DEBEVOISE & PLIMPTON LLP

FCPA Update

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Hints and Olive Branches in the Morgan Stanley Declinations

On April 25, 2012, the Department of Justice ("DOJ") announced that Garth Peterson – former managing director for Morgan Stanley's real estate investment and fund advisory business in China – pleaded guilty to one-count of conspiring to circumvent Morgan Stanley's internal accounting controls, which the company is required to maintain under the FCPA.[1] The Securities and Exchange Commission ("SEC") also charged Peterson with violating the FCPA, as well as securities laws for investment advisers.[2]

The significance of the DOJ's and the SEC's announcements, however, lies not in the charging of Peterson for his alleged misconduct, but in the agencies' statements that they had declined to bring an enforcement action against Morgan Stanley related to Peterson's conduct based, in part, on Morgan Stanley's pre-existing compliance program as well as on its self-disclosure and robust cooperation.[3]

Peterson's alleged misconduct, which occurred between October 2004 and December 2007, involved Peterson and a now former Chairman[4] of Shanghai Yongye Enterprise (Group) Co. Ltd. ("Yongye") – a Chinese state-owned entity with influence over the success of Morgan Stanley's real estate business in Shanghai's Luwan District – with whom Peterson had a pre-existing personal friendship and undisclosed business relationship.[5]

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1. *See* DOJ Press Rel. 12-534, Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA (Apr. 25, 2012), http://www.justice.gov/opa/pr/2012/April/12-crm-534.html; *United States v. Peterson*, No. 12-CR-224, Criminal Information, ¶¶ 44–45 (E.D.N.Y. Apr. 25, 2012), http://www.justice.gov/criminal/fraud/fcpa/cases/petersong/petersong-information.pdf [hereinafter Information].
2. *See* SEC Press Rel. 2012-78, SEC Charges Former Morgan Stanley Executive with FCPA Violations and Investment Adviser Fraud (Apr. 25, 2012), http://www.sec.gov/news/press/2012/2012-78.htm; *SEC v. Peterson*, No. 12-CV-2033, Complaint, ¶¶ 27–39 (E.D.N.Y. Apr. 25, 2012), http://www.sec.gov/litigation/complaints/2012/comp-pr2012-78.pdf [hereinafter Complaint].
3. *See* DOJ Press Rel. 12-534, note 1, *supra* ("After considering all the available facts and circumstances, including that Morgan Stanley constructed and maintained a system of internal controls, which provided reasonable assurances that its employees were not bribing government officials, the [DOJ] declined to bring any enforcement against Morgan Stanley related to Peterson's conduct. The company voluntarily disclosed this matter and has cooperated throughout the department's investigation."); SEC Press Rel. 2012-78, note 2, *supra* ("Morgan Stanley, which is not charged in the matter, cooperated with the SEC's inquiry and conducted a thorough internal investigation to determine the scope of the improper payments and other misconduct involved.")
4. The former Yongye Chairman was a senior executive of Yongye from 1995 to late 2006. *See* Information at ¶ 9, note 1, *supra*.
5. *See* DOJ Press Rel. 12-534, note 1, *supra*; SEC Press Rel. 2012-78, note 2, *supra*.

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The DOJ and the SEC alleged that, unbeknownst to Morgan Stanley, Peterson and the former Chairman of Yongye – a foreign official under the FCPA[6] – secretly acquired millions of dollars worth of real estate investments from Morgan Stanley's funds for themselves and a Canadian lawyer, and secretly arranged to pay themselves at least $1.8 million disguised as finder's fees.[7] In return, the former Yongye Chairman steered business to Morgan Stanley's funds.[8]

Peterson agreed to a settlement with the SEC, in which he will pay more than $250,000 in disgorgement, will be permanently barred from the securities industry, and must relinquish his interest in approximately $3.4 million worth of Shanghai real estate acquired through his alleged misconduct.[9] He is scheduled to be sentenced in the criminal case on July 17, 2012 and faces a maximum sentence of 5 years imprisonment and a maximum fine of $250,000 or twice his gross gain from the offense.[10]

The DOJ's and the SEC's Public Declinations With Respect to Morgan Stanley

In its press release announcing Peterson's guilty plea, the DOJ announced that it had "declined to bring any enforcement action against Morgan Stanley related to Peterson's conduct."[11] In reaching its decision, the DOJ considered "all available facts and circumstances,"[12] including Morgan Stanley's pre-existing compliance program: "Morgan Stanley constructed and maintained a system of internal controls, which provided reasonable assurances that its employees were not bribing government officials."[13]

Although the DOJ has emphasized that the "existence and implementation" of a compliance program is a "significant" factor in whether to charge a corporation with an FCPA violation,[14] it has not been the DOJ's practice to announce publicly its decision to conclude an investigation without bringing an enforcement action, a disposition commonly referred to as a declination.[15] This is in large part due to the DOJ's concerns that a company or individual that has been investigated and not prosecuted would be

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6. *See* Information at ¶ 10, note 1, *supra*.
7. *See* DOJ Press Rel. 12-534, note 1, *supra*; SEC Press Rel. 2012-78, note 2, *supra*.
8. *Id.*
9. *See* SEC Press Rel. 2012-78, note 2, *supra*.
10. *See* DOJ Press Rel. 12-534, note 1, *supra*.
11. *Id.*
12. *Id.*
13. *Id.*
14. Statement of Greg Andres, Acting Deputy Assistant Attorney General, Criminal Division, DOJ, Before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security at 4 (June 14, 2011) ("And while no single factor is necessarily more important than another, the existence and implementation of a company's compliance program remains an important factor, and one which the Department has routinely recognized as significant."), http://www.justice.gov/ola/testimony/112-1/06-14-11-crm-andres-testimony-re-foreign-corrupt-practices-act.pdf.
15. *See* Foreign Corrupt Practices Act, Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 112th Cong. 62 (June 14, 2011) (testimony of Greg Andres, Acting Deputy Assistant Attorney General, Criminal Division, DOJ) ("[T]here are, of course, cases where we decide not to prosecute or not to require a company to enter into a resolution, because they have strong compliance programs. You don't read about those because we don't issue a press release when we decide not to prosecute."), http://judiciary.house.gov/hearings/printers/112th/112-47_66886.PDF [hereinafter 2011 FCPA Hearing].

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prejudiced by revelation of the fact of the investigation itself.[16] Thus, the DOJ's announcement in the *Peterson* case that it had declined to bring an enforcement action against Morgan Stanley, and its publicly crediting the company's pre-existing compliance program in this manner, is an objectively significant development that has received corresponding media attention, an outcome the DOJ no doubt anticipated.[17]

The transparency – or lack thereof – of the DOJ's declination decisions has been the subject of frequent debate,[18] especially in connection with calls for FCPA reform, including the addition of an affirmative compliance defense.[19] Subsequent to a June 14, 2011 hearing held by the United States House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security on possible amendments to the FCPA, during which DOJ declinations were discussed,[20] U.S. Representatives Sandy Adams (R-Florida) and F. James Sensenbrenner, Jr. (R-Wisconsin) expressed their interest in DOJ declinations and "whether there is a way for companies to have access to the information surrounding those decisions."[21] In a letter to the DOJ, Representatives Adams and Sensenbrenner formally requested that the DOJ provide information on cases in which it decided not to investigate or pursue prosecution within the last year, as well as the Department's rationale for those decisions.[22]

"The transparency – or lack thereof – of the DOJ's declination decisions has been the subject of frequent debate, especially in connection with calls for FCPA reform, including the addition of an affirmative compliance defense."

The DOJ responded in a letter by Assistant Attorney General for Legislative Affairs Ronald Weich stating that the DOJ's decision to bring an enforcement action under the FCPA is made pursuant to internal guidelines set forth in the United States Attorney's Manual, namely, the Principles of Federal Prosecution of Business Organizations.[23] The Weich letter also listed circumstances in the previous two years in which the DOJ declined to bring enforcement actions against corporations, including instances in which a corporation voluntarily self-disclosed potential misconduct, voluntarily cooperated with the DOJ's investigation, provided the DOJ with information about its "extensive compliance policies, procedures, and internal controls" and/or the alleged misconduct involved a single employee.[24]

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16. *Id.* at 67 (responding to a question from Rep. Sandy Adams concerning whether the DOJ publishes its declination decisions, Acting Deputy Assistant Attorney General Andres stated: "[T]hat is a difficult area for the government. We don't, in large part, because we don't want to penalize a company or an individual that has been investigated and not prosecuted, that there may be some prejudice from that.").

17. *See* "Breakthrough: Feds Credit Morgan Stanley Compliance Program," *FCPA Blog* (Apr. 27, 2012), http://www.fcpablog.com/blog/2012/4/27/breakthrough-feds-credit-morgan-stanley-compliance-program.html.

18. *See, e.g.*, James G. Tillen and Marc Alain Bohn, "Declinations During the FCPA Boom" at 1, *Bloomberg Law Reports* (2011) (discussing how "[e]nforcement officials routinely suggest that declinations are commonplace, but provide few concrete details as to how often they occur or what circumstances would merit a decision to decline"), http://www.millerchevalier.com/portalresource/lookup/poid/Z1tOl9NPl0LTYnMQZ56TfzcRVPMQiLsSwOZDm83!/document.name=/miller_chevalier_tillen_bohn_article.pdf.

19. *See, e.g.*, Mike Koehler, *Revisiting a Foreign Corrupt Practices Act Compliance Defense*, 2 Wis. L. Rev. 609, 644 (2012) (referring to DOJ decision-making in the context of corporate criminal liability as "opaque, inconsistent, and unpredictable"), http://wisconsinlawreview.org/wp-content/files/13-Koehler.pdf. Professor Koehler argues that "a company's *pre-existing* compliance policies and procedures, and its good faith efforts to comply with the FCPA, should be relevant *as a matter of law* when a non-executive employee or agent acts contrary to those policies and procedures in violation of the FCPA." *Id.* at 611 (emphasis in original); 2011 FCPA Hearing at 23–26 (written testimony of Judge Michael B. Mukasey, Partner, Debevoise & Plimpton), note 15, *supra*.

20. 2011 FCPA Hearing at 67–68 (questioning of Greg Andres, Acting Deputy Assistant Attorney General, Criminal Division, DOJ by U.S. Representative Sandy Adams concerning DOJ declinations), note 15, *supra*.

21. Letter from Representatives Sandy Adams & F. James Sensenbrenner, Jr. to Greg Andres, Deputy Assistant Attorney General, Criminal Division, DOJ (June 22, 2011), http://www.scribd.com/doc/68419036/DOJ-Declination-Responses-to-Congress.

22. *Id.*

23. Letter from Ronald Weich, Assistant Attorney General, Office of Legislative Affairs, to Representative Sandy Adams (Aug. 3, 2011), http://www.scribd.com/doc/68419036/DOJ-Declination-Responses-to-Congress [hereinafter Weich Letter]; *see* Statement of Greg Andres, Acting Deputy Assistant Attorney General, Criminal Division, DOJ, Before the Subcommittee on Crime, Terrorism, and Homeland Security at 3 (June 14, 2011), http://www.justice.gov/ola/testimony/112-1/06-14-11-crm-andres-testimony-re-foreign-corrupt-practices-act.pdf; Principles of Federal Prosecution of Business Organizations, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm.

24. Weich Letter, note 23, *supra*.

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In Morgan Stanley's case, the DOJ found a company deserving of a declination decision – Morgan Stanley (1) voluntarily self-disclosed Peterson's potential misconduct; (2) cooperated with the government's investigation; and (3) had a robust compliance program in place prior to and at the time of Peterson's alleged misconduct.[25] Notably, the alleged misconduct involved a single "rogue" Morgan Stanley employee, *i.e.*, Peterson, who, according to the government, intentionally evaded Morgan Stanley's internal controls and undermined the company's extensive due diligence efforts.[26]

Although somewhat less emphatically pointing to Morgan Stanley's compliance program, the SEC's press release and complaint drew attention to the degree to which Peterson's alleged misconduct depended for its success on his individual efforts to evade internal controls that were reasonably designed to prevent misconduct. In addition to pointing out Morgan Stanley's due diligence steps regarding Peterson's Chinese counter-party and numerous and specific misrepresentations that Peterson had made to his superiors, in some cases in response to specific FCPA-related warnings and directives, the SEC complaint noted several key aspects of the company's compliance program that, in the totality of events, led to a conclusion that Peterson, and not the company, was at fault.[27]

Morgan Stanley's Preexisting Compliance Program

The government's court filings in the *Peterson* case provide concrete details concerning the type of pre-existing compliance program both the DOJ and the SEC deem worthy of credit in FCPA matters, providing much-needed guidance to corporations, other legal entities, and individuals alike seeking to ensure that compliance programs meet best practices.[28] Specifically, the DOJ, the SEC, or both, took pains to note that, prior to and at the time of Peterson's alleged misconduct, Morgan Stanley had implemented the following:

1. **Frequent training of its employees.** Morgan Stanley maintained an FCPA compliance program that frequently trained its employees, including live training presentations and web-based training.[29] Between 2000 and 2008, the company conducted "at least 54 trainings for various groups of Asia-based employees on anti-corruption policies, including the FCPA."[30] From 2002 to 2008, the company trained Peterson on his duties under the FCPA at least seven times. In addition to live and web-based training, Peterson also participated in a teleconference training conducted by the company's Global Head of Litigation and Global Head of the Anti-Corruption Group.[31] Peterson was also "specifically trained . . . that employees of Chinese state-owned entities could be government officials under the FCPA."[32]

2. **Frequent compliance reminders, including written compliance materials.** Between 2000 and 2008, Peterson received at least 35 FCPA compliance reminders, including "FCPA-specific distributions, such as written training materials that Peterson kept in his office; circulations and reminders of Morgan Stanley's Code of Conduct, which included policies

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25. *See* Howard Sklar, "The Most Marketable Compliance Officer In the World," *Forbes* (Apr. 30, 2012) ("To be entirely accurate, Morgan Stanley benefited from the holy trinity of reduced penalties: pre-existing compliance, self-disclosure, and cooperation. But it was the compliance program the DOJ highlighted in its press release."), http://www.forbes.com/sites/howardsklar/2012/04/30/the-most-marketable-compliance-officer-in-the-world/?goback=%2Egde_2924423_member_111840807; DOJ Press Rel. 12-534, note 1, *supra* ("The company voluntarily disclosed this matter and has cooperated throughout the department's investigation.").

26. *See* DOJ Press Rel. 12-534, note 1, *supra*; SEC Press Rel. 2012-78, note 2, *supra* (finding Peterson to be a "rogue employee who took advantage of his firm and its investment advisory clients"). Also noteworthy is the fact that the Global Head of Morgan Stanley's Anti-Corruption Group, Raja Chatterjee, was previously an attorney in the Fraud Section of DOJ's Criminal Division. *See* Sklar, note 25, *supra*.

27. Complaint at ¶¶ 23–26, note 2, *supra*; *see also infra* Part II. Noting Morgan Stanley's implementation of internal controls as required by 15 U.S.C. § 78m(b)(2)(A) and (B), the SEC described how "Morgan Stanley required each of its employees, including Peterson, annually to disclose their outside business interests," "had policies to conduct due diligence on its foreign business partners, conducted due diligence on the Chinese Official and Yongye before initially conducting business with them, and generally imposed an approval process for payments made in the course of its real estate investments" – requirements "meant to ensure, among other things, that transactions were conducted in accordance with management's authorization and to prevent improper payments, including the transfer of things of value to officials of foreign governments." Complaint at ¶¶ 24–26, note 2, *supra*.

28. Information, note 1, *supra*; Complaint, note 2, *supra*.

29. Information at ¶¶ 13, 17, note 1, *supra*.

30. *Id.* at ¶ 17.

31. *Id.* at ¶ 18; Complaint at ¶ 23(1), note 2, *supra*.

32. Information at ¶ 18, note 1, *supra*; *see* Complaint, ¶ 23(3), note 2, *supra*.

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that directly addressed the FCPA; various reminders concerning Morgan Stanley's policies on gift-giving and entertainment; the circulation of Morgan Stanley's Global Anti-Bribery Policy; guidance on the engagement of consultants; and policies addressing specific high-risk events, including the Beijing Olympics."[33]

> "Among other things, '[b]etween 2002 and 2008, Morgan Stanley employed over 500 dedicated compliance officers, and its compliance department had direct lines to Morgan Stanley's Board of Directors[.]'"

3. **Annual employee certification of anti-corruption policies.** Morgan Stanley's employees were required to certify annually "adherence to Morgan Stanley's Code of Conduct, which included a section specifically addressing corruption risks and activities that would violate the FCPA. Morgan Stanley's standing anti-corruption policy also addressed the FCPA and risks associated with the giving of gifts, business entertainment, travel, lodging, meals, charitable contributions, and employment."[34] The company required Peterson to certify his compliance with the FCPA on multiple occasions, and the written certifications were retained as part of Peterson's permanent employment record.[35]

4. **Robust staffing and region-specific compliance personnel.** "Between 2002 and 2008, Morgan Stanley employed over 500 dedicated compliance officers, and its compliance department had direct lines to Morgan Stanley's Board of Directors and regularly reported through the Chief Legal Officer to the Chief Executive Officer and senior management committees. Morgan Stanley employed dedicated anti-corruption specialists who were responsible for drafting and maintaining policies and procedures; providing anti-corruption training to Morgan Stanley employees; coordinating with business units firmwide to provide anti-corruption-related advisory services; evaluating the retention of agents; pre-clearing expenses involving non-U.S. government officials; and working with outside counsel to conduct due diligence into potential business partners. Morgan Stanley's compliance personnel regularly surveiled and monitored client and employee transactions; randomly audited selected personnel in high-risk areas; regularly audited and tested Morgan Stanley's business units; and completed additional anti-corruption initiatives by, for instance, aggregating and evaluating expense reports to attempt to detect potential illicit payments. Morgan Stanley also employed regional compliance officers who specialized in particular regions, including China, in order to evaluate region-specific risks."[36]

5. **Compliance Hotline.** Morgan Stanley also "provided its employees with a toll-free compliance hotline that was available 24 hours a day, 7 days a week," which "was staffed to field calls in every major language, including Chinese."[37]

6. **Continued evaluation and improvement of compliance program and internal controls.** "Morgan Stanley engaged in risk-based FCPA auditing intended to detect transactions, payments, and partnerships that suggested increased risks for Morgan Stanley to violate the FCPA. Morgan Stanley checked the efficacy of its controls through various systems, including internal audits and desk reviews that included meetings between employees and compliance personnel to discuss anti-corruption risks. Morgan Stanley compliance personnel regularly reviewed and

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33. Information at ¶ 19, note 1, *supra*; *see* Complaint at ¶ 23(2), (4), note 2, *supra*.
34. Information at ¶ 16, note 1, *supra*; *see* Complaint at ¶ 24, note 2, *supra*.
35. Information at ¶ 20, note 1, *supra*; *see* Complaint at ¶ 23(5), note 2, *supra*.
36. Information at ¶ 14, note 1, *supra*.
37. *Id.* at ¶ 15; *see* "Integrity Hotline," http://www.morganstanley.com/about/company/governance/hotline.html [last visited May 24, 2012].

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updated Morgan Stanley's compliance program and policies to reflect regulatory developments and changing risk. Morgan Stanley, in conjunction with outside legal counsel, also annually conducted a formal review of each of its anti-corruption policies."[38]

Other Factors Noted In Connection with the Declination Decisions

While the government clearly credited the robustness of the general features of Morgan Stanley's pre-existing compliance program and the specific efforts the company undertook to control Peterson's behavior as a general matter, along with the company's voluntary self-disclosure and cooperation,[39] the government also considered the company's specific responses to Peterson's individualized actions and the specific set of transactions at issue. This focus on the company's conduct in the particulars of an unfolding compliance issue highlights the government's willingness to weigh in each case of misconduct the relative responsibility of an individual and his or her corporate employer, despite the rule that an employee acting within the scope of his or her employment can generate civil and criminal liability for an employer under principles of *respondeat superior*.[40] As the DOJ noted in its press release, it considered "all the available facts and circumstances" in its decision not to bring an enforcement action against Morgan Stanley.[41]

In court filings, the government highlighted not only the "substantial system of controls" Morgan Stanley had in place "to detect and prevent improper payments,"[42] and the company's extensive due diligence efforts concerning business dealings with Yongye,[43] but the lengths to which Peterson – a "rogue employee"[44] – went to evade the company's internal controls and to undermine the company's due diligence. As alleged by the government, Peterson knowingly and falsely represented to others within Morgan Stanley that Yongye was purchasing the real estate interest, when in fact the interest would be conveyed to a shell company controlled by Peterson, the former Yongye Chairman, and a Canadian attorney.[45] Peterson's deception was documented in company emails.[46] In one instance, an employee in the controller function of Morgan Stanley's real estate business expressly warned Peterson of the anti-bribery compliance implications of paying the former Yongye Chairman personally for his help in obtaining business.[47] Despite the company's warning, Peterson is alleged to have secretly shared part of a finder's fee with the former Yongye Chairman.[48]

Although the Morgan Stanley declinations provide some very useful guidance for corporations seeking to implement best practices in their compliance programs, it remains to be seen how a corporation would fare if it had a less robust compliance program and a less compelling set of factual circumstances.[49] Indeed, given the breadth of prosecutorial discretion afforded the government, companies cannot assume these declinations will be held legally to bind the government to decline to prosecute another company even with closely similar facts.

Absent more formal guidance from the DOJ, the SEC, Congress, or the courts, the Morgan Stanley declinations will remain but one important data point that in-house counsel and compliance personnel can look to as they work to ensure compliance in this fluid environment. It would be

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38. Information at ¶ 23, note 1, *supra*.

39. DOJ Press Rel. 12-534, note 1, *supra* ("The company voluntarily disclosed this matter and has cooperated throughout the department's investigation."); *see* Morgan Stanley, Current Report (Form 8-K) (Feb. 11, 2009) ("In an unrelated matter, Morgan Stanley announced today that it has recently uncovered actions initiated by an employee based in China in an overseas real estate subsidiary that appear to have violated the Foreign Corrupt Practices Act. Morgan Stanley has terminated the employee, reported the activity to appropriate authorities and is continuing to investigate the matter."), http://www.sec.gov/Archives/edgar/data/895421/000095010309000265/dp12515_8k.htm.

40. *See, e.g.*, *United States v. Koppers Co.*, 652 F.2d 290, 298 (2d Cir. 1981).

41. DOJ Press Rel. 12-534, note 1, *supra*.

42. Information at ¶¶ 21-22, note 1, *supra*.

43. *Id.* at ¶¶ 24–28; Complaint at ¶ 26, note 2, *supra*.

44. SEC Press Rel. 2012-78, note 2, *supra* (describing Peterson as a "rogue employee who took advantage of his firm and its investment advisory clients").

45. DOJ Press Rel. 12-534, note 1, *supra*.

46. Information at ¶ 45(a)–(d), note 1, *supra*; Complaint at ¶ 16, note 2, *supra*.

47. *See* Complaint at ¶ 21, note 2, *supra*.

48. *Id.* at ¶ 22.

49. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.") (citing, *e.g.*, *Confiscation Cases*, 7 Wall. 454 (1869)).

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inappropriate to see the Morgan Stanley declinations as a startling and dramatic turnabout, particularly as the compliance environment is ever-changing and unique to each company's facts. The variables that can affect compliance programs from company to company, and, within companies over time, will include both the costs of compliance tools and internal controls, and the strategies individuals might use to evade them. These and other circumstances could affect whether a company's compliance program can be said to be reasonably designed and implemented to prevent misconduct.

But there can be no question – with respect to this particular matter, the in-house legal and compliance personnel at Morgan Stanley have much to be proud of for their hard work and diligence.

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U.K. Ministry of Justice Publishes Consultation Paper on Deferred Prosecution Agreements

The U.K.'s Ministry of Justice ("MoJ") has published a consultation paper[1] seeking views on its proposals to introduce U.S. style Deferred Prosecution Agreements ("DPAs") in England and Wales. The DPAs would be used by prosecutors in relation to economic crimes (fraud, bribery and money laundering) committed by commercial organizations.

DPAs have long been used in the United States. They allow prosecutors to agree that prosecution of an organization will be deferred generally in exchange for the payment of monetary penalties and compliance with the terms and conditions of the DPA by the defendant organization. English law currently does not permit prosecutors to strike such a deal with defendants: sentencing is exclusively a matter for the court, though the law does allow prosecutors to recommend a range of possible sentencing outcomes. The absence of DPAs has generally been viewed as the missing sentencing tool that prevented the U.K. authorities – and in particular the Serious Fraud Office ("SFO") – from putting into effect a U.S. style enforcement model in which self-reporting is effectively and demonstrably incentivized.

Indeed, the MoJ's proposals come in the wake of severe judicial criticism of the attempts by the SFO to agree on criminal penalties with defendant companies in the absence of DPAs.[2] In *R v. Innospec Ltd.,* Innospec had "agreed" with the SFO and the U.S. authorities that it should pay a financial penalty to be split between the authorities, in respect of the bribery of government officials and employees of a state-owned refinery in Indonesia. Although the judge (Thomas LJ) in that instance imposed the agreed fine, he made clear that the court was not bound by any such agreement and that the court's hands would not be tied in the same way in the future.

This approach was followed in the case of *R v. Dougall*, in which at first instance Mr. Justice Bean imposed a sentence of 12 months' imprisonment, contrary to the defendant's agreement with the SFO for

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1. Ministry of Justice, "Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements" (May 2012), http://www.official-documents.gov.uk/document/cm83/8348/8348.pdf [hereinafter "Consultation Paper"].

2. *See R v. BAE Systems PLC*, [2010] S2010565, ¶ 13 (Dec. 21, 2010), http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/r-v-bae-sentencing-remarks.pdf; *R v. Dougall*, [2010] EWCA Crim. 1048, ¶¶ 19–25 (May 13, 2010), http://www.judiciary.gov.uk/media/judgments/2010/r-v-dougall; *R v. Innospec Ltd.*, [2010] Crim. L.R. 665, Sentencing Remarks of Lord Justice Thomas, ¶¶ 26–28 (Mar. 26, 2010), http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/sentencing-remarks-thomas-lj-innospec.pdf.

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cooperating in respect of corrupt payments made to medical professionals within the Greek state healthcare system. Although this sentence was overturned and replaced with a suspended sentence on appeal, the Court of Appeal was still highly critical of the SFO's approach, endorsing the comments of Thomas LJ concerning plea agreements.

The MoJ hopes that granting prosecutors the ability to enter into DPAs in dealing with economic crimes by commercial organizations may lead to a higher proportion of economic crime being identified and more effective enforcement action being brought against such organizations.

The range of options currently available to prosecutors in England and Wales in dealing with economic crime are to prosecute or obtain a civil recovery order[3] (or both) against the commercial organization. The latter option involves no criminal punishment or admission of liability by the organization, and was recently criticized by the Organization for Economic Cooperation and Development ("OECD") for that reason.[4] The MoJ hopes that DPAs will provide a middle ground between these options. Their implementation should also provide greater incentives to self-reporting than exist in the current regime, in which organizations still face the very real prospect of a criminal prosecution.

Further, the international nature of many commercial organizations means that economic crimes often occur across multiple jurisdictions and result in the involvement of prosecuting authorities in other jurisdictions. The limited options available to the prosecuting authorities in England and Wales to deal with economic crimes often restricts their ability to prosecute the commercial organizations under English law. Contrary to the position in the United States, a defendant may not be prosecuted under English law if that defendant has already been convicted or acquitted of the same offense by another sovereign.

> "The MoJ hopes that granting prosecutors the ability to enter into DPAs in dealing with economic crimes by commercial organizations may lead to a higher proportion of economic crime being identified[.]"

The MoJ's consultation paper, indeed, even suggests that commercial organizations which are liable to be prosecuted in both the United States, on the one hand, and England and Wales, on the other, may choose to engage with the U.S. authorities to avoid action being taken by the U.K. authorities. Striking a deal with U.S. authorities is often more attractive to an organization than cooperating with the U.K. authorities due to the option of entering into a DPA or non-prosecution agreement, which would not result in a criminal conviction.[5] This lack of equivalent enforcement methods in the U.K. makes negotiations on prosecution and resolution of the case between the U.K. and other jurisdictions difficult.

Although the MoJ's proposals in its consultation paper are largely based on the current U.S. system of DPAs, the MoJ notes that the lack of judicial oversight in the U.S. DPA regime. DPA regime would not be suitable in light of English law constitutional and legal traditions; the MoJ thus advocates a more transparent approach and greater judicial intervention in England and Wales.

Under the MoJ's proposals, a prosecutor would lay, but not immediately proceed with, criminal charges pending successful compliance with the agreed terms and conditions set out in the DPA.

The terms and conditions envisaged include:

- Payments of civil penalties;
- Reparation for victims, including compensatory payments;
- Disgorgement of the profits of wrongdoing; and
- Implementation of measures to prevent future offending, such as changes to

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3. Civil Recovery Orders are briefly addressed in the consultation paper. *See* Consultation Paper at ¶¶ 49–51, note 1, *supra*. They are also discussed in the August 2011 issue of FCPA Update. *See* Karolos Seeger and Matthew H. Getz,"The U.K. Proceeds of Crime Act and the SFO's Latest Bribery-Related Settlement," *FCPA Update*, Vol. 3, No.1 (Aug. 2011), http://www.debevoise.com/files/Publication/9d56da80-1da1-4e29-bc27-4288643df3cc/Presentation/PublicationAttachment/ea922c2f-78d8-46ea-ad2d-69638418a04e/FCPAUpdateAugust2011.pdf.

4. *See* John B. Missing, Karolos Seeger, and Matthew H. Getz,"UK Anti-Bribery Efforts Draw Qualified Praise from OECD," *Debevoise & Plimpton Client Update* (Apr. 5, 2012), http://www.debevoise.com/files/Publication/c9fe36db-8195-49e5-8259-c45b2d1af224/Presentation/PublicationAttachment/d3f1c9db-9155-49f4-b63e-d2df0bbf8b2f/UK%20Anti-Bribery%20Efforts%20Draw%20Qualified%20Praise%20from%20OECD.pdf.

5. Consultation Paper at ¶¶ 39–40, note 1, *supra*.

MoJ Publishes Consultation Paper on DPAs ■ Continued from page 8

corporate governance, the appointment of an independent monitor or a reporting requirement.

The consultation paper envisages that any DPA would be for a duration of between one and three years, although shorter or longer periods would be possible depending on the individual case.

Any proposed DPA would be subject to scrutiny by the court at an early stage of negotiations, with a judge having the power to reject a DPA if it is deemed inappropriate for the case, such as if a judge determines the public interest would be better served by a criminal prosecution. This would keep DPAs within the default scheme of English law, whereby all criminal punishments are ultimately decided by the court. The consultation paper proposes a two-stage judicial process:

- Stage one preliminary hearing: following an initial agreement between the prosecutor and commercial organization to enter into a DPA, a hearing would be held in private where a judge would assess whether it is in "the interests of justice" to proceed with the DPA and give an indication whether the proposed terms of the DPA are "fair, reasonable, adequate, and in the public interest."

- Stage two approval hearing: the agreed DPA would be returned for final judicial approval, which would be held in open court.

- The terms of the final DPA would then be published (subject to certain restrictions).

- The MoJ hopes that this two stage process would allow for transparency while at the same time preserving the ability of the prosecutor and defendant to have open discussions and the right of the defendant to withdraw from the DPA prior to final judicial approval.

- If the commercial organization fails to meet its obligations under the DPA, the consultation paper proposes three options:

  - Consideration and amendment of the terms and conditions of the DPA, either by application to a judge to vary the terms, by agreement between the prosecutor and commercial organization without recourse to the court, or by express provision in the DPA itself;

  - Formal breach proceedings before the court. It is proposed that these be civil, not criminal proceedings. Any findings of a breach would not amount to a conviction or criminal offense, but the court would have the power to amend, extend or terminate the DPA and/or impose a financial penalty on the commercial organization; or

  - Revival of the original criminal prosecution.

The MoJ makes clear that DPAs would not replace criminal prosecutions for the most serious offenses or if it would be in the public interest to bring a prosecution. A Code of Practice setting out the factors to be considered by prosecutors in determining the appropriateness of a DPA would be issued by the Director of Public Prosecutions and the SFO for this purpose. The factors for consideration proposed by the MoJ include: (i) the nature and seriousness of the offense; (ii) the level of premeditation; (iii) how widespread the wrongdoing was and the seniority and number of perpetrators; (iv) losses to innocent third parties; (v) the likely impact on the commercial organization of prosecution and its financial situation; and (vi) any action taken by the organization to remedy the issues.

The introduction of DPAs in England and Wales should give U.K. prosecutors the ability to deal with commercial organizations in a more flexible and effective way, leading to the identification of more offenses through the incentive to self-report and comply with the authorities. At the same time, the MoJ proposal would still allow enforcement against the organization in a proportionate way.

The consultation opened on May 17 and is due to close on August 9, 2012.

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Blowing the Whistle on FCPA Violations by Domestic Concerns: A District Court Finds No Protection Under Dodd-Frank

One of a number of issues lurking in the Dodd-Frank Act's whistleblower provisions codified at 15 U.S.C. § 78u-6 is whether these whistleblower bounty and anti-retaliation provisions were intended to apply to individuals blowing the whistle on FCPA violations allegedly committed by domestic concerns governed by 15 U.S.C. § 78dd-2 or other entities that might be subject to the FCPA solely because part of a corrupt scheme took place "in the territory of the United States" as provided in 15 U.S.C. § 78dd-3.[1]

The Dodd-Frank Act's SEC whistleblower bounty program and related anti-retaliation provisions codified at 15 U.S.C. § 78u-6[2] define "whistleblower" as "any individual who provides . . . information relating to a violation of the securities laws to the Commission, in a manner established by rule or regulation, by the Commission."[3]

As recognized by a recent decision by the District Court for the Middle District of Tennessee, a key issue for those who blow the whistle on violations of 15 U.S.C. §§ 78dd-2 or 78dd-3 as well as a company that is the target of such whistleblowing, is whether those laws, like the parts of the FCPA applicable to "issuers" under the 1934 Securities Exchange Act, are "securities laws" under 15 U.S.C. § 78u-6(a)(6).[4]

Though 15 U.S.C. §§ 78dd-2 and 78dd-3, which govern domestic concerns and misconduct "in the territory of the United States," are codified in the same title of the United States Code that house the Securities Act of 1933 and the Securities Exchange Act of 1934, as well as other laws enforced by the Securities and Exchange Commission ("SEC"), the SEC has long been understood to lack authority to prosecute so-called dd-2 and dd-3 offenses. Instead, the U.S. Department of Justice ("DOJ") prosecutes such offenses.[5]

Still, until recently, no court had ruled on whether sections 78dd-2 and section 78dd-3 of Title 15 are "securities laws" within the meaning of the Dodd-Frank Act.

Holding they are not, in *Nollner v. Southern Baptist Convention, Inc.*, the District Court dismissed claims by a terminated employee who alleged that the Southern Baptist Convention, Inc. and two affiliates fired him after he reported to his superiors misconduct by these entities and their agents in connection with a construction project in India, including that "[t]he contractor and architect were paying bribes to local Indian officials with money furnished by the defendants for that purpose."[6]

In refusing to "interpret the [Dodd-Frank Act] as extending its whistleblower protections to companies that otherwise have no relationship to the SEC and that have not committed securities violations,"[7] the District Court followed a common sense approach that is also supported in the text of the public laws constituting the FCPA, as amended.

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1. *Compare* 15 U.S.C. § 78dd-2 (applying to "domestic concerns") *and* 15 U.S.C. § 78dd-3 (applicable to entities and individuals who are not either "issuers" or "domestic concerns" and if relevant conduct took place "in the territory of the United States") *with* 15 U.S.C. § 78dd-1 (applying to "issuers").
2. Dodd-Frank Act § 922(a), Pub. L. No. 111-203, 124 Stat. 1376, 1844 (2010), *codified* at 15 U.S.C. 78u-6 (Supp. 2011). In addition to authorizing whistleblower bounties and legislating corresponding anti-retaliation provisions for SEC-related whistleblowing, the Dodd-Frank Act also created whistleblower protections for reports to the Commodities Futures Trading Commission, *see* Dodd-Frank Act § 748, *id.*, 124 Stat. 1376, 1739 *et seq.*, and amended the Sarbanes-Oxley Act's whistleblower provisions to include protection for employees of subsidiaries or affiliates of issuers whose financial information is included in the issuer's consolidated financial statements, as well as those of nationally recognized statistical rating organizations. *See* Dodd-Frank Act §§ 922(b), 929A, *id.*, 124 Stat. 1376, 1848, 1852.
3. 15 U.S.C. § 78u-6(a)(6).
4. *Nollner v. Southern Baptist Convention, Inc.*, No. 3:12-Cv-40, 2012 WL 1108923 at *9-10 (M.D. Tenn. Apr. 3, 2012).
5. The same is true for FCPA alternative jurisdiction over United States persons. 15 U.S.C. § 78dd-2(i). The DOJ also exercises exclusive authority to enforce criminal FCPA offenses by issuers under the '34 Act.
6. *Nollner*, 2012 WL 1108923 at *2, 3, 9. The affiliates named were International Mission Board of the Southern Baptist Convention, Inc. ("IMB"), and Global Enterprise Services, LLC ("GES"). Southern Baptist Convention, Inc. is a Georgia corporation with its principal place of business in Tennessee; IMB is a Virginia corporation and GES is a Virginia Limited Liability Company. *Id.* None is or was an "issuer" under the '34 Act. *Id.* at *8.
7. *Id.* at *9.

Whistleblower Protection ■ Continued from page 10

In the 1977 public law that became the FCPA,[8] Congress stated its purpose as "amend[ing] the Securities Exchange Act of 1934 to make it unlawful for an issuer of securities registered pursuant to section 12 of such Act or an issuer required to file reports pursuant to section 15(d) of such Act to make certain payments to foreign officials and other foreign persons, to require such issuers to maintain accurate records, and for other purposes."[9] Those "other purposes" included creating new statutory sections wholly apart from amendments to the '34 Act to prohibit foreign bribery by "domestic concerns."[10] When Congress in 1998 created "in the territory" liability in section 78dd-3, it also did not amend the '34 Act, but instead enacted a new provision of federal law.[11]

The District Court's decision left open the possibility that state law might provide a cause of action for retaliation against those who blow the whistle against domestic concerns and companies that are not otherwise covered by the FCPA except to the extent they are implicated in a "territorial" scheme under section 78dd-3. But the District Court chose not to exercise jurisdiction over those claims, leaving them to the state courts.[12]

While addressing the specific issues that arise in the context of a domestic concern that is unaffiliated with an "issuer" under the '34 Act, the *Nollner* decision cannot be over-read as making Dodd-Frank's whistleblower provisions wholly inapt in cases in which a domestic concern or other entity is an affiliate of such an issuer. Primary FCPA anti-bribery violations by affiliates of an issuer could well give rise to books and records, or internal controls violations by a parent company that *is* an issuer under the '34 Act, and blowing the whistle on such issuer violations could be viewed by the courts (and the SEC) as both protected and, if undertaken in accordance with the Commission's Rules, eligible for a bounty under the Dodd-Frank bounty program.[13]

Because of the continued possibility of state law claims, the reasoning of the *Nollner* court does not eliminate the threat of whistleblower litigation for non-issuers, even if the situation in which an individual seeking to blow the whistle does not involve an SEC-regulated entity.[14] At the same time, as the District Court chose to focus on the complete inapplicability of the Dodd-Frank Act to Mr. Nollner's claims, it also had no occasion to reach other federal defenses – for example, that plaintiff had not reported the alleged misconduct to the SEC.[15]

But for domestic concerns and companies subject to "in the territory" jurisdiction under Sections 78dd-2 and 78dd-3 of Title 15, the decision is an important development. Particularly if followed by the SEC and other courts,[16] the reasoning in *Nollner* sharply reduces if not eliminates the cost, risk, and disruption of Dodd-Frank whistleblower bounty claims for a significant class of entities and individuals now subject to the FCPA.

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8. Public Law No. 95-213, 91 Stat. 1494 (1977).
9. *Id.* (preamble).
10. *Id.* § 104.
11. Pub. L. No. 105-366, 112 Stat. 3302 (1998).
12. *Nollner*, 2012 WL 1108923 at *10, 12-13.
13. Nor does *Nollner* address claims by whistleblowers who might seek to posture an anti-retaliation claim before the U.S. Department of Labor under Sarbanes-Oxley's distinct whistleblower regime, which is designed to protect whistleblowing pertaining to violations of federal criminal law prohibiting mail fraud, wire fraud, bank fraud, securities and commodities fraud, or of "any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." 18 U.S.C. § 1514A(a). *Compare* 18 U.S.C. § 1514A(a) *with* DOJ Press Rel. 07-474, Former Senior Officer of Schnitzer Steel Industries Inc. Subsidiary Pleads Guilty to Foreign Bribes (June 29, 2007) (mail and wire-fraud charges), http://www.justice.gov/opa/pr/2007/June/07_crm_474.html.
14. Entities that are not "issuers" could still be subject to SEC jurisdiction in particular circumstances, for example, with respect to violations of FINRA regulations. *See Nollner*, 2012 WL 1109823 at *7.
15. *See, e.g.*, *Egan v. Tradingscreen, Inc.*, No. 10 Civ. 8202, 2011 WL 1672066 (S.D.N.Y. May 4, 2011).
16. The *Nollner* plaintiffs did not appeal. *See* Docket, Nos. 3:12-cv-00040, 3:12-cv-0043 (M.D. Tenn.)

NEWS FROM THE BRICs

More Developments in Russian Anti-Corruption Efforts

The February 2012 issue of *FCPA Update* reported on two recent developments in anti-corruption law – Russia's accession to the Organization for Economic Cooperation and Development ("OECD") Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and then-President Dmitry Medvedev's[1] proposal of a draft National Anti-Corruption Plan for 2012–2013 (the "National Plan"). The February article cast those developments as positive steps in Russia's efforts to modernize its business environment and anti-corruption laws, and suggested that the developments might provide a needed shot in the arm for Russian anti-corruption enforcement efforts.[2]

The final version of the National Plan, which was signed into law on March 13, 2012,[3] as well as several more recent legislative initiatives, point to another positive trend in Russian anti-corruption efforts: increased transparency in business dealings among public officials, state-owned entities, and the private sector. Although the ultimate proof of Russia's commitment to anti-bribery enforcement lies in implementation, the recent initiatives are further signs of Russia's efforts to improve transparency in public officials' personal finances and receipt of gifts, to enact laws relating to the lobbying of public officials, and to address public officials' potential conflicts of interest.

Disclosing Expenditures That May Be Funded by Corrupt Payments

In the most recent of the new developments, on April 3, 2012, then-President Medvedev introduced Bill No. 47244-6,[4] which provides for increased transparency into expenditures by public officials and officials of state-owned entities that may be funded by corrupt payments. Bill No. 47244-6 authorizes a public official's supervisor to require each public official under supervision (and his or her spouse) to declare certain categories of expenditures[5] the costs of which exceed the official's total family income for the prior three years.[6] A request for disclosure under Bill No. 47244-6 also would require the official to declare the sources of income used for expenditures.[7]

Bill No. 47244-6 also requires that any request for disclosure from an official be based on receipt by the official's supervisor of information that the official, or his or her spouse or minor children, had in fact made a purchase in excess of their declared income.[8] However, the information cannot be based on an anonymous source.[9] Refusal to disclose the requested expenditure is

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1. Mr. Medvedev stepped down as President of Russia on May 7, 2012 and was confirmed on May 8, 2012 as the Prime Minister of Russia. *See* Michael Schwirtz, "With Some Dissent, Russia's Parliament Confirms Medvedev," *NY Times* (May 8, 2012), http://www.nytimes.com/2012/05/09/world/europe/slight-hiccup-as-putin-and-medvedev-switch-jobs-in-russia.html?ref=Europe.
2. B. Yannett, A. Kucher, A. Maximenko and M. Leigh, "News from the BRICS: Russia's Turn Toward Anti-Corruption Enforcement?" *FCPA Update*, Vol. 3, No. 7 (Feb. 2012), http://www.debevoise.com/files/Publication/f1606dac-62eb-4299-9bfa-5de993090940/Presentation/PublicationAttachment/db0149b4-0ec7-4633-87b6-69b728577aa1/FCPA_Update_Feb_2012.pdf.
3. *See* "Executive Order on National Anti-Corruption Plan for 2012–2013: Dmitry Medvedev signed Executive Order *On the National Anti-Corruption Plan for 2012-2013 and Amendments to Certain Acts of the President of the Russian Federation on Countering Corruption*" (Mar. 13, 2012), http://eng.kremlin.ru/news/3539.
4. Bill No. 47244-6, "Monitoring of the Conformity of the Expenditures of Persons Holding Public Office and Other Persons to Their Income"; *see* "Bill for the control of conformity of the expenditure and revenue officials, President of the Russian Federation, introduced in the State Duma," *BakuToday.Net*, http://www.bakutoday.net/bill-for-the-control-of-conformity-of-the-expenditure-and-revenue-officials-president-of-the-russian-federation-introduced-in-the-state-duma.html.
5. Article 4 of Bill No. 47244-6 requires declaration of expenses associated with the following categories: land parcels, immovable property, vehicles, securities, and shares in a charter capital. Such expenses are required to be declared if made by the official or the official's spouse or minor children. Bill No. 47244-6, art. 4, note 4, *supra*.
6. Bill No. 47244-6, art. 3, note 4, *supra*.
7. *Id.*
8. *Id.*, art. 4.
9. *Id.*

Russian Anti-Corruption Efforts ■ Continued from page 12

grounds for termination of the official's government employment.[10]

Once the expenditures and the manner of purchase are disclosed, Bill No. 47244-6 requires that the information be verified and a determination made whether the expenditures conform with the official's income.[11] Under Bill No. 47244-6, if authorities determine that the disclosed expenditures cannot be explained by lawful income, the official's disclosures would be referred to law enforcement authorities for potential proceedings to require forfeiture of the unlawfully acquired property.[12]

Bill No. 47244-6 is not the first time in recent months the Russian State Duma has taken up consideration of legislation concerning disclosure of public officials' expenditures that exceed their government income. In December 2011, several State Duma deputies introduced another piece of legislation, Bill No. 2832-6,[13] which would require public officials and their family members to annually declare their expenditures along with their income, property, and debt obligations.[14] Bill No. 2832-6 differs from Mr. Medvedev's Bill No. 47244-6 in that Bill No. 2832-6, if enacted, would require automatic annual reporting of expenditures exceeding the annual income declared by the relevant public official.[15]

As noted in February, if enacted, the Duma deputy-initiated legislation likely would be welcomed by the international community because Russia, in ratifying the U.N. Convention Against Corruption, omitted Article 20, which would have criminalized a significant increase in a public official's assets that cannot reasonably be explained in relation to his or her lawful income.[16] Although Mr. Medvedev's recently proposed Bill No. 47244-6 is arguably somewhat weaker legislation than Bill No. 2832-6, it may be better positioned to be enacted into law given that Medvedev is its sponsor[17] and was recently confirmed as Prime Minister of Russia.[18] Both bills remain pending in the State Duma.

> "Meanwhile, the recently approved National Plan tasks the Russian government with issuing new regulations requiring disclosure by public officials of gifts received in connection with their performance of official duties[.]"

New Rules on Gifts and Lobbying

Meanwhile, the recently approved National Plan tasks the Russian government with issuing new regulations requiring disclosure by public officials of gifts received in connection with their performance of official duties, business trips in their capacity as public officials, or other official events.[19] The regulations would require disclosure of such gifts by officials at all levels of government – state, regional, and municipal – and by officials of the Bank of Russia and other entities established by the state.[20] The new regulations must, among

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10. *Id.*, art. 16.
11. *Id.*, arts. 10, 11.
12. *Id.*, art. 17.
13. Bill No. 2832-6, "On Amendments to Certain Legislative Acts of the Russian Federation in Connection with the Improvement of Public Administration in Fighting Corruption," http://asozd2.duma.gov.ru/main.nsf/%28Spravka%29?OpenAgent&RN=2832-6&02 [Russian].
14. *Id.*, art. 9.
15. *Id.*
16. *See* United Nations Convention Against Corruption, art. 20 (adopted Oct. 31, 2003), http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf; B. Yannett *et al.* at 6, note 2, *supra*.
17. The bill will become law if adopted by the State Duma in three separate readings, approved by the Federation Council, signed by President Putin, and then officially published.
18. *See* Schwirtz, note 1, *supra*; "Vladimir Putin signed Executive Order appointing Dmitry Medvedev Prime Minister of the Russian Federation" (May 8, 2012), http://eng.news.kremlin.ru/news/3770.
19. Item 2 of National Anti-Corruption Plan for 2012–2013 [hereinafter "National Plan"].
20. *Id.*

Russian Anti-Corruption Efforts ■ Continued from page 13

other things, define what it means to receive a gift "in connection with the performance of official duties," and establish a timeframe for reporting the receipt and value of such gifts.[21] If the gift is received in connection with an official's government duties, the gift will be sold and the money added to government coffers.[22]

The National Plan's requirement for new regulations may be an attempt to add transparency in gifting to officials in an effort to curb the practice. According to studies conducted by the World Bank, businesses' perception of the degree to which gifts or informal payments are made to public officials to "get things done" has decreased somewhat in recent years – in 2005, 62 percent of businesses polled expected firms to make such gifts or payments in Russia; in 2009, the most recent year for which data is available, approximately 40 percent of businesses expected firms to make such gifts or payments.[23]

Requiring disclosure of gifts received by public officials in connection with their government positions also might be aimed at educating those officials as to what gifts they can and cannot receive under Russian law. Since 2009, the Russian Civil Code has allowed public officials to receive gifts valued at no more than 3,000 rubles (approximately 100 U.S. dollars) on any one occasion.[24] Excepted from the Criminal Code prohibition on receiving gifts,[25] as well as the value limit on gifts under the Civil Code, are gifts made in the course of official protocol or at an official state function, although such gifts are considered government property and are required to be turned over to the receiving official's ministry or government institution.[26]

The National Plan, as enacted, also calls for various federal entities, including the Ministry of Economic Development and Trade and the Ministry of Justice, to devise concrete proposals for the establishment of Russia's first set of lobbying regulations.[27] Since 1995, there have been several unsuccessful attempts to promulgate statutory lobbying regulations.[28] Each of those past attempts was resisted by both the presidential administration at the time, as well as by private sector stakeholders that were wary of state regulation of their government-relations activity.[29]

As recently as 2009, the Russian edition of *Newsweek* published what it reported to be a "price list" belonging to lobbyists of the State Duma that showed "costs" to lobbyists to obtain specific actions by Russian legislators.[30] The prices ranged from $3,000 (U.S. dollars) for a phone call or meeting with an official in order to advocate for a lobbyist's client, to $30,000 for a Duma deputy's vote on a pending bill, to $50,000 for the introduction of new legislation.[31]

Russia currently has no legislation or regulation requiring persons who advocate before government entities on behalf of private interests publicly to disclose the identities of the principals whom they represent, or the authorization for which such advocates are certified as allowed to participate in meetings of government authorities (through powers of attorney, for example). Enactment of such regulations could be a significant positive step in improving transparency in government interactions with private business, as well as toward improving the international community's perception of Russia's business environment.

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21. *Id.*
22. *Id.*
23. World Bank, Enterprise Surveys Project, "Percent of firms expected to give gifts to public officials 'to get things done,'" http://www.enterprisesurveys.org/Data/ExploreTopics/corruption (last visited May 23, 2012).
24. Article 575 of the Civil Code of the Russian Federation [hereinafter "Civil Code"].
25. Article 290 of the Criminal Code of the Russian Federation.
26. Article 575 of the Civil Code.
27. Item 15 of the National Plan.
28. *See* Dmitry Denisov, "Business Lobbying and Government Relations in Russia: The Need for New Principles," Reuters Institute Fellowship Paper at 8 (2010), http://reutersinstitute.politics.ox.ac.uk/fileadmin/documents/Publications/fellows__papers/2010-2011/Business_lobbying_and_government_relations_in_Russia.pdf.
29. *Id.*
30. *Id.* at 9.
31. *Id.* at 9–10.

Russian Anti-Corruption Efforts ■ Continued from page 14

New Efforts to Prevent and Resolve Conflicts of Interest

The National Plan, as enacted, also requires national and regional authorities in Russia to devise strategies better to identify and timely resolve public officials' potential conflicts of interest.[32] Under the National Plan, the Presidential Council of Anti-Corruption and the national government are required to assess the results of various government authorities' conflicts of interest prevention work, and determine appropriate metrics for improvement of the government's performance in situations in which officials may be potentially conflicted.[33] In addition, the national government is to establish restrictions on transactions between government authorities and private commercial entities whose management or major shareholders are close relatives of persons within the transacting government entity.[34]

> "Recent action on the new National Plan, and moves toward disclosure requirements for gifts and Russia's first official lobbying regulations, reinforce a trend of modernization[.]"

* * * * * * * * * * *

Recent action on the new National Plan, and moves toward disclosure requirements for gifts and Russia's first official lobbying regulations, reinforce a trend of modernization of Russia's business environment. The recent developments show that, as in other areas, Russia has made some progress, but also that much work remains to be done.

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32. Item 18 of the National Plan. Russian law defines a "conflict of interest" as any situation in which the personal interest of a government official or civil servant may influence the official's ability to objectively perform his or her government duties, or which may lead to a clash between the official's personal interests and the interests of the Russian public or the Russian Federation generally. Federal Law 79-FZ, art. 19 (Jul. 27, 2004).

33. Item 18 of the National Plan.

34. *Id.*

Recent and Upcoming Speaking Engagements

May 4, 2012
Paul R. Berger
"Country Developments – China"
Foreign Corrupt Practices Act and International Anti-Corruption Developments 2012
PLI
New York
Conference information:
http://www.pli.edu/Content/Seminar/Global_Capital_Markets_the_U_S_Securities/_/N-4kZ1z1337n?Npp=1&ID=143096

May 8–9, 2012
Sean Hecker
"FCPA, Corporate Governance and Personal Liability: How to Deal with Audit Committees, Board of Directors and Corporate Officers when FCPA Issues Arise"
Sixth National Conference on the FCPA and Anti-Corruption for the Life Sciences Industry
American Conference Institute
New York
Conference information:
http://americanconference.com/2012/709/fcpa-and-anti-corruption-for-the-life-sciences-industry/overview

June 4–6, 2012
Frederick T. Davis
Matthew H. Getz
"Global Anti-Corruption Enforcement Efforts"
Certificate in Healthcare Compliance Ethics & Regulation
Seton Hall Law and SciencesPo.
Conference information:
http://www.sciences-po.fr/spf/conferences/certificat_healthcare.php

June 7, 2012
Philip Rohlik
Asia Discovery Exchange 2012
Proactive Legal Management - Dialogue - Transforming reactive to proactive eDiscovery benefits business and litigation outcomes.
Website: http://www.asiaediscovery.com/

June 26–27, 2012
Bruce E. Yannett
"What the Latest Cases Reveal About the US DOJ and SEC Enforcement Priorities"
Karolos Seeger
"Optimising Compliance: How Leading Companies are Enhancing their Compliance Programmes One Year After the Implementation of the UK Bribery Act"
6th Annual European Forum on Anti-Corruption
C5
London
Conference information:
http://www.c5-online.com/2012/683/anti-corruption-london/overview

July 18, 2012
Steven S. Michaels
"Minimizing Risk and Adhering to the FCPA Mandates When Conducting Clinical Trials Abroad"
Advance Summit on Clinical Trials
ACI
Boston
Conference information:
http://www.americanconference.com/2012/723/clinical-trials