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FCPA Update

September 2010 ■ Vol. 2, No. 2

Prison Sentences, Fines, and Forfeitures in Recent Cases Against Individuals

The Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC") continue to aggressively pursue FCPA cases against individuals. Three recently-resolved cases are *United States v. Diaz*, in which a federal court imposed one of the longest prison sentences for an FCPA violation; *SEC v. Turner*, in which the SEC claimed jurisdiction over the conduct of two non-U.S. citizens and reached substantial monetary settlements with them; and *SEC v. Summers*, in which the settling defendant allegedly bribed officials to secure an improper advantage in obtaining the payment of receivables, a scenario that is not frequently the basis for SEC charges.

U.S. v. Diaz: 57 Months Imprisonment, $1,028,851 Forfeiture and $73,824 Restitution

In May 2009, Juan Diaz pleaded guilty to one count of conspiracy to violate the FCPA's antibribery provisions, 15 U.S.C. § 78dd-2(a), and to commit money-laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i).[1] On July 30, 2010, Diaz was sentenced to 57 months imprisonment followed by 36 months of supervised release and ordered to pay $73,824 in restitution and to forfeit $1,028,851.[2] Diaz's sentence ranks among the lengthiest handed down in any FCPA case, and follows on the heels of the longest-ever 87-month sentence given to Charles Paul Edward Jumet in April 2010.[3]

Diaz acted as an intermediary in deals between Florida-based telecommunications

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1 *United States v. Diaz*, No. 09-cr-20346, Factual Agreement (S.D. Fla. 2009), http://www.justice.gov/criminal/fraud/fcpa/cases/docs/diaz-fatual-agree.pdf; DOJ Press Rel. 09-476, Two Florida Businessmen Plead Guilty to Participating in a Conspiracy to Bribe Foreign Government Officials and Money Laundering (May 15, 2009), http://www.justice.gov/opa/pr/2009/May/09-crm-476.html. A copy of the criminal information filed on April 22, 2009 is available at http://www.justice.gov/criminal/pr/documents/05-15-09diaz-information.pdf.

2 *Diaz*, No. 09-cr-20346, Judgment and Sentencing Minutes (S.D. Fla. 2010), http://www.justice.gov/criminal/fraud/fcpa/cases/docs/08-05-10diaz-judgment.pdf; DOJ Press Rel. 10-883, Florida Businessman Sentenced to 57 Months in Prison for Role in Foreign Bribery Scheme (July 30, 2010), http://www.justice.gov/opa/pr/2010/July/10-crm-883.html.

3 DOJ Press Rel. 10-442, Virginia Resident Sentenced to 87 Months in Prison for Bribing Foreign Government Officials (Apr. 19, 2010), http://www.justice.gov/opa/pr/2010/April/10-crm-442.html.

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companies and Telecommunications D'Haiti ("Haiti Teleco"), the Republic of Haiti's state-owned national telecommunications company. In 2001, Haiti Teleco was the sole land-line provider for calls to and from Haiti.[4] Several international telecommunications companies negotiated contracts with Haiti Teleco to allow their customers to make calls to Haiti for a set rate per minute.[5] Diaz agreed with two Haiti Teleco officials to create a shell company for the "sole purpose of accepting bribes and then laundering those bribes."[6] The agreement allowed Diaz and the Haitian officials to "enrich themselves" in exchange for business advantages afforded to the Florida companies in the form of preferred telecommunication rates, a reduction in the number of minutes for which payment was owed, and credits toward sums owed.[7] From 2001 through 2003, Diaz kept $73,824.00 in commissions and laundered $955,027.95 in bribes to the officials through the shell account.[8]

SEC v. Turner: $1.35 million settlement

On August 5, 2010, the SEC filed a settled enforcement action against David P. Turner, former business director of Innospec, Inc. ("Innospec"), and Ousama M. Naaman, a former Innospec agent in Iraq. The SEC alleged that Turner and Naaman participated in a scheme to pay kickbacks to the Iraqi government in connection with Innospec's sales to Iraq of the fuel additive tetraethyl lead ("TEL") under the United Nations Oil for Food Program from 2001-2003. After the Oil for Food Program ended in late 2003, the individuals purportedly continued paid bribes to Iraqi officials until 2008 to maintain TEL business with the Iraqi government for Innospec.[9] The SEC's complaint charged Turner and Naaman with violating the FCPA's anti-bribery, books and records, and internal controls provisions, and with aiding and abetting Innospec's violations of the books and records and internal controls provisions.[10]

The SEC also alleged that Turner authorized bribes to Indonesian government officials from at least 2000-2005 to win contracts for Innospec to sell TEL to state-owned oil and gas companies.[11]

According to the SEC, Innospec made illicit payments of over $6.3 million and promised another $2.8 million in illicit payments to Iraqi and Indonesian

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4 *Diaz*, No. 09-cr-20346, Factual Agreement; DOJ Press Rel. 09-476, note 1, *supra*.

5 *Id.*

6 DOJ Press Rel. 09-476, note 1, *supra*.

7 *Id.*; No. 09-cr-20346, Factual Agreement.

8 *Diaz*, No. 09-cr-20346, Factual Agreement.

9 SEC Litig. Rel. No. 21615, SEC Files Settled Charges Against David P. Turner and Ousama M. Naaman for Engaging in Bribery (Aug. 5, 2010), http://www.sec.gov/litigation/litreleases/2010/lr21615.htm.

10 *SEC v. Turner*, No. 1:10-cv-01309, Complaint (D.D.C. 2010), ¶¶ 4, 6-7, http://www.sec.gov/litigation/complaints/2010/comp21615.pdf.

11 *Id.* at ¶ 54.

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Debevoise & Plimpton LLP
919 Third Avenue
New York, New York 10022
+1 212 909 6000

www.debevoise.com

Washington, D.C.
+1 202 383 8000

Moscow
+7 495 956 3858

London
+44 20 7786 9000

Hong Kong
+852 2160 9800

Paris
+33 1 40 73 12 12

Shanghai
+86 21 5047 1800

Frankfurt
+49 69 2097 5000

Paul R. Berger
Co-Editor-in-Chief
+1 202 383 8090
prberger@debevoise.com

Bruce E. Yannett
Co-Editor-in-Chief
+1 212 909 6495
beyannett@debevoise.com

Sean Hecker
Associate Editor
+1 212 909 6052
shecker@debevoise.com

Steven S. Michaels
Managing Editor
+1 212 909 7265
ssmichaels@debevoise.com

Erik C. Bierbauer
Deputy Managing Editor
+1 212 909 6793
ecbierbauer@debevoise.com

David M. Fuhr
Deputy Managing Editor
+1 202 383 8153
dmfuhr@debevoise.com

Erin W. Sheehy
Deputy Managing Editor
+1 202 383 8035
ewsheehy@debevoise.com

Please address inquiries regarding topics covered in this publication to the editors.

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government officials between 2000 and 2008.[12]

Turner and Naaman consented to the entry of a permanent injunction without admitting or denying the SEC's allegations. Turner agreed to disgorge $40,000 in profits to the SEC, while Naaman agreed to disgorge $810,076, plus prejudgment interest of $67,030, and to pay a civil penalty of $438,038.[13] Naaman was extradited to the U.S. and pleaded guilty to conspiracy and FCPA charges on June 25, 2010. He is currently awaiting sentencing.[14] His civil penalty will be offset by any criminal fines he is required to pay. The SEC cited Turner's "extensive and ongoing cooperation in the investigation" in explaining why no civil penalties were imposed on him.[15]

The SEC's action against Turner and Naaman is the latest FCPA case in which the U.S. authorities have used aiding-and-abetting or conspiracy allegations and seemingly minimal contacts with the U.S. to support the assertion of jurisdiction over non-U.S. nationals. While Innospec is a Delaware corporation and a U.S. issuer,[16] Turner is a United Kingdom citizen and Naaman is a dual citizen of Lebanon and Canada.[17] In asserting jurisdiction over Turner and Naaman, the SEC alleged that the pair "sent and received emails to and from the United States to carryout [sic] the scheme," and made use of interstate commerce and mail.[18] The SEC's complaint contains no allegations that Turner or Naaman took actions on U.S. soil in furtherance of the alleged bribery.

The FCPA's anti-bribery provisions apply to U.S. citizens and residents, "issuers" and "domestic concerns" as well as the officers, directors, employees, agents, or shareholders acting on their behalf, and to any other person who commits an act in furtherance of an FCPA violation "while in the territory of the United States."[19] *SEC v. Turner* reflects the U.S. authorities' position— never tested in a court of law— that a foreign national can be subject to FCPA jurisdiction merely for *causing* an act in furtherance of a bribe to be done in the U.S., including by sending emails to the U.S. or effecting a wire transfer through a U.S. bank.[20]

On March 18, 2010, Innospec settled with the SEC regarding the same alleged bribery schemes. The SEC settlement followed coordinated enforcement actions by the U.S. Department of Justice ("DOJ"), the Department of the Treasury's Office of Foreign Assets Control ("OFAC"), and the U.K.'s Serious Frauds Office ("SFO"). Innospec agreed to pay $11.2 million in disgorgement to the SEC, a criminal fine of $14.1 million to the DOJ, and a criminal fine of $12.7 million to the SFO. The company paid an additional $2.2 million to OFAC for unrelated violations of the U.S. embargo against Cuba. Under the SEC settlement, Innospec was ordered to retain an

"The SEC's action against Turner and Naaman is the latest FCPA case in which the U.S. authorities have used aiding and abetting or conspiracy allegations and seemingly minimal contacts with the U.S. to support the assertion of jurisdiction over non-U.S. nationals."

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12 SEC Litig. Rel. No. 21615, note 9, *supra*.

13 *Id.*

14 *Turner*, No. 1:10-cv-01309, Complaint at ¶ 11, note 10, *supra*; *United States v. Naaman*, No. 1:08-cr-00246, Scheduling Order (D.D.C. 2010) (setting sentencing for Dec. 9, 2010) (Docket #27).

15 SEC Litig. Rel. No. 21615, note 9, *supra*.

16 *Turner*, No. 1:10-cv-01309, Complaint at ¶ 12, note 10, *supra*.

17 *Id.* at ¶¶10-11.

18 *Id.* at ¶¶ 5, 8.

19 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3.

20 *See United States v. Snamprogetti Netherlands B.V.*, No. 10-cr-460, Deferred Prosecution Agreement (S.D. Tex. 2010) (FCPA jurisdiction based on wire transfers through New York banks); *United States v. Tesler*, No. 09-cr-098, Indictment (S.D. Tex. 2009) (FCPA jurisdiction based in part on emails sent to U.S.), http://www.justice.gov/criminal/fraud/fcpa/cases/docs/tesler-indict.pdf; *see also United States v. Carson*, No. 09-cr-077, Indictment (C.D. Cal. 2009), http://www.justice.gov/criminal/fraud/fcpa/cases/docs/carson-indictment.pdf (non-citizens indicted under FCPA as aiders and abettors despite no physical presence in United States).

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independent FCPA compliance monitor for three years.[21]

SEC v. Summers: $25,000 settlement

In its continuing pursuit of the alleged FCPA violations of Pride International, Inc ("Pride"), one of the world's largest offshore drilling companies, in Venezuela and Mexico, on August 5, 2010, the SEC filed a settled enforcement action against Joe Summers, a U.S. citizen and former country manager for Pride in Venezuela. Summers was charged with alleged violations of the FCPA's anti-bribery, books and records, and internal control provisions, and for allegedly aiding and abetting Pride's violations of those provisions, in connection with bribes paid to officials in Venezuela.[22]

Without admitting or denying the SEC's allegations, Summers consented to the entry of a permanent injunction and agreed to pay a civil penalty of $25,000.[23]

The SEC alleged that from 2003-2005, Summers "authorized or allowed payments totaling approximately $384,000 to third party companies believing that all or a portion of the funds would be given to an official of Venezuela's state owned oil company in order to secure extensions of three drilling contracts."[24] The SEC also alleged that Summers authorized payment of about $30,000 to a third party to bribe an employee of Venezuela's state owned oil company to secure for Pride an improper advantage in obtaining the payment of receivables[25]— a reminder that U.S. authorities apply the "obtain or retain business" element of an FCPA bribery offense to situations well beyond the archetypal corrupt payment to win a tender, make a sale, or avoid government regulation.

In its 2005 Annual Report, Pride reported that it had disclosed to the DOJ and SEC evidence that payments were made to government officials in Venezuela and Mexico from 2003-2005.[26] Pride said in February 2010 that it has reserved $56.2 million for an expected settlement with the DOJ and SEC.[27] In December 2009, the SEC brought an FCPA-related complaint against Bobby Benton, Pride's former vice president for Western Hemisphere operations.[28] The SEC has stated that it is continuing its investigation. ■

Sean Hecker
Christopher M. Russell

Sean Hecker is a partner and Christopher M. Russell is an associate in the New York office. They are members of the Litigation Department and White Collar Litigation Practice Group. The authors may be reached at shecker@debevoise.com and cmrussell@debevoise.com. Full contact details for each author are available at www.debevoise.com.

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21 The enforcement actions against Innospec are discussed in detail in the March 2010 edition of the *FCPA Update*, available at http://www.debevoise.com/files/Publication/26147e63-cfb5-4dc3-b515-c72a3818ddbb/Presentation/PublicationAttachment/e001486e-090a-429b-91e8-e3108b94e8d9/FCPAUpdateMarch2010.pdf; *see also* SEC Press Rel. 2010-40, SEC Charges Innospec for Illegal Bribes to Iraqi and Indonesian Officials (Mar. 18, 2010), http://www.sec.gov/news/press/2010/2010-40.htm.

22 *SEC v. Summers*, No. 4:10-cv-02786, Complaint (S.D. Tex. 2010), ¶¶ 2-3; SEC Litig. Rel. No. 21617, SEC Charges Former Employee of Pride International with Violating the Foreign Corrupt Practices Act (Aug. 5, 2010), http://www.sec.gov/litigation/litreleases/2010/lr21617.htm.

23 SEC Litig. Rel., note 22, *supra*.

24 *Summers*, No. 4:10-cv-02786, Complaint, ¶ 2, note 22, *supra*.

25 *Id.*

26 Pride International, Inc., Annual Report (Form 10-K) (June 29, 2006).

27 Pride Int'l Press Rel., Pride International Fourth Quarter 2009 Results to Include Accrual Pertaining to FCPA Investigation (Feb. 16, 2010), http://ir.prideinternational.com/phoenix.zhtml?c=72166&p=irol-newsArticle&ID=1391143&highlight=.

28 *See* SEC Litig. Rel. No. 21335, SEC Charges Former Officer of Pride International with Violating the Foreign Corrupt Practices Act (Dec. 14, 2009), http://www.sec.gov/litigation/litreleases/2009/lr21335.htm.

DOJ Issues Guidance on Consultant Engagement

The Department of Justice ("DOJ") issued guidance on September 1, 2010 illuminating its approach to American companies' common practice of hiring consultants with ties to foreign governments to help negotiate business deals with those governments.[1]

"Domestic concerns" or "issuers" under the FCPA may request guidance from the DOJ in the form of an "opinion release" or "opinion procedure release" regarding possible enforcement action for specific conduct in which the company plans to engage.[2] Opinion releases are public, but do not name the requesting company. Although specific to the requestor's facts— which the DOJ assumes the requestor has presented accurately and completely— opinion releases give useful insight into how the DOJ would approach similar fact patterns. The DOJ issued its latest opinion release about six months after it was requested, which is a fairly typical wait time.

The latest request for guidance came from a U.S. company engaged in natural resources development. The company hired a consultant on a success-fee basis to assist in negotiations with a foreign government. The key fact is that the consultant, a U.S. entity owned by a U.S. citizen, also does lobbying and other work for the same foreign government, including the representation of ministries that will participate in discussions of the company's project. The consultant is a registered agent of a foreign government pursuant to the Foreign Agents Registration Act, 22 U.S.C. § 611 *et seq.* The consultant's relationship with the foreign government raised the issue of whether the consultant and its personnel, even if they are U.S. citizens, would themselves be considered foreign officials under the FCPA. The FCPA provides that "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, *or any person acting in an official capacity for or on behalf of any such government* or department, agency, or instrumentality, or for or on behalf of any such public international organization" is deemed a "foreign official."[3]

The DOJ stated in its opinion release that it would take no enforcement action against the company solely on the basis of its payments to the consultant because the company had taken steps to defuse conflicts of interest and establish that the consultant and its personnel should not be considered government officials under the company's contract with the consultant. More specifically, the company and the consultant put in the following safeguards:

- The consultant's owner would cease working for the foreign government, although other employees of the consultant would continue to do such work;
- The consultant represented that none of its employees or other individuals affiliated with it are foreign officials or would become foreign officials during the contract term;
- Neither the consultant nor its owner has decision-making power on behalf of the government;
- Consultant personnel who work for the requesting company would be walled off from those who work for the government;
- For the duration of the consultancy, the consultant would not take any new work for the government or do any work for the government outside the

"The consultant's relationship with the foreign government raised the issue of whether the consultant and its personnel, even if they are U.S. citizens, would themselves be considered foreign officials under the FCPA."

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1 DOJ Opinion Procedure Rel. 10-03, Foreign Corrupt Practices Act Review (Sept. 1, 2010), http://www.justice.gov/criminal/fraud/fcpa/opinion/.

2 28 C.F.R. pt. 80.4. (Foreign Corrupt Practices Act Opinion Procedure, Issuer or Domestic Concern).

3 15 U.S.C. § 78dd-2(h)(2)(A) (emphasis added).

Upcoming Speaking Engagements

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scope of existing contracts disclosed to the requesting company;

- The consultant would have no business relationship with the government in connection with the company's planned project and would not contact or take any material action with regard to government officials without the company's advance approval.

In addition, the consulting arrangement was disclosed to the foreign government's finance ministry, it was confirmed that that the consultant and its employees are not considered government officials under local law, and the company obtained a local legal opinion that it is legal for the consultant to work for both the company and the government simultaneously.

The DOJ noted that its opinion is narrowly limited to the determination that the consultant and its personnel are not "foreign officials" for purposes of the company's payments to the consultant under the consulting contract. The DOJ observed that the consulting relationship increases the risk of FCPA violations and that it could take enforcement action if a violation did occur; for example, if payments the company made to the consultant were passed on to officials of the foreign government.

The DOJ release referenced prior opinion releases to illustrate that business relationships with or payments to foreign officials are not *per se* violations of the FCPA absent "indicia of corrupt intent." In this instance, the company benefited from transparency as to the arrangement and its efforts to avoid conflicts of interest or the violation of local or U.S. law. ■

Paul R. Berger
Noelle Duarte Grohmann

Paul R. Berger is a partner at Debevoise & Plimpton, LLP's Washington, D.C. office and Noelle Duarte Grohmann is an associate in the New York office. They are members of the Litigation Department and White Collar Litigation Practice Group. The authors may be reached at prberger@debevoise.com and ndgrohmann@debevoise.com. Full contact details for each author are available at www.debevoise.com.

Russia's New Privatization Program: Opportunities and Challenges

Facing budget deficits as a result of 2008-2009's financial crisis, the Russian government recently approved a draft of the key directions of Russia's budgetary policy for 2011-2013, which contemplates a significant privatization program.[1] Under the Russian privatization legislation, prior to commencing a privatization process, the Russian Government must approve a privatization plan specifying the companies to be privatized and the size of interests that must be privatized. It is expected that the definite privatization plan will be approved by the Russian Government as early as October 2010. The privatization may raise up to $50 billion over five years, as described by Finance Minister Alexei Kudrin at the Reuters Russia Investment Summit in mid-September.[2] This is an expansion on a previously announced three-year plan with a target of raising $29 billion. President Medvedev recently noted in his budget message that, apart from covering a deficit gap, privatization of major investment-attractive companies would promote competition and a favorable investment climate.[3]

Historically, privatization and corruption have gone hand in hand in many of the countries that have attempted to raise capital and introduce greater efficiency and productivity through stronger market forces. One reason that the privatization process has been called "a hotbed for corruption" is that it often takes place in the absence of strong regulatory systems.[4] In addition, the strict accounting methods typically used by private companies are not always employed by state enterprises, leaving room for interpretation in setting values when those enterprises are preparing their books for scrutiny by prospective buyers.[5] Numerous foreign investors, both individuals and corporations, have faced allegations of bribery arising out of participation, or attempted participation, in privatization opportunities. Among the most notorious of these cases is that of handbag designer Frederick Bourke of Dooney & Bourke Inc., who was found guilty after a trial for conspiring to violate the FCPA.[6] The allegations arose out of Bourke's failed attempt to invest in Azerbaijan's state oil company during that country's privatization plans in the late 1990s. Bourke was part of a large group of investors— including among them several sophisticated investors— who had gone in on a plan organized by Czech entrepreneur Viktor Kozeny, who is now an international fugitive.[7] Bourke was accused of knowing about bribes being made by Kozeny to Azerbaijan officials to secure the deal. Last November, Bourke was sentenced to one year and one day in prison by a federal district court judge in the Southern District of New York.[8] (The Bourke case also highlights the practical risks of investing during privatization opportunities; the Azerbaijan government ultimately decided not to sell the company and the investment deal fell apart.[9] Similarly, the risk that the privatization will be undone for questionable reasons or pretense can also exist. In reporting on the recently announced key directions of the Russian budgetary policy, including plans for privatization, *The New York Times* noted that "[m]any of the valuable oil fields in Rosneft [a state owned oil company that may be included in Russia's new privatization] have already been privatized and nationalized once before. That alone might seem a good reason to

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1 Government of the Russian Federation Press Rel., Prime Minister Putin Chairs a Government Meeting (Jul. 29, 2010), http://premier.gov.ru/eng/events/news/11560/.

2 Toni Vorobyova and Melissa Akin, "Russia Eyes $50 Billion Sell Off," *Reuters* (Sept. 15, 2010), http://www.reuters.com/article/idUSTRE68E1DT20100915.

3 Government of the Russian Federation Press Rel., Prime Minister Vladimir Putin Chairs a Meeting on Federal Budget Spending on Agriculture for 2011-2013 (Jun. 29, 2010), http://www.government.ru/eng/gov/priorities/docs/11222/.

4 Michelle Celarier, "Privatization: A Case Study in Corruption," *Journal of International Affairs*, Vol. 50, No. 2. (Winter 1997).

5 *Id.* at 532.

6 Andrew Longsteth, "Azerbaijan Bribes Put One Mogul on Trial, Another in Exile," *The American Lawyer* (Oct. 9, 2010), http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202434399273.

7 *Id.*

8 Nathan Vardi, "Founder Of Dooney & Bourke Gets Jail In Bribery Case," *Forbes* (Nov. 10, 2009), http://www.forbes.com/2009/11/10/bourke-corrupt-foreign-business-bribery.html.

9 Longsteth, note 6, *supra*.

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give investors pause.").[10]

Despite the historic risks in this area, there are reasons for optimism about the opportunities presented by Russia's latest privatization plan. First, the involvement of investment banks in the bidding process, which is more likely as a result of legislation passed in Russia last year, should result in a competitive process geared toward obtaining the highest possible price for assets.[11] The privatization plans may also take place over a longer period of time, and, unlike the wide-ranging privatization of the 1990s, this time the country plans to sell only minority stakes in state property.[12] In addition, both state and private bankers have said there is an interest in Russia in attracting foreign investment as a tool to improve corporate governance and management.[13] The chairman of Russian state development bank VEB, Vladimir Dmitriyev, recently said that it was important for Russian state entities to increase the number of investors, as new investors can have a positive effect on management teams.[14] But the uncertain legal environment, and the breadth of state power in Russia, may keep foreign investors at bay.[15]

Whether a transparent process can be achieved and whether foreign investors can overcome concerns about governance remains unclear as Russia embarks on this next round of privatization. Despite recent amendments, the privatization legislation in Russia still lacks the level of sophistication that is necessary to ensure a transparent and fair bidding process. In an increasingly robust FCPA enforcement environment, prospective foreign investors need to adhere to well-crafted compliance policies when exploring opportunities in this, or any, privatization plan. The compliance steps that need to be taken before a company seeks to bid on a privatization are not static, but must be adjusted to the facts. First, a bidding company must understand the terms of the tender and, particularly, what kinds of local partnering ("localization") will be required. Any requirements for local partners are rife with risk that the tender is an overt set-up for corrupt payments, or at least an opportunity for corrupt payments to cloud the bidding. Due diligence at the pre-tender stage and of any potential local partners is critical. The terms of any agreements with any local partners, as well as agents, consultants, lawyers and accountants, including compensation terms, must be carefully scrutinized, to assure fair market value is received for any compensation paid. Among other steps, the invoices from third parties should be carefully reviewed by the accounting and finance function of a bidding entity to assure compliance and to check for the presence of evidence of fraud or corruption. Advanced anti-bribery training for those involved in the privatization bidding and negotiation is essential, and expenditures related to the privatization should be prioritized for the company's internal audit review. ■

Bruce E. Yannett
Alan Kartashkin
Kimberly A. Kessler

Bruce Yannett is a partner in Debevoise & Plimpton, LLP's New York office and Kimberly Kessler is an associate in the New York office. They are members of the Litigation Department and White Collar Litigation Practice Group. Alan Kartashkian is a partner in the firm's Moscow office and is a member of the firm's Corporate Department. The authors may be reached at beyannet@debevoise.com, avkartas@debevoise.com, and kakessle@debevoise.com. Full contact details for each author are available at www.debevoise.com.

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10 Andrew E. Kramer, "Russia Moves to Sell Shares in State Companies," *The New York Times* (Jul. 28, 2010), http://www.nytimes.com/2010/07/29/business/global/29ruble.html?_r=1.

11 "Russia's Privatization Ambitions," *Forbes.com* (Aug. 4, 2010), http://www.forbes.com/2010/08/03/russia-economy-medvedev-privatization-business-oxford_2.html.

12 *See* Kramer, note 10, *supra*.

13 John Bowker, "Russia Eyes Foreign Boost to Governance," *Reuters* (Sept. 14, 2010), http://www.reuters.com/article/idUSTRE68D41R20100914.

14 *Id.*

15 Toni Vorobyova and Dmitry Sergeyev, "Russia Asset Sales May Reveal Goverment, Investor Resolve," *Reuters* (Sept. 14, 2010), http://www.reuters.com/article/idUSTRE68C3LP20100914?loomia_ow=t0:s0:a49:g43:r4:c0.041667:b37324490:z0.