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A Global Anti-Corruption Newsletter

Also in this issue:

8 France Takes Steps to Implement Its Anti-Corruption Laws – or Does It?

20 China Releases New Criminal Judicial Interpretation on Bribery

Click here for an index of all *FCPA Update* articles

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Resolutions of the Direct Access Partners Case and the Panama Papers: A Caution for Financial Sector Anti-Corruption Compliance

In May 2013, the Department of Justice ("DOJ") unsealed criminal FCPA, Travel Act, anti-money laundering, and conspiracy charges against two employees of the New York broker-dealer Direct Access Partners LLC ("DAP"), as well as Travel Act, anti-money laundering and conspiracy charges against Maria de Los Angeles Gonzalez de Hernandez ("Gonzalez"), Vice President for Finance of the Economic and Social Development Bank of Venezuela (Banco de Desarrollo Económico y Social de Venezuela ("BANDES")).[1] At the same time, the Securities and Exchange Commission ("SEC") brought civil charges of securities fraud, aiding

Continued on page 2

1. Complaint, *U.S. v. Bethancourt*, 2013 WL 1891344, No. 13CR03074 (S.D.N.Y. May 7, 2013); U.S. Dep't Justice, Press Release 13-515, *Two U.S. Broker-dealer Employees and Venezuelan Government Official Charged for Massive International Bribery Scheme* (May 7, 2013).

Continued from page 1

and abetting, and failure to keep proper records in violation of the Securities Laws against the same two defendants, the wife of one of the defendants, and a relative of the other.[2] The DAP case involved a labyrinthine kickback scheme involving the payment of millions to Gonzalez through Swiss and Panamanian entities. Those payments, and the defendants' profits, were created by marked-up transaction fees on economically riskless bond trading undertaken by DAP on BANDES' behalf.

In the three years since the original indictments, the case expanded, with additional indictments, amended SEC complaints, guilty pleas, sentencing, and, in early April 2016, final judgments being entered in the SEC civil action.[3] Coincidentally, the SEC judgments – the (probable) end of the DAP saga – coincided with the release, by the International Committee of Investigative Journalists ("ICIJ"), of the so-called "Panama Papers," information about a trove of 11.5 million hacked documents from the Panamanian law firm Mossack Fonseca relating to offshore companies in offshore jurisdictions.[4] While the DAP case was uncovered in the course of a routine SEC inspection, and none of the entities described in the DAP filings are found (as of the time of writing) in the limited information released by the ICIJ,[5] the Panama Papers serve as a reminder to financial institutions of the importance of policing the use of offshore shell companies and the real possibility that similar schemes could be discovered out of the trove of stolen data being released by the ICIJ and enhanced international cooperation spurred on by their release.

The DAP Scheme: Fraudulent Transaction Fees and a Kickback

The DAP case essentially involved a fraud and a kickback. The fraud involved earning transaction fees for economically riskless trades on BANDES' behalf and disguising those trades from other market participants. The kickback involved rerouting part of those fees back to Gonzalez, the executive at BANDES who approved the trades.

DAP earned approximately $66 million in marked-up transaction fees on transactions for BANDES. The trades and the mark-ups on the BANDES trades

Continued on page 3

2. Complaint, *SEC v. Bethancourt*, 2013 WL 1889540, No. 13-CV-3074-JMF (S.D.N.Y. May 7, 2013); U.S. Sec. Exch. Comm'n, Press Release 2013-84, *SEC Charges Traders in Massive Kickback Scheme Involving Venezuelan Official* (May 7, 2013), https://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171514248.

3. U.S. Sec. Exch. Comm'n, Press Release No. 23513, *SEC Obtains Settlement in Kickback Scheme to Secure Business of Venezuelan Bank* (Apr. 8, 2016), https://www.sec.gov/litigation/litreleases/2016/lr23513.htm.

4. *See, e.g.,* Luke Harding, *What are the Panama Papers? A Guide to History's Biggest Leak*, The Guardian, Apr. 5, 2016, http://www.theguardian.com/news/2016/apr/03/what-you-need-to-know-about-the-panama-papers.

5. Offshore Leaks Database by The International Consortium of Investigative Journalists, https://offshoreleaks.icij.org (searched May 10, 2015).

Resolutions of the Direct Access Partners Case and the Panama Papers: A Caution for Financial Sector Anti-Corruption Compliance

Continued from page 2

were hidden from DAP's clearing brokers by the use of internal wash trades, interpositioning, and round-trip transactions.[6]

The kickback involved routing some of those profits to Gonzalez through a Swiss or Panamanian channel. Originally, DAP transferred part of the funds derived from the bond trading to a Swiss entity, Private Wealth Corporation S.A., which was controlled by Alejandro Hurtado (Hurtado), a DAP employee and defendant in both the DOJ and SEC actions. Later, payments were transferred in the form of fictitious finder's fees to Hurtado's fiancée, Haydee Leticia Pabon (Pabon) (a defendant in the SEC action).[7] Some of these funds were routed to Gonzalez.

"With the information from the Panama Papers and, more importantly, a future stream of information likely to come from international efforts to crack down on tax havens, enforcement authorities will soon have a greater ability to trace transactions undertaken by the offshore entities back to the source instead."

Later, payments were routed to a Panamanian company, ETC Investment S.A. ("ETC"), of which Iuri Rodolfo Bethancourt ("Bethancourt") (a defendant in the SEC action), was the President and over which his relative, Tomas Alberto Clarke Bethancourt ("Clarke"), a senior vice president at DAP and defendant in both actions, held a power of attorney. These payments were sent to bank accounts over which Clarke exercised control, $5.6 million of which ultimately was transferred to Gonzalez, either to the Swiss account of Cartegena International, Inc., controlled by a relative of Gonzalez, or to the relative himself.[8] In total, the DAP defendants arranged for at least $9.1 million in kickbacks to Gonzalez.[9] In an example of the manner in which fraud and corruption build on one another, the DAP case also exemplifies what the SEC called "no honor among thieves," as certain defendants deceived Gonzalez as to the true extent of the marked-up fees, keeping the remainder for themselves.[10]

Continued on page 4

6. Second Amended Complaint, *SEC v. Bethancourt*, 2014 WL 3867760, No. 13-CV-03074-JMF, ¶ 93 (S.D.N.Y. Apr. 14, 2014).
7. *Id.* ¶¶ 51-60.
8. *Id.* ¶¶ 65-75.
9. *Id.* ¶ 67.
10. *Id.* ¶¶ 83-89.

Continued from page 3

Additional Individual Charges, Guilty Pleas, and Sentencing

Following the initial May 2013 indictments of Clarke, Hurtado, and Gonzalez, the case expanded to encompass additional DAP officers and employees. On June 12, 2013, the DOJ announced charges against Ernesto Lujan, the Managing Partner of DAP Global LLC and head of DAP's Miami office.[11] The SEC added Lujan as a defendant in its civil action on the same day.[12]

On August 30, 2013, Clarke, Hurtado, and Lujan pleaded guilty in New York federal court to conspiring to violate the Travel Act and to commit money laundering as well as to substantive counts of the same offenses.[13] On November 18, 2013, Gonzalez pleaded guilty to conspiracy, money laundering, and Travel Act offenses.[14]

In April 2014, the DOJ announced additional charges against Benito Chinea, co-founder and CEO of DAP, and Joseph DeMeneses, DAP's managing partner for global strategy, who were indicted for conspiracy to pay and launder bribes to Gonzales.[15] On the same day, the SEC amended its complaint to include Chinea and DeMeneses as defendants.[16] Chinea and DeMeneses pleaded guilty on December 17, 2014.[17]

In March 2015, Chinea and DeMeneses, the most senior executives at DAP, were each sentenced to four years in prison and ordered to pay forfeiture of approximately $3.6 million and $2.7 million, respectively.[18] In December of the same year, Lujan and Clarke were sentenced to two years in prison and ordered to pay forfeiture of

Continued on page 5

11. U.S. Dep't Justice, Press Release 13-670, *Managing Partner of U.S. Broker-Dealer Charged in Manhattan Federal Court with Participating in Massive International Bribery Scheme* (June 12, 2013), https://www.justice.gov/opa/pr/managing-partner-us-broker-dealer-charged-manhattan-federal-court-participating-massive.
12. U.S. Sec. Exch. Comm'n, Press Release 2013-109, *SEC Announces More Charges in Massive Kickback Scheme to Secure Business of Venezuelan Bank* (June 12, 2013), https://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171574826.
13. U.S. Dep't Justice, Press Release 13-980, *Three Former Broker-dealer Employees Plead Guilty in Manhattan Federal Court to Bribery of Foreign Officials, Money Laundering and Conspiracy to Obstruct Justice* (Aug. 20, 2013), https://www.justice.gov/opa/pr/three-former-broker-dealer-employees-plead-guilty-manhattan-federal-court-bribery-foreign.
14. U.S. Dep't Justice, Press Release 13-1229, *High-Ranking Bank Official at Venezuelan State Development Bank Pleads Guilty to Participating in Bribery Scheme* (Nov. 18, 2013), https://www.justice.gov/opa/pr/high-ranking-bank-official-venezuelan-state-development-bank-pleads-guilty-participating.
15. U.S. Dep't Justice, Press Release 14-381, *CEO and Managing Partner of Wall Street Broker-Dealer Charged with Massive International Bribery Scheme* (Apr. 14, 2014), https://www.justice.gov/opa/pr/ceo-and-managing-partner-wall-street-broker-dealer-charged-massive-international-bribery.
16. U.S. Sec. Exch. Comm'n, Press Release 14-74, *SEC Charges Brokerage Firm Executives in Kickback Scheme to Secure Business of Venezuelan Bank* (Apr. 14, 2014), https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370541487258.
17. U.S. Dep't Justice, Press Release 14-1421, *CEO and Managing Director of U.S. Broker-Dealer Plead Guilty to Massive International Bribery Scheme* (Dec. 17, 2014), https://www.justice.gov/opa/pr/ceo-and-managing-director-us-broker-dealer-plead-guilty-massive-international-bribery-scheme.
18. U.S. Dep't Justice, Press Release 15-382, *CEO and Managing Director of US Broker-Dealer Sentenced for International Bribery Scheme* (Mar. 27, 2015), https://www.justice.gov/opa/pr/ceo-and-managing-director-us-broker-dealer-sentenced-international-bribery-scheme.

Continued from page 4

approximately $18.5 million and $5.8 million, respectively.[19] Both Clarke and Lujan cooperated and the Government requested downward departures from the standard sentences for both defendants.[20]

That same month, Hurtado, who also acted as a cooperating witness, was sentenced to three years in prison and ordered to pay forfeiture of over $11.8 million.[21] Hurtado's longer sentence is hard to explain, as his base sentencing level was the same as Lujan's,[22] and the Government also requested a downward departure. Moreover, Lujan personally profited more from the scheme than did Hurtado,[23] (though it was Hurtado who made the first introduction to Gonzalez).

Finally, in January 2016, Gonzalez, who had spent 16.5 months in jail since her arrest, was sentenced to time served and ordered to pay forfeiture of approximately $5 million.[24] Gonzalez's lenient sentence might seem odd, since, as the foreign official, she alone among the defendants violated a public duty. However, the judge noted "the degree of remorse" shown by Gonzalez[25] and the Government's sentencing memorandum noted "it is rare in the context of FCPA prosecutions for the Government to be able to call to the stand the actual bribe recipient, who could testify regarding the unequivocal quid pro quo nature of the payments she received…"[26]

On April 6 and 7, 2016, final judgments were entered against defendants Iuri Rodolfo Bethancourt, Benito Chinea, Tomas Alberto Clarke Bethancourt, Joseph DeMeneses, Jose Alejandro Hurtado, Ernesto Lujan, and Haydee Leticia Pabon in the SEC's civil action. The defendants were enjoined from further

Continued on page 6

19. Nate Raymond, *Ex-brokerage Executive Gets Two Years in U.S. Prison over Venezuelan Bribes*, Reuters (Dec. 4, 2015), http://www.reuters.com/article/us-venezuela-usa-corruption-idUSKBN0TN2NZ20151205; Dylan Tokar, *DAP Executive Tomas Clarke Sentenced*, Global Investigations Rev. (Dec. 9, 2015), http://globalinvestigationsreview.com/article/1024535/dap-executive-tomas-clarke-sentenced.

20. Dylan Tokar, *DAP Executive Tomas Clarke Sentenced*, Global Investigations Rev. (Dec. 9, 2015), http://globalinvestigationsreview.com/article/1024535/dap-executive-tomas-clarke-sentenced; Government's Sentencing Memorandum, *United States v. Lujan*, No. 13-cr-00617-DLC (S.D.N.Y. Dec. 4, 2015).

21. Josh Kovensky, *DAP Cooperating Witness Sentenced to Three Years Behind Bars*, Global Investigations Rev. (Dec. 16, 2015), http://globalinvestigationsreview.com/article/1024551/dap-cooperating-witness-sentenced-bars.

22. Government's Sentencing Memorandum at 9, *United States v. Hurtado*, No. 13-cr-00673-DLC (S.D.N.Y. Dec. 9, 2015).

23. *Id.* at 5.

24. Nate Raymond & Brendan Pierson, *Ex-Venezuela Bank Official Avoids Prison Time in Bribery Case*, Reuters (Jan. 15, 2016), http://www.reuters.com/article/venezuela-usa-corruption-idUSL2N14Z348.

25. Dylan Tokar, *Former Venezuelan bank official sentenced for DAP bribery case*, Global Investigations Rev. (Jan. 19, 2016), http://globalinvestigationsreview.com/article/1024579/former-venezuelan-bank-official-sentenced-for-dap-bribery-case.

26. Government's Sentencing Memorandum at 7, *United States v. Gonzalez,* No. 13-00901-DLC (S.D.N.Y. Jan. 19, 2016).

Resolutions of the Direct Access Partners Case and the Panama Papers: A Caution for Financial Sector Anti-Corruption Compliance
Continued from page 5

violations of the Securities Laws, and defendants Chinea, Clarke, DeMeneses, Hurtado, and Lujan were ordered to pay $42,506,171 in disgorgement and prejudgment interest.[27]

A Preview of Things to Come? DAP and the Panama Papers

The DAP case came about after some incriminating evidence was discovered in the course of a routine SEC examination of DAP. Without this fortuitous event, the DAP action might not have happened, as it is more common for FCPA cases to come to authorities' attention through other channels, including as the result of voluntary self-reporting.

Although unrelated in this case – despite the Panama connection to DAP – the coincident release of the Panama Papers could signal a different source of such cases in the future. With the information from the Panama Papers and, more importantly, a future stream of information likely to come from international efforts to crack down on tax havens, enforcement authorities will soon have a greater ability to trace transactions undertaken by the offshore entities back to the source instead. This essentially means conducting the DAP investigation in reverse, for example, by identifying the names of broker-dealers in the stolen materials released by the ICIJ.[28]

The United States Department of the Treasury has already announced new rules to counter money laundering (an element of the DAP case), requiring enhanced due diligence procedures for banks, broker-dealers, and other financial market participants.[29] In addition, the Department of Justice has proposed legislative changes making it easier for the DOJ to obtain overseas bank records and expand the scope of bribery-related money-laundering prosecutions.[30] Given the likelihood of increased scrutiny and the significant sentences and monetary forfeiture in

Continued on page 7

27. U.S. Sec. Exch. Comm'n, Litigation Release No. 23513, *SEC Obtains Settlement in Kickback Scheme to Secure Business of Venezuelan Bank* (Apr. 8, 2016), https://www.sec.gov/litigation/litreleases/2016/lr23513.htm.

28. *Cf.* Carmen Germaine, *Panama Papers to Provide Fertile FCPA Hunting Ground*, Law 360 (May 9, 2016), http://www.law360.com/articles/794022.

29. U.S. Dep't Treasury, *Treasury Announces Key Regulations and Legislation to Counter Money Laundering and Corruption, Combat Tax Evasion* (May 5, 2016), https://www.treasury.gov/press-center/press-releases/Pages/jl0451.aspx.

30. U.S. Dep't Justice, Press Release 16-530, *Justice Department Proposes Legislation to Advance Anti-Corruption Efforts* (May 5, 2016), https://www.justice.gov/opa/pr/justice-department-proposes-legislation-advance-anti-corruption-efforts.

Continued from page 6

the DAP action, companies that use offshore vehicles would do well to institute additional controls, including due diligence on their own (and their employees') dealings, ensuring that such vehicles are used properly.[31]

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Continued on page 8

31. *See, e.g.,* Nicholas M. Berg, Kim B. Nemirow & Jaime Orloff Feeney, *Effective FCPA Compliance Strategies in the Wake of the Panama Papers*, 5 FCPA Report 9 (May 4, 2016), http://fcpareport.com.

France Takes Steps to Implement Its Anti-Corruption Laws – or Does It?

In 2015, in response to widespread criticism that French authorities had not achieved acceptable results in the fight against international bribery, the Government of France indicated that it would be submitting new legislation. The proposal would be intended to strengthen French prosecution procedures and allow its prosecutors to achieve better results, particularly with regard to overseas bribery. One key element of the draft bill – known as the "Loi Sapin 2," after Michel Sapin, the Minister of Finances who proposed it[1] – was to introduce, for the first time in France, a provision similar to a Deferred Prosecution Agreement ("DPA") as practiced for some years in the United States and, since 2014, in the United Kingdom. At the last minute, however, the *Conseil d'Etat*, France's highest administrative court, issued an unfavorable opinion on this particular proposal, which was then dropped from the proposed legislation. The bill, without the DPA proposal, is now before the legislature, which may debate it over the coming weeks, including possibly whether to include a DPA procedure notwithstanding the position of the *Conseil d'Etat*.

This article reviews the current status of affairs in France relating to its efforts to fight overseas bribery: the history, current structure, and potential future of the proposed legislation, as well as possible next steps.

1. France's efforts to fight overseas corruption

Until 2000, payment of bribes to officials outside of France was essentially tolerated by French authorities: there was no criminal legislation specifically prohibiting such conduct, and in many instances corporations were permitted to take a tax deduction for such payments. In 1997, the Organization of Economic Cooperation and Development ("OECD") promulgated the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention"), which obligated its signatories to adopt legislation criminalizing overseas bribery, essentially along the lines of the Foreign Corrupt Practices Act, which had been enacted twenty years earlier.

The obvious purpose of the OECD Convention was to create a "level playing field" where common rules would be applied on a common basis by authorities in all the major industrialized nations whose companies might be tempted to engage

Continued on page 9

1. Michel Sapin was also at the origin of the "Loi Sapin 1," which was adopted in 1993 while he was Minister of Economy and Finances under President François Mitterrand, and represented France's first effort to enhance its anti-corruption efforts.

France Takes Steps to Implement Its Anti-Corruption Laws – or Does It?

Continued from page 8

in overseas bribery. Absent even-handed prosecution, nationals of any country whose officials posed a real threat of prosecution for overseas bribery operated at a severe competitive disadvantage to companies from countries whose laws on that subject either did not exist or were not enforced. Mindful of the need to evaluate actual efforts to implement legislation, the OECD has engaged in periodic review of the efforts of each of its signatory nations to evaluate not only the efficacy of their laws adopted pursuant to the Convention, but their efforts to prosecute and achieve visible results.

Pursuant to its obligations under the OECD Convention, in 2000, France adopted Article 435-3 of its Penal Code, which criminalizes the payment of anything of value to an official or of a representative of an official of a foreign country.[2] This law is, in its general outline, thus comparable to the FCPA.

In the sixteen years since the adoption of this law, France's efforts to enforce it have produced meager results. With two limited exceptions, not a single French corporation has yet been convicted under the new statute for overseas corruption. In 2012, there was a short-lived exception, when the French technology company Safran was found guilty after trial for having been responsible for payments made in Nigeria that were found by the trial court to have led to the award of a very significant contract to Safran. On appeal, the Public Prosecutor formally took the position that Safran should be acquitted, while at the same time urging the conviction of its employees who were accused of having made the payments in question, because the proof did not demonstrate the corporate criminal responsibility of Safran for the acts of its agents. Not surprisingly, the Court of Appeals in fact acquitted Safran, though it also acquitted the two individuals in question.[3]

The only other exception was that in February 2016, the Court of Appeals in Paris convicted all of the defendants in the so-called Oil-for-Food case, including French oil giant Total S.A. and the Italian company Vitol S.A. That said, the Oil-for-Food cases[4] did not include classic "bribery" in the sense of a payment to the

Continued on page 10

2. The official English translation of the French Penal Code can be found at https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations.

3. *See* Frederick T. Davis, "The Fight Against Overseas Bribery – Does France Lag?" *Ethic Intelligence* (Jan. 2015), http://www.ethic-intelligence.com/experts/7546-fight-overseas-bribery-france-lag/; and Frederick T. Davis, "Corporate Criminal Responsibility in France – Is It Out of Step?" *Ethic Intelligence* (April 2015), http://www.ethic-intelligence.com/experts/8344-corporate-criminal-responsibility/.

4. There were two Oil-for-Food cases, known as Oil-for-Food I and Oil-for-Food II. The February 2016 Decision by the Court of Appeals related to Oil-for-Food I, in which an acquittal of all the defendants had been announced in June 2013. Pursuant to French procedures permitting such appeals, the Public Prosecutor appealed this acquittal and obtained a conviction of all the defendants. In June 2015, a separate group of defendants in Oil-for-Food II went to a separate criminal trial which also resulted in an acquittal of all the defendants; the Public Prosecutor is appealing that acquittal.

France Takes Steps to Implement Its Anti-Corruption Laws – or Does It?
Continued from page 9

personal benefit of a dishonest agent of a government in order to influence that government's decision. Rather, this scheme involved so-called "surcharges" paid directly to the regime of Saddam Hussein in Iraq, beyond the appropriate amounts paid into the UN escrow account, in violation of embargoes of that country prior to the US invasion in 2003.

The trial courts in both Oil-for-Food I and Oil-for-Food II concluded that since the funds in question went to the regime itself and not to a faithless agent, it did not constitute "bribery." This reasoning was rejected by the Court of Appeals in Oil-for-Food I, which held that private gain was not a necessary element of conviction under France's overseas corruption statute, and that it sufficed to show that the defendants in question had covertly violated the UN Oil-for-Food regulations and the Iraqi laws implementing them. Presumably, this reasoning may be applied during the appeal of Oil-for-Food II, which is presently underway.

"The bill, without the DPA proposal, is now before the legislature, which may debate it over the coming weeks, including possibly whether to include a DPA procedure notwithstanding the position of the *Conseil d'Etat*."

The fact therefore remains that no French company has ever been convicted in France of classic overseas bribery. As a result, France has been heavily criticized by the OECD in the course of its period review of national efforts to combat overseas corruption, notably in the 2014 report of the OECD Working Group's review of France.[5] This criticism was echoed in the "EU Anticorruption Report" on France issued the same year.[6] In 2015, Transparency International also noted that France had only been a "limited enforcer" of its anti-corruption laws.[7]

Continued on page 11

5. OECD Report, "France: Follow-up to the Phase 3 Report and Recommendations" (Dec. 2014), http://www.oecd.org/daf/anti-bribery/France-Phase-3-Written-Follow-up-ENG.pdf.

6. European Commission, "France to the EU Anti-corruption Report" (Mar. 2, 2014), http://www.google.fr/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCUQFjAAahUKEwjgrsC4vuDIAhWEGz4KHfpGDBQ&url=http%3A%2F%2Fec.europa.eu%2Fdgs%2Fhome-affairs%2Fwhat-we-do%2Fpolicies%2Forganized-crime-and-human-trafficking%2Fcorruption%2Fanti-corruption-report%2Fdocs%2F2014_acr_france_chapter_en.pdf&usg=AFQjCNGJJcgMbsGSY6qnKtDQ84uklwzpIQ.

7. Transparency International, "Exporting Corruption – Progress Report 2015: Assessing Enforcement of the OECD Convention on Combating Foreign Bribery" at 5 (2015), http://www.transparency.org/whatwedo/publication/exporting_corruption_progress_report_2015_assessing_enforcement_of_the_oecd.

Continued from page 10

In the meantime, four very large French companies – Total, Alstom, Alcatel and Technip – all entered into DPAs (as well as, in some instances, guilty pleas) negotiated with the US Department of Justice and in some instances with other US prosecuting or administrative authorities.[8] And it appears that all of these companies could have been prosecuted by French authorities; those authorities are clearly competent to prosecute their own corporate nationals,[9] and in any event it appears evident that at least some of the constitutive acts took place in France.[10] Indeed, the "center of gravity" in each case could hardly be said to have been in the United States, which generally had only a limited connection with the matters in question. Indeed, the US Department of Justice may have pursued these entities in significant part because the French authorities had not done so.

There are a number of theories why France lags so noticeably. It seems unlikely that the disparity can be explained by a hypothesis that French companies engage in overseas bribery far less than nationals of other countries. Such a theory would be inconsistent with both studies of the relative incidence of corruption in France[11] and the fact that four large French companies have acknowledged responsibility for such payments in the context of negotiated outcomes with the US Department of Justice.

Rather, the most plausible explanations for the disparity focus on anomalies of French procedures that make definitive outcomes of bribery investigations much more difficult in France than in other countries.[12] Two such procedures are particularly noteworthy.

First, France has lacked any procedural mechanism that facilitates negotiated outcomes of criminal investigations. Since 2011, a French procedure known as a CRPC, which essentially means an "appearance based on a recognition of guilt,"

Continued on page 12

8. U.S. Department of Justice, "Alstom Pleads Guilty and Agrees to Pay $772 Million Criminal Penalty to Resolve Foreign Bribery Charges," Dec. 22, 2014, available at https://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery; *United States v. Technip S.A.*, No. 10-cr-439 (S.D. Tex. June 28, 2010), available at https://www.justice.gov/criminal-fraud/case/united-states-v-technip-sa-court-docket-number-10-cr-439; https://www.justice.gov/opa/pr/french-oil-and-gas-company-total-sa-charged-united-states-and-france-connection-international; *United States v. Alcatel-Lucent France, S.A., et al*, No. 10-cr-20906 (S.D. Fla. Dec. 27, 2010), available at https://www.justice.gov/criminal-fraud/case/united-states-v-alcatel-lucent-france-sa-et-al-court-docket-number-10-cr-20906.

9. *See* Code Pénal [C. PÉN] [Penal Code] art. 113-6 (Fr.). Note also that art. 4(1) of the OECD Convention contemplated that signatory nations would be competent to prosecute their nationals.

10. *Id.* at art. 113-2 (noting that an infraction is deemed to have been committed in France if any constitutive element took place there).

11. *See, e.g.*, "Les Priorites des Services Achats en 2015 Ou la Maniere don't Seront Geres les Sous-triaitants en 2015", http://www.google.fr/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CCsQFjABahUKEwiinLPbu-DIAhXIGz4KHeEnAaE&url=http%3A%2F%2Fwww.agilebuyer.com%2Fmemo%2Fpresse%2FEnquete_AgileBuyer-HEC_Tendance_2015_150104_web.pdf&usg=AFQjCNFmfBzgTW-c4vGNVAis-JmqLW9h_A.

12. *See* Sarah Krys, "France's Failure to Fight Foreign Bribery: the Problem is Procedure", *Global Anticorruption Blog* (Dec. 14, 2015), http://globalanticorruptionblog.com/2015/12/14/frances-failure-to-fight-foreign-bribery-the-problem-is-procedure/; Davis, supra, at 3.

France Takes Steps to Implement Its Anti-Corruption Laws – or Does It?
Continued from page 11

has been applicable to financial crimes committed by corporations, including overseas bribery.[13] In those four years, only one single company – a Swiss bank – has used this procedure to resolve a criminal investigation by means of a guilty plea.[14] The reason for this may be that the CRPC procedure ends in an acknowledgement of guilt and a criminal conviction, which under some circumstances may be an intolerable outcome, especially for companies for which participation in public bidding is impossible upon a conviction. In addition, the CRPC procedure can be quite complicated to implement, in particular when it is proposed by an investigative magistrate during an "*instruction*" – an *instruction* being in general mandatory in the context of investigation pertained to complex offenses. In such case, a negotiated outcome can occur only with the consent of four separate parties or entities, namely, the corporation itself, any victims who have appeared in the matter,[15] the public prosecutor, and the judge, who must approve the agreement.

A second disparity between the laws of France and the United States is the fundamental difference in the approach to corporate criminal responsibility. A corporation facing prosecution in the United States can only rarely argue that it does not bear criminal responsibility for a bribe made by any of its employees or on its behalf if done even generally in the interests of the corporation. Under Department of Justice guidelines, a corporation may well argue that a particular infraction was done in violation of its stated policies and in defiance of an existing compliance program. Such an argument at least may in rare cases, cause prosecutors to exercise discretion and decline prosecution entirely. But it does not constitute a legal defense. More commonly, such arguments may, again as a matter of prosecutorial discretion, help avoid a criminal conviction (through negotiation of a deferred prosecution or non-prosecution agreement) or result in a reduction of criminal fines or penalties. The fact remains, however, that the corporation will know that it will most likely be held responsible for any corrupt acts found during an investigation to have been committed by an employee or anyone acting on its behalf. This, of course, creates an immediate incentive for the corporation to take charge of the matter, to investigate the extent of its likely responsibility, and to arrange a negotiated outcome sooner rather than later.

Continued on page 13

13. The CRPC procedures are set forth in articles 180-1 and 495-7 to 495-16 of the French Code of Criminal Procedure, which is also available in English translation, see fn.supra.

14. Frederick T. Davis, "First Corporate Guilty Plea in France – Will There Be More?" *Ethic Intelligence* (Feb. 2016), http://www.ethic-intelligence.com/experts/11539-first-corporate-guilty-plea-france-will/.

15. Under French criminal procedures, the victims – in some instances, including organizations expressing an interest in the matter – can become "*parties civiles*," which is a formal status to a criminal matter including access to the file, participation in a trial, and all procedural access to the case. *See generally* Frederick T. Davis & Antoine Kerry, "France", in The International Investigations Review (2015).

France Takes Steps to Implement Its Anti-Corruption Laws – or Does It?

Continued from page 12

These incentives basically do not exist in France because of still-evolving interpretation of a relatively recent statute concerning corporate criminal responsibility by the courts and prosecutors. Until 1994, corporations could not, in general, be prosecuted criminally at all; exceptions existed only if a given particular statute – often in the environmental area – criminalized specific conduct and made the criminal penalties applicable to corporations. In 1994, the current article 121-2 of the Penal Code was adopted, which provides that a corporation or other corporate entity may be criminally responsible for the acts committed "on its behalf" by an "organ or representative" of the corporation.

While seemingly straightforward, this statute – and in particular the phrase "organ or representative" – has been the subject of inconsistent interpretation. In the *Continental Airways* case, for example, the airline was originally convicted of criminal negligence with respect to the July 25, 2000 crash of the Concorde because one of its employees had negligently fitted a piece of a Continental Airlines jet that dislodged on the tarmac of Charles de Gaulle airport and was found to have been the cause of the Concorde crash. On appeal, the Court of Appeals reasoned that because in the United States there was no recognizable "work contract" between Continental and the employee in question, it could not find the airline responsible for its employee's acts.[16] More recently, the position of the public prosecutor in the Safran case, noted above, where the public prosecutor specifically sought an acquittal of the corporation at the same time as the criminal conviction of its employees who had been alleged to have engaged in bribery, clearly suggested that French prosecutors see problems with obtaining corporate convictions in this area. The effect of this jurisprudence on corporate strategy is major: whereas a decision-maker of a company facing prosecution in the United States has every incentive to learn the facts, gain maximum control over the procedures, and arrange an early and advantageous outcome – often by cooperating with the authorities – a decision-maker in a parallel circumstance in France shares very little or any of this incentive. Instead, corporate criminal investigations often last upwards of 10 years; as noted above there remains a very decent chance of an acquittal based on the still-evolving jurisprudence under article 121-2; and the maximum penalties are relatively small.[17] There is no reason to negotiate.

Continued on page 14

16. Versailles Court of Appeals, chamber 8, B, November 29, 2012, *Continental Airlines Inc – Ford Stanley – Frantzen Claude – Taylor Jonh – Perrier Henri – Herubel Jacques c/ parties civiles et autres*, RG n° 11/00332.

17. In the *Safran* case for example, after Safran was originally convicted at trial, it received the maximum fine then possible, which was €500,000 - in the context of a transaction that was alleged to have had a value of €250 million. In 2014 the maximum penalties were raised so that corporations now can be fined up to €5 million for corporate bribery. This amount is still relatively modest compared to the outcomes in US proceedings; furthermore, French authorities generally do not accumulate fines by making independent "counts" out of each act of bribery. See Davis & Kirry, *supra* note 15, at 130-31.

Continued from page 13

2. The Proposed – And Then Largely Withdrawn – Reform

In response to these criticisms, finance minister Michel Sapin announced in 2015 that his ministry would propose a comprehensive set of amendments to France's procedures for tackling corruption, which proposed law ultimately became known as the "Loi Sapin 2." Under French procedures, this proposed law was not made public in the first instance, but rather was submitted to the *Conseil d'Etat*, France's highest administrative court that also opines on proposed legislation before it is submitted to Parliament. During the course of this review by the *Conseil d'Etat*, unofficial but nonetheless clearly authentic copies of the proposed law were in circulation, and several articles appeared in the French press analyzing the draft bill.

"As set forth in the proposed law, the Agreement for Restitution in the Public Interest procedure was clearly designed to achieve some of the ends of an American or UK Deferred Prosecution Agreement, but within the context of existing French criminal procedures."

In the form proposed to the *Conseil d'Etat*, the law provided for these principal changes with respect to the laws and practices in the area of international corruption:

- It created a new agency, called the *Agence nationale de détection et de prévention de la corruption* ("National Agency for the Detection and the Prevention of Corruption"). This new agency would replace a current inter-ministerial agency known as the SCPC, which stands for the "Central Service for the Prevention of Corruption," and which has been widely viewed as ineffective. The new agency would be tasked with issuing guidelines respecting the new obligation (described below) for French enterprises to adopt compliance programs, and would have the limited ability to investigate such companies in order to impose, where appropriate, an administrative sanction for failure to maintain an adequate compliance program.
- The proposed act created a new obligation for all corporations over a certain size to adopt compliance programs to meet the guidelines set forth by the new agency. It also provided that in the event of a criminal investigation, the existence and extent of such a program could be viewed as a mitigating factor with respect to the corporate sentence imposed.

Continued on page 15

France Takes Steps to Implement Its Anti-Corruption Laws – or Does It?

Continued from page 14

- The law proposed certain technical changes with respect to the procedures governing extraterritorial application of France's purchasing laws in order to facilitate their application to French corporate activity overseas.
- Most importantly, the proposed act included a set of amendments to the French Code of Criminal Procedure to introduce a new procedure, called an "Agreement for Restitution in the Public Interest" (*Convention de compensation d'intérêt public*) to permit a negotiated outcome without a criminal conviction for offenses of corruption and traffic in influence.

As set forth in the proposed law, the Agreement for Restitution in the Public Interest procedure was clearly designed to achieve some of the ends of an American or UK Deferred Prosecution Agreement, but within the context of existing French criminal procedures. Specifically, under the new provision, until such time as a "public action" had commenced,[18] the corporate entity and the prosecutor could enter into an agreement to defer prosecution; after the commencement of the "public action." Then, any negotiated outcome would presumably have to comply with the more complex procedures of the CRPC described above and would result in a guilty plea. The purpose of such an agreement would be to set forth the terms under which the corporate defendant would make specified payments to the French treasury and would engage in supervised remediation efforts such as a new or improved compliance program. At the end of an agreed-upon period, the agreement would be complete, and the "public action" would be "extinguished," thereby prohibiting any future prosecution of the matter. The provision further noted that the maximum possible penalty to be imposed on a corporation was 30% of the average annual turnover over the previous three years.

As drafted, this proposed procedure had a number of anomalies:

- First, the procedure only applied to corporations and only with respect to alleged violations of corruption and similar corporate infractions. It was not intended to be available with respect to any other form of criminal activity. The reason for this is clear: the law was adopted only in response to the perceived threat that American authorities, and potentially British ones as well, will continue to prosecute French companies, and was viewed as an effort to meet that specific threat rather than to revise French criminal laws generally.

Continued on page 16

18. The notion of "public action" (called "*action publique*" in French) refers to the stage of the French criminal procedure when an act or a defendant (author of the act and/or his accomplices) are referred to the competent judicial authority, in order to (i) establish whether the act constitutes an offense under French criminal law (i.e. matter referred *in rem* to the investigating magistrate), (ii) determine whether the defendant is guilty, and (iii) impose an appropriate sanction on the defendant. The *action publique* is generally initiated by the French Public Prosecutor on behalf of the society, but can also be triggered by any person who claims being the victim of an offense. Under French law, once the *action publique* is "extinguished" as to specific defendants (e.g. due to death, *res judicata*, expiration of the statute of limitation, amnesty), they cannot be prosecuted for the acts in question. *See* Code De Procédúré Pénale [C. PR. PEN] [Criminal Procedure Code] art. 6(Fr.).

Continued from page 15

- The new procedure would be available only until such time as the "*action publique*" commenced. As a practical matter, this would mean that an investigating magistrate, for example, could preclude the availability of such an outcome by giving a corporation being investigated the status of "*mis en examen*," which basically designates it as a formal target and would instigate the *action publique*.[19] As noted above, once the *action publique* would have started, the much more complicated procedures of the CRPC would be the only negotiated procedure available, with the only possible outcome to include a corporate guilty plea.
- The maximum fine to which a corporate could agree under the proposed procedure was 30% of the average annual turnover during the preceding three years. The actual number would be the subject of negotiation. And the size of this maximum would, of course, depend upon the turnover of the relevant company. But in general, it would appear to be significantly higher than the maximum penalty of US$5 million that would be permissible had the corporation proceeded to trial.

These and other practical questions that might arise under this provision were obviated when, at the very last minute, the *Conseil d'Etat* issued its opinion respecting the Loi Sapin 2.[20] While it approved many of the provisions of the proposed law – including the institution of a new agency and the amendment of France's laws on extraterritoriality – it disapproved of the negotiated outcome. Its principal criticisms were that the provision did not include the rights of victims either to participate in the decision whether to enter into such agreement (such as would be the case with respect to a CRPC), or in the financial outcome, and that its scope would be limited only to overseas bribery as opposed to domestic corruption. The *Conseil d'Etat* also was of the view that if such a procedure was ever to be adopted, it should be available to both corporations and individuals.

As a result of this opinion, and even though drafts of the proposed law including the new proposed procedure were circulating as recently as a few days before the opinion was released on March 30, 2016, the proposed bill released on that date dropped the proposal concerning a new procedure.

Continued on page 17

19. *See* Davis &Kirry, *supra* note 15, at 130.

20. Le Conseil d'État et la juridiction administrative, "Projet de loi relatif à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, Conseil d'État (March 30, 2016), http://www.conseil-etat.fr/Decisions-Avis-Publications/Avis/Selection-des-avis-faisant-l-objet-d-une-communication-particuliere/Projet-de-loi-relatif-a-la-transparence-a-la-lutte-contre-la-corruption-et-a-la-modernisation-de-la-vie-economique. (Fr.).

Continued from page 16

3. The Next Steps?

It is unclear how the Loi Sapin 2 will fare in the French legislature, which will now review the proposed law as submitted to it – that is, without the DPA equivalent in it. Legislators could insist on restoring some sort of negotiated outcome to the legislation, notwithstanding the contrary opinion by the *Conseil d'Etat*.[21] Finance minister Sapin has indicated that he will push in that direction. On the other hand, a number of highly visible NGOs have formally filed submissions opposing any form of negotiated outcomes that do not include a formal criminal conviction, on the ground that such outcomes are not only unfair to victims but also would treat corporations too leniently.[22] In addition, there is still a lingering distrust of negotiated criminal outcomes, including among sitting judges, who have voiced their displeasure over the proposed procedure.[23]

"Any future steps by the French legislators to amend French laws, procedures, and practices will, however, have to do more than simply create a procedure that permits a negotiated outcome along the lines of a DPA."

Longer term, it seems highly likely that one way or another French procedures will evolve to permit more efficacious treatment of overseas bribery cases. As noted above, absent increased performance results by French authorities that seem to be highly unlikely under the current procedures there will be continuing and even increased pressure from American prosecutors against French corporations viewed as having violated the principles of the OECD Convention. NGOs such as Transparency International as well as the OECD Working Group will keep up their pressure on France. And not only the United Kingdom, but other nations in Europe and elsewhere, are moving in the direction of allowing negotiated outcomes and thereby streamlining their processes for dealing with overseas corruption.

Continued on page 18

21. Notably, the *Conseil d'Etat* did not suggest that such a DPA equivalent would be unconstitutional, but rather opined on its fairness and efficacy.

22. *See, e.g.*, "Projet de loi Sapin II : les propositions de 14 organisations de la société civile", Anticor (March 24 2016), http://www.anticor.org/2016/03/24/projet-de-loi-sapin-ii-les-propositions-de-14-organisations-de-la-societe-civile/ (Fr.).

23. In 2013, two well-known commentators edited a collection of essays under the title *Deals de Justice: Le Marché Américain de l'Obéissance Mondialisée* that were in general critical of DPAs. A common element of the discussion, which was reflected in the opposition of many judges to the proposed Loi Sapin 2, was that a DPA, at least as practiced in the United States, "privatized justice" by relying on a negotiated outcome rather than a neutral factual finding by a judge.

France Takes Steps to Implement Its Anti-Corruption Laws – or Does It?
Continued from page 17

Any future steps by the French legislators to amend French laws, procedures, and practices will, however, have to do more than simply create a procedure that permits a negotiated outcome along the lines of a DPA. Such steps have to ensure that companies actually have an incentive to use such a procedure. There are several reasons for this.

First, the current state of the law on corporate criminal responsibility under article 121-2 of the Penal Code stands as a clear disincentive to French corporate decision makers to enter into negotiations. As long as they know that an investigation will take a long time and that the corporation, itself, has a healthy possibility of a defense on this ground, there is little incentive to enter into an early negotiation.

Second, the proposed Loi Sapin 2 as well as existing French procedures are silent on the issue of "cooperation" – that is, the principle that a corporation reaching a deal with the prosecutor will share all available information, including evidence that might be highly incriminating of the corporation's employees and even its senior officers, in exchange for a mitigated penalty. A strongly worded insistence on obtaining such information on an early basis was a hallmark of the so-called "Yates Memorandum" issued by the US Department of Justice in October 2015. This pronouncement emphasized the DOJ's expectation of full cooperation in identifying culpable individuals in order for a corporation to receive credit and reaffirmed the DOJ's policy to pursue individuals as well as corporations. In this respect only, the *Conseil d'Etat*'s opinion may have made a point by advising the French Government to adopt a DPA procedure that will be available to both corporations and individuals.

Taken together, these trends will create difficulties for any company faced with an investigation,[24] including how to handle an internal investigation that may include interviews with individuals at risk of incrimination.[25] In France, such "cooperation" issues are particularly problematic, because French corporations have

Continued on page 19

24. *See* Frederick T. Davis, "The DOJ 'Yates Memorandum'- What is it, and Why Does it Matter?", Ethic Intelligence (Sept. 2015), http://www.ethic-intelligence.com/experts/9759-doj-yates-memorandum-matter/?wb48617274=334D2872 (discussing difficulties in implementing a procedure involving "cooperation" with U.S. authorities.).

25. Internal investigations such as practiced in the United States are not regularly conducted in France. There has been a significant debate whether French lawyers can even participate in such an investigation without violating professional responsibility principles. Very recently, a committee appointed by the Paris Bar issued a thoughtful report concluding that members of the Bar could in fact participate in internal investigations, even with respect to a corporation that they were advising or representing, but also noted that the conduct of such investigations might be carefully scrutinized by the Bar and that the Committee would issue guidelines for such conduct after consulting among members of the Bar.

http://www.avocatparis.org/mon-metier-davocat/publications-du-conseil/rapport-sur-lavocat-charge-dune-enquete-interne (Fr.).

It remains to be seen how a report of such any internal investigation might be received by French authorities in the context of a negotiation.

France Takes Steps to Implement Its Anti-Corruption Laws – or Does It?
Continued from page 18

no experience with such agreements, and undoubtedly will face intense opposition from officers, employees, and workers' councils in the event of such investigations.

In summary, the last-minute hesitation of the French Government to introduce a significant change in its procedures for dealing with overseas corruption must be viewed in the context of inherent difficulties with addressing the problem that would not be fully resolved even with the adoption of the proposed legislation. It is likely to take considerable time before changes are made sufficient to remedy France's shortfall in this area.

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Continued on page 20

China Releases New Criminal Judicial Interpretation on Bribery

Last September, we noted significant changes regarding bribery made by the ninth amendment to China's Criminal Law ("**Amendment IX**").[1] Amendment IX defined degrees of bribery with vague terms such as "relatively large," "especially serious," and "huge."[2] On April 18, 2016, the Supreme People's Court (SPC) and the Supreme People's Procuratorate (SPP) – the highest judicial and prosecutorial organs in China – released a judicial interpretation[3] ("**Interpretation**") providing clarity on how criminal anti-bribery laws should be enforced by lower courts. The Interpretation is not a law, but guidance to lower courts and prosecutors on the interpretation of laws.[4] As they are not laws or regulations, such interpretations are more easily updated, especially, as in the case of the Interpretation, with regard to monetary thresholds.

The Interpretation addresses the definitions of and punishments for giving and receiving bribes, embezzlement, and misappropriation of official funds. Much of the document provides additional details on bribery crimes under the amended Criminal Law, which include (i) a clearer definition of bribes, (ii) more specific thresholds for prosecution and sentencing standards, (iii) detailed requirements for voluntary confession and leniency, and (iv) rules for determining the amount of monetary fines.

Clearer Definition of Bribery

Under the Criminal Law, a bribe means "money or property" offered to state functionaries, or other organizations or individuals, in return for securing inappropriate benefits.[5] The Interpretation broadly defines "money or property" to include "money, items and property-like benefits," and further specifies

Continued on page 21

1. Sean Hecker, Bruce E. Yannett, and Philip Rohlik, "China Amends its Bribery Laws," *FCPA Update*, Vol. 7, No. 2 (September 2015), http://www.debevoise.com/~/media/files/insights/publications/2015/09/fcpa_update_september_2015.pdf.
2. "Amendment to the Criminal Law of the People's Republic of China (IX)" [in Chinese: Z*hong Hua Ren Min Gong He Guo Xing Fa Xiu Zheng An (Jiu)*] (effective on Nov. 1, 2015). Unofficial draft translation available at Westlaw China, http://app.westlawchina.com/maf/china/app/document?&src=nr&doc guid=i000000000000014e6674ca111002816e&lang=en. *See* Hecker et al., *supra* note 1 at 18.
3. "Interpretations of the Supreme People's Court and the Supreme People's Procuratorate on Certain Issues Concerning the Application of Law in Handling Criminal Cases Involving Embezzlement and Bribery" [in Chinese: Zui Gao Ren Min Fa Yuan Zui Gao Ren Min Jian Cha Yuan Guan Yu Ban Li Tan Wu Fu Bai Hui Hu Xing Shi An Jian Shi Yong Fa Yu Ruo Gan Wen Ti De Jie Shi] (effective on Apr. 18, 2016). Unofficial English translation available at Westlaw China, http://app.westlawchina.com/maf/china/app/document?&src=nr&docguid=i000000000000015427 7211dd6c4c7851&lang=en (unless otherwise indicated, quoted language from the Interpretation is derived from this translation).
4. Jianfu Chen, "Chinese Law: Toward an Understanding of Chinese Law, Its Nature and Development," Kluwer Law International, 1999, at 106–110.
5. Criminal Law of the People's Republic of China" ("**Criminal Law**"), Arts. 163 and 385.

China Releases New Criminal Judicial Interpretation on Bribery
Continued from page 20

the last category to encompass "material interests that can be converted into monetary amount such as decoration of houses and exemption of debts, etc. and other interests requiring the payment of money such as membership services and travel, etc."[6] The value of "property-like benefits" – relevant to the determination of punishment – should be calculated with reference to the "the amount actually paid or required to be paid."[7]

The Interpretation also addresses the situation of a state functionary accepting payments that are offered after the fact, in thanks or exchange for services rendered. Such payments had often been considered (controversially)[8] gifts that do not constitute a bribe. The Interpretation clarifies that accepting such payments is a crime, although the Interpretation is silent with respect to giving. As a result, a state functionary commits a crime by accepting a benefit from someone whom the state functionary has benefitted, even if the beneficiary did not request the benefit.[9] Although it is not entirely clear, this provision may apply to the acceptance of commercial bribery as well.

Prosecution Thresholds and Sentencing Standards

The Interpretation raises the minimum thresholds at which a bribe should be subject to criminal prosecution.[10] Under older interpretations, the thresholds for bribery were identical for bribery of a state functionary and commercial bribery.[11] The Interpretation differentiates between bribery of state functionaries and commercial bribery, increasing the prosecution thresholds for both giving and receiving bribes to RMB 30,000 [approximately $4,700] for bribery involving state functionaries (or RMB 10,000 [approximately $1,560] in the presence of aggravating factors)[12] and RMB 60,000 [approximately $ 9,400] for commercial bribery (or RMB 20,000 [approximately $3,125] in the presence

Continued on page 22

6. Interpretation, Art. 12.
7. *Id.*
8. For example, one of the considerations for differentiating gifts and bribes established by the SPC and SPP in an earlier interpretation is "the cause, time and manner of money or property transaction, whether the person offering money or property has brought forward official request towards the recipient or not." *See* Opinions of the Supreme People's Court and the Supreme People's Procuratorate on Certain Issues Concerning the Application of Law in Handling Criminal Cases of Commercial Bribery (effective on Nov. 20, 2008) § 10.
9. Interpretation, Art. 13.3.
10. Bribery below the threshold is subject to various administrative or Party disciplinary procedures.
11. Provisions of the SPP on the Criteria on Initiating Cases Eligible for Direct Acceptance and Investigation by People's Procuratorates (Trial) (effective on Sep. 16, 1999) § 1(3)–(8); Provisions of the SPP on the Case-Filing Criteria for Crimes of Offering Bribes (effective on Dec. 22, 2000) § 1(1); Provisions of SPP and Ministry of Public Security regarding Criteria for Accepting Cases for Prosecution in respect of Criminal Cases under the Jurisdiction of Public Security Organ (Part 2) (effective on May 7, 2010), Arts. 10 & 11.
12. Interpretation, Arts. 1 & 7.

China Releases New Criminal Judicial Interpretation on Bribery
Continued from page 21

of aggravating factors).[13] With regard to state functionaries accepting bribes (the Interpretation is silent with respect to bribe payers), the Interpretation makes clear that these thresholds are cumulative (i.e., they may be met by a series of smaller payments).

> "The Interpretation raises the minimum thresholds at which a bribe should be subject to criminal prosecution…. The Interpretation differentiates between bribery of state functionaries and commercial bribery…."

The Interpretation also attaches monetary thresholds to the different degrees of bribery based on the size of the bribe (defined in the law with terms such as "relatively large," "huge," or "especially huge") or the circumstance of the crime (defined in the law with terms such as "relatively serious," "serious," "especially serious," etc.).[14] The Interpretation elaborates on these general standards by setting new and higher monetary thresholds and providing examples of certain serious circumstances.[15] For instance, the Interpretation substantially raises the minimum amount of bribes that could trigger the death penalty for state functionaries who accept bribes, from RMB 100,000 to RMB 3 million.[16] While the Interpretation is not entirely clear as to how the new thresholds apply to commercial bribery offenses (merely stating that the threshold for commercial bribery should be a multiple of

Continued on page 23

13. Interpretation, Art. 11.
14. Amended Criminal Law, Art. 383.
15. Interpretation, Arts. 1–3.
16. In exceptional cases, the threshold for death penalty could be RMB 1.5 million. Interpretation, Arts. 3 & 4.

China Releases New Criminal Judicial Interpretation on Bribery
Continued from page 22

the threshold for bribery involving a state functionary), the table below sets forth our current reading of the new thresholds:

Bribery crime	Threshold / Aggravated Threshold (RMB)	Punishment	Fine
State functionary accepting	30,000/10,000 – 200,000	Up to 3 years	100,000 to 500,000
State functionary accepting	200,000/100,000 – 3 million	3 to 10 years	200,000 or 2x amount of bribe
State functionary accepting	Over 3 million/ over 1.5 million	10 years to life, death penalty	500,000 or 2x amount of bribe
Bribing state functionary	30,000/10,000 – 1 million	Up to 5 years	100,000 or 2x amount of bribe
Bribing state functionary	1 million/500,000 – 5 million	5 to 10 years	100,000 or 2x amount of bribe
Bribing state functionary	Over 5 million/ over 2.5 million	10 years to life	100,000 or 2x amount of bribe
Accepting commercial bribe	60,000/20,000 – 1 million	Up to 5 years	100,000 or 2x amount of bribe
Accepting commercial bribe	Over 1 million/500,000	Over 5 years	100,000 or 2x amount of bribe
Offering commercial bribe	60,000/20,000 – 2 million	Up to 3 years	100,000 or 2x amount of bribe
Offering commercial bribe	Over 2 million/ 1 million	3 to 10 years	100,000 or 2x amount of bribe

Continued on page 24

Continued from page 23

Voluntary Confessions and the Calculation of Fines

The Interpretation also addresses the circumstances set forth in Amendment IX dealing with mitigating factors making defendants eligible for leniency, including voluntary confession by bribe payers. The Interpretation provides specific examples of what constitutes voluntary confession (and cooperation).[17]

The Interpretation also provides guidance on monetary fines that should be imposed, which has long been a matter of discretion for local courts and prosecutors.[18] The range of fines is set forth in the table above.

Conclusion

While President Xi Jinping's crackdown on corruption is now several years old, the Interpretation is the latest in a recent series of updates to the PRC's anti-corruption legislation, including Amendment IX and recent proposed amendments to the law governing commercial bribery,[19] These updates have served to modernize China's anti-corruption legislation and could presage a new stage in the anti-corruption campaign, possibly suggesting a new role for civil and criminal law in what has, to date, been a crackdown largely overseen by Party disciplinary organs.

Debevoise & Plimpton LLP, as all other foreign firms in China, is not admitted to practice PRC law in China. This article is based on our general experience in dealing with similar matters and consultation of published compilations of Chinese law.

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17. Interpretation, Art. 14.
18. "Regulations of the Supreme People's Court on Several Questions Concerning the Application of Property-Oriented Penalty" (effective on Dec. 13, 2000) §2 (giving discretion to local courts).
19. *See* Andrew M. Levine, Philip Rohlik and Christina Jie Wang, "China Proposes Amendments to its Commercial Bribery Legislation," *FCPA Update*, Vol. 7, No. 6 (March 2016), http://www.debevoise.com/insights/publications/2016/03/fcpa-update-march-2016.

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