

# FCPA Update

November 2012 ■ Vol. 4, No. 4

## U.S. Enforcement Agencies Issue Extensive New FCPA Guidance

On November 14, 2012, the U.S. Department of Justice (“DOJ”) and the Securities and Exchange Commission (“SEC”) issued “A Resource Guide to the U.S. Foreign Corrupt Practices Act,” which provides extensive and long-awaited guidance on the interpretation and enforcement of the FCPA.<sup>1</sup> This landmark document (“the Guidance”), which spans more than 120 pages, presents the views of the U.S. enforcement agencies on a wide range of FCPA issues of significant concern to the global business community, including the jurisdictional reach of the FCPA; the meaning of “foreign official” and “government instrumentality;” the treatment of business hospitality and gifts; successor liability in mergers and acquisitions; the principles that govern enforcement decisions, including self-reporting, cooperation and remediation; the elements of effective compliance programs; and reporting obligations under the Sarbanes-Oxley Act. The discussion of these topics is accompanied by illustrative examples and hypothetical scenarios. Although the Guidance is non-binding, the DOJ and the SEC likely will rely heavily on it when making decisions regarding the application of the FCPA’s anti-bribery and accounting provisions, and companies should consider the Guidance when reviewing and implementing their anti-corruption policies, internal controls and compliance programs.

### Key issues covered by the Guidance:

**Jurisdiction:** The Guidance reaffirms the position of the DOJ and the SEC that the anti-bribery provisions of the FCPA may be triggered even by conduct that has only a fleeting connection to the United States. For issuers and domestic concerns or their agents, any use of interstate commerce in furtherance of a corrupt payment to a foreign official will suffice – including “placing a telephone call or sending an e-mail, text message, or fax from, to, or through the United States” or “sending a wire transfer from or to a U.S. bank or otherwise using the U.S. banking system.”<sup>2</sup> Similarly, acts within the U.S. may ensnare co-conspirators who remain outside the U.S.: “a foreign national who attends a meeting in the United States that furthers a foreign bribery scheme may be subject to prosecution, as may any co-conspirators, even if they did not themselves attend the meeting.”<sup>3</sup> These

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1. U.S. Dep’t of Justice & U.S. Sec. and Exch. Comm’n, “A Resource Guide to the U.S. Foreign Corrupt Practices Act” (Nov. 14, 2012), <http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf> [hereinafter, “FCPA Resource Guide”].

2. FCPA Resource Guide at 11.

3. *Id.* at 12.

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far-reaching theories of jurisdiction have formed the basis of settled enforcement actions under the FCPA, but have yet to be tested fully in U.S. courts.<sup>4</sup>

**Meaning of “Foreign Official” and “Government Instrumentality”:** Under the FCPA, “foreign official” is defined to include any officer or employee of any “instrumentality” of a foreign government, but the statute does not define “instrumentality.”<sup>5</sup> As a result, it can be challenging for companies to determine when they are dealing with “foreign officials,” particularly in markets in which many businesses are partially state-owned. The meaning of these terms is the subject of ongoing litigation, including in the U.S. Court of Appeals for the Eleventh Circuit, where a potentially significant appeal currently is pending.<sup>6</sup> In the Guidance, the DOJ and the SEC follow the lead of the handful of federal district courts that have considered this issue, stating that “[w]hether a particular entity constitutes an ‘instrumentality’ under the FCPA requires a fact-specific analysis of an entity’s ownership, control, status, and function,” then providing a long but non-exclusive list of factors to be considered.<sup>7</sup> The Guidance offers the welcome clarification that “as a practical matter, an entity is unlikely to qualify as an instrumentality if a government does not own or control a majority of its shares”<sup>8</sup> but absent further judicial clarification, the fact-specific nature of the analysis is likely to continue to make the meaning of these terms a source of uncertainty.

**Business Hospitality and Gifts:** The FCPA’s anti-bribery provisions contain no explicit exception for de minimis gifts or business hospitality provided to foreign officials, though do contain an affirmative defense for reasonable and bona fide business expenditures.<sup>9</sup> The Guidance emphasizes that the FCPA requires proof of corrupt intent, which “protects companies that engage in the ordinary and legitimate promotion of their businesses” and makes it “difficult to envision any scenario in which the provision of cups of coffee, taxi fare, or company promotional items of nominal value” would be deemed to violate the FCPA.<sup>10</sup> The Guidance also acknowledges that moderately priced gifts that are “tokens of esteem or gratitude” are unlikely to be given with corrupt intent.<sup>11</sup> Likewise, the payment of travel and entertainment expenses for foreign officials has resulted in enforcement action only where such hospitality was extravagant or “occurred in conjunction with other conduct reflecting systemic bribery or other clear indicia of corrupt intent.”<sup>12</sup> The Guidance provides concrete examples of gifts and hospitality that would violate the FCPA and others that would not. For example, “a trip to Paris for a government official and his

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4. See, e.g., *SEC v. Straub, et al.*, No. 11-CV-9645, Memorandum of Law in Support of Defendants’ Joint Motion to Dismiss (S.D.N.Y. Nov. 5, 2012) (challenging SEC’s theory of jurisdiction).
5. 5 U.S.C. §§ 78dd-1(f)(1)(A), 78dd-2(h)(2)(A), 78dd-3(f)(2)(A).
6. *United States v. Esquenazi*, No. 09-CR-21010 (S.D. Fla. 2011), *appeal filed*, No. 11-15331-C (11th Cir. Nov. 14, 2011).
7. FCPA Resource Guide at 20.
8. *Id.* at 21.
9. 5 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2).
10. FCPA Resource Guide at 15.
11. *Id.* at 15, 17.
12. *Id.* at 15.

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wife that consisted primarily of touring activities via a chauffeur-driven vehicle” would be improper, while in the context of providing training to employees of a state-owned company in connection with a long-term contract, it would be permissible to

“[T]he Guidance emphasizes that ‘both DOJ and SEC place a high premium on self-reporting, along with cooperation and remedial efforts, in determining the appropriate resolution of FCPA matters.’”

pay for international business-class airfare, hotel expenses, a moderately priced dinner, a baseball game and a play.<sup>13</sup>

**Successor Liability:** Although the successor company in any acquisition or merger runs the risk of inheriting the FCPA liabilities of the acquired company or predecessor entity, the Guidance provides advice on how best to minimize those risks. In essence, if a company conducts appropriate pre-transaction FCPA diligence (or post-transaction diligence, if pre-transaction diligence is impractical), voluntarily reports any discovered violations to the DOJ and the SEC, and takes prompt remedial actions, including implementing robust compliance programs and internal

controls, the likelihood of any enforcement action against the successor company is low: “DOJ and SEC have only taken action against successor companies in limited circumstances, generally in cases involving egregious and sustained violations or where the successor company directly participated in the violations or failed to stop the misconduct from continuing after the acquisition.”<sup>14</sup> Even after being acquired, a predecessor company previously subject to the FCPA – whose past conduct constituted a violation – will remain subject to DOJ and SEC enforcement action.

**Principles Governing Enforcement**

**Decisions:** The Guidance summarizes the policies of the DOJ and the SEC on whether and how they will bring charges or commence enforcement proceedings and resolve matters involving potential FCPA violations. After reciting the DOJ’s well-established Principles of Federal Prosecution of Business Organizations and relevant provisions from the SEC’s Enforcement Manual, the Guidance emphasizes that “both DOJ and SEC place a high premium on self-reporting, along with cooperation and remedial efforts, in determining the appropriate resolution of FCPA matters.”<sup>15</sup> Also, the Guidance provides examples of actual “declinations,” matters involving evidence of FCPA violations in which the DOJ and SEC declined to pursue any enforcement action.<sup>16</sup> In each instance, without identifying the company involved, the Guidance describes the factors that led to the declination.

**Compliance Programs:** While noting that the DOJ and the SEC “have no formulaic requirements regarding compliance programs,” the Guidance describes the elements of what the enforcement agencies consider an effective compliance program: (1) a commitment from senior management and a clear anti-corruption policy; (2) a concise, accessible code of conduct as well as “policies and procedures that outline responsibilities for compliance within the company, detail proper internal controls, auditing practices, and documentation policies, and set forth disciplinary procedures;” (3) oversight responsibility vested with senior executives who have sufficient authority, autonomy and resources; (4) strong risk assessment and internal audit procedures; (5) periodic training and advice on FCPA compliance; (6) appropriate disciplinary procedures and positive incentives; (7) risk-based due diligence on third parties; (8) mechanisms for confidential reporting and efficient, reliable internal investigation; (9) periodic testing and review of compliance procedures; and (10) for mergers and acquisitions, thorough pre-acquisition due diligence and post-acquisition integration.<sup>17</sup> The particular application of these elements should “be tailored to an organization’s specific needs, risks, and challenges” based upon a “company’s own assessment.”<sup>18</sup> The Guidance on this topic does not break new ground, but the detailed recitation of

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13. *Id.* at 16-18.

14. *Id.* at 28.

15. *Id.* at 54.

16. *Id.* at 77-79.

17. *Id.* at 56-63.

18. *Id.* at 57.

## New FCPA Guidance ■ Continued from page 3

what the DOJ and the SEC consider “best practices” in compliance programs will be useful to companies seeking to ensure that their anti-corruption procedures and controls are robust.

Sarbanes-Oxley Reporting Obligations: Under Section 404 of the Sarbanes-Oxley Act, an issuer must report on management’s assessment of the effectiveness of the company’s internal controls over financial reporting, and the company’s auditor must evaluate the effectiveness of those controls.<sup>19</sup> The Guidance makes clear that the internal controls to be assessed “include those related to illegal acts and fraud – including acts of bribery – that could result in a material misstatement of the company’s financial statements.”<sup>20</sup> While Section 404 focuses on material weaknesses in internal controls, the FCPA contains no materiality requirement. Accordingly, while the Guidance stops short of suggesting any new Section 404 obligations, it does make clear for companies that anti-bribery controls should be considered an integral part of their internal controls over financial

reporting and thus should be tested as part of companies’ annual 404 procedures.

With regard to these issues, among others, the Guidance is an important

“[A]s a non-binding compilation of the views of the U.S. enforcement agencies, the Guidance leaves tremendous latitude for prosecutorial discretion in enforcement decisions...”

and valuable resource for companies and their legal and compliance advisors in developing effective compliance programs and preventing violations of the FCPA. However, as a non-binding compilation of the views of the U.S. enforcement agencies, the Guidance leaves tremendous latitude for prosecutorial discretion in enforcement decisions and is no substitute for greater

clarity in the statutory language of the FCPA. The perspectives offered by the DOJ and the SEC, like the FCPA itself, will now be subject to considerable debate and interpretation.

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19. 15 U.S.C. § 7262(a)-(b).

20. FCPA Resource Guide at 42.

# Recent Surveys Highlight Anti-Corruption Trends Facing Companies

Several firms have recently released the results of surveys of corporate executives regarding the anti-bribery and anti-corruption compliance programs that their companies have adopted, their attitudes about these measures, and their perceptions about broader anti-corruption issues facing their companies.

Ernst & Young's *Growing Beyond: A Place for Integrity*<sup>1</sup> collected the results of more than 1,700 interviews with Chief Financial Officers ("CFOs") and compliance executives in 43 countries regarding their views on fraud, bribery, and corruption risk.

Deloitte issued *Look Before You Leap: Navigating Risks in Emerging Markets*,<sup>2</sup> a survey of 126 business executives regarding the approaches that their companies are taking to address compliance and integrity-related risks in emerging markets.

Kroll Advisory Solutions published *The 2012 FCPA Benchmarking Report*,<sup>3</sup> a survey of 139 senior corporate compliance executives from U.S. multinational

companies regarding their attitudes towards anti-bribery risk and compliance.

Dow Jones issued its *2012 State of Anti-Corruption Compliance Survey*<sup>4</sup> based on interviews with more than 300 compliance professionals at companies across key industries worldwide.

FTI Consulting's *The Realities of the U.K. Bribery Act*<sup>5</sup> surveyed 571 U.K. executives holding board-level, senior management, and middle management positions regarding their perceptions of enforcement and compliance issues facing their companies one year after the U.K. Bribery Act took effect.

Respondents to all five surveys perceived significant bribery and corruption risks to their businesses. The E&Y Survey found that 39% of respondents believed that bribery or corrupt practices occurred frequently in the countries in which they worked.<sup>6</sup> In the Kroll Survey, 69% of respondents said their companies were either moderately or highly exposed to

bribery risk, and 85% of respondents said they expected the risk would increase or stay the same in the future.<sup>7</sup> Not surprisingly, respondents to the Deloitte Survey, the E&Y Survey and the FTI Survey perceived greater challenges in emerging markets.<sup>8</sup> A majority of respondents to the E&Y and FTI Surveys reported that corrupt practices were common in rapid-growth markets.<sup>9</sup> Seventy percent of respondents to the Deloitte Survey said that they were extremely or very concerned about compliance risks when their company conducts business in emerging markets, and 71% believed the risks had grown over the past two years.<sup>10</sup> In addition, almost half (48%) of the respondents to the Dow Jones Survey reported that their companies stopped or delayed entering an emerging market because of concern about violating anti-corruption regulations.<sup>11</sup> Executives participating in the FTI Survey believed that the U.K. Bribery Act would make it more difficult to do business in certain emerging

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1. Ernst & Young, "Growing Beyond: A Place for Integrity," 12th Global Fraud Survey (2012), <http://www.ey.com/GL/en/Services/Assurance/Fraud-Investigation---Dispute-Services/Global-Fraud-Survey---a-place-for-integrity> [hereinafter, "E&Y Survey"].
2. Deloitte, "Look Before You Leap: Navigating Risks in Emerging Markets" (2012), [http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/FAS\\_ForensicCenter\\_us\\_fas-us\\_dfc/us\\_fas\\_lbyl\\_navigating\\_risks\\_in\\_emerging\\_markets\\_102412.pdf](http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/FAS_ForensicCenter_us_fas-us_dfc/us_fas_lbyl_navigating_risks_in_emerging_markets_102412.pdf) [hereinafter, "Deloitte Survey"].
3. Kroll Advisory Solutions, "2012 FCPA Benchmarking Report: Compliance Officers Assess Bribery Risk at U.S. Multinationals" (2012), <http://www.krolladvisory.com/library/KrollAdvisorySolutionsFCPABenchmarkingReport.pdf> [hereinafter, "Kroll Survey"].
4. Dow Jones, "2012 State of Anti-Corruption Compliance Survey" (2012), <http://www.dowjones.com/pressroom/smpr/djrcsurvey2012.html> [hereinafter, "Dow Jones Survey"].
5. FTI Consulting, "The Realities of the U.K. Bribery Act" (2012), <http://www.fticonsulting.com/global2/critical-thinking/featured-perspectives/uk-bribery-act/the-realities-of-the-uk-bribery-act.aspx> [hereinafter, "FTI Survey"].
6. E&Y Survey at 4.
7. Kroll Survey at 8-9.
8. Deloitte Survey at 1, 3; E&Y Survey at 4; FTI Survey at 7.
9. E&Y Survey at 4; FTI Survey at 7.
10. Deloitte Survey at 3.
11. Dow Jones Survey at 5.

## Surveys Highlight Anti-Corruption Trends ■ Continued from page 5

markets: 56% said it would make it more difficult to do business in Brazil, 60% in China, 58% in Russia, and 54% in India.<sup>12</sup>

Two of the surveys reported increased acceptance of corrupt business practices as a result of the economic downturn. The E&Y Survey found that 30% of respondents said entertainment spending could be justified

“Eighteen percent of surveyed U.K. executives – and a startling one-fourth of all board-level respondents – said they would violate the U.K. Bribery Act to win business...”

to win and retain business in an economic downturn, versus 20% in the prior survey; 15% thought that cash payments were justifiable, as opposed to 9% in the previous survey; 16% would provide personal gifts, compared to 6% in the prior survey;<sup>13</sup> and 5% of respondents said they would misstate the financial performance of their business, versus 3% in the prior survey.<sup>14</sup> Forty-seven

percent of CFOs surveyed thought that one or more of these practices could be justified in an economic downturn, a worrying finding considering that CFOs often play a critical role in helping to establish and monitor accounting and financial controls.<sup>15</sup> The FTI Survey found 27% of respondents believed that the U.K. government would not actively pursue bribery cases in an effort to safeguard U.K. economic growth.<sup>16</sup> Eighteen percent of surveyed U.K. executives – and a startling one-fourth of all board-level respondents – said they would violate the U.K. Bribery Act to win business, indicating a problematic “tone at the top” for a number of the companies surveyed.<sup>17</sup> These positions are especially risky given recent Serious Fraud Office (“SFO”) guidance regarding enforcement of the Bribery Act, in which the SFO reaffirmed its commitment to criminally prosecuting Bribery Act violations.<sup>18</sup>

The surveys generally reported an increase in corporate compliance efforts. The Dow Jones Survey found that 83% of companies had compliance programs in place, up from 74% in 2011.<sup>19</sup> Seventy-four percent of the U.S. executives participating in the Kroll Survey said their companies’ compliance programs positioned them

as “extremely” or “very well” prepared to combat bribery risks and 53% said their compliance department budgets had increased in the last year.<sup>20</sup> However, executives expressed concern about whether their companies are ultimately sufficiently protected against corruption and bribery. The most frequently cited challenges by respondents to the Kroll Survey were the inability to anticipate the regulators’ next moves (21%), and ensuring that employee training is taken seriously and applied when a risky situation presents itself (20%).<sup>21</sup> The E&Y Survey, conducted globally, revealed that 42% of respondents had not received training on anti-bribery and anti-corruption policies and 52% thought that board members did not have a sufficiently detailed understanding of the company’s business to effectively protect against corruption risks.<sup>22</sup> The Deloitte Survey indicated that only 38% of executives were very confident in the effectiveness of their company’s processes to identify corruption risks during mergers and acquisitions.<sup>23</sup>

The survey results also confirmed the continuing risk presented by the retention of third parties. Though more than 90% of FCPA enforcement actions have involved third-party intermediaries,<sup>24</sup> it appears that

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12. FTI Survey at 7.

13. E&Y Survey at 5.

14. *Id.* at 5.

15. *Id.* at 12.

16. FTI Survey at 2.

17. *Id.* at 5.

18. SFO Press Rel., “Revised Policies” (Oct. 9, 2012), <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/revised-policies.aspx>.

19. Dow Jones Survey at 1.

20. Kroll Survey at 10.

21. *Id.* at 11.

22. E&Y Survey at 6, 14.

23. Deloitte Survey at 6.

24. E&Y Survey at 8.

## Surveys Highlight Anti-Corruption Trends ■ Continued from page 6

companies generally are still not adequately monitoring these relationships. In the Kroll Survey, which included only U.S. executives, 99% of respondents said they had anti-bribery provisions for employees in their companies' codes of conduct, but only 73% had similar provisions in agreements with third parties.<sup>25</sup> Fewer than 70% of respondents reported that they were able to track payments made through third parties to their intended recipients.<sup>26</sup> Though 71% of respondents to the Deloitte Survey said that they almost always conduct due diligence before a merger or acquisition, only 49% said they conduct due diligence when engaging a third-party agent.<sup>27</sup> Only 56% of participants in the E&Y Survey said they performed background checks on third parties and 59% said they used an approved supplier database.<sup>28</sup> Only 45% of the E&Y Survey respondents identified audit rights or regular audits of third parties as a process in place to monitor third-party relationships.<sup>29</sup> Half of the respondents to the Dow Jones

Survey believe that it is always necessary to conduct due diligence on third-party agents or consultants.<sup>30</sup> Both E&Y and Kroll advocated in their reports for the implementation of various technology-data systems to track third-party information and more effectively detect red flags.<sup>31</sup>

These surveys provide valuable insight into attitudes regarding anti-bribery and

“Both E&Y and Kroll advocated in their reports for the implementation of various technology-data systems to track third party information and more effectively detect red flags.”

anti-corruption risks and compliance from the perspective of those who have

ultimate responsibility for dealing with these challenges. The findings of the surveys conducted by Ernst & Young, Kroll, Dow Jones and FTI provide additional data points to boards and executive management for conducting institutional risk assessments and identifying potential areas for heightened controls in anti-bribery and anti-corruption compliance.

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25. Kroll Survey at 14.

26. *Id.* at 17.

27. Deloitte Survey at 10.

28. E&Y Survey at 9.

29. *Id.* at 10.

30. Deloitte Survey at 10; Dow Jones Survey at 10.

31. E&Y Survey at 9-10; Kroll Survey at 16.

# Italy Adopts New Anti-Corruption Law

On November 8, 2012, Italy enacted new anti-corruption legislation, joining numerous other countries that have recently implemented strong anti-corruption measures.<sup>1</sup> Approved by overwhelming majorities in the Italian Parliament,<sup>2</sup> the new anti-corruption law provides for the creation of an agency, the National Anti-Corruption Authority (“NACA”), to coordinate anti-corruption efforts, as well as numerous other measures, including increased penalties for corruption and whistleblower protections.<sup>3</sup> The strength and scope of the new anti-corruption law’s provisions may initiate a more active era of anti-corruption enforcement in both the public and private sectors in Italy, a country previously not viewed as a leader in such efforts.

The new law was initially proposed by former Prime Minister Silvio Berlusconi in May 2010.<sup>4</sup> Current Prime Minister Mario Monti recently submitted the law to a confidence vote to speed its passage through both houses of Italy’s parliament.<sup>5</sup> Prime Minister Monti indicated that the reforms were required to encourage foreign investment and to enhance the country’s reputation following the Berlusconi-related scandals that have engulfed Italy during the past year, most notably the October 26, 2012 conviction of Berlusconi for tax fraud.<sup>6</sup> The law incorporates changes recommended by the Organization for Economic Cooperation and Development (“OECD”) Working Group on Bribery and the Council of Europe Group of States

Against Corruption,<sup>7</sup> and builds on Italy’s prior anti-corruption measures (both by augmenting existing provisions and by enacting new measures).<sup>8</sup>

The newly-created NACA is provided with greater investigatory and supervisory powers than those of the existing anti-corruption agency, the Commission for the Evaluation, Transparency and Integrity of the Administration.<sup>9</sup> Under the new law, NACA is authorized to implement a National Anti Corruption Plan developed by the Department of Public Service.<sup>10</sup> NACA is required to provide an annual report to Parliament concerning anti-corruption initiatives.<sup>11</sup>

Regional and local government administrations are also required to develop

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1. Disposizioni per la prevenzione e la repressione della corruzione e dell’illegalità nella pubblica amministrazione (“Provisions for the prevention and combating of corruption and illegality in public administration”) (C. 4434-B), [http://www.camera.it/\\_dati/leg16/lavori/stampati/pdf/16PDL0064270.pdf](http://www.camera.it/_dati/leg16/lavori/stampati/pdf/16PDL0064270.pdf) [Italian]. Russia, China, and the United Kingdom, for example, have all recently implemented enhanced anti-corruption laws and programs. See Paul R. Berger, Bruce E. Yannett, Sean Hecker, David M. Fuhr, & Noelle Duarte Grohmann, “The FCPA in 2011: The Year of the Trial Shapes FCPA Enforcement,” *FCPA Update* Vol. 3, No. 6 (Jan. 2012), <http://www.debevoise.com/files/Publication/20960d4e-4743-40b8-bd29-27e9ed1a16c3/Presentation/PublicationAttachment/287fbc56-a440-4e41-97f1-3d76e6128a19/FCPAUpdateJanuary2012.pdf>; see also Bruce E. Yannett, Alyona N. Kucher, Anna V. Maximenko, & Michael T. Leigh, “Russia’s Turn Toward Anti-Corruption Enforcement?” *FCPA Update* Vol. 3, No. 7 (Feb. 2012), <http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=f1606dac-62eb-4299-9bfa-5de993090940>.
2. The vote in the Assembly of the Chamber of Deputies was 480 votes in favor, 19 votes against, and 25 abstentions. AgenParl, “Anticorruzione: Ok Della Camera Tutte Le Novita’ Della Nuova Legge” (Oct. 31, 2012), <http://www.agenparl.it/articoli/news/politica/20121031-anticorruzione-ok-della-camera-tutte-le-novita-della-nuova-legge-1> [Italian]. The vote in the Senate was 228 to 33. Naomi O’Leary and Steve Scherer, “Italy moves closer to passing anti-corruption law,” *Reuters* (Oct. 17, 2012), <http://uk.reuters.com/article/2012/10/17/uk-italy-corruption-idUKBRE89G1G720121017>.
3. C. 4434-B, note 1, *supra* at Art. 1(2), 3, 12, 19(1).
4. See Directorate General of Human Rights and Legal Affairs Directorate of Monitoring, Council of Europe Group of States Against Corruption, “Compliance Report on Italy” at 4 (May 27, 2011), [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC1&2\(2011\)1\\_Italy\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC1&2(2011)1_Italy_EN.pdf).
5. See Philip Pulella, “New Italy law tackles rampant corruption,” *Reuters* (Oct. 30, 2012), <http://www.reuters.com/article/2012/10/30/us-italy-corruption-idUSBRE89T1MT20121030>.
6. See Sarah Delaney, “Italy lawmakers approve anti-corruption legislation,” *Los Angeles Times* (Oct. 31, 2012), <http://articles.latimes.com/2012/oct/31/world/la-fg-italy-corruption-20121011>.
7. See Transparency International Italia, “Corruption is Not an Inevitable Fate but a Cultural Dress” (Oct. 31, 2012), [http://blog.transparency.org/wp-content/uploads/2012/10/CS\\_approvazione\\_ING.pdf](http://blog.transparency.org/wp-content/uploads/2012/10/CS_approvazione_ING.pdf).
8. Italy is a party to the OECD’s Anti-Bribery Convention (ratified Sept. 29, 2000), the UN’s Convention Against Transnational Organized Crime (ratified Aug. 2, 2006), the UN’s Convention Against Corruption (ratified Oct. 5, 2009), and the EU’s Anti-Corruption Convention (ratified Sept. 29, 2000). Italy previously enacted its commitments under these international agreements in its domestic laws. Under Italian law, bribery of public officials is outlawed under Articles 318-322 of the Italian Criminal Code. Article 322-bis criminalizes bribery of foreign officials. Under these provisions, bribery of an official for acts in breach of official duties can be penalized with up to five years of imprisonment.
9. 4434-B, note 1, *supra* at Art. 1(2), (3).
10. *Id.* at Art. 1(2)(b), (g).
11. *Id.*



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plans to fight corruption that conform to the National Anti-Corruption Plan.<sup>12</sup> Public institutions must also name anti-corruption managers responsible for creating annual anti-corruption plans.<sup>13</sup> The plans must identify areas prone to corruption, provide training to staff, and ensure adequate compliance monitoring.<sup>14</sup> The anti-corruption managers of public institutions can be liable for failures that result in losses due to corruption unless an appropriate anti-corruption plan has been implemented and monitored.<sup>15</sup> The new law also requires greater transparency of public institutions: budgets, details of public works project costs, and salaries of senior officers must be made publicly available on the internet.<sup>16</sup>

The new law also adds an additional category of crimes to the Criminal Code for corruption in the private sector.<sup>17</sup> The current anti-corruption law proscribes only conduct between private citizens when dealing with public bodies.<sup>18</sup> Under the new law, private corruption causing harm (regardless of whether there is any

involvement of a public body) is punishable by one to three years in prison, with sentences doubled for corruption involving publicly listed companies.<sup>19</sup> The new law also limits influence peddling, requiring greater disclosure from lobbyists, and adding a crime for the “illegal traffic of influence.”<sup>20</sup>

“The new law also requires greater transparency of public institutions: budgets, details of public works project costs, and salaries of senior officers must be made publicly available on the internet.”

Prison sentences under the new law are increased for convictions for corruption, bribe demands, embezzlement, and abuse of office.<sup>21</sup> The new law also makes anyone who has been convicted of a corruption-

related crime ineligible to run for public office.<sup>22</sup> Finally, the new law also adds protections for public sector whistleblowers. Whistleblowers are guaranteed anonymity and protection from retaliation.<sup>23</sup>

The new law comes at a time when Italy has increased its anti-corruption enforcement efforts, yet struggles to shake the perception that its efforts are less than adequate. Anti-bribery enforcement has increased in Italy in recent years, with 32 cases brought in 2011 as compared to 18 cases brought in 2010.<sup>24</sup> Despite these efforts, Italy continues to be perceived as lagging behind many of its peers in anti-corruption efforts and in the perceived acceptance of corruption in the country's culture. According to Transparency International's 2011 Corruption Perceptions Index, Italy ranks 69th out of 183 countries surveyed.<sup>25</sup> This perception is derived, in part, by the lack of fines and penalties imposed in the majority of cases initiated. Of the 60 cases brought through December 2011, punishments were imposed against only three legal persons and nine individuals, all through settlements

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12. *Id.* at Art. 1(5), (6).

13. *Id.* at Art. 1(7).

14. *Id.* at Art. 1(9).

15. *Id.* at Art. 1(12).

16. *Id.* at Art. 3(1), (2).

17. *Id.* at Art. 19(1), Art. 20(1).

18. *See* Delaney, note 6, *supra*.

19. 4434-B, note 1, *supra* at Art. 20(1).

20. *Id.* at Art. 19(1)(f).

21. *Id.* at Art. 19(1).

22. *Id.* at Art. 17.

23. *Id.* at Art. 12.

24. *See* Transparency International, “Exporting Corruption? Country Enforcement of the OECD Anti-Bribery Convention, Progress Report 2012” at 9 (Sept. 6, 2012) [http://www.transparency.org/whatwedo/pub/exporting\\_corruption\\_country\\_enforcement\\_of\\_the\\_oecd\\_anti\\_bribery\\_convention](http://www.transparency.org/whatwedo/pub/exporting_corruption_country_enforcement_of_the_oecd_anti_bribery_convention); *see also* OECD Working Group on Bribery, “Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Italy” at 7 (Dec. 16 2011), <http://www.oecd.org/dataoecd/59/47/49377261.pdf>.

25. Transparency International, “Corruptions Perceptions Index 2011” at 4 (2011) <http://cpi.transparency.org/cpi2011/results>.

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("patteggiamento").<sup>26</sup> According to the OECD's Working Group on Bribery Phase 3 Report, issued in December 2011, numerous cases are dismissed because of statute of limitations problems owing to the length of the investigations, and the difficulty in countering the frequently-asserted defense of extortion ("concussione").<sup>27</sup>

Despite these challenges, the law may mark the beginning of a new era of Italian anti-corruption enforcement. The OECD Working Group on Bribery Phase 3 Report called on Italy to provide increased enforcement resources, enact

laws mandating greater transparency, and implement whistleblower protections.<sup>28</sup> All of these initiatives are embodied in Italy's new anti-corruption law. It is too soon to tell how these measures will be implemented in practice, but the law is a step forward for Italian anti-corruption enforcement efforts and suggests that Italy may be entering a more aggressive phase of enforcement. As such, companies operating in Italy, as well as companies subject to the FCPA and UK Bribery Act, should pay particular attention to the new law's compliance requirements and ensure that they are following best compliance practices.

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26. International Bar Association, "Italy Country Brief 2012" at 3 (2012), <http://www.ibanet.org/Document/Default.aspx?DocumentUid=DDE48C04-E58B-46CC-8139-B82ED8F3F965>.

27. Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Italy, note 11, *supra* at 10-13.

28. *Id.* at 50-53.

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