FCPA Update

A Global Anti-Corruption Newsletter

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U.S. Department of Justice Issues New FCPA Guidance and Launches Pilot Enforcement Program

On April 5, 2016, the Criminal Division of the United States Department of Justice ("DOJ") issued "The Fraud Section's Foreign Corrupt Practice Act Enforcement Plan and Guidance"[1] (the "2016 Guidance") and launched a corresponding one-year pilot program aimed at encouraging self-reporting and cooperation. In addition to announcing increased FCPA-dedicated law enforcement resources and an intention to expand international law enforcement cooperation, the 2016 Guidance elaborates on the DOJ's standards with respect to "voluntary disclosure," "full cooperation," and "timely remediation," and, for the first time, quantifies potential benefits of self-disclosure, cooperation, and remediation.

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1. U.S. Department of Justice, "The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance," April 5, 2016, available at https://www.justice.gov/opa/blog/criminal-division-launches-new-fcpa-pilot-program [hereinafter "2016 Guidance"].

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The 2016 Guidance and pilot program are welcome steps towards greater clarity with regard to self-disclosure and cooperation. But there is relatively little new information or policy in the 2016 Guidance. The benefits described in the 2016 Guidance are specific only with respect to the possible reduction of a criminal fine (and even then phrased in conditional language), and such reduction is paired with mandatory disgorgement of profits earned through the "FCPA-related misconduct." Other benefits offered to self-reporting, cooperating, and remediating companies include the possibility, but not the promise, that entities meeting the standards set forth in the 2016 Guidance "generally should not require appointment of a monitor." The 2016 Guidance also indicates that DOJ "will consider a declination of prosecution" for such cooperating entities, though the exact requirements for such a declination remain unspecified. Given this conditional language and the stringent factors encompassed in the definition of "full cooperation," real questions remain about when self-reporting is appropriate. Hopefully, additional clarity will follow at the end of the one-year pilot program.

Increased Law Enforcement Resources

In conjunction with issuance of the 2016 Guidance, the DOJ announced that it was adding ten more prosecutors to its FCPA Unit (an increase to thirty prosecutors) and that the FBI had established three new squads of special agents devoted to FCPA investigations. The DOJ also stated that it was "strengthening its coordination with" its international counterparts, listing twelve recent cases showing the fruits of such cooperation.[2]

The increase in resources and cooperation are designed to "send a message to wrongdoers that FCPA violations that might have gone uncovered in the past are now more likely to come to light" and to provide an introduction to the pilot program, which is designed to incentivize voluntary self-disclosure of "FCPA-related misconduct."[3]

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2. *Id.* at 2. In eleven of the twelve cases of international cooperation listed, the jurisdictions providing cooperation previously had been identified. A review of those prior announcements shows the scope of recent international cooperation involving authorities from Germany, Switzerland, Australia, UK, Indonesia, Italy, Singapore, Saudi Arabia, Cyprus, Taiwan, Brazil, France, Poland, Colombia, the Philippines, Panama, the Netherlands, Sweden, Latvia, Belgium, Ireland, Luxembourg, and unnamed "other countries." While most of the countries on the list are other OECD countries, it is notable that the list includes major emerging economies (such as Indonesia and Brazil), as well as financial centers (Latvia, Panama, Cyprus, Singapore, and Luxembourg).

3. *Id.* at 1-2.

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Self-Disclosure, Cooperation, and Remediation, and the Benefit Thereof

The 2016 Guidance appears designed to provide greater transparency with regard to self-disclosure, rather than to set forth new policy. Like the U.S. Attorneys' Manual and the 2012 "Resource Guide to the U.S. Foreign Corrupt Practices Act" ("Resource Guide"), the 2016 Guidance is a non-binding internal document that does not create any rights. Moreover, it is applicable only to the FCPA Unit of DOJ's Fraud Section; it does not apply to other parts of the DOJ or to other agencies, such as the Securities and Exchange Commission, which separately has civil enforcement jurisdiction for the FCPA. The 2016 Guidance also does not supplant the Principles of Federal Prosecution of Business Organizations in the U.S. Attorneys' Manual.[4] Nor does it change the calculation that prosecutors must make under Chapter 8 of the U.S. Sentencing Guidelines. Finally, although actively encouraging self-reporting of FCPA-related misconduct, the 2016 Guidelines acknowledge that the FCPA itself does not require self-reporting (though sometimes there may be compelling reasons to do so).[5]

"The 2016 Guidance and pilot program are welcome steps towards greater clarity with regard to self-disclosure and cooperation. But there is relatively little new information or policy in the 2016 Guidance."

The 2016 Guidance also articulates the DOJ's expectations with regard to self-disclosure, cooperation, and remediation. This section largely repeats prior guidelines from the U.S. Attorneys' Manual, the Sentencing Guidelines, the Resource Guide, and elsewhere. Of particular note, in addition to actually self-reporting, cooperating, and remediating, the 2016 Guidance indicates that companies also must disgorge any profit made as a result of the FCPA-related misconduct. The 2016 Guidance sets out specific percentage reductions in the criminal fine (beyond any reduction dictated by the U.S. Sentencing Guidelines) that a company "may" receive in FCPA matters depending on the DOJ's judgment on the extent to which the company met the standards set forth in the 2016 Guidance.

With regard to self-disclosure, the 2016 Guidance repeats prior policy,[6] that self-disclosure must be: (i) voluntary (not required by another law, agreement, or contract); (ii) made "prior to an imminent threat of disclosure or government

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4. United States Attorneys' Manual 9-28.000.
5. 2016 Guidance at 4.
6. *See* United States Attorneys' Manual 9-28.000; United States Sentencing Guidelines § 8C2.5(g)(1).

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investigation;" and (iii) made "within a reasonably prompt time after becoming aware of the offense," with the burden on the company to demonstrate timeliness.[7]

The Guidance identifies eleven factors the DOJ will consider in evaluating whether an entity has provided "full cooperation" under the pilot program. The first factor is compliance with the September 9, 2015 memorandum of Deputy Attorney General Sally Q. Yates regarding "Individual Accountability for Corporate Wrongdoing" (the "Yates Memo"),[8] requiring the identification of individuals involved in wrongdoing and facts related to their involvement. Compliance with the Yates Memo is mandatory in order for a company to receive any cooperation credit.

Companies seeking full cooperation credit will also need to comply with an additional ten factors set forth in the 2016 Guidance. These factors, relating to full disclosure and proactive cooperation, are not new, but are phrased in the 2016 Guidance in a manner making clear that full cooperation is more involved than simply preserving, producing, and sometimes translating documents.

For example, the DOJ expects companies to "de-conflict" internal investigations from the government's investigation, if requested. This might include a request from the DOJ not to interview certain individuals or to defer interviewing particular individuals until after the DOJ can do so. For full cooperation credit, companies also are required to make current and former employees and officers, including those located overseas, available for government interviews. Moreover, the DOJ has underscored that it is not enough to provide a factual narrative when reporting to the DOJ; a company must provide specific facts, "including attribution of facts to specific sources."[9] Finally, unless prohibited by foreign law (with the burden of proving the prohibition on the company), companies are expected to disclose overseas documents and facilitate third-party production of documents and witnesses. With the exception of compliance with the Yates Memo, companies "should be able to" receive some credit for cooperation, even if they fail to satisfy all the cooperation factors.

How the "full cooperation" factors apply will depend on the facts of each case, which greatly (and perhaps necessarily) limits the clarity offered by the 2016 Guidance. For example, while assuring that small companies will not be expected "to conduct as expansive an investigation in as short a period of time as

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7. 2016 Guidance at 4.

8. Deputy Attorney General Sally Quillian Yates, "Individual Accountability for Corporate Wrongdoing," (Sept. 9, 2015), https://www.justice.gov/dag/file/769036/download; *see also* "The "Yates Memorandum": Has DOJ Really Changed Its Approach To White Collar Criminal Investigations and Individual Prosecutions?" Debevoise & Plimpton Client Update (Sept. 15, 2015), http://www.debevoise.com/insights/publications/2015/09/the-yates-memorandum-has-doj-really-changed.

9. 2016 Guidance at 5.

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a Fortune 100 company," the 2016 Guidance also states in a footnote that it will be the company's burden to show that "its financial condition impairs its ability to cooperate more fully."[10] Similarly, while assuring companies that the DOJ does "not *generally* expect a company to investigate matters unrelated in time or subject" (emphasis added) or location to the "FCPA-related misconduct" reported, the 2016 Guidance advises companies seeking clarity as to the scope of an appropriately tailored investigation to consult with Fraud Section attorneys.[11]

With regard to remediation, the 2016 Guidance requires companies to institute effective compliance programs, generally following the factors found in the 2012 Guidance and later compliance undertakings in non-prosecution and deferred prosecution agreements. However, the 2016 Guidance makes clear that credit for remediation is available only to companies that cooperate with government investigations.[12]

The 2016 Guidance describes the credit that is available to companies under the pilot program; however, it is most specific as to the limits on credit for non-self-reporting companies. If a company does not self-report, but otherwise cooperates and remediates, it "may" receive *at most* a 25% reduction off the bottom of the Sentencing Guidelines fine range.[13] If a company does self-report, fully cooperates, and remediates, it "may" receive up to a 50% reduction off the bottom end of the Sentencing Guidelines fine range and "generally should not require appointment of a monitor."[14] Furthermore, when a company self-reports, fully cooperates, and remediates, the DOJ "will consider a declination of prosecution" depending on the circumstances.[15]

Uncertainty Remains

While greater clarity with regard to the benefits of self-reporting, full cooperation, and remediation are welcome, there remains significant uncertainty with regard to what a self-reporting company can expect. It will remain solely for the DOJ to determine how well a company meets the factors set forth in the 2016 Guidance and what benefit up to a 50% reduction a company will receive in any particular case. Moreover, the full cooperation factors will almost certainly require incurring significant investigation expenses which could exceed any reduction in fine. Finally, the benefit of percentage departures from the bottom of the Sentencing Guidelines

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10. 2016 Guidance at 6.
11. *Id.*
12. *Id.* at 7.
13. *Id.* at 8.
14. *Id.*
15. *Id.* at 9.

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range is not as clear as may appear. The calculation of the Sentencing Guidelines range involves numerous factors and is not a precise science. The calculation of "profits" that are subject to disgorgement is similarly imprecise.

Moreover, gain from "FCPA-related misconduct" or loss attributable to the same is a factor in determining the Sentencing Guidelines range. What the gain or loss ultimately will be will largely be determined by the scope of an "appropriately tailored" investigation. For example, while it is commendable that the 2016 Guidance suggests that the government will not "generally" request a company to investigate matters unrelated in time, subject matter, or location, it is not always clear what is unrelated. For example, in the course of investigating payments to third parties used to fund illicit trips for SOE customers, the government may ask about "gifts, meals and entertainment." While investigating such expenses can provide the DOJ a view of the effectiveness of a compliance program, a review of several years' worth of travel and entertainment expenses will – in addition to incurring significant investigative costs - result in the aggregation of small infractions thereby producing significant additional "FCPA-related misconduct" to be included in the Sentencing Guidelines and disgorgement calculations. Indeed, as with the DOJ's recent non-prosecution agreement with PTC, a paragraph dealing with these types of expenses is often tacked on to the end of the statement of facts.[16]

Moreover, what the 2016 Guidance does not address, and what will be interesting to watch as the pilot program unfolds, is the question of what type of "FCPA-related misconduct" should be self-reported. For example, it remains unclear exactly which hiring practices US authorities view as violating the FCPA.[17] Should a company that discovers that it hired the child of an important official rush to self-disclose during the pilot period or wait until the DOJ has commented more fully on hiring practices? Does it matter whether there is a single hire or multiple hires?

More fundamental is the question of when instance(s) of FCPA-related misconduct reaches a level of seriousness that merit the attention of the DOJ's still-limited resources. As applied by the enforcement agencies, the FCPA imposes liability on corporations for the misconduct of the employees of subsidiaries in high-risk jurisdictions where corruption is endemic. An effective compliance program will both "detect[] and prevent[] FCPA violations."[18] Companies doing business in jurisdictions where corruption is endemic are frequently likely to "detect" potential

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16. *See, e.g., In re Parametric Technology(Shanghai) Software Co. Ltd. and Parametric Technology (Hong Kong) Limited* at ¶ 16 (Feb. 16, 2016), https://www.justice.gov/criminal-fraud/fcpa/cases/in-re-parametric-technology.

17. *See* Andrew M. Levine, Bruce E. Yannett, and Philip Rohlik, "SEC Expands its Aggressive Approach to Connected Hires in Qualcomm Enforcement Action," *FCPA Update*, Vol. 7, No. 8 (March 2016), http://www.debevoise.com/insights/publications/2016/03/fcpa-update-march-2016.

18. Resource Guide at 56.

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misconduct, which is more a marker of an effective compliance program than a sign of a an unethical operation. As Assistant Attorney General Leslie Caldwell recently admitted, "in more than half of all countries it's very difficult to do business without being faced with the potential of a FCPA violation."[19] Beyond the question of a "rogue employee" deliberately circumventing internal controls for nefarious ends, as a matter of statistical probability, once a company's operations in a high-risk jurisdiction reach a certain size, it is likely that some (hopefully small) percentage of employees will misbehave; be it ambitious employees looking to cut corners or otherwise ethical employees faced with the challenges of working in a highly corrupt market. While training and internal controls can reduce the percentage of employees behaving badly, these steps, like FCPA enforcement itself, address only one side of a corrupt transaction (i.e., they do not stop foreign officials from soliciting bribes). As a result, companies operating in high-risk jurisdictions with an effective compliance program frequently detect "FCPA-related misconduct" and follow up with appropriate remedial steps, including disciplinary measures and relevant compliance enhancements. If companies are expected to begin self-reporting each time they detect an employee in a given high-risk jurisdiction committing "FCPA-related misconduct," the DOJ will need to hire significantly more than ten new prosecutors and probably build more meeting rooms at the DOJ's offices.

"The Guidance is ostensibly designed to provide some measure of clarity, if not certainty, into a company's calculus in determining whether to self-report.... Unfortunately, … [t]he many contingencies built into the Guidance prevent any company from gaining any greater clarity in outcome analysis than in the 'pre-Guidance' era."

The Guidance is ostensibly designed to provide some measure of clarity, if not certainty, into a company's calculus in determining whether to self-report. This is commendable and frankly much needed. Unfortunately, although a bit premature to declare the Guidance without redemption, it doesn't alter the very careful, thoughtful, and often difficult analysis that companies must undertake to determine whether to self-report. The many contingencies built into the Guidance

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19. Kara Scannell, "US redoubles efforts on foreign bribery cases," *Financial Times*, (Feb. 10, 2016), http://www.ft.com/intl/cms/s/0/cdb01524-cb8b-11e5-be0b-b7ece4e953a0.html#axzz46GftW7DT.

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prevent any company from gaining any greater clarity in outcome analysis than in the "pre-Guidance" era. Of course, time will tell as DOJ addresses the Guidance factors in future cases and we remain hopeful that further and perhaps clearer guidance will be forthcoming.

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Russia Extends Extraterritorial Effect of its Anti-corruption Legislation

On March 9, 2016, the President of the Russian Federation signed Federal Law No. 64-FZ on Amendments to the Administrative Offenses Code of the Russian Federation (the "Law").[1] The Law extends the anti-corruption prohibitions provided for by Russian legislation to the actions of legal entities – regardless of the country of their incorporation – committed abroad. It follows the National Anticorruption Plan for 2014-2015, which required Russian Government to ensure that the Administrative Offenses Code applies to all cases of illegal payments made by legal entities abroad if they affect the interests of the Russian Federation.

Before the Law was passed, Article 19.28 of the Administrative Offenses Code,[2] which generally does not have extraterritorial effect, applied to violations committed only within Russian territory, unless provided otherwise by an international treaty to which Russia was a signatory.[3] In 2012, Russia acceded to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "Convention"), which provides that signatories should penalize bribery of foreign officials if committed fully or partly in their territory. Thus, in conjunction with Article 19.28, the Convention provided jurisdiction to Russia over cases of illegal remuneration paid to foreign (i.e., non-Russian) officials partially in Russia and partially elsewhere, creating a limited exception to the territoriality principle.

The Law further broadens that exception, providing that Russian and foreign legal entities on whose behalf illegal remuneration was provided entirely outside Russia will also be subject to administrative liability in Russia if the offense is viewed as targeting the interests of the Russian Federation.[4]

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1. The Law came into force on March 20, 2016. The Law also amends the legislation in respect of repository activities. These amendments come into force on June 28, 2016. The text of the Law is available at the Official Web-Portal of Legal Information at http://pravo.gov.ru/proxy/ips/?docbody=&nd=102391505&rdk=&intelsearch=%D4%E5%E4%E5%F0%E0%EB%FC%ED%FB%E9+%E7%E0%EA%EE%ED+%B964-%D4%C7+%EE%F2+9+%EC%E0%F0%F2%E0+2016.
2. Under Article 19.28 of the Administrative Offenses Code, illegal remuneration on behalf of a legal entity is defined as an illegal transfer, offer or promise of money, securities, other property, provision of services or transfer of proprietary rights on behalf of a legal entity to an official, a person performing management functions in a commercial or other entity, a foreign official or an official of a public international organization, in exchange for actions (or omissions) in the interests of such legal entity, which fall under the authority of the respective official. The administrative penalty for the offense consists of an administrative fine for up to triple the amount of the illegal remuneration, but not less than one million rubles, with seizure of the illegal remuneration or its equivalent value.
3. Article 1.8 (2) of the Administrative Offenses Code as amended by the Law.
4. Article 1.8 (2)(3) of the Administrative Offenses Code as amended by the Law.

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The Law does not clarify what actions will be considered as targeting the interests of the Russian Federation, and the legislators have kept silent. The Russian Ministry of Justice – the only government authority that has so far commented on the issue – stated that an illegal payment affects Russian interests if it "can harm social relations protected by Russian legislation or can lead to other negative consequences for business entities in the Russian Federation."[5] This interpretation is broad: corruption in any form violates stated principles of Russian legislation. Moreover, the Ministry of Justice mentions infringement of interests of private entities as a possible trigger of liability for illegal remuneration offered abroad. Thus, for example, if a foreign entity bribes a foreign official to obtain a contract or win a tender, and a contract would have been awarded to a Russian company if such bribe were not given, Russian authorities could initiate an administrative case against the bribe-giver.

Notably – and in contrast with anti-corruption laws elsewhere – the Law explicitly applies the principles of "international double jeopardy." A legal entity cannot be held administratively liable for illegal remuneration if it already has been convicted of a criminal or administrative offense in respect of such illegal remuneration outside of Russia.[6] As multinational corruption investigations have become increasingly prevalent, so have the calls for national legislation or transnational initiatives that would protect companies and individuals from being prosecuted for the same offenses in several jurisdictions.[7] The Law's provisions in this regard may place Russia where it rarely finds itself when it comes to anti-corruption legislation and enforcement – at the forefront of an international trend.

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5. *See* Jana Milyukova and Maria Makutina, "Korruptsia bez granits: kak Rossiya budet borotsya so vzyatkami za rubejom", *RBK* (Oct. 9, 2015), http://www.rbc.ru/economics/09/10/2015/55db18319a7947ed6c110d4a?wb48617274=21F0EA61.

6. Article 1.8 (3) of the Administrative Offenses Code as amended by the Law.

7. *See, e.g.*, Alistair Craig, "OECD should protect against multi-country enforcement" (Nov. 11, 2013), http://www.fcpablog.com/blog/2013/11/11/oecd-should-protect-against-multi-country-enforcement.html; Peter Herbel, Beat Hoss, and Massimo Mantovani, "Double jeopardy – finding a balance in enforcement actions for companies" (Nov. 24, 2011), http://www.legalweek.com/legal-week/analysis/2126979/double-jeopardy-finding-balance-enforcement-actions-companies. As *FCPA Update* recently reported, in the summer of 2015, a French court took a step towards recognizing international double jeopardy principles when it acquitted four French corporations facing trial under French anti-corruption laws in part because their parent companies had settled a case in the United States arising out of the same facts. *See* Frederick T. Davis and Antoine F. Kirry, "A Recent Decision in France Applies 'International Double Jeopardy' Principles to U.S. DPAs," *FCPA Update*, Vol. 7, No. 2 (Sept. 2015), http://www.debevoise.com/~/media/files/insights/publications/2015/09/fcpa_update_september_2015.pdf. Although the validity of that ruling has been questioned by a more recent decision in a separate but related case, it demonstrates that courts, like commentators, are continuing to grapple with the issue.

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2015 Corruption Perceptions Index Shows Few Major Changes

Transparency International released its 2015 Corruption Perceptions Index ("CPI") earlier this year. The CPI, first published in 1995, measures how much public-sector corruption is perceived to exist in 168 different countries "[b]ased on expert opinion from around the world."[1] Specifically, the CPI aggregates data from twelve international surveys examining, among other things, local governance, economic and investment risk, and executive opinion.[2] These surveys also consider factors such as government accountability and the implementation of effective anti-corruption initiatives.[3]

The CPI is a useful tool for anti-corruption and compliance professionals, including because its yearly release keeps the issue of corruption on the public policy radar, it provides a helpful benchmark, highlighting patterns and issues across the globe, and because U.S. enforcement agencies expect multinational corporations to use the CPI in connection with regular risk assessments. However, its usefulness is limited in part by the fact that it measures only the *perception* of corruption; it does not purport to measure or aggregate actual instances of corruption (*e.g.*, tracking prosecutions, arrests for bribery and corruption-related offenses, the size and scope of corruption-related offenses). Moreover, the CPI does not necessarily indicate countries' future corruption-related risk in that it may not highlight reforms still underway or other changes not yet seen or noted by the public.

Despite ongoing anti-corruption enforcement efforts worldwide and growing attention to corruption risks, once again (as in the 2014 CPI), two-thirds of the countries ranked in the CPI scored below 50 on a scale of 0 ("highly corrupt") to 100 ("very clean").[4] However, in the 2015 CPI, more countries improved their rankings than declined.[5] And some individual movements of country risk perception within the CPI warrant attention.

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1. *See* Transparency International, "Corruption Perceptions Index 2015," at 3 (2016), http://www.transparency.org/cpi2015#downloads [hereinafter "Transparency International"]; Transparency International Press Rel., Corruption Perceptions Index 2014: Clean Growth at Risk (Dec. 3, 2014), http://www.transparency.org/cpi2014/press.
2. *See* Transparency International, "Corruption Perceptions Index 2015: Full Source Description," at 1 (2016), http://www.transparency.org/cpi2015#downloads.
3. *See id.*
4. *See* Transparency International at 3; Transparency International Press Rel., "Corruption Perceptions Index 2015: Corruption still rife but 2015 saw pockets of hope" (Jan. 27, 2016), http://www.transparency.org/cpi2015#downloads [hereinafter "CPI Press Release"]; Transparency International, "Corruption Perceptions Index 2014," at 3 (2014), http://files.transparency.org/content/download/1856/12434/file/2014_CPIBrochure_EN.pdf [hereinafter "Transparency International 2014"].
5. *See* CPI Press Release.

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For instance, after last year's steep drop of 20 spots in the rankings, China made a big leap in its CPI 2015 ranking. It rose 17 spots from 100th in 2014 to 83rd in 2015 – although its actual score only improved by one point from 36 to 37.[6] China's recent scores highlight one of the shortcomings of the CPI: the lag time in the public "perceiving" the results of a robust anti-corruption enforcement campaign is reflected in its relatively stagnant score. Over the past four years, Xi Jinping, President of the People's Republic of China, has made the eradication of public-sector corruption a top priority. Many foreign multinational firms have been investigated and fined for price fixing activities or bribery, including, in 2014, China's second-largest corporate fine: its $490 million enforcement action against U.K. pharmaceutical corporation GlaxoSmithKline.[7]

Indeed, in discussing stagnant CPI numbers despite increased efforts at corruption reform, Transparency International wrote: "[M]arginal upward movement or stagnation can also be the result of corruption becoming more visible and talked about."[8] While it may take time for public perception to catch up to the pace of reform, conversely, bad news seems to travel fast. Transparency International reported that "Brazil was the biggest decliner in the index, falling 5 points and dropping 7 positions to a rank of 76. The unfolding Petrobras scandal brought people into the streets in 2015 and the start of judicial process may help Brazil stop corruption."[9]

The 2015 results have otherwise remained mostly constant. Denmark (with a score of 91) took the top spot for the second straight year.[10] Other Northern European countries continued to claim the top spots: Finland (90) took second place, Sweden (89) third, and Norway (87) and the Netherlands (87) tied for fifth. At the bottom of the rankings, North Korea (8) and Somalia (8) tied for last place, ranking 167th.

The best performing countries "share key characteristics: high levels of press freedom; access to budget information so the public knows where money comes from and how it is spent; high levels of integrity among people in power; and judiciaries that don't differentiate between rich and poor, and that are truly

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6. *See* Transparency International at 6-7; Transparency International 2014 at 4-5.
7. *See* Hester Plumridge and Laurie Burkitt, "GlaxoSmithKline Found Guilty of Bribery in China," *The Wall Street Journal* (Sept. 19, 2014), http://www.wsj.com/articles/glaxosmithkline-found-guilty-of-bribery-in-china-1411114817?cb=logged0.4781269888354078.
8. Transparency International at 9.
9. CPI Press Release.
10. *See id.*; Transparency International at 6-7.

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independent from other parts of government."[11] Countries ranking further down on the list also share characteristics, such as "conflict and war, poor governance, weak public institutions like police and the judiciary, and a lack of independence in the media."[12]

Although the CPI remains an important touchstone, companies striving to develop best-in-class compliance programs should recognize the limitations and drivers underlying the CPI rankings and take into account other information regarding corruption risks, all while appreciating the importance of carefully reviewing a company's particular circumstances when conducting risk assessments and allocating compliance resources.

"U.S. enforcement agencies expect multinational corporations to use the CPI in connection with regular risk assessments. However, its usefulness is limited in part by the fact that it measures only the *perception* of corruption…."

I. Regional Breakdown of Scores and Rankings

The 2015 CPI is based on data for each country, as in 2014, and offers a region-by-region comparison based on the average score of each individual country within a region.[13] Although there are inherent limitations in attempting to draw conclusions from differences in survey results from one year to the next, several patterns emerge.

(i) *Europe and Central Asia*

Thirty of the fifty countries in Europe and Central Asia featured in the 2015 CPI achieved higher scores compared to 2014, including the United Kingdom, Austria, the Czech Republic, Croatia, Greece, Romania, and Slovakia.[14]

The rankings for Western Europe remained relatively stable as the survey participants and sources continue to regard Western Europe with low perceived corruption risks. Led by Denmark, which retained the highest ranking with a score of 91, thirteen Western European countries are ranked among the top 20 nations.[15] The United Kingdom made significant improvements in its score, rising from

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11. CPI Press Release.
12. *Id.*
13. Transparency International at 4, 6-7.
14. *Id.* at 6-7; Transparency International 2014 at 4-5.
15. *See* Transparency International at 6-7.

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74 to 81 between 2012 and 2015, and tying with Germany and Luxembourg for 10th place this year.[16] This improvement comes after a year during which the United Kingdom secured its first conviction under Section 7 of the Bribery Act and the Serious Fraud Office entered into its first deferred prosecution agreement.

Transparency International noted, however, that Western Europe still has work to do in addressing finance-related corruption: "Western Europe's relentless stream of banking scandals continued in 2015, as Deutsche Bank paid the largest Libor fine in history in a market-rigging scandal. More proof that the financial sector – banking in particular – is in dire need of reform."[17]

The Czech Republic significantly improved its ranking from 53rd to 37th overall and its score from 51 to 56.[18] Croatia (ranked 50th with a score of 51), and Greece and Romania (tied for 58th with a score of 46) also made strides, improving their rankings by 11 spots and increasing their scores by 3 points.[19] However, other countries in this group received lower scores in 2015, including: Hungary (falling from 47th to 50th in the rankings and losing 3 score points), Turkey and FYR of Macedonia (falling together from 64th to 66th and losing 3 score points), Bulgaria (maintaining a rank of 69th but losing 2 score points), Spain (gaining in the rankings, moving from 37th to 36th, but losing 2 score points).[20] Of these states, Transparency International commented: "These are places where there was once hope for positive change. Now we're seeing corruption grow, while civil society space and democracy shrinks. . . . [P]oliticians and their cronies are increasingly hijacking state institutions to shore up power. . . ."[21]

Transparency International also singled out restrictive governments in Central Asia as well as Russia for comment in its report, despite the countries' improved rankings in the 2015 CPI: Kazakhstan (rising in the rankings from 126th to 123rd, with a score of 28), Azerbaijan (rising from 126th to 119th, with a score of 29), Russia (rising from 136th to 119th, with a score of 29), and Uzbekistan (rising from 166th to 153rd, with a score of 19).[22] Of these states, the organization wrote that these "governments are restricting, if not totally stifling, civil society and free media – both proven to prevent corruption."[23]

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16. *See id.*; Transparency International, Corruption Perceptions Index 2014: Results: Tables and Rankings, https://www.transparency.org/cpi2014/results [hereinafter "Transparency International 2014 Table"].
17. Transparency International at 13.
18. *See id.* at 6-7; Transparency International 2014 at 4-5.
19. *See* Transparency International at 6-7; Transparency International 2014 at 4-5.
20. *See id.*
21. Transparency International at 12.
22. *See id.* at 6-7; Transparency International 2014 at 4-5.
23. Transparency International at 13.

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Ukraine, which saw its ranking improve by 2 spots in 2014 after its adoption of five new anti-corruption laws earlier that year, saw a small measure of progress in 2015: it continued to rise in the rankings, moving from 142nd to 130th, and gained one score point.[24] Despite this upward trend, Transparency International highlighted Ukraine as a negative case, writing that "Ukraine . . . does badly, as the government drags its heels on reform."[25]

(ii) *The Americas*

The United States gained one spot in the rankings, climbing from 17th to 16th, and improved its score by two points (from 74 to 76).[26] Canada had the best score in the region, with a ranking of 9th (up from 10th in 2014) and a score of 83 (up from 81).[27] Mexico rose 8 spots in the rankings to 95th, though its score remained stagnant at 35.[28]

Despite these improved rankings for the US, Canada, and Mexico, 81% of countries in the Americas scored below 50 out of 100 and are thus perceived as being "highly corrupt."[29] However, Transparency International indicated a positive regional trend in tackling corruption: "We witnessed two remarkable trends in the Americas in 2015: the uncovering of grand corruption networks and the mass mobilization of citizens against corruption. It's no surprise that Brazil – which faced its largest-ever corruption scandal around Petrobras – is this year's biggest index decliner in the Americas, yet there and elsewhere we saw corruption investigations against people who looked untouchable only 12 months ago."[30] Transparency International noted that Honduras (rising from 126th to 112th in rank, and 29 to 31 in score) had charged members of its elite with money laundering, and Guatemala (dropping from 115th to 123rd in rank, and 32 to 28 in score) jailed its president for allegedly taking bribes.[31] Venezuela and Haiti once again find themselves at the bottom among countries in the Western hemisphere, tying for 158th place with Guinea-Bissau, just above the war-torn states of Libya and Iraq.[32]

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24. *See id.* at 6-7; Transparency International 2014 at 4-5; William Helbling, "Ukraine Enacts Anti-Corruption Laws to Promote Government Accountability," *Jurist* (Oct. 15, 2014), http://jurist.org/paperchase/2014/10/ukraine-enacts-anti-corruption-laws-to-promote-government-accountability.php.
25. Transparency International at 13.
26. *See id.* at 6-7; Transparency International 2014 at 4-5.
27. *See* Transparency International at 6-7; Transparency International 2014 at 4-5.
28. *See id.*
29. *See id.*
30. Transparency International at 9.
31. *See id.* at 6-7, 9.
32. *See id.* at 6-7.

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(iii) *Asia Pacific*

The Asia Pacific region includes a wide spectrum of nations, from among the best in terms of perceived corruption, New Zealand (4th), Singapore (8th), and Australia (13th), to the most risky, including Afghanistan (166th) and North Korea (167th).[33] For the most part, the region's 2015 CPI numbers were static. Only 9 of the 27 countries in Asia Pacific achieved a score of at least 50; the 18 others scored below 40 and are thus perceived to be "highly corrupt."[34] This breakdown is the same as in the 2014 CPI, indicating stagnancy and a lack of progress across the region.[35]

As noted above, China improved its ranking by 17 places (from 100th to 83rd) but its score improved by only 1 point (from 36 to 37) in the 2015 CPI.[36] The score change is noteworthy given that China had a score of 40 in 2013 – before it launched a well-publicized anti-corruption campaign.[37] The case of China highlights that increased enforcement activity may have the effect of increasing the public perception of corruption, which is revealed and highlighted by increased enforcement activity, without having the corresponding effect of improving public perception of the efficacy of the enforcement activity itself. Transparency International's view is that "China's prosecutorial approach isn't bringing sustainable remedy to the menace" of corruption.[38] Whatever the level of actual or remediated public-sector corruption in China, the 2015 CPI would seem to indicate that the Chinese anti-corruption campaign has not yet altered perceptions of corruption risk in China.

Among other notable changes in the Asia-Pacific region, India has improved its ranking from 94th to 85th in 2014 and to 76th in 2015.[39] It improved its score by 2 points (from 36 to 38) in 2014 but saw no score increase in 2015.[40] The 2-point score increase achieved in 2014 could perhaps be attributed to Prime Minister Narendra Modi's coming to power with a clear anti-corruption agenda, promising to root out local corruption and improve India's overall business climate, and the widespread public support for his agenda.[41] Despite this hope for change,

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33. *See id.*
34. *See id.*
35. *See* Transparency International 2014 at 4-5.
36. *See* Transparency International at 6-7; Transparency International 2014 at 4-5.
37. *See* Transparency International 2014 Table.
38. Transparency International at 11.
39. *See* Transparency International at 6-7; Transparency International 2014 Table.
40. *See id.*
41. *See* Robert Guy, "All Eyes on Modi's Re-make of India," *Barron's Asia* (Dec. 4, 2014), http://blogs.barrons.com/asiastocks/2014/12/04/all-eyes-on-modis-re-make-of-india/.

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Transparency International notes in its 2015 CPI report that, in India and elsewhere, "leaders are falling short of their bold promises."[42]

Even the highest ranked countries in the region require further reform: Australia's numbers slipped for the third consecutive year, falling two spots in the rankings this year, from 11th to 13th; its score also dipped from 80 to 79.[43] Transparency International attributes Australia's "dwindling score" to an "inability to tackle root causes" of corruption.[44] It was reported that Anthony Whealy, QC, the new chairman of Transparency International Australia, and a former Supreme Court judge, said "successive federal governments had been 'complacent in addressing corruption' and urgent laws were required, particularly to crack down on foreign bribery."[45]

"Although the CPI rankings are an important benchmark for evaluating corruption risk, its findings must be assessed against real world developments and practical insights."

(iv) *Middle East and North Africa*

The Middle East and North Africa continue to be perceived as high-risk areas for corruption, with 68% of countries having a score below 50 in 2015.[46] Qatar and the United Arab Emirates led the region, with rankings of 22nd and 23rd and scores of 71 and 70 respectively.[47] Kuwait, Jordan, and Saudi Arabia all saw improved scores: Kuwait increased its ranking from 67th to 55th and its score from 44 to 49, Jordan increased its ranking from 55th to 45th and its score from 49 to 53, and Saudi Arabia increased its ranking from 55th to 48th and its score from 49 to 52.[48] However, Egypt, Yemen, Libya, Morocco, Syria and Tunisia all had lower scores (by 1 to 3 points) in 2015.[49] Transparency International noted that some of these nations are dealing with ongoing political and/or military conflicts, but reported its

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42. Transparency International at 11.
43. *See id.* at 6-7; Transparency International 2014 at 4-5; Michaela Whitbourn, "Transparency International warns Australia is 'complacent' about corruption," *The Sydney Morning Herald* (Jan. 27, 2016), http://www.smh.com.au/nsw/transparency-international-warns-australia-is-complacent-about-corruption-20160127-gmes5h.html.
44. *See* Transparency International at 11.
45. Whitbourn.
46. *See* Transparency International at 6-7.
47. *See id.*
48. *See id.* at 6-7, 15; Transparency International 2014 at 4-5.
49. *See id.*

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concern that "[t]he rise of ISIS and the ensuing fight against terrorism have been used by many governments as an excuse to crack down on civil liberties and civil society . . . . [and] such an approach means that entrenched corrupt networks go unchallenged . . . ."[50]

(v) *Sub-Saharan Africa*

Finally, sub-Saharan Africa ranked the lowest out of any surveyed region, with nearly 87% of the countries in that region scoring below 50 in 2015.[51] There was little progress to report, with more than half of the countries having no change in score.[52] Botswana was the region's highest ranked country at 28th (rising from 31st a year ago but retaining the same score of 63).[53] South Africa, the region's sole G20 member, improved 6 spots from 67th to 61st but retained the same score of 44.[54] Sixteen countries in the region ranked below 130th place, with Somalia (167th) tying North Korea for the lowest ranking in the world.[55]

II. Conclusion

Last year, we noted that "the CPI rankings should be only one of several key data points for managers seeking to evaluate corruption risk."[56] This conclusion remains apt. Although the CPI rankings are an important benchmark for evaluating corruption risk, its findings must be assessed against real world developments and practical insights.

For instance, China's ranking highlights that public perception of corruption risk may lag behind actual reform, whereas the case of Brazil makes clear that negative headlines penetrate public perception quickly and perhaps disproportionately. Public perception thus may not be an ideal proxy for either current corruption-related risk or future risk. Moreover, CPI rankings often have little relation to changes in CPI score or real-world events: China's rankings have fluctuated wildly over the past two years but its score has changed by 1 point, countries in Sub-Saharan Africa and elsewhere saw improved rankings with no change in score, and – perhaps most tellingly – Ukraine and countries in Central Asia saw positive improvement in their CPI scores and/or rankings but were simultaneously criticized

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50. Transparency International at 15.
51. *See id.* at 6-7.
52. *See id.*; Transparency International 2014 at 4-5.
53. *See id.*
54. *See id.*
55. *See id.*
56. Sean Hecker, Andrew M. Levine, Steven S. Michaels, Alexander Dmitrenko, and Neal S. Shechter, "Transparency International's 2014 Corruption Perceptions Index," *FCPA Update*, Vol. 6, No. 5 (Dec. 2014), http://www.debevoise.com/insights/publications/2014/12/fcpa-update-december-2014.

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by Transparency International for insufficient reform efforts or repressive regimes. Accordingly, CPI scores and rankings, while frequently useful, remain only a starting point when assessing corruption risk.

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