

FCPA Update

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Transparency International's 2011 Corruption Perceptions Index

Following the November 2011 release of its Bribe Payers Index, Transparency International ("TI") published the 2011 edition of its annual Corruption Perceptions Index ("CPI") on December 1, 2011. The CPI is a ranking of 183 nations according to "their perceived levels of public-sector corruption."¹ The CPI draws on 17 data sources from 13 institutions, which purport to measure perceptions of corruption in the public sector.²

The CPI – as its title openly acknowledges – is only an index of "perceptions" based on survey data rather than a measure of actual corrupt activity and has met with some criticism as a result.³ TI defends the perceptions-based methodology as a "reliable estimate of corruption," noting that "corruption – whether frequency or amount – is to a great extent a hidden activity that is difficult to measure. . . . Measuring scandals, investigations or prosecutions, while offering 'non-perception' data, reflect[s] less on the prevalence of corruption in a country and more on other factors, such as freedom of the press or the efficiency of the judicial system."⁴ Further criticism of the CPI centers on potential divergences in how a country is scored in the 17 sets of data relied on to construct the Index, and how those divergences are resolved by TI. TI has responded that the CPI reflects "the beauty of aggregating the surveys," because it looks at "corruption perceptions across the spectrum."⁵

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1. See Transparency International, "Corruption Perceptions Index" at 4 (2011), <http://cpi.transparency.org/cpi2011/results/> [hereinafter, "CPI 2011"]. For comparison purposes, the 2009 Corruption Perceptions Index is available at http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table, and the 2010 Corruption Perceptions Index is available at http://www.transparency.org/policy_research/surveys_indices/cpi/2010/in_detail.
2. See Transparency International, "What is the Corruption Perceptions Index" (2011), http://cpi.transparency.org/cpi2011/in_detail/#myAnchor3.
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://www.globalintegrity.org/node/335>.
4. See CPI 2011, note 1, *supra*, at 3.
5. Christopher Matthews, "TI Corruption Rankings: Not So Clear Cut?" *The Wall Street Journal Corruption Currents Blog* (Dec. 6, 2011), <http://blogs.wsj.com/corruption-currents/2011/12/06/ti-corruption-rankings-not-so-clear-cut/?mod=WSJBlog> (noting that one database used by TI gave the U.S. a 9.2, while another gave it a 4.5; TI ascribed to the U.S. a score of 7.1).

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Regardless of the criticisms that may be leveled against it, the CPI remains a critical and trusted benchmark used to allocate scarce compliance, prosecutorial and regulatory resources. It is also a key measure for private actors to consult when designing or refining anti-bribery programs. This includes 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.

Bearing in mind the inherent limitations involved in year-to-year comparisons of rankings, a number of comparisons to rankings in previous CPI surveys are worth noting.

After falling from 146th place in 2009 to 154th place in 2010, Russia rose to 143rd this year, where it is tied with eight countries, including Timor-Leste, Nigeria and Uganda, and remains the worst-ranked member of the G-20 and the BRIC nations. However, Russia is no longer the worst-ranked European country, placing alongside Azerbaijan and Belarus, and one spot above Ukraine (whose dramatic eighteen spot decline from 134th place to 152nd place reflected one of the largest movements in this year's rankings). TI ascribes Russia's improvement to the government's current focus on fighting corruption, which has resulted in the recent implementation of anti-bribery legislation and signing the Organization for Economic Cooperation and Development's Anti-Bribery Convention.⁶ Notwithstanding these positive steps, Russia remains well within the bottom third of the rankings, perhaps reflecting a continuing view that "even if new laws are adopted, it does not have the desired effect on those involved in corruption because they are not enforced."⁷

Of the other BRICs, China enjoyed a marginal improvement, up three places from 78th place in 2010 to 75th place in 2011, while Brazil and India's rankings both declined this year, with Brazil falling four spots from 69th to 73rd place and India eight places from 87th in 2010 to 95th in 2011.

Mexico, the United States' second largest trade partner for U.S. exports and third largest trade partner overall,⁸ appears to have put the brakes somewhat on its steep rankings decline over the last few years; since 2008 it has dropped almost 30 places from 72nd place to the 100th spot, which it occupies this year with eleven other countries including Argentina (rising from 105th place in 2010) and Indonesia (also rising from 110th place). This represents a decline for Mexico of only two places from last year's position of 98th place. Greece dropped two places from 78th to 80th, a position it shares with Colombia, El Salvador, Morocco, Peru and Thailand. Italy also fell two places from 67th to 69th place, along with Ghana, Macedonia and Samoa. Both countries continue to trail Rwanda (climbing 17 places to 49th), Lithuania (50th place) and Turkey (61st place). Spain fell one spot from 30th to 31st position. Portugal remained in 32nd position, which it shared this year with Botswana and Taiwan.

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6. Khristina Narizhnaya, "Corruption Drops Slightly in '11," *The Moscow Times* (Dec. 2, 2011), <http://www.themoscowtimes.com/business/article/corruption-drops-slightly-in-11/449071.html>.
 7. Elena Panfilova, "Bribe Payers Index 2011: Why is Russia last?" Space for Transparency (Nov. 2, 2011), <http://blog.transparency.org/2011/11/02/bribe-payers-index-2011-why-is-russia-last/>.
 8. See U.S. Census Bureau, "Top Trading Partners – Total Trade, Exports, Imports" (Aug. 2011), <http://www.census.gov/foreign-trade/statistics/highlights/top/top1108yr.html>.

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Other leading OECD countries did not change significantly from the 2010 rankings. The United States continued its recent decline, falling two spots to 24th, and remaining outside of the top 20 countries for the second year in a row. Germany and Japan are tied in 14th place in the 2011 CPI, representing a one place and three place improvement respectively. The United Kingdom climbed from 20th place to 16th, while France remained steady in the 25th spot.

In South and Central America, Chile and Uruguay remain by far the top ranked countries, placing 22nd and 25th place respectively (a one-spot decline for each country). Chile remains ahead of the United States and the majority of the G20. Ecuador again made gains, rising from 127th to 120th. However, the region experienced some of the most significant declines in this year's CPI, including Bolivia which fell from 110th to 118th. A total of seven countries from this region ranked in the bottom third of the table, including Paraguay (146th to 154th) and Venezuela (164th to 172nd).

The Middle East and Central Asia were also perceived to be extremely high-risk regions, with Tajikistan (moving from 154th to 152nd place), Kyrgyzstan (stable in 164th place), Afghanistan (moving from 176th to 180th place), Kazakhstan (notably falling fifteen places from 105th to 120th), Turkmenistan (moving from 172nd to 177th place), and Uzbekistan (moving from 172nd to 177th place) all ranking within the bottom third of the table. Iran and Pakistan both showed improvements, rising twenty-six spots from 146th to 120th and nine places from 143rd to 134th spot respectively; however, both

countries remained within the bottom third of the rankings. The wealthiest countries in the Middle East also saw declines in their rankings; Oman fell nine places from 41st to 50th, Saudi Arabia seven places from 50th to 57th, Jordan six places from 50th to 56th, and Qatar three places from 19th to 22nd. Kuwait and the United Arab Emirates both remained stable at 54th and 28th place respectively, while Bahrain improved from 48th to 46th.

Africa remained the region perceived to be most high-risk, with 25 countries ranked in the bottom third. Notable outliers are Botswana rising one place from 33rd to 32nd and Rwanda, rising from 66th to 49th place and into the top third of the rankings.

While the global financial crisis continues to have an impact on corruption perceptions, this year's rankings reflect in large part the negative effects that well-publicized internal political turmoil has on perceptions of corruption. The countries experiencing the most dramatic declines this year counted among their number Haiti (falling twenty-nine places from 146th to 175th), Libya (dropping twenty-two places from 146th to 168th), Zimbabwe (down 20 places from 134th to 154th), Ukraine (falling eighteen places from 134th to 152nd), Yemen (falling eighteen places from 146th to 164th), Belarus (falling sixteen places from 127th to 143rd), Tunisia and Egypt (both falling fourteen places, from 59th to 73rd and 98th to 112th respectively). The declines experienced by the wealthier Middle Eastern countries may also be a reflection of this trend.

As in previous years, the worst-ranked countries remain those that have been ravaged by continual war or civil unrest. Afghanistan, Myanmar and Somalia remain

at the bottom of the table in 180th and 182nd, together with North Korea (a new addition to this year's CPI). Uzbekistan, Turkmenistan, Sudan, Iraq, Haiti and Venezuela round out the bottom ten. The United States has a significant military presence in several of these countries, which poses an increased risk for military contractors and suppliers. Conversely, conflict-free nation New Zealand is first place in this year's rankings, followed closely by Denmark, Finland, Sweden, Singapore and Norway.

In light of the 2011 CPI, companies should carefully review the jurisdictions in which they conduct business, particularly if those countries rank in the bottom three quarters of the index. As described in the TI CPI Report, "the vast majority of the 183 countries and territories assessed score below five on a scale of 0 (highly corrupt) to 10 (very clean)," indeed, only forty-nine countries actually scored five or higher.⁹ Governments in these countries are highly susceptible to corruption, and corrupt payments may be expected as a way of life.

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9. See CPI 2011, note 1, *supra*, at 3.

Citing “Flagrant” Prosecutorial Misconduct, Judge Dismisses Landmark FCPA Conviction

The May 2011 conviction of Lindsey Manufacturing Co. (“LMC”) and two of its executives (together, the “Lindsey defendants”) was a milestone in FCPA enforcement, marking the first time a company had been convicted on FCPA charges after a jury trial. This month marked another major development: On December 1, United States District Judge A. Howard Matz issued a 41-page opinion dismissing the convictions and indictment of the Lindsey defendants based on numerous acts or omissions by the Department of Justice (“DOJ”) over a three-year period that, Judge Matz concluded, “add up to an unusual and extreme picture of a prosecution gone badly awry.”¹

LMC is a California-based company that manufactures electrical transmission towers and related products, including emergency restoration systems. After a five-week trial, a jury convicted LMC, its president, Keith E. Lindsey, and its former CFO, Steve K. Lee, each of one count of conspiracy to violate the FCPA and five counts of FCPA violations.² The DOJ alleged that, from 2002 to 2009, the Lindsey defendants

paid bribes to government officials at the Comisión Federal de Electricidad (“CFE”), Mexico’s state-owned electrical utility company, in order to obtain more than \$19 million in contracts.³ Lindsey was alleged to have paid these bribes through an intermediary, Grupo Internacional de Asesores S.A., which submitted fraudulent invoices for a 30 percent commission on all of LMC’s sales to CFE (a significantly higher commission than LMC’s previous sales representatives received).⁴ One of the intermediary’s directors, Angela Aguilar, authorized the payment of more than \$170,000 of a CFE official’s credit card debt and bought that same official a nearly \$300,000 Ferrari Spyder and \$1.8 million yacht; Aguilar also authorized cash transfers to the family members of another CFE official.⁵

Both before and after the trial, defendants filed at least six motions to dismiss the indictment on the basis of alleged prosecutorial misconduct.⁶ In granting the most recent motion, Judge Matz noted that in his experience, “almost all of the prosecutors in the Office of

the United States Attorney for this district consistently display admirable professionalism, integrity and fairness,” and that he reached his conclusions “with deep regret.”⁷ The opinion chronicles numerous instances of governmental misconduct at various stages of the prosecution that, the court observed, put defendants Lindsey and Lee “through a severe ordeal . . . as a result of a sloppy, incomplete and notably overzealous investigation.”⁸

The findings of misconduct during the pre-indictment stage included the inclusion of false statements in affidavits in support of several search warrants or seizure warrants; an unauthorized warrantless search, and false or misleading grand jury testimony.⁹ Post-indictment instances of wrongdoing, as identified by the court, included a failure to produce certain grand jury testimony, wrongfully obtaining privileged communications, making misrepresentations regarding certain evidence at trial, and improper statements made during the government’s closing argument regarding willful blindness.¹⁰

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1. *United States v. Aguilar, et al.*, No. 10-cr-01031-AHM, Order Granting Motion to Dismiss (C.D. Cal. Dec. 1, 2011) at 5 [hereinafter, “Dec. 1 opinion”].

2. DOJ Press Rel. 11-596, California Company, Its Two Executives and Intermediary Convicted by Federal Jury in Los Angeles on All Counts for Their Involvement in Scheme to Bribe Officials at State-Owned Electrical Utility in Mexico (May 10, 2011), <http://www.justice.gov/opa/pr/2011/May/11-crm-596.html>.

3. *Id.*

4. *Id.*

5. *Id.* Angela Aguilar and her husband, Enrique Aguilar, both residents of Mexico, were also charged. At trial, Angela Aguilar was convicted of one count of money laundering, while Enrique Aguilar (who has been charged with money laundering violations, conspiracy to violate the FCPA, and substantive FCPA violations) remains a fugitive. *Id.* Following the dismissal of charges against the Lindsey defendants, the government voluntarily sought dismissal of Angela Aguilar’s conviction. See Christopher Matthews, “There Goes Another FCPA Team Conviction (Possibly),” *The Wall Street Journal Corruption Currents Blog* (Dec. 12, 2011), <http://blogs.wsj.com/corruption-currents/2011/12/12/there-goes-another-fcpa-conviction-possibly/>; “DOJ Tosses Aguilar’s Conviction, Pending Appeal,” *The FCPA Blog* (Dec. 12, 2011), <http://www.fcpablog.com/blog/2011/12/12/doj-tosses-aguilars-conviction-pending-appeal.html>.

6. Dec. 1 opinion, note 1, *supra*, at 4.

7. *Id.* at 2. The opinion notes that two of the three prosecutors were from the main DOJ office in Washington, DC. *Id.* at 2 n.2.

8. Dec. 1 opinion, note 1, *supra*, at 40.

9. *Id.* at 8-13.

10. *Id.* at 13-24.

Lindsey Dismissal ■ Continued from page 4

The court rejected several of defendants' other allegations of misconduct.¹¹

The United States filed a notice of appeal the same day that the district court entered its order and opinion.¹² The government faces an uphill battle, given the district court's litany of adverse findings,¹³ although the DOJ will likely argue that Judge Matz did not adequately consider whether the Lindsey defendants were prejudiced by the prosecution's errors.¹⁴

Lessons for Other FCPA Defendants?

The dismissal of the Lindsey defendants' convictions and indictment does not necessarily signify that the DOJ's FCPA case was substantively weak. To the contrary, the district court highlighted some of the evidence of guilt presented at trial, including evidence pertaining to several red flags relating to the individual defendants' knowledge of (or willful blindness regarding) possible corrupt activities by an intermediary, commission payments that were much higher than industry standards, and reclassification of those high

commissions with the knowledge that they were potential indicators of corruption.¹⁵

The district court stated explicitly that the Lindsey defendants were not entitled to a finding of factual innocence.¹⁶ Nevertheless, the court stated that the government's case "was far from compelling," and noted that there was no direct evidence of the Lindsey defendants' intent that the money paid to the intermediary would be used to bribe CFE officials.¹⁷

Other observers have noted that, because the district court's decision was based on governmental misconduct that was not unique to an FCPA prosecution, the otherwise remarkable fact that the conviction was dismissed is not likely to diminish the DOJ's FCPA enforcement efforts.¹⁸ Rather, the Lindsey dismissal bears more similarity to the dismissal of the public corruption conviction of former Senator Ted Stevens. Although two high-profile findings of prosecutorial misconduct do not make a trend,¹⁹ those FCPA defendants who opt to go to trial would be well-advised to inform the court of, and zealously pursue, via motion practice, any compelling evidence of government misbehavior.²⁰

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11. *Id.* at 25-26.

12. *United States v. Aguilar et al.*, No. 10-cr-01031-AHM, Notice of Appeal (C.D. Cal. Dec. 1, 2011).

13. See Christopher Matthews, "DOJ to Appeal Judge's Dismissal of Lindsey FCPA Conviction," *The Wall Street Journal Corruption Currents Blog* (Dec. 2, 2011), <http://blogs.wsj.com/corruption-currents/2011/12/02/doj-to-appeal-judges-dismissal-of-lindsey-fcpa-conviction/>.

14. See Howard Sklar, "Lindsey Prosecutors Deserved Better," *Forbes* (Dec. 8, 2011), <http://www.forbes.com/sites/howardsklar/2011/12/08/lindsey-prosecutors-deserved-better>.

15. Dec. 1 opinion, note 1, *supra*, at 6-7; see also Sklar, note 14, *supra*.

16. Dec. 1 opinion, note 1, *supra*, at 40.

17. Dec. 1 opinion, note 1, *supra*, at 37. See also Mike Koehler, "Milestone Erased: Judge Matz Dismisses Lindsey Convictions, Says that 'Dr. Lindsey and Mr. Lee Were Put Through a Severe Ordeal' and that Lindsey Manufacturing, A 'Small, Once Highly Respected Enterprise . . . Placed In Jeopardy,'" *FCPA Professor Blog* (Dec. 1, 2011), (arguing that "it seems clear that [the] decision was based in part on the quality of the DOJ's case in the first instance"), <http://www.fcpaprofessor.com/milestone-erased-judge-matz-dismisses-lindsey-convictions-says-that-dr-lindsey-and-mr-lee-were-put-through-a-severe-ordeal-and-that-lindsey-manufacturing-a-small-once-highly-respected-ente>.

18. See, e.g., Michael Volkov, "Lindsey and the FCPA," *Corruption, Crime & Compliance* (Dec. 6, 2011), <http://corruptioncrimecompliance.com/2011/12/lindsey-and-the-fcpa.html>.

19. Cf. Rachel G. Jackson, "Judges Sending 'Clear Message' Against Prosecutor Tactics, Defense Lawyers Argue," *Main Justice: Just Anti-Corruption* (Dec. 1, 2011), <http://www.mainjustice.com/justanticorruption/2011/12/01/judges-sending-clear-message-against-prosecutor-tactics-defense-lawyers-argue/>.

20. See Alison Frankel, "What FCPA Defendants Can Learn from Blockbuster Lindsey Win," *Reuters On the Case Blog* (Dec. 5, 2011), <http://blogs.reuters.com/alison-frankel/2011/12/05/what-fcpa-defendants-can-learn-from-blockbuster-lindsey-win/>.

APEC's Recent Proposals for Industry Codes of Business Ethics

Virtually every significant corporate settlement arising from investigations by the U.S. Department of Justice (“DOJ”) or the U.S. Securities and Exchange Commission (“SEC”) into FCPA violations identifies purported weaknesses in the entity’s compliance program. Not least because of this reality, companies increasingly appreciate the importance of adopting and implementing effective compliance mechanisms and continually enhancing compliance programs over time.

But devising a program that fits the company’s size, industry and risk profile can be a costly and complex exercise that often requires assistance from experienced external counsel. To help remedy this problem, industry-specific codes of conduct offer a useful framework to shape appropriate compliance policies that are tailored to the business’s particular risk profile. Even more important, industry codes help responsible companies to level the playing field by encouraging competitors to adhere to common strong compliance standards. It is for this very reason, among others, that properly adopted and enforced voluntary codes should not present antitrust or other competition law concerns.

In this article we address a recent series of anti-corruption initiatives adopted

at the November 2011 Asia-Pacific Economic Cooperation (“APEC”) forum in Honolulu, Hawaii, affecting the medical device, construction/engineering and biopharmaceutical industries.

APEC’s Proposed Codes of Conduct

Founded in 1989, APEC is an inter-governmental forum consisting of 21 member states from the Asia-Pacific region that seeks to promote free trade and economic cooperation.¹ In furtherance of those goals, APEC has promulgated various initiatives to combat corruption and to encourage good governance and transparency, including a very high-level code of conduct for business in 2007 that calls for the prohibition of the payment of bribes.² In 2011, APEC’s Anti-Corruption and Transparency Experts Working Group developed principles for voluntary codes of business ethics aimed specifically at three critical sectors: medical device and diagnostics, construction and engineering, and biopharmaceuticals. The APEC Ministerial Meeting, under the chairmanship of U.S. Secretary of State Clinton, endorsed these principles during APEC’s annual session in November 2011.³

The three industries have significant exposure to government customers and thus must take special precautions to comply with applicable anti-corruption laws. Medical device manufacturers, construction and engineering firms, and pharmaceutical companies have been the target of large FCPA investigations that rank among the most costly resolutions to date.⁴ Against this backdrop, the development of robust ethics and compliance standards across business sectors throughout these industries in the APEC region is warranted and will help to decrease the likelihood of wrongful conduct.

The principles underlying APEC’s proposed voluntary codes, named for the cities in which they were finally negotiated and preliminarily adopted, feature similar goals. They set forth uncontroversial ideals to help ensure that companies act as good corporate citizens and work towards transparent business environments in which their employees and customers interact in ethical and legal ways.

For example, the overarching aims of the Kuala Lumpur Principles for the medical device sector feature the core concepts of “Integrity, Independence, Appropriateness, Transparency and Advancement.”⁵ The Hanoi Principles, applicable to the

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1. The 21 APEC members include Australia, Brunei, Canada, Chile, China, Hong Kong, Indonesia, Japan, Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, the Philippines, Russia, Singapore, Chinese Taipei (Taiwan), Thailand, the United States and Vietnam. See Asia-Pacific Economic Cooperation, “History” (2011), <http://www.apec.org/About-Us/About-APEC/History.aspx>.
2. According to information on the APEC website, the Anti-Corruption and Transparency Experts’ Task Force was enhanced in status to a “working group” in 2011 and has published numerous papers and declarations. Chief amongst them are the Singapore Declaration of 2009 and the APEC Guidelines on Enhancing Governance and Anti-Corruption. Further information available at <http://www.apec.org/Home/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Working-Groups/Anti-Corruption-and-Transparency.aspx>.
3. See APEC Ministerial Statements, “APEC High Level Policy Dialogue on Open Governance and Economic Growth,” Asia-Pacific Economic Cooperation (Nov. 11, 2011), http://www.apec.org/Meeting-Papers/Ministerial-Statements/Annual/2011/2011_amm/2011_governance.aspx.
4. Among the largest FCPA settlements to date, companies representing these three sectors include Siemens AG, KBR/Halliburton Co., Johnson & Johnson, JGC Corporation, and Technip S.A.
5. Asia-Pacific Economic Cooperation, “The Kuala Lumpur Principles Medical Device Sector Code of Ethics” (May 21, 2011), http://aimp.apec.org/Documents/2011/MM/SMEMM/11_smemm_009.pdf.

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construction/engineering industry, call for fair competition, transparency and accountability in business dealings, prohibition of bribery, creation of a healthy and safe work environment with fair treatment of workers, and environmental and communal responsibility.⁶ And the Mexico City Principles, applicable to the biopharmaceutical sector, invoke broad themes such as healthcare and patient focus, integrity, independence, legitimate intent, transparency and accountability as guideposts for transactions in the biopharmaceutical sector.⁷

The principles also contain more concrete suggestions on how to realize these aspirations. The medical device principles feature advisories on a range of compliance-relevant topics, such as consultancy agreements with healthcare professionals, financial support for educational programs and donations, and prohibitions on entertainment and recreational activities. The pharmaceutical industry's catalogue of guidance includes prescriptions for sales representatives on promotional activities and the marketing of drugs, as well as specific instructions aimed at minimizing compliance risks arising from invitations to medical congresses, travel and accommodation and a ban on entertainment. Although not quite as detailed, the pharmaceutical guidelines resemble the provisions contained in the widely known ethical code on the marketing

of products by the Pharmaceutical Research and Manufacturers of America (commonly referred to as the "PhRMA code").⁸

The principles adopted at the APEC conference recognize that effective implementation of codes of conduct and their translation into exemplary business practice requires appropriate commitment from senior management. For that reason, the three industry-specific principles call on companies to construct effective organizational structures featuring familiar elements of any robust compliance program, such as assignment of responsibility to senior officers, regular training of employees in the relevant laws and regulations and appropriate opportunities for employees to voice compliance concerns. Finally, the principles adopted at the APEC conference call on companies and industry associations to collaborate and to publicize their membership, to offer training on the industry codes and to help small and medium-sized enterprises build capacity.

Inherent Limitations of Codes of Conduct

It is worth emphasizing that the principles for each of the voluntary codes of business ethics are just that – principles that articulate a general framework for ethical and legal corporate behavior. Such codes do not identify concrete mechanisms to ensure adherence. Because of their voluntary nature, robust independent

monitoring of a company's compliance and the threat of adverse consequences for violators is limited. For example, although the above-mentioned PhRMA code includes annual self-certification⁹ (which virtually all signatories complete), only six signatories have submitted to external verification of their policies and procedures, such as training, monitoring and remediation.¹⁰ It remains to be seen whether and to what extent industry-wide codes in the APEC jurisdictions will encompass serious compliance verification mechanisms.

Until external monitoring increases, the success of voluntary codes of conduct will be significantly determined by signatories' commitments to create appropriate procedures and policies. And this may be all one can and should expect. Voluntary codes of conduct are not intended to replace legal regimes governing corporate behavior, but – especially in high-risk jurisdictions and high-risk industries – they can serve to complement other efforts to reduce corrupt and/or unethical transactions.

One note of caution. Signatories to voluntary codes of business conduct should not take lightly public declarations that they operate an exemplary compliance program that prevents the payment of bribes. The travails of BAE Systems plc serve as a reminder that prosecutors (or private litigants) might challenge a company's false assurances and warranties in the face of evidence of improper payments.

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6. Asia-Pacific Economic Cooperation, "The Hanoi Principles for Voluntary Codes of Business Ethics in the Construction and Engineering Sector" (Nov. 8, 2011), http://aimp.apec.org/Documents/2011/SOM/CSOM/11_csom_022.pdf.

7. Asia-Pacific Economic Cooperation, "The Mexico City Principles for Voluntary Codes of Business Ethics in the Biopharmaceutical Sector" (Nov. 8, 2011), http://aimp.apec.org/Documents/2011/SOM/CSOM/11_csom_021.pdf.

8. See PhRMA, "PhRMA Code on Interactions with Healthcare Professionals" (effective Jan. 2009), <http://www.phrma.org/about/principles-guidelines/code-interactions-healthcare-professionals>.

9. See PhRMA, "PhRMA Statement Before U.S. Senate Special Committee on Aging" (July 29, 2009), <http://www.phrma.org/phrma-statement-us-senate-special-committee-aging>.

10. See PhRMA, "External Verifications" (Oct. 27, 2011), http://www.phrma.org/sites/default/files/108/2011_external_verifications_phrma_code_as_of_102711.pdf.

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BAE Systems plc pleaded guilty and reached a \$400 million settlement with the DOJ in March 2010 for, *inter alia*, having made false statements in government contract documents about its FCPA compliance program.¹¹ The DOJ alleged that BAE Systems plc had falsely represented to U.S. government agencies that it would implement procedures ensuring its compliance with the FCPA and other anti-corruption laws.¹²

Voluntary Codes of Business Ethics Typically Do Not Violate U.S. Antitrust Laws

Industry associations are subject to U.S. antitrust laws and have been held liable under the Sherman Act for anti-competitive and unreasonable restraints on trade.¹³ In theory, even codes calling for ethical

business conduct fall within the purview of U.S. antitrust laws.¹⁴ Nothing in APEC's principles for the contemplated codes of conduct, however, suggests that they would run afoul of any relevant antitrust laws. So long as voluntary industry codes have a legitimate purpose and clear and fair standards that are reasonably related to the professed purpose, and do not restrict lawful competition between signatories or by non-signatories, they should be not be deemed anti-competitive. The industry codes envisaged here, particularly insofar as they were formulated under the auspices of an inter-governmental organization, contemplate no actions that would typically trigger antitrust concerns, such as exchange of pricing information, bid rigging, allocation of customers, or discrimination against those who do not participate.¹⁵

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11. See DOJ Press Rel. No. 10-209, BAE Systems PLC Pleads Guilty and Ordered to Pay \$400 Million Criminal Fine (Mar. 1, 2010), <http://www.justice.gov/opa/pr/2010/March/10-crm-209.html>.

12. *Id.*

13. See, e.g., *Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (holding that case assignment boycott of lawyer's association violated antitrust laws).

14. See *Wilk v. Am. Med. Ass'n*, 895 F.2d 352, 371 (7th Cir.1990) (upholding finding that boycott of chiropractors by medical association enforced through code of ethics violated antitrust laws); *Nat'l Soc'y of Prof'l Eng'rs. v. United States*, 435 U.S. 679 (affirming finding that association's ban on competitive bidding for engineering services through publication of ethics code ran afoul of antitrust laws).

15. See, e.g., Federal Trade Commission, "An FTC Guide to Antitrust Laws" at 5 (last visited Dec. 20, 2011), www.ftc.gov/bc/antitrust/factsheets/antitrustlawsguide.pdf.

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