

FCPA Update

November 2009 ■ Vol. 1, No. 4

Transparency International's 2009 Corruption Perceptions Index

On November 17, 2009, Transparency International released the 2009 edition of its annual Corruption Perception Index ("TI CPI"), a ranking of 180 nations according to "the perceived level of public sector corruption in a country/territory."¹ The Index is a composite of 13 different expert and business surveys that purport to measure perceptions of the overall extent of corruption in the public and political spheres.²

Despite its arguable shortcomings as a self-described index of "perceptions" based on survey data rather than a measure of actual corrupt activity,³ the TI CPI remains a – if not *the* – leading benchmark and tool for allocating scarce compliance, prosecutorial and regulatory resources. It is also a necessary component of anti-bribery due diligence, both in the review of the potential engagement of agents and other third parties, and by buy-side and sell-side managers overseeing M&A activity.

Key highlights of the 2009 TI CPI rankings include the precipitous drop by Mexico, the United States' second largest trading partner for U.S. exports, of 17 places from its previous rank of 72nd to its current 89th place ranking.⁴ Greece also notably declined 14 places from its 2008 ranking of 57th place to 71st, a ranking it now shares with Bulgaria, Romania and Macedonia. Italy fell eight

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¹ See http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table.

² See http://www.transparency.org/policy_research/surveys_indices/cpi/2009/methodology.

³ See Christine Arndt and Charles Orman, "Uses and Abuses of Governance Indicators," OECD Development Centre (2006) (noting general concerns arising from government indicators relating to transparency, economic growth and other standards of measuring development), http://www.oecd.org/document/25/0,2340,en_2649_33935_37081881_1_1_1_1,00.html. See also Nathaniel Heller, "Hey Experts, Stop Abusing the Corruption Perceptions Index!" *Global Integrity Commons* (Feb. 4, 2009) (noting inconsistencies in the TI-CPI over time due to changes in the nature of the data considered, among other factors), <http://commons.globalintegrity.org/2009/02/hey-experts-stop-abusing-corruption.html>.

⁴ See 2008 TI CPI, http://www.transparency.org/news_room/in_focus/2008/cpi2008/cpi_2008_table.

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Upcoming Speaking Engagements

December 3, 2009

2:30 - 6:30 p.m.

Antoine Kirry

Transparence-International (France)
"Acting Against Corruption - How to Render Justice More Effective?"

Université Paris Descartes
Salle du Conseil
12 rue de l'Ecole de Médecine, Paris
6ème
Paris, France

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January 13, 2010

8:00 – 10:00 a.m.

Paul R. Berger
Mark P. Goodman
James E. Johnson
Bruce E. Yannett

Debevoise & Plimpton LLP Seminar
*“The Year Just Passed and the Year Ahead: Staying Ahead of the
FCPA Enforcement Curve”*

Debevoise & Plimpton LLP
919 Third Avenue
New York, NY 10022
Conference Brochure: [http://www.debevoise.com/newseventspubs/
events/detail.aspx?id=d2d6fafc-ef26-4010-ba77-6a5975c89257](http://www.debevoise.com/newseventspubs/events/detail.aspx?id=d2d6fafc-ef26-4010-ba77-6a5975c89257)

January 19, 2010

1:00 p.m. - 6:00 p.m.

Paul R. Berger
Lord Goldsmith QC, PC
Bruce E. Yannett

Debevoise & Plimpton LLP Seminar
“Internal Investigations in Switzerland”

Bär & Karrer AG
Brandschenkestrasse 90
CH-8027 Zurich
Switzerland

January 26-27, 2010

9:00 am - 5:00 pm

Frederick T. Davis

*5th European Forum on Anti-Corruption: Minimising Your Company's Risk
in an Era of Increased International Enforcement*

The Fundamentals of FCPA Compliance: The Foreign Corrupt
Practices Act Demystified
Frankfurt, Germany

Conference Brochure: [http://www.debevoise.com/publications/
Frankfurt%20Seminar.pdf](http://www.debevoise.com/publications/Frankfurt%20Seminar.pdf)

FCPA Update

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FCPA Enforcement: The Latest From U.S. DOJ and SEC Representatives

In the last month, several senior U.S. officials whose responsibilities include enforcing the FCPA made notable appearances at conferences and forums. From Attorney General Eric Holder's speech in Qatar at the Global Forum on Fighting Corruption and Safeguarding Integrity, to Assistant Attorney General Lanny Breuer's address at a pharmaceutical industry congress, and statements by key Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC") officials at the American Conference Institute's 22nd National Forum on the Foreign Corrupt Practices Act (including Breuer, Mark Mendelsohn (Deputy Chief of the DOJ Criminal Division's Fraud Section) and Cheryl Scarborough (Associate Director of the SEC's Division of Enforcement)), there have been many opportunities to hear the government's representative's perspectives.¹

Key themes emanating from the various November 2009 remarks are identified below. Few of these themes are new, and they evidence a continuing focus on established enforcement priorities and theories heading into 2010.

Continued Pace of Enforcement:

Mendelsohn acknowledged that the DOJ currently has 130 open FCPA investigations. This appears to be the largest publicly-acknowledged number of investigations pending at one time in the history of the FCPA.

Economic Downturn: Each of the regulatory officials recognized that the current economic climate increases pressures on individuals and companies to engage in illicit conduct to win or retain business or improper advantages. According to Breuer, "[the DOJ] is looking carefully at lapses – both past, present, and future – in corporate compliance as a result of the downturn in the global economy."² Mendelsohn pointed out that the massive infusion of public money into the private sector, particularly for major infrastructure projects that traditionally have spawned corruption, will likely cause a spike in international corruption.

Individual Prosecutions: Breuer, Mendelsohn and Scarborough confirmed that the DOJ and SEC will continue to focus on individual culpability as a cornerstone of FCPA enforcement thought to most effectively deter

violations. Mendelsohn stated that the DOJ is not interested in dedicating resources to prosecuting violations by low-level sales employees; instead the spotlight will continue to be on relatively senior corporate executives, such as CEOs, finance directors, country heads and heads of global sales.

Sector-Wide Probes: The pharmaceutical industry joins the medical device industry and the Oil-For-Food program as sectors investigated for FCPA violations, and the government regulators said to expect additional sector-wide investigations.

Compliance Monitors: The fact that compliance monitors were not imposed in some recent settlements does not signal a trend. Breuer and Mendelsohn noted that they consider monitors to be a valuable tool and confirmed that the DOJ will continue to use them when appropriate. They also stated that the DOJ is exploring other means to achieve the same types of assurances provided by monitors.

International Cooperation: According to Breuer, the DOJ continues to press its foreign counterparts to prosecute bribery in their home countries in an effort to

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1 The remarks of Attorney General Holder and Assistant Attorney General Breuer are available at <http://www.justice.gov/ag/speeches/2009/ag-speech-091107.html> (Remarks of Attorney General Eric Holder at the Opening Plenary of the VI Ministerial Global Forum on Fighting Corruption and Safeguarding Integrity, Doha, Qatar, November 7, 2009); <http://www.justice.gov/criminal/pr/speeches/2009/11/11-12-09breuer-pharmaspeech.pdf> (Lanny A. Breuer, Assistant Attorney General, Criminal Division, Prepared Address to the Tenth Annual Pharmaceutical Regulatory and Compliance Congress and Best Practices Forum, November 12, 2009); and <http://www.justice.gov/criminal/pr/speeches/2009/11/11-17-09aagbreuer-remarks-fcpa.pdf> (Lanny A. Breuer, Assistant Attorney General, Criminal Division, Prepared Address to the 22nd National Forum on the Foreign Corrupt Practices Act, November 17, 2009).

2 Lanny A. Breuer, Assistant Attorney General, Criminal Division, Prepared Address to the 22nd National Forum on the Foreign Corrupt Practices Act, November 17, 2009, available at <http://www.justice.gov/criminal/pr/speeches/2009/11/11-17-09aagbreuer-remarks-fcpa.pdf>.

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achieve a level playing field for multinational corporations conducting business in multiple jurisdictions. Two mutual legal assistance and extradition treaties will take effect in January 2010 that will help advance this goal. Mendelsohn reported that, to date in 2009, the DOJ has issued more than 25 mutual legal assistance treaties requests, including to jurisdictions such as

"According to Breuer, '[the DOJ] is looking carefully at lapses—both past, present, and future—in corporate compliance as a result of the downturn in the global economy.'"

Azerbaijan, Dubai, Guernsey, Haiti, Lithuania, Macedonia and Mexico. Scarboro noted marked improvement in cooperation in respect to obtaining documents from countries such as Belgium, Cyprus, Denmark, Greece,

Hong Kong and Italy.

M&A Transactions: Mendelsohn emphasized that companies must continue to be sensitive to issues of FCPA liability in merger and acquisition activity, including both stock and asset purchases. He warned acquirers not to assume the target was not subject to the FCPA pre-acquisition, as there are a variety of ways for entities to come within DOJ jurisdiction. Companies must consider exposure to both pure successor liability (for violations that occur pre-acquisition) and liability for tainted contracts, licenses, intellectual property rights and other assets that continue post-transaction. As a result, companies must undertake robust diligence and thoroughly remediate FCPA violations that are identified both pre- and post-acquisition. These efforts should be carefully documented and appropriately preserved and recorded. Scarboro cautioned that companies should seriously consider whether a target with corruption problems can be successfully integrated into the compliance culture of the acquiring company.

Voluntary Disclosure: The regulators said that each of their respective agencies continue to encourage companies to self report violations of the FCPA and assured that cooperation will give rise to tangible benefits to companies. The majority of cases initiated by the DOJ, however, are not a product of voluntary disclosure. Instead, they are a result of

sources such as proactive investigations, whistleblower tips, newspaper articles, referrals from foreign authorities, and tips from U.S. embassy personnel abroad. ■

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places in the past year. In its current rank of 63rd, it now trails 61st-ranked Turkey. Russia (ranked 146th), marginally improved upon its low 2008 ranking by one place, while sister BRIC nations China (ranked 79th) declined from 72nd in 2008, Brazil (ranked 75th) improved five places, and India (ranked 84th) improved by one place.

Other leading OECD countries did not significantly alter their positions from 2008. The United States (ranked 19th) dropped one place, Germany (ranked 14th) remained the same, Japan (ranked 17th) improved by one place, the United Kingdom (ranked 17th) declined by one place, and France (ranked 21st) moved up two in the rankings.

Encouraging improvements include the movements of Middle East nations Saudi Arabia (moving up 17 spots from 80th to 63rd) and Qatar (moving from 28th to 22nd), among others.

As Transparency International noted in its accompanying commentary, those countries ranked lowest on the list include jurisdictions haunted by war, civil unrest, or military dictatorship, including Iraq (tied for 176th), Sudan (tied for

176th), Myanmar (178th), Afghanistan (179th) and Somalia (180th).⁵ In addition to the generalized risks posed by war zones, the very low rankings of Iraq and Afghanistan, two locations where U.S. military contractors have substantial presences, indicate very high corruption risks.

Latin America remains a significantly risky region, with Ecuador (ranked 146th), Haiti (ranked 168th), Honduras (ranked 130th), Nicaragua (ranked 130th), Paraguay (ranked 154th), and Venezuela (ranked 162nd), all falling in the lowest third of the TI CPI. Twenty-three of the countries ranked in the lowest third are located in Africa. The countries in the bottom third outside of Latin America and Africa are located in the high-risk jurisdictions of Eastern Europe, Central and Southeast Asia and the subcontinent. These countries include Bangladesh, Belarus, Pakistan and the Philippines (all tied for 139th), Azerbaijan and Nepal (tied for 143rd), Cambodia, Laos and Tajikistan (tied for 158th), Kyrgyzstan (ranked 162nd), Iran and Turkmenistan (tied for 168th) and Uzbekistan (ranked 174th).⁶

In-house counsel, compliance personnel, and senior managers evaluating the anti-corruption risks of conducting business in a particular jurisdiction need to pay special attention to operations located or conducted in the countries in the bottom two-thirds of the TI CPI. Personnel employed in high-risk jurisdictions should receive regular anti-bribery and related compliance training in relevant local languages, and internal audit resources should be devoted to testing whether due diligence on third parties is robust and consistent with company policy. The allocation of compliance and internal audit resources in a reasonably-framed compliance program must address the volume of business done in a country, as well as its TI CPI ranking and other factors.

Managers also need to remember that the TI CPI rankings are only one data point to be considered in evaluating the due diligence required of agents, third parties and M&A activity, as well as business practices generally in a particular jurisdiction.

For example, the precipitous drop in Mexico's ranking may be attributable, at least in part, to the disastrous impact of the drug wars in that country, which may or may not

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⁵ See http://www.transparency.org/policy_research/surveys_indices/cpi/2009/what_s_new_in_cpi_2009.

⁶ Id.

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affect the actual risk of corruption by officials with roles in particular businesses.⁷ Likewise, a business such as healthcare technology, medical devices or pharmaceuticals, with primary purchases or important purchasing-related decisions (such as prescribing behavior, formulary stocking or placement of a particular medicine or treatment on the list approved for reimbursement via public insurance) may face significant anti-corruption compliance issues regardless of a country's TI CPI ranking.

Finally, in-house counsel, compliance personnel and senior managers need to be attentive to jurisdictions that pose anti-bribery risks, even though the governments of those jurisdictions might not

themselves be perceived to be corrupt. In this regard, even though Cyprus (ranked 27th), Macao (ranked 43rd) and Switzerland (ranked 5th) are ranked relatively highly, these bank-secrecy jurisdictions, as well as similar jurisdictions the TI CPI does not even rank, such as Liechtenstein, the Channel Islands, the Marshall Islands and the Cayman Islands, have often been the site of improper activity, including bribery, in connection with their banking systems. Appropriate anti-corruption risk analysis addressing a company's banking functions should include a focus on such routes for the making of inappropriate payments, as well as the site of corruption. ■

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⁷ See, e.g., Marc Lacey, *In Mexico Drug War, Sorting Good Guys from Bad*, *The New York Times* (Nov. 1, 2008), http://www.nytimes.com/2008/11/02/world/americas/02mexico.html?_r=1&ref=Americas. A country's TI CPI ranking can of course change from year-to-year based on (1) changes in its own TI CPI score, or (2) changes in the TI CPI scores in other jurisdictions. In Mexico's case, assuming year-to-year comparisons are appropriate, its fall resulted primarily from a decrease in its own TI CPI score from 3.6 last year to 3.3 this year. Had Mexico's TI CPI score again been 3.6, it would have fallen only seven spots in the rankings.