[d]oing business in a country where corruption is rife means higher costs, delays and losing business to competitors who pay bribes."[14]

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12. *See* TI Press Rel., note 5, *supra.*
13. *Id.*
14. Transparency International, "A Look at the Corruption Perceptions Index 2012" (Dec. 5, 2012), http://www.transparency.org/news/feature/a_look_at_the_corruption_perceptions_index_2012.

DOJ and SEC Officials Discuss FCPA Guidance and Current Enforcement Issues

Officials from the U.S. Department of Justice ("DOJ") and U.S. Securities and Exchange Commission ("SEC") spoke about the newly released FCPA guidance[1] ("the Guidance") and current issues in FCPA enforcement at the American Conference Institute's 28th National Conference on the Foreign Corrupt Practices Act, held in Washington, D.C., on November 15-16, 2012.[2]

Assistant Attorney General Lanny A. Breuer delivered the keynote address on November 16. Breuer cast enforcement of the FCPA in terms of American exceptionalism, arguing that the United States is in a unique position "to spread the gospel of anti-corruption."[3] Highlighting the DOJ's and SEC's work in preparing and issuing the Guidance, Breuer stated that the Guidance is contained in the most comprehensive document ever produced by the DOJ and SEC to explain the government's approach to enforcing a statute.[4] According to Breuer, the Guidance represents a bold commitment to transparency, although obviously it will not answer every question.[5] Breuer highlighted the Department's declination of an enforcement action against Morgan Stanley as an example of increasing transparency and rewarding companies that have robust compliance systems in place.[6]

Jeffrey Knox, Principal Deputy Chief of the DOJ's Fraud Section, spoke on a conference panel about the Guidance, discussing how it covered many issues in FCPA enforcement.[7] Knox, however, noted that the Guidance includes a disclaimer on the inside cover that states: "[The guidance] is non-binding, informal, and summary in nature, and the information contained here does not constitute rules or regulations. As such, it is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, that are enforceable at law by any party, in any criminal, civil, or administrative matter."[8] The Guidance therefore should be digested similarly to the U.S. Attorneys' Manual: counsel can expect the government to abide by the Guidance, but the government is not bound to act in accordance with it.[9]

I. Enforcement Trends

Charles E. Duross, Deputy Chief of the DOJ's Fraud Section, and Kara Brockmeyer, Chief of the SEC's FCPA Unit, spoke on a panel about current enforcement trends. According to Duross, the DOJ is bringing a wide variety of cases across industries, not just concentrating on one industry such as pharmaceuticals; trying to increase transparency, *e.g.*, by releasing the Guidance; and seeking to reward self-reporting. Looking back on the past year, Duross stated that the issuance of the Guidance, as well as multiple trials, sentences, and appeals, has made 2012 the DOJ's busiest year ever in FCPA enforcement. Duross emphasized the value of self reporting in the DOJ's enforcement program, strongly encouraging companies with FCPA issues to reach out proactively to the government as the issues arise. Adding some levity to the conference, Duross told conference participants, "We're here to help."

Brockmeyer said that the SEC's FCPA Unit has also had a busy year with numerous cases brought and settled. The

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1. U.S. Dep't of Justice & U.S. Sec. and Exch. Comm'n, "A Resource Guide to the U.S. Foreign Corrupt Practices Act" (Nov. 14, 2012), http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf [hereinafter, "FCPA Resource Guide"]. *See generally* Paul R. Berger, Sean Hecker, Andrew M. Levine, Bruce E. Yannett, Erich O. Grosz, & Erin W. Sheehy, "U.S. Enforcement Agencies Issue Extensive New FCPA Guidance," *FCPA Update*, Vol. 4, No. 4 (Nov. 2012), http://www.debevoise.com/files/Publication/4991d9f7-b7dc-495f-a767-4e75adc4a7f8/Presentation/PublicationAttachment/ce5f6ffa-f028-4252-a1fb-6480ba48d93e/FCPA_Update_Nov_112812.pdf [hereinafter, "FCPA Update Guidance Article"].

2. ACI Conference Agenda, http://www.fcpaconference.com/Agenda.html (last visited December 6, 2012).

3. DOJ Justice News, Assistant Attorney General Lanny A. Breuer Speaks at the American Conference Institute's 28th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2012), http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1211161.html.

4. *Id.*

5. *Id.*

6. *See generally* Paul R. Berger, Sean Hecker, Bruce E. Yannett, & Elizabeth A. Kostrzewa, "Hints and Olive Branches in the Morgan Stanley Declinations," *FCPA Update*, Vol. 3, No.10 (May 2012), http://www.debevoise.com/files/Publication/71aba13d-70d9-4e81-803b-4231ab73f0d1/Presentation/PublicationAttachment/9c07e8dd-c87d-4722-978b-7b7bdfe0e261/FCPA_Update_May_2012.pdf.

7. With the exception of Assistant Attorney General Breuer, DOJ and SEC officials prefaced their remarks by stating that they appeared at the conference in their individual capacities and were not articulating views on behalf of the government. Their remarks related herein should not be construed as such.

8. FCPA Resource Guide, inside cover. *See also* FCPA Update Guidance Article at 1, 4.

9. U.S. Attorneys' Manual § 1-1.00, "Purpose," http://www.justice.gov/usao/eousa/foia_reading_room/usam/title1/1mdoj.htm.

ACI Conference ■ Continued from page 4

SEC continues to aggressively pursue tips provided by whistleblowers and issues that come to its attention from news media reports. According to Brockmeyer, the whistleblower program is producing excellent tips from individuals with documents and specific names in hand, and more awards to whistleblowers are in the pipeline. Brockmeyer said that her unit has occasionally responded to media reports by preemptively calling companies and asking if an internal investigation has commenced, rather than waiting for the company to reach out to the government.

II. Whistleblower Program

Sean McKessy, head of the SEC's Whistleblower Office, spoke to the conference about the effects of the Dodd-Frank Act's new whistleblower protections. The Whistleblower Office will have grown from a staff of one in February 2011 to a staff of eleven lawyers, three paralegals, and one program support specialist by the end of 2012. Reviewing the statistics provided in the office's report[10] on its first full fiscal year, McKessy noted that the office received 3,001 tips, of which 3.8% (115 tips) were FCPA related.[11] Tips have been coming in from around the world, from former employees, current employees, family members of employees, and market observers. According to McKessy, a significant majority of tipsters have tried internal reporting and have approached the SEC only after an unsatisfactory internal response. In August, the office paid out its first award to a whistleblower in a case involving ongoing fraud.[12] The $50,000 award represented 30% (the maximum allowed percentage under the whistleblower provision)[13] of the amount the Commission had collected to date. McKessy noted that the sanctions far exceeded $1 million, the minimum threshold for eligibility under the whistleblower provisions,[14] but the SEC only pays out based upon what it collects.[15] According to McKessy, the office recommended compensating the whistleblower at the maximum allowable amount because of the quality of the information provided, *i.e.*, specific documents and individuals involved in the fraud. McKessy commented that, despite some predictions that the whistleblower program would harm compliance efforts, few companies appear to feel that this prediction has been borne out.

III. Evaluation of Compliance Programs

Several DOJ and SEC officials spoke about how the government evaluates compliance programs and what companies should be doing to improve their programs. For example, Tracy Price, Assistant Director of the SEC's FCPA Unit, spoke on a panel about internal controls. According to Price, the fact that a company has a problem does not necessarily mean that it has a faulty compliance program. As several officials noted, there will always be circumstances that foil the most robust compliance programs. Price emphasized that compliance programs need to adjust dynamically to changing risks and potential problems as they occur: a good compliance program is not static.

* * * * * *

In light of these comments by DOJ and SEC officials, companies can expect vigorous FCPA enforcement to continue in the near future, particularly as new information is provided through the whistleblower program. Companies are well advised to review carefully the new Guidance, develop appropriate controls to address FCPA-related risks, and seek to continuously improve their compliance programs to meet best practices and evolving risks.

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10. U.S. Sec. and Exch. Comm'n, Annual Report on the Dodd-Frank Whistleblower Program (November 2012), http://www.sec.gov/about/offices/owb/annual-report-2012.pdf.
11. *Id.* at Appendix A: Whistleblower Tips by Allegation Type – Fiscal Year 2012.
12. SEC Press Rel. 2012-162, SEC Issues First Whistleblower Program Award (Aug. 21, 2012), http://www.sec.gov/news/press/2012/2012-162.htm.
13. 15 U.S.C. § 78u-6(b)(1)(B).
14. 15 U.S.C. § 78u-6(a)(1).
15. 15 U.S.C. § 78u-6(b)(1)(B).

NEWS FROM THE BRICs

Use of Prepaid Cards in China

In recent years, the market for commercial prepaid cards has been growing rapidly in China. There are two types of prepaid cards in China: vendor-specific cards (which can be used at only one store) and multi-purpose cards (essentially cash-equivalent prepaid cards that can be used at a variety of vendors). Prepaid cards have provided considerable convenience to the public, and may even have stimulated consumption to a certain extent.[1] However, they also give rise to the risk of corruption and bribery for two main reasons: first, without needing to be registered to a specific individual's name, it is very difficult to trace to whom the prepaid cards have been given; and second, giving prepaid cards is a less blatant form of gift giving compared to giving cash, and therefore may be considered more acceptable to both the bribe giver and bribe receiver.[2] The Chinese government has recently reinvigorated its efforts to regulate the issuance and circulation of such commercial prepaid cards.

In September 2012, the Ministry of Commerce of the People's Republic of China ("MOFCOM") issued the Administrative Measures on Single-Purpose Commercial Prepaid Cards (Trial Implementation) (单用途商业预付卡管理办法(试行)) ("MOFCOM Measures"),[3] and the People's Bank of China ("PBOC") issued the Administrative Measures for Payment Institutions in relation to the Prepaid Cards Business (支付机构预付卡业务管理办法) ("PBOC Measures")[4] (collectively, the "Measures"). The Measures both became effective on November 1, 2012. The new Measures are important for companies doing business in China. They provide a new legal framework for companies issuing cards and signal that the Chinese authorities (not limited to the PBOC and MOFCOM) are focused on cracking down on the potential abuse of prepaid cards.

The Measures implement the May 2011 Opinion on Regulating the Administration of Commercial Prepaid Cards (关于规范商业预付卡管理的意见) (the "Opinion"),[5] jointly issued by the PBOC, MOFCOM and five other central government authorities, namely: the Ministry of Supervision, the Ministry of Finance, the State Administration of Taxation, the State Administration for Industry and Commerce, and the National Bureau of Corruption Prevention.

The Opinion mandated that MOFCOM and PBOC regulate single-vendor and multi-purpose prepaid cards, respectively. The Opinion and the MOFCOM and PBOC Measures set forth three principles to regulate prepaid cards: (1) real name registration; (2) restrictions on cash purchase; and (3) limits on card value.

The MOFCOM Measures require card issuers of prepaid vendor-specific cards to register within 30 days of commencing single-purpose prepaid card business. Thereafter, issuers must record the name, identification number and contact details of purchasers of prepaid cards valued at more than RMB 10,000 (approximately US$ 1,615).[6] Prepaid cards valued at or above RMB 5,000 (approximately US$ 805), if purchased by entities, or RMB 50,000 (approximately US$ 8,050), if purchased by individuals, must be purchased by bank transfer, rather than cash. Finally, the Measures differentiate between cards bearing the name of the purchaser ("registered cards") and those which do

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1. Ministry of Supervision and Other Departments on Regulating the Administration of Commercial Prepaid Cards Circular [2011] No. 25, Notice of the General Office of the State Council Forwarding the Opinions of the People's Bank of China (issued by the General Office of the State Council on May 23, 2011), http://www.gov.cn/zwgk/2011-05/25/content_1870519.htm [Chinese].
2. *See, e.g.*, Du Xiao, "Diaocha: Yufuka Shimingzhi Nengfou Zhizhu 'Ka Fubai' Yin Guanzhu," [Investigation: Whether Real Name Registration of Prepaid Card Could Stop "Card Corruption" Attracts Attention], *Fazhi Ribao* [Legal Daily], (Oct. 22, 2012), http://news.xinhuanet.com/politics/2012-10/22/c_123850845.htm [Chinese].
3. Ministry of Commerce of the People's Republic of China Circular [2012] No. 9, Administrative Measures on Single-Purpose Commercial Prepaid Cards (Trial Implementation) (Sept. 21, 2012, effective Nov. 1, 2012), http://www.mofcom.gov.cn/aarticle/b/d/201209/20120908362416.html [Chinese].
4. People's Bank of China Circular [2012] No. 12, Administrative Measures for Payment Institutions in relation to the Prepaid Cards Business (Sept. 27, 2012, effective Nov. 1, 2012), http://www.pbc.gov.cn/image_public/UserFiles/goutongjiaoliu/upload/File/pdf.pdf [Chinese].
5. *See* Notice of the General Office, note 1, *supra*.
6. If the purchaser is a corporation, the issuer must record the details of the corporation's agent.

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not ("unregistered cards"). The maximum value of a registered prepaid card is RMB 5,000 (approximately US$ 805), and the maximum value of an unregistered card is RMB 1,000 (approximately US$ 161). The Measures do not address the possibility that individuals could avoid the registration requirement by purchasing numerous small value unregistered cards.[7]

The MOFCOM Measures also set a limit on the maximum amount of prepaid card revenue allowable for card issuers. The limit is calculated as a percentage of the card issuer's principal business revenue in the previous accounting year. The percentage cap varies depending on the nature of the card issuer's business (retail, hospitality, catering, residential services, etc).

The PBOC Measures are based upon the Opinion and the PBOC's 2010 Administrative Measures for the Payment Services Provided by Non-Financial Institutions (非金融机构支付服务管理办法).[8] The PBOC Measures mirror the MOFCOM Measures by requiring registration of prepaid cards in a specific individual's name, limiting cash purchases above the same specified amounts, and limiting maximum card value to RMB 1,000 or RMB 5,000. In addition, the PBOC Measures prohibit the use of credit cards to purchase or recharge any multiple-purpose prepaid cards.

> "The Measures do not provide any guidance to companies doing business in China regarding what is an acceptable gift under Chinese law and likewise provide no guidance with regard to the FCPA"

In addition to addressing bribery risks, the Measures appear to have been motivated by other concerns, particularly tax evasion. The Measures do not provide any guidance to companies doing business in China regarding what is an acceptable gift under Chinese law and likewise provide no guidance with regard to the FCPA. Civil and criminal penalties for bribery of public officials and commercial bribery can be found elsewhere in Chinese law.[9] There is limited guidance about what circumstances would most likely result in criminal prosecution: improper benefits exceeding RMB 10,000 (approximately US$ 1,615) will normally be prosecuted criminally while improper payments of lesser amounts may or may not be prosecuted, depending on the circumstances.[10]

Numerous regulations emanating from the state organs and the Communist Party relate to what gifts are permissible for officials (typically including officers at state-owned enterprises) to accept. The two most specific regulations are the December 1993 Regulation Regarding Provision and Acceptance of Gifts in Foreign Official Business (国务院关于在对外公务活动中赠送和接受礼品的规定）(the "1993 Regulation"),[11] followed by a circular jointly issued by the central administrative offices of the Party and the State Council for the implementation of the 1993 Regulation (中共中央办公厅、国务院办公厅关于认真贯彻执行<国务院关于在对外公务活动中赠送和接受w礼品>的通知)

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7. It has been reported that one large department store has two types of prepaid cards available, with face values of RMB 1,000 and RMB 5,000, respectively, and requires registration of purchasers of the RMB 5,000 card (in compliance with the express requirement of Article 18) or more than five RMB 1,000 cards (even though well below the RMB 10,000 threshold set forth in Article 15). The same report notes that several other card issuers apparently allow purchases of multiple prepaid cards with smaller value at one time. *See* Du Xiao, note 2, *supra*. It remains to be seen whether more specific rules will be enacted to set a limit on aggregate purchases. Card issuers should seek a qualified PRC legal opinion for definitive advice.

8. People's Bank of China Decree [2012] No. 2, Administrative Measures for the Payment Services Provided by Non-financial Institutions (June 14, 2010, effective Sept. 1, 2010), http://www.gov.cn/flfg/2010-06/21/content_1632796.htm [Chinese], [hereinafter "Payment Measures"]. The Payment Measures were promulgated five years after its first draft was released for public comment, and provide a legal framework for the third-party settlement and payment industry in China. *Id.*

9. *See* PRC Criminal Law (1997 and as amended); Regulation Concerning Prosecution Standard for the Crime of Offering (2000), http://www.law-lib.com/law/law_view.asp?id=502 [Chinese], [hereinafter "Prosecution Standard"]; Circular Concerning Prosecution Standards for Various Financial Crimes (2010), http://www.court.gov.cn/qwfb/sfwj/jd/201010/t20101027_10442.htm [Chinese], [hereinafter "Financial Crimes Prosecution Standards"]; Anti-Unfair Competition Law (1993), http://www.gov.cn/banshi/2005-08/31/content_68766.htm [Chinese]; Opinion on Issues Concerning the Application of the Law in the Handling of Criminal Cases of Commercial Bribery (2008), http://news.xinhuanet.com/legal/2008-11/25/content_10409046.htm [Chinese], [hereinafter "the Opinion"]; Tentative Provisions on Prohibition of Commercial Bribery (issued by the State Administration of Industry and Commerce in 1996), http://baike.baidu.com/view/2741823.htm [Chinese], [hereinafter "SAIC Provisions"].

10. *See, e.g.*, Prosecution Standard, note 9, *supra*; Anti-Unfair Competition Law, note 9, *supra*; SAIC Provisions, note 9, *supra*.

11. Regulation Regarding Provision and Acceptance of Gifts in Foreign Official Business (Dec. 1993), http://cpc.people.com.cn/GB/64162/71380/71387/71590/4855484.html [Chinese].

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(the "1993 Circular")[12] (collectively, the "1993 Regulations")[13] and the April 1995 Regulation for the Registration of Gifts Received by CPC and Government Employees in Their Domestic Association（关于对党和国家机关工作人员在国内交往中收受的礼品实行登记制度的规定）(the "1995 Regulation"),[14] followed by a circular jointly issued by the central general affairs bureaus of the CPC and the State Council in September 1995 for the implementation of the 1995 Regulation (中共中央直属机关事务管理局、国务院机关事务管理局关于中央党政机关工作人员在国内交往中收受礼品登记和处理办法) (the "1995 Circular")[15] (collectively, the "1995 Regulations").

The 1993 and 1995 Regulations limit officials' ability to accept gifts and set out various notification requirements regarding the acceptance of gifts.

The 1993 and 1995 Regulations limit officials' ability to accept gifts and set out various notification requirements regarding the acceptance of gifts. The 1995 Regulation sets out certain monetary guidelines. For example, gifts over RMB 100 (approximately US$ 16) must be disclosed and registered, while gifts over RMB 200 (approximately US$ 32) must be handed over. There is also an annual gift limit of RMB 600 (approximately US$ 97) per official. Although the amounts set out in the 1995 Regulations were worth much more in real terms at the time the regulations were promulgated, neither set of regulations has been repealed (and therefore both remain in effect), even if they are commonly not observed.

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12. Circular for the Implementation of the 1993 Regulation (jointly issued by the Central Administrative Offices of the Party and the State Council), http://cpc.people.com.cn/GB/64162/71380/71387/71590/4855484.html [Chinese].
13. The 1993 Regulations also deal with the provision of gifts by state officials to foreign parties or visitors in their international official business. This is outside the scope of this memorandum and therefore not discussed here.
14. Regulation for the Registration of Gifts Received by CPC and Government Employees in Their Domestic Association (Apr. 1995), http://news.xinhuanet.com/ziliao/2005-03/16/content_2703917.htm [Chinese].
15. Circular for the Implementation of the 1995 Regulation (jointly issued by the Central General Affairs Bureaus of the CPC and the State Council in September 1995), http://www.law-lib.com/law/law_view.asp?id=120537 [Chinese].

Frederic Bourke's Petition for Certiorari

Businesses and individuals subject to the FCPA, particularly those considering investments in high-risk jurisdictions, will want to mark the first quarter of 2013 on their calendars.

That is when, absent further delays, the Supreme Court of the United States will likely grant or deny a petition for certiorari filed on October 25, 2012 by Frederic Bourke, Jr., the investor and founder of the luxury goods company Dooney & Bourke who was convicted by a federal jury in the United States District Court for the Southern District of New York in July 2009 and sentenced to a year in prison and to a $1 million fine for conspiring to violate the FCPA and the Travel Act in connection with a failed investment scheme seeking to gain ownership of the state oil company of Azerbaijan.[1]

The government's response to the petition, which seeks review of the December 14, 2011 decision by the United States Court of Appeals for the Second Circuit to affirm Bourke's conviction and sentence, is due January 2, 2013.[2] The Supreme Court could consider the petition as early as its January 18, 2013 conference, although the more likely result is a listing for a conference date in late February 2013.[3]

As we have noted previously, the *Bourke* case is one of the "must-read" cautionary tales in the FCPA arena.[4] As investors close their books on 2012 and plot strategy for 2013, a report on the upcoming endgame in *Bourke* is warranted.

Below we review (1) the key points decided by the Second Circuit and the arguments Bourke raises in his petition; (2) factors that could affect the Supreme Court's disposition; and (3) the implications of the Supreme Court's upcoming action.

The Second Circuit's Decision and Bourke's Petition for Certiorari

As described by the Second Circuit, Bourke's conviction rests on evidence introduced at trial to show that Bourke knew of, or was at least willfully blind to, a scheme organized by lead investor Viktor Kozeny to pay bribes through a variety of circuitous routes to Azerbaijan's President and his family in exchange for favored treatment during privatization of the state oil company SOCAR. As the Second Circuit stated in its decision affirming Bourke's conviction, Bourke was aware that Kozeny was known as the "Pirate of Prague" as a result of Kozeny's "shady dealings" in state privatizations,[5] and traveled to Baku, Azerbaijan, where Bourke was allegedly told by Kozeny's attorney, Hans Bodmer, of a pre-existing bribery scheme devised by Kozeny as well as "the corporate structures created to carry it out."[6] Ultimately noting how, between May and September 1998, Bodmer wired roughly $7 million to Azeri officials or family members, the court canvassed other proof the government submitted that had a bearing on Bourke's knowledge of the scheme, including evidence that Bourke set up his own company to channel investment funds.[7] The court thus stated:

> …[After twice traveling to Azerbaijan,] Bourke made another trip to Baku shortly after the Minaret office opening [Minaret being the investment bank set up by Kozeny]. When he returned home, Bourke contacted his attorneys to discuss ways to limit his potential FCPA liability. During the call, Bourke raised the issue of bribe payments and investor liability. Bourke's attorneys

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1. Petition for Writ of Certiorari, *Bourke v. United States*, No. 12-531 (filed Oct. 25, 2012) [hereinafter, "Petition"]. Bourke was also convicted of violating 18 U.S.C. § 1001, the False Statements Act, for making false statements to federal investigators. *Id.* at 13-14. Whether that conviction would stand if review were granted and Bourke's conspiracy conviction were vacated is not expressly addressed in Bourke's petition.
2. *Bourke v. United States*, Docket No. 12-531 (Dec. 11, 2012) http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-531.htm.
3. *See* Sup. Ct. R. 16 and the Court's calendar for 2013 at http://www.supremecourt.gov. Actions on petitions voted on at the winter Friday conferences are typically posted by the Clerk the following Monday.
4. Paul R. Berger, Sean Hecker, & Steven S. Michaels, "The Bourke Conviction and Willful Blindness: Did the Second Circuit Get it Right?" *FCPA Update*, Vol. 3, No. 7 (Feb. 2012), http://www.debevoise.com/files/Publication/f1606dac-62eb-4299-9bfa-5de993090940/Presentation/PublicationAttachment/db0149b4-0ec7-4633-87b6-69b728577aa1/FCPA_Update_Feb_2012.pdf; Erik Bierbauer, "*U.S. v. Bourke*: Red Flags and the Perils of Conscious Avoidance," *FCPA Update*, Vol. 1, No. 1 (Aug. 2009), http://www.debevoise.com/files/Publication/3143fa0a-ebbb-4dff-a8e1-28b53eb18152/Presentation/PublicationAttachment/842874c6-e886-4a04-89b4-28e58f03e031/FCPA_Update_August09v12.pdf.
5. *United States v. Kozeny*, 667 F.3d 122, 127 (2d Cir. 2011).
6. *Id.* at 128.
7. *Id.* at 128-29.

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advised him that being linked to corrupt practices could expose the investors to FCPA liability. Bourke and fellow Oily Rock investor Richard Friedman agreed to form a separate company affiliated with Oily Rock [another Kozeny vehicle set up to purchase the shares in the Azeri oil company] and Minaret. This separate company would shield U.S. investors from liability for any corrupt payments made by the companies and Kozeny. To that end, Oily Rock U.S. Advisors and Minaret U.S. Advisors were formed, and Bourke joined the boards of both on July 1, 1998. Directors of the advisory companies each received one percent of Oily Rock for their participation.

In mid-1998, Kozeny and Bodmer told Bourke that an additional 300 million shares of Oily Rock would be authorized and transferred to the Azeri officials. Bourke told a Minaret employee, Amir Farman-Farma, that "Kozeny had claimed that the dilution was a necessary cost of doing business and that he had issued or sold shares to new partners who would maximize the chances of the deal going through, the privatization being a success."[8]

Rejecting Bourke's challenge to the "factual predicate" for a willful blindness instruction, the court of appeals noted that "[t]he testimony at trial demonstrated that Bourke was aware of how pervasive corruption was in Azerbaijan generally," and "knew of Kozeny's reputation as the 'Pirate of Prague.'"[9] The court wrote that "Bourke created the American advisory companies to shield himself and other American investors from potential liability from payments made in violation of the FCPA, and joined the boards of the American companies instead of joining the Oily Rock board. In so doing, Bourke enabled himself to participate in the investment without acquiring actual knowledge of Oily Rock's undertakings."[10] In addition to noting that "Bourke's attorney testified that he advised Bourke that if Bourke thought there might be bribes paid, Bourke could not just look the other way," the court quoted a transcript of a May 18, 1999 tape-recorded phone conference Bourke had with a co-investor and their attorneys, in which Bourke in several instances asked the call's participants "[w]hat are you going to do with that information" if it turned out that they learned that bribes were being paid, or words to that effect.[11] The court also cited evidence demonstrating that other potential investors conducted more rigorous due diligence than Bourke did and walked away from the deal.[12] Holding that a willful blindness instruction was appropriate, the court of appeals also rejected Bourke's attack on the wording of the charge, *i.e.*, that the charge allowed the jury "to … convict[] based on negligence."[13]

> "Bourke's lead argument why review should be granted challenges the giving of a 'conscious avoidance' instruction and, critically, the wording of the instruction."

Bourke's lead argument why review should be granted challenges the giving of a "conscious avoidance" instruction and, critically, the wording of the instruction.[14] His petition relies heavily on the Supreme Court's May 31, 2011 decision in *Global-Tech Appliances, Inc. v. SEB S.A.*,[15] a patent case in which the Court articulated and applied a rule that allows "willful blindness" to substitute as a proxy for "actual knowledge" pursuant to "an appropriately

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8. *Id.*
9. *Id.* at 133.
10. *Id.*
11. *Id.*
12. *Id.* at 134.
13. *Id.* at 130.
14. *See* Petition, note 1, *supra* at i, 1-21.
15. 131 S. Ct. 2060 (2011).

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limited" definition that requires that "(1) the defendant must subjectively believe that there is a high probability that [the] fact [at issue] exists and (2) the defendant must take deliberate actions to avoid learning of the fact."[16] "[O]ne who merely knows of a substantial and unjustified risk of wrongdoing"[17] (the standard for recklessness) or "one who should have known of a similar risk, but, in fact, did not"[18] (the standard for negligence), cannot be willfully blind, as "'[a] court can find willful blindness only where it can almost be said that the defendant actually knew.'"[19]

Bourke's petition summarizes the purported *Global-Tech* error as essentially misconstruing, as "deliberate actions" or "active efforts" by Bourke "designed to shield him from *knowledge*, the relevant point here," the creation, based on advice of counsel, of U.S. investment vehicles that "might have shielded Bourke from potential *liability*."[20] In addition to thus challenging the basis for a willful blindness instruction, Bourke attacks the wording of the instruction given, arguing it "omits the requirement that the defendant take 'deliberate actions' or make 'active efforts' to avoid knowledge," and "omits that even *recklessness* is not enough."[21]

Factors Likely to Affect the Supreme Court's Disposition

Like the other thousands of petitions for certiorari brought by private parties each year, Bourke's petition, at best, faces long statistical odds of being granted. Merely demonstrating error is not enough to gain a grant of review by the Supreme Court.[22] Indeed, as he did in the underlying facts, at least with respect to the ground of review he presents based on the *Global-Tech* decision, Bourke seems to have found himself in the wrong place at the wrong time – in a procedural no-man's land in which *Global-Tech* was unavailable when the jury charge conference took place in 2009 and his principal briefs were filed in the court of appeals and the case was argued, but in which *Global-Tech* was issued before the court of appeals' decision was rendered in December of 2011.

This gives rise to the risk for Bourke that the threshold procedural issue potentially clouding the question of whether the Second Circuit correctly decided Bourke's case, namely, whether Bourke's jury trial issues were properly preserved or should be decided only under a mere "plain error" standard of review, could cause the Supreme Court to deny review because the case was not an appropriate vehicle for revisiting the matter of willful blindness instructions.[23] The mere two-year gap since *Global-Tech* was decided also complicates Bourke's efforts to gain review, in that even if the Court perceives there to be a conflict of some kind in the courts of appeals on how willful blindness instructions are to be handled there is a risk the conflict may not be perceived as sufficiently mature as to warrant review.[24] Although a summary disposition expressly directing the Second Circuit to reconsider Bourke's conviction in light of *Global-Tech* also is a possibility, the fact that *Global-Tech* had been brought to the court of appeals' attention prior to the issuance of its mandate militates against this outcome.[25]

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16. *Id.* at 15. *See* Sean Hecker & Steven S. Michaels, "*Global-Tech Appliances, Inc. v. SEB S.A.*: From Deep Fryers Into the Fire of the 'Willfull Blindness' Doctrine," *FCPA Update*, Vol. 2, No. 11 (June 2011), http://www.debevoise.com/files/Publication/027aee9f-9006-4037-8195-6da0c6a55c00/Presentation/PublicationAttachment/4ca57a9a-7232-4f23-a0d8-14cb3eb008e2/FCPAUpdateJune2011.pdf.

17. Petition, note 1, *supra* at 24 (citing *Global-Tech*, 131 S. Ct. at 2071).

18. *Global-Tech*, 131 S. Ct. at 2071.

19. *Id.*

20. Petition, note 1, *supra* at 22-23.

21. *Id.* at 23-24. Bourke also reprises challenges to the jury instruction that, he contends, allowed the jury to reach a non-unanimous verdict on which conduct sufficed as the "overt act" connecting him to the conspiracy, as well as evidentiary rulings that he contends undermined his ability to cross-examine Bodmer. *See id.* at 25-38.

22. *See generally* Sup. Ct. R. 10; Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, & Kenneth S. Geller, *Supreme Court Practice* 219-85 (8th ed. 2002).

23. *United States v. Kozeny*, No. 09-4704, Memorandum in Opposition to Petition for Rehearing at 2-5 (Apr. 16, 2012). As the government also argued below, *Global-Tech* cited to Second Circuit precedent, suggesting that the Supreme Court would not likely hold that the instruction in *Bourke*, which was guided by that prior court of appeals decision, violated *Global-Tech*. *Id.* at 3 (citing *Global-Tech*, 131 S. Ct. at 2070 & n.9 and *United States v. Svoboda*, 347 F.3d 471 (2d Cir. 2003)).

24. Although Bourke seeks to identify a circuit-split on the meaning of *Global-Tech*, the split he identifies rests in part on differences between the specific instruction approved by the Second Circuit and so-called "pattern instructions" adopted administratively in the Third and Eighth Circuits, rather than holdings in specific cases. Petition, note 1, *supra*, at 16. Although Bourke contrasts a willful blindness instruction upheld by the Fourth Circuit, *id.*, even if the conflict between the Second and the Fourth Circuits is construed as genuine, it would not resolve the issue of under what standard Bourke's challenge should be assessed, although that issue could be remanded to the court of appeals were the Court to grant certiorari and agree with Bourke on the general issue.

25. *But cf. Webster v. Cooper*, 130 S. Ct. 456, 457 (2009) (Scalia, J., dissenting) (noting the Court's evolving and expanding practice of issuing "grant, vacate and remand" ("GVR") orders in cases in *Bourke's* posture).

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What is at Stake in the *Bourke* Petition

Should the Court grant review, the Court could provide useful and nationally applicable clarification of how, precisely, the willful blindness doctrine that underlies Bourke's conviction operates in the recurring FCPA context of investor due diligence and investment partner management in high-risk jurisdictions – an arena increasingly confronted by private equity firms, hedge funds, trading companies, banks, insurers and other financial institutions, as well as any other company that undertakes global acquisitions. Should the Court deny review, companies and individuals whose conduct might be litigated in the federal courts of New York, Connecticut, or Vermont (where the Second Circuit's decision is binding), will need to take very particular heed of Bourke's experience, and how the government and the federal courts dealt with it.

> "Should the Court grant review, the Court could provide useful and nationally applicable clarification of how, precisely, the willful blindness doctrine that underlies Bourke's conviction operates in the ... FCPA context..."

More generally, if the Second Circuit's decision stands, the DOJ's hand will be strengthened, and those subject to the FCPA will need to be ever more mindful of the risks of investing in projects without appropriate due diligence, close monitoring of partner behavior, and the need for the fortitude to turn down or exit from certain high-risk investments with seeming outsize returns rather than trying to structure the investment to reduce compliance risks. We will thus continue to monitor the Supreme Court's handling of the *Bourke* case and will report on upcoming key developments in the litigation.

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