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New Edition of FCPA Resource Guide Offers Guidance and Raises Questions

On July 3, 2020, DOJ and the SEC released a new edition of *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (the "Second Edition").[1] As we noted shortly after its release, the Second Edition largely parallels the original 2012 *Resource Guide* (the "First Edition").[2] The updates incorporate more recent examples of enforcement actions and key case law since the First Edition's publication.[3] Although the *Resource Guide* is not binding on the agencies, the Second Edition, like the First, provides valuable insights into the agencies' views of FCPA enforcement.

Continued on page 2

1. U.S. Dep't of Justice, Criminal Div. and U.S. Sec. & Exch. Comm'n, Enf't Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act: Second Edition (July 2020), https://www.justice.gov/criminal-fraud/fcpa-resource-guide [hereinafter "Second Edition"].
2. U.S. Dep't of Justice, Criminal Div. and U.S. Sec. & Exch. Comm'n, Enf't Div., A Resource Guide To The U.S. Foreign Corrupt Practices Act (Nov. 2012), https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf [hereinafter "First Edition"].
3. Debevoise & Plimpton LLP, "U.S. Enforcement Agencies Release Second Edition of FCPA Resource Guide" (July 8, 2020), https://www.debevoise.com/insights/publications/2020/07/us-enforcement-agencies-release-second-edition.

New Edition of FCPA Resource Guide Offers Guidance and Raises Questions

Continued from page 1

Of particular note, the Second Edition of the *Resource Guide*:

- Incorporates recent case examples, post-2012 court decisions, and various DOJ policies, including the *Corporate Enforcement Policy*, the 2020 edition of *Evaluation of Corporate Compliance Programs*, and the memos on "Selection of Monitors in Criminal Division Matters" and "Coordination of Corporate Resolution Penalties";[4]
- Addresses limitations on the use of conspiracy and aiding-and-abetting theories to reach foreign nationals under the FCPA's anti-bribery provisions, in the wake of the Second Circuit's decision in *United States v. Hoskins*;[5]
- Reflects the government's continued interest in expanding the reach of the FCPA's accounting provisions, including asserting that a *six*-year statute of limitations applies to criminal violations of those provisions and asserting that conspiracy and aiding-and-abetting theories remain available for those violations;
- Briefly discusses but does not fully address potential impact of the U.S. Supreme Court's recent pronouncements on the SEC's disgorgement remedy;
- Provides additional guidance as to successor liability and best practices in the M&A context; and
- Addresses some additional noteworthy issues, albeit only in passing.

A Compendium of Updates

Both editions of the *Resource Guide* are authored by the enforcement agencies and necessarily reflect their "interested party" view of the law. That said, the vast majority of the *Resource Guide* is comprised of uncontroversial descriptions of the law, already familiar to practitioners, but helpfully collected in one document with useful case studies and hypotheticals. The Second Edition updates the *Guide* to reflect changes to case law and DOJ policy since 2012.

These include descriptions of:

- **What constitutes an "instrumentality":** As students of the statute know, the FCPA defines "foreign officials" to include not just officers or employees of foreign governments and their departments or agencies, but also "instrumentalities" of the government. At the time of the First Edition, no appellate court had addressed

Continued on page 3

4. U.S. Dep't of Justice, Justice Manual, § 9-47.120; U.S. Dep't of Justice, Criminal Division, *Evaluation of Corporate Enforcement Programs* (updated June 2020), https://www.justice.gov/criminal-fraud/page/file/937501/download; Memo from Assistant Attorney General Brian A. Benczkowski, "Selection of Monitors in Criminal Division Matters" (Oct. 11, 2018), https://www.justice.gov/criminal-fraud/file/1100366/download; Memo from Deputy Attorney General Rod J. Rosenstein, "Policy on Coordination of Corporate Resolution Penalties" (May 9, 2018), https://www.justice.gov/opa/speech/file/1061186/download.
5. 902 F.3d 39 (2d Cir. 2018).

New Edition of FCPA Resource Guide Offers Guidance and Raises Questions

Continued from page 2

the issue of what constitutes an "instrumentality" of a foreign government under the statute. The First Edition proposed a series of factors to consider, based on guidance from district court cases at the time. Eighteen months after the *Guide* was released, the Eleventh Circuit adopted a multifactor test in the closely-watched case of *United States v. Esquenazi*.[6] The Second Edition of the Guide updates its discussion of instrumentality to set forth the "non-exhaustive" factors used by the Eleventh Circuit and recommends that companies consider these elements when evaluating their compliance programs.[7]

"Although the *Resource Guide* is not binding on the agencies, the Second Edition, like the First, provides valuable insights into the agencies' views of FCPA enforcement."

- **What is required for the local law defense:** The FCPA includes a specific affirmative defense for conduct that would be lawful under the written laws and regulations of the foreign country. There is very little case law on this defense. The Second Edition includes a discussion of the recent *United States v. Ng Lap Seng* case, in which the district court rejected the defendant's proposed jury instruction that the defendant merely had to show that the payment was not illegal under local law, as opposed to that it was expressly permitted under local law.[8]
- **What constitutes cooperation credit:** The Second Edition contains a detailed description of DOJ's Corporate Enforcement Policy ("CEP"), including three examples of "declinations" under that policy.[9] One of the *Resource Guide*'s benefits is that it provides a glimpse into the current thinking of the enforcement agencies. As a result, it is perhaps noteworthy that two of the three examples selected (out of 13) involve declinations that DOJ granted

Continued on page 4

6. 752 F.3d 912 (11th Cir. 2014). For a more detailed discussion of the *Esquenazi* test, *see* Sean Hecker, Andrew M. Levine, Colby A. Smith, Bruce E. Yannett & Michael T. Leigh, "U.S. Appellate Court Defines Government 'Instrumentality' Under the FCPA," FCPA Update, Vol. 5, No. 10 (May 2014), https://www.debevoise.com/insights/publications/2014/05/fcpa-update.
7. Second Edition, *supra* note 1, at 20.
8. *See* Trial Transcript 715-18, *United States v. Ng Lap Seng*, No. 15-cr-706 (S.D.N.Y. July 26, 2017), ECF No. 609.
9. Second Edition, *supra* note 1, at 51-54.

New Edition of FCPA Resource Guide Offers Guidance and Raises Questions

Continued from page 3

notwithstanding the involvement of senior management,[10] something the Second Edition also points out explicitly in describing the CEP.[11] Each of the three declination examples selected for inclusion also involved "full cooperation."

- **What other DOJ policies provide**: The Second Edition includes brief sections describing DOJ's 2018 guidance[12] on when a corporate monitorship will be necessary[13] and its 2018 "Policy on Coordination of Corporate Resolution Penalties" (or the "anti-piling on" policy).[14] The Second Edition also includes minor changes to its description of the "Hallmarks of Effective Compliance Programs" – to bring them in line with DOJ's recent guidance on compliance programs in its *Evaluation of Corporate Compliance Programs* (itself updated in June 2020).[15]
- **What examples of recent enforcement activity reflect**: Finally, and perhaps most usefully, the Second Edition updates its examples of enforcement actions throughout the *Guide*. Although these changes are not substantive, they are a good reflection of how anti-bribery enforcement has changed since 2012 and provide helpful source material for any compliance officer looking for examples of cases to use with senior management.

In addition to largely uncontroversial updates, the Second Edition also includes a number of changes or omissions that merit further discussion.

Conspiracy, Aiding and Abetting, and the Continuing Relevance of *U.S. v. Hoskins*

The Second Edition's most significant change addresses the impact of *United States v. Hoskins* on FCPA enforcement. In *Hoskins*, the Second Circuit held that the government cannot use the conspiracy or aiding-and-abetting statutes to expand the extraterritorial reach of the anti-bribery provisions over foreign nationals, because the FCPA specifically enumerates those subject to anti-bribery jurisdiction.[16]

Continued on page 5

10. *Id.* at 53-54 (examples 2 and 3).
11. *Id.* at 51-52 ("Even where aggravating circumstances exist, DOJ may still decline prosecution, as it did in several cases in which senior management engaged in the bribery scheme.").
12. Memo from Assistant Attorney General Brian A. Benczkowski, "Selection of Monitors in Criminal Division Matters" (Oct. 11, 2018), https://www.justice.gov/criminal-fraud/file/1100366/download.
13. Second Edition, *supra* note 1, at 73.
14. Memo from Deputy Attorney General Rod J. Rosenstein, "Policy on Coordination of Corporate Resolution Penalties" (May 9, 2018), https://www.justice.gov/opa/speech/file/1061186/download.
15. U.S. Dep't of Justice, Criminal Division, *Evaluation of Corporate Enforcement Programs* (updated June 2020), https://www.justice.gov/criminal-fraud/page/file/937501/download.
16. *United States v. Hoskins*, 902 F. 3d 69, 71-72 (2d Cir. 2018); *see also* Kara Brockmeyer, Colby A. Smith, Bruce E. Yannett, Philip Rohlik, Jil Simon & Anne M. Croslow, "Second Circuit Curbs FCPA Application to Some Foreign Participants in Bribery," FCPA Update, Vol. 10, No. 1 (Aug. 2018), https://www.debevoise.com/insights/publications/2018/08/20180830-fcpa-update-august-2018.

New Edition of FCPA Resource Guide Offers Guidance and Raises Questions

Continued from page 4

The First Edition of the *Resource Guide* included a blanket statement that foreign non-issuers and individuals were subject to the FCPA through the conspiracy and aiding-and-abetting statutes, even when not taking any action in the United States.[17] The Second Edition recognizes the impact of *Hoskins* by noting that, "at least in the Second Circuit, an individual can be criminally prosecuted for conspiracy to violate the FCPA's anti-bribery provisions or aiding and abetting an anti-bribery violation *only if* that individual's conduct and role fall into one of the specifically enumerated categories expressly listed in the FCPA's anti-bribery provisions."[18] The Second Edition also deletes any reference to conspiracy theory from the "FCPA Jurisdiction" hypothetical, the most substantive change to any hypothetical in the updated Guide.[19]

However, DOJ clearly has not given up on the use of conspiracy and aiding-and-abetting theory to broaden the reach of the statute. The Second Edition specifically notes that one district court in another circuit already has rejected the *Hoskins* decision, a reminder that this is not settled law.[20]

Noticeable in its absence from the Second Edition is a discussion of what constitutes an agent, an issue currently being litigated in a later iteration of the *Hoskins* case. In the original *Hoskins* case, the Second Circuit dismissed conspiracy charges against Hoskins, a foreign national who did not undertake any action while within the United States, and remanded Hoskins for trial on the issue of whether he could still be held liable as the agent of the U.S. company (which was a sister company to the European subsidiary for which he worked), as well as on money laundering charges. Hoskins was convicted at trial on both the agency and the money laundering charges.

After his conviction, Hoskins moved for judgment of acquittal, which was granted by the district judge as to the agency charges.[21] In a thoughtful opinion, the district judge applied a three-prong test to agency, requiring: (i) manifestation by the principal; (ii) acceptance by the agent; and (iii) an understanding by both that the principal will be in control of the undertaking. While the principal need not control every action of the agent, the district judge found that there was insufficient evidence to find beyond a reasonable doubt that the principal, which in this case lacked the normal indicia of control over Hoskins, had interim control of Hoskins's actions.[22]

Continued on page 6

17. First Edition, *supra* note 2, at 12, 34.
18. Second Edition, *supra* note 1, at 36 (emphasis added).
19. *Id*. at 11-12.
20. *Id*. at 36.
21. *United States v. Hoskins*, Ruling on Defendant's Rule 29(C) and Rule 33 Motions, No. 3:12-cr-238-JBA, 2020 WL 914302 (D. Conn. Feb. 26, 2020).
22. *Id*. at *6-*7; *see* Kara Brockmeyer, Andrew M. Levine, Andreas Glimenakis, Katherine R. Seifert, "District Courts Address Significant Aspects of Individual Criminal Liability under the FCPA," FCPA Update, Vol. 11, No. 8 at 9 (Mar. 2020), https://www.debevoise.com/insights/publications/2020/03/fcpa-update-march-2020.

New Edition of FCPA Resource Guide Offers Guidance and Raises Questions
Continued from page 5

Subsequent to the release of the Second Edition, the government filed its opening brief in its appeal of the agency issue, disputing the district court's narrow view of interim control and indicia of control, while arguing that, regardless, the evidence was sufficient for a jury to find agency beyond a reasonable doubt.[23]

The Second Edition obliquely recognizes that agency is an important issue in FCPA statutory interpretation by updating its discussion of parent-subsidiary liability to include a statement that a principal is liable for an agent's conduct when the agent is acting within the scope of its authority.[24] The enforcement agencies' decision not to address the jurisdictional theory of agency at issue in the ongoing *Hoskins* litigation is surprising, but perhaps understandable given the non-contentious approach of the *Resource Guide*.

The Importance of the Accounting Provisions

1. The Statute of Limitations

While the FCPA's books and records and internal controls provisions have long been central to SEC enforcement, these provisions have taken on a larger role in criminal enforcement since 2012. The Second Edition unsurprisingly reflects this increased importance in two corrections and one assertion.

The First Edition of the *Guide* stated that the general five-year statute of limitations applicable to federal crimes applies to criminal violations of the FCPA.[25] The Second Edition now asserts that DOJ will employ a *six*-year statute of limitations for criminal violations of the FCPA's accounting provisions, on the grounds that those claims "are defined as 'securities fraud offense[s]' under 18 U.S.C. § 3301."[26]

18 U.S.C. § 3301 was passed in 2010 as part of the Dodd-Frank Reform Act and provides for a six-year statute of limitations for violations of any "securities fraud offense."[27] This is defined in the statute to include violations of Section 32(a) of the Securities Exchange Act of 1934 [15 U.S.C. § 78ff(a)], the general penalty provision that applies to most violations of the Exchange Act, including violations of the FCPA's accounting provisions. (The FCPA's anti-bribery provisions have their own penalty provision and are not subject to the six-year statute of limitations for criminal violations.)

Continued on page 7

23. *United States v. Hoskins*, No 20-842, Doc. 33, Brief for the United States of America (2d Cir. July 13, 2020).
24. Second Edition, *supra* note 1, at 28.
25. The government may apply for a court order to extend the statute of limitations by up to three years in criminal cases in order to obtain evidence from countries other than the United States.
26. Second Edition, *supra* note 1, at 36.
27. Pub. L. 111–203, title X, § 1079A(b)(1), July 21, 2010, 124 Stat. 2079.

New Edition of FCPA Resource Guide Offers Guidance and Raises Questions

Continued from page 6

Although this provision regarding any "securities fraud offense" existed at the time of the First Edition, it was not cited in the *Guide*, which may have been an oversight. When the First Edition was written, however, DOJ's focus was largely on bribery charges, and it was unusual for DOJ to bring a criminal books-and-records or internal controls case without an accompanying bribery charge (whether at the parent or a subsidiary). That has changed in the years since the *Guide* was first published. DOJ clearly is much more focused on accounting violations now than it was in 2012.

While it was already common in 2008 for DOJ to bring corporate enforcement actions on the basis of criminal violations of the accounting provisions, those charges typically were brought in connection with substantive violations of the anti-bribery provisions (often by a subsidiary).[28] Starting with the non-prosecution agreement with Comverse Technology in 2011,[29] DOJ began to resolve enforcement actions solely alleging or charging criminal violations of the accounting provisions. As these corporate enforcement actions often represent negotiated solutions to avoid anti-bribery charges, the relative rarity of such resolutions at the time of the First Edition might explain the absence of a reference to the statute of limitations dealing solely with the accounting provisions.

"[T]he Second Edition . . . [r]eflects the government's continued interest in expanding the reach of the FCPA's accounting provisions, including asserting that a *six*-year statute of limitations applies to criminal violations of those provisions and asserting that conspiracy and aiding-and-abetting theories remain available for those violations."

In addition, since the First Edition of the *Guide*, the Supreme Court has severely limited the SEC's ability to seek disgorgement or penalties in FCPA cases, holding first in *SEC v. Gabelli* that a five-year statute of limitations applies to civil penalties, regardless of when the misconduct was discovered, and then in *SEC v. Kokesh* that disgorgement is subject to a five-year statute of limitations as well. As a result, it has become more important to DOJ to seek to expand the statute of limitations whenever possible.

Continued on page 8

28. *See, e.g., United States v. Siemens Aktiengesellschaft*, Case 1:08-cr-00367-RJL, Doc. 15, Statement of Offense (D.D.C. Dec. 15, 2008), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2013/05/02/12-15-08siemens-statement.pdf; U.S. Dep't of Justice, Letter to Danforth Newcomb re: AB Volvo, et al. (March 18, 2008), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/03/19/03-18-08volvo-dpa.pdf; "Flowserve Corporation to Pay $4 Million Penalty for Kickback Payments to the Iraqi Government under the U.N. Oil for Food Program," Press Rel. 08-132 (Feb 21, 2008), https://www.justice.gov/archive/opa/pr/2008/February/08_crm_132.html.

29. U.S. Dep't of Justice, "Comverse Technology INC. Agrees to Pay $1.2 Million Penalty to Resolve Violations of the Foreign Corrupt Practices Act," Press Rel. 11-438 (Apr. 7, 2011), https://www.justice.gov/opa/pr/comverse-technology-inc-agrees-pay-12-million-penalty-resolve-violations-foreign-corrupt.

New Edition of FCPA Resource Guide Offers Guidance and Raises Questions

Continued from page 7

2. *Mens Rea*

The First Edition stated that companies and individuals can be criminally liable for "knowingly failing to comply" with the accounting provisions, but that, "[a]s with the FCPA's anti-bribery provisions, individuals are only subject to the FCPA's criminal penalties for violations of the accounting provisions if they acted 'willfully'."[30] The Second Edition is amended to state that "[c]riminal liability can be imposed on companies and individuals for knowingly and willfully failing to comply with the FCPA's books and records or internal controls provisions."[31] Both editions cite the same statutory text without explaining the reason for the Second Edition's update.

3. Extraterritorial Jurisdiction of the Accounting Provisions

While acknowledging that the *Hoskins* decision precludes the use of conspiracy and aiding-and-abetting theories of jurisdiction (at least in the Second Circuit), the Second Edition explicitly states that conspiracy and aiding-and-abetting theories can still be used for violations of the books and records and internal controls portions of the statute, given that those provisions apply by their terms to "*any* person."[32]

This assertion seems to indicate clearly that DOJ will continue to assert aggressively its jurisdiction over foreign nationals not otherwise subject to the FCPA (by, for example, charging them with aiding and abetting accounting violations).

Additionally, conspiracy and aiding-and-abetting theories for accounting violations could be used to overcome a potentially narrow view of agency coming out of the *Hoskins* litigation currently before the Second Circuit. With respect to an employee of a corporate affiliate (like Hoskins), it may be easier to plead aiding and abetting or conspiring to cause a knowing circumvention of internal controls without the need to contort agency and employment law.

4. The Relationship between Internal Accounting Controls and Compliance Programs

The Second Edition provides some additional clarification regarding internal accounting controls and the intersection between those controls and a company's compliance program. The updated *Resource Guide* acknowledges that the statute refers to internal *accounting controls*, which are not necessarily synonymous with a company's FCPA compliance program.[33]

Continued on page 9

30. First Edition, *supra* note 2, at 44.
31. Second Edition, *supra* note 1, at 45.
32. *Id.* at 46 (emphasis added).
33. *Id.* at 40-41.

New Edition of FCPA Resource Guide Offers Guidance and Raises Questions
Continued from page 8

The Second Edition then notes, however, that there may be "critical" overlap between the two, and states that "the design of a company's internal controls must take into account the operational realities and risks attendant to the company's business . . . ."[34] Unfortunately, the Second Edition does not provide any further guidance on how DOJ and the SEC distinguish between a failure of a company's compliance program that results in an internal accounting controls violation and one that does not.

Limitations on SEC Disgorgement

As noted above, since the First Edition of the *Guide* in 2012, the Supreme Court has limited the SEC's ability to seek disgorgement, holding that the SEC is subject to a five-year statute of limitations for both penalties and disgorgement claims (though not traditional equitable remedies such as injunctions).[35] Since the *Kokesh* decision, the SEC has reported publicly that it has had to forgo $1.1 billion in disgorgement.[36] Although the SEC has never quantified the impact specifically on FCPA cases, prior to *Kokesh*, the SEC sought disgorgement sometimes as far back as ten or twenty years, in instances where the misconduct was long running. Since *Kokesh* of course, the SEC can no longer seek disgorgement of illicit gains that go back further than five years (absent a tolling agreement). We already have seen some changes in how both agencies approach this issue, with DOJ in at least one recent case stating that it was obtaining forfeiture for an earlier period because the SEC was foreclosed from doing so. The updated *Guide* does not explicitly address this, but one can imagine that we will see more of these types of hybrid cases.

Two weeks before the Second Edition was released, the Supreme Court further limited the SEC's ability to obtain disgorgement in *SEC v. Liu*.[37] In *Liu*, the Supreme Court held that disgorgement is permissible as equitable relief only "when it does not exceed a wrongdoer's net profits and is awarded for victims."[38] The Second Edition makes passing reference to *Liu*, but does not really grapple with what this case may mean for FCPA enforcement. The first part of the test should be no difficulty for the SEC, which has a long history of calculating net profits in FCPA cases. However, the second part of the test – that it be "awarded to harmed

Continued on page 10

34. *Id.* at 40.
35. Second Edition, *supra* note 1, at 37.
36. U.S. Sec. & Exch. Comm'n, Enf't Div., 2019 Annual Report at 21 (Nov. 2019), https://www.sec.gov/files/enforcement-annual-report-2019.pdf.
37. No. 18-1501, 2020 WL 3405845, at *1 (June 22, 2020); *see also* Kara Brockmeyer, Andrew J. Ceresney, Arian M. June, Robert B. Kaplan, David A. O'Neil, Julie M. Riewe, Paul D. Rubin, Jonathan R. Tuttle, Bruce E. Yannett, Mary Jo White, Ada Fernandez Johnson, Valerie A. Zuckerman, "Supreme Court Liu Decision Upholds SEC Disgorgement Power While Suggesting Potential Limits and May Impact FTC Enforcement" (June 23, 2020), https://www.debevoise.com/insights/publications/2020/06/supreme-court-liu-decision-upholds-sec.
38. Second Edition, *supra* note 1, at 71.

New Edition of FCPA Resource Guide Offers Guidance and Raises Questions

Continued from page 9

investors" – may provide a significant challenge. There is no discussion in the Second Edition of how this will work in FCPA cases, given that "disgorgement" in such cases previously has been paid to the Treasury, and the enforcement agencies (and courts) traditionally have had difficulty distinguishing between victims and willing participants.[39]

Successor Liability and M&A Best Practices

The First Edition already noted that the U.S. agencies, absent aggravating circumstances, rarely take action against successor companies in M&A transactions following voluntary self-disclosure, remediation, and cooperation with DOJ and the SEC.[40] The Second Edition goes somewhat further in providing additional comfort in the transactional context.

"DOJ is thereby underscoring the importance of anti-corruption due diligence (preferably pre-, but also post-transaction), albeit without guaranteeing a transactional free pass . . . ."

Similar to past speeches by DOJ officials, the updated *Guide* expressly recognizes "the potential benefits of corporate mergers and acquisitions, particularly when the acquiring entity has a robust compliance program in place."[41] It reiterates that, under DOJ's Corporate Enforcement Policy, "in appropriate cases, an acquiring company that voluntarily discloses misconduct may be eligible for a declination, even if aggravating circumstances existed as to the acquired entity."[42] As we have previously observed, DOJ is thereby underscoring the importance of anti-corruption due diligence (preferably pre-, but also post-transaction), albeit without guaranteeing a transactional free pass and notwithstanding that a declination under the Corporate Enforcement Policy remains less attractive than a traditional declination without any charges or settlement.[43]

Continued on page 11

39. *See* David O'Neil, Philip Rohlik, Jil Simon, "Decision Permitting Restitution Claims Against Och-Ziff May Signal Increased Litigation Risks for Companies Settling FCPA Actions," FCPA Update, Vol. 11, No. 2 at 13 (Sept. 2019).
40. First Edition, *supra* note 2, at 28.
41. Second Edition, *supra* note 1, at 29.
42. *Id.* at 32.
43. Andrew M. Levine, Philip Rohlik, Kamya B. Mehta, "Mitigating Anti-Corruption Risk in M&A Transactions: Successor Liability and Beyond," FCPA Update, Vol. 10, No. 5 at 2 (Dec. 2018), https://www.debevoise.com/insights/publications/2018/12/fcpa-update-december-2018.

New Edition of FCPA Resource Guide Offers Guidance and Raises Questions

Continued from page 10

Issues Not Fully Addressed

Hiring Practices: When the SEC brought the first hiring practices enforcement action against Bank of New York Mellon, we noted that there was "a heated debate in the legal community about whether such allegations could form the basis for enforcement actions under the FCPA and, in particular, whether providing a job to an official's relative (rather than to the official personally) could constitute a 'thing of value' to the official."[44] Five years and several enforcement actions later, the SEC and DOJ may be approaching the end of the hiring practices cases, but there has still not been any case law on whether a non-monetary benefit to a relative constitutes a thing of value. The Second Edition relegates the hiring practices cases to a two-sentence example of "gifts."[45] Likewise, there is also no substantive update to the discussion of charitable contributions or facilitation payments, despite those being areas of keen interest among compliance professionals.

The Rest of the World: The First Edition noted that, "[i]n fiscal year 2009, the U.S. government provided more than $1 billion for anti-corruption and related good governance assistance abroad."[46] According to the Second Edition, that same number ten years later amounted to $112 million.[47] During this time, of course, numerous jurisdictions have adopted their own anti-corruption laws and demonstrated an increased willingness to enforce these laws and to cooperate with U.S. and other authorities in conducting investigations and coordinating resolutions. While the Second Edition mentions France's *Sapin II* law, as an example, a discussion of how the FCPA fits in the global context is a matter we hope will be explored further in the Third Edition.

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Continued on page 12

44. Sean Hecker, Bruce E. Yannett, Philip Rohlik, David Sarratt, "The SEC Announces First FCPA Enforcement Action Based on Allegedly Improper Hiring of Relatives of Foreign Officials," FCPA Update, Vol. 7, No. 1 (Aug. 2015).
45. *Id.* at 16.
46. First Edition, *supra* note 2, at 6.
47. Second Edition, *supra* note 1, at 6.

COVID-19 and Combatting Corruption in Latin America

Latin America's fight against corruption faces an unusual adversary in 2020: addressing the COVID-19 pandemic. As the coronavirus continues to ravage many Latin American countries, the influx of emergency funding and aid for health-related projects presents serious corruption and other compliance risks, which are compounded by daunting circumstances that often involve less transparency and weaker procurement controls.

More broadly, the significant compliance obstacles posed by the pandemic are heightened by the underlying abilities of governments in Latin America to combat corruption. The Capacity to Combat Corruption ("CCC") Index – developed by the Americas Society, Council of the Americas, and Control Risks – considers precisely that critical issue. In that regard, the newly released CCC report concludes that many Latin American countries have entered 2020 with weaker capacities to fight corruption than in the prior year.

This article first explores valuable insights from the CCC report and then considers pandemic-related difficulties, such as corruption in health-related procurement, that likely will challenge further regional anti-corruption efforts. Finally, this article addresses measures being taken to mitigate the increased risk of corruption in light of the pandemic, and discusses some guidance issued to assist countries in such efforts.

Latin America's Anti-Corruption Capacity in 2020

Released in June 2020, the latest CCC report concluded that countries such as Chile, Brazil, Colombia, and Mexico became less capable in 2019 than in 2018 to detect, punish, and create mechanisms to prevent corruption.[1] Based on relevant data and input from experts, the CCC Index scores several Latin American countries on 14 variables under three overarching categories: (1) Legal Capacity; (2) Democracy and Political Institutions; and (3) Civil Society, Media, and the Private Sector.[2] First

Continued on page 13

1. "The Capacity to Combat Corruption (CCC) Index: Assessing Latin America's Ability to Detect, Punish, and Prevent Corruption Amid COVID-19," Americas Society, Council of the Americas, and Control Risks (June 2020), https://www.as-coa.org/sites/default/files/archive/2020_CCC_Report.pdf.

2. The 14 variables are: under (1) **Legal Capacity**, (i) judicial independence and efficiency; (ii) anti-corruption agencies' independence and efficiency; (iii) access to public information and overall government transparency; (iv) independence and resources for the Chief Prosecutor's Office and investigators; (v) level of expertise and resources available to combat white collar crime; (vi) quality of leniency and plea bargain instruments; and (vii) level of international cooperation on law enforcement; under (2) **Democracy and Political Institutions**, (i) quality and enforceability of campaign finance legislation; (ii) lawmaking and ruling processes; and (iii) overall quality of democracy; and under (3) **Civil Society, Media, and the Private Sector**, (i) civil society mobilization against corruption; (ii) education improvements; (iii) quality of the press and investigative journalism; and (iv) digital communications and social media.

COVID-19 and Combatting Corruption in Latin America

Continued from page 12

published in 2019 to reflect countries' positions in 2018, the CCC Index serves as a proxy for what the future may hold, by country (though not every country), across Latin America's anti-corruption landscape.[3] (In contrast, Transparency International's Corruption Perceptions Index provides a useful proxy for current degrees of corruption by assessing the *perception* of corruption in various countries.[4])

As the recent CCC report details, many Latin American countries experienced changes in 2019 that seemingly weakened their abilities to combat corruption, reflecting an overall setback for the region.[5] The majority of Latin America's largest economies experienced a decline in their overall CCC Index scores, suggesting lower overall capacity to combat corruption compared to the year before:

CCC Index Overall Scores

Rank	Country	2020 Score	2019 Score	Score Change	Percent Change
1	Uruguay*	7.78	–	–	–
2	Chile	6.57	6.66	- 0.09	- 1.4%
3	Costa Rica*	6.43	–	–	–
4	Brazil	5.52	6.14	- 0.62	- 10.1%
5	Peru	5.47	5.17	+ 0.30	+ 5.8%
6	Argentina	5.32	5.33	- 0.01	- 0.2%
7	Colombia	5.18	5.36	- 0.18	- 3.4%
8	Mexico	4.55	4.65	- 0.10	- 2.2%
9	Ecuador*	4.19	–	–	–
10	Panama*	4.17	–	–	–
11	Guatemala	4.04	4.55	- 0.51	- 11.2%
12	Paraguay*	3.88	–	–	–
13	Dom. Rep.*	3.26	–	–	–
14	Bolivia*	2.71	–	–	–
15	Venezuela	1.52	1.71	- 0.19	- 11.1%

Source: Americas Society, Council of the Americas, and Control Risks
Note: A higher score implies greater capacity to combat corruption.
*Country was added to the CCC Index in 2020.

Continued on page 14

3. "The Capacity to Combat Corruption (CCC) Index," *supra* note 1.
4. "The Corruption Perceptions Index," Transparency International, https://www.transparency.org/en/cpi; *see also* Andrew M. Levine, Karolos Seeger, Robin Lööf, et al., "White Collar Crime and COVID-19: Enforcement in a Rapidly Changing Landscape," FCPA Update Vol. 11, No. 10 (May 2020), https://www.debevoise.com/insights/publications/2020/05/fcpa-update-may-2020.
5. "The Capacity to Combat Corruption (CCC) Index," *supra* note 1.

COVID-19 and Combatting Corruption in Latin America

Continued from page 13

On an absolute basis in the CCC Index, Brazil was the country most negatively impacted by 2019 events, with a drop of 0.62 points in its overall score, representing a 10% decrease compared to the previous year. In the Legal Capacity category, Brazil experienced a marked decrease given concerns about the independence of law enforcement agencies, as well as judicial decisions viewed as unfavorable to fostering police investigations into white-collar crime. In particular, the CCC Index report expressed concerns about Brazil, including:

- President Jair Bolsonaro's selection of an attorney general with whom he is considered to be aligned, thus deviating from the tradition of choosing from among the list suggested by federal prosecutors;[6]
- perceived attempts by the President to interfere with federal investigations,[7] reducing Brazil's score for the law enforcement institutions subcategory;[8]

"As the coronavirus continues to ravage many Latin American countries, the influx of emergency funding and aid for health-related projects presents serious corruption and other compliance risks, which are compounded by daunting circumstances that often involve less transparency and weaker procurement controls."

- diminished judicial independence, noting leaked text messages between federal prosecutors and then-Judge Sergio Moro discussing targets and investigations;[9] and
- the effectiveness of collaboration instruments and overall judicial strength, reflecting substantial decreases in part given the Supreme Court's reversal of its 2016 decision, now enabling criminal defendants to remain outside prison while awaiting their appeals under some circumstances, leading to the early release of several *Lava Jato* defendants, including former President Lula da Silva.[10]

Continued on page 15

6. *Id.*; *see also* Ricardo Brito et al., "Brazil's Bolsonaro Picks Top Prosecutor Who Agrees With Him on Environment," Reuters (Sept. 5, 2019), https://www.reuters.com/article/us-brazil-politics-prosecutor/brazils-bolsonaro-picks-top-prosecutor-who-agrees-with-him-on-environment-idUSKCN1VR00O.
7. "The Capacity to Combat Corruption (CCC) Index," *supra* note 1; *see also* Luciana Magalhães and Jeffrey T. Lewis, "Brazil's Former Justice Minister Accuses President of Abandoning Anticorruption Fight," Wall Street Journal (June 2, 2020), https://www.wsj.com/articles/brazils-former-justice-minister-accuses-president-of-abandoning-anticorruption-fight-11591138621.
8. "The Capacity to Combat Corruption (CCC) Index," *supra* note 1.
9. *Id.*; Glenn Greenwald et al., Secret Archive Brazil, The Intercept (June 9 – October 4, 2019), https://theintercept.com/2019/06/09/brazil-archive-operation-car-wash; Ricardo Balthazar and Paula Bianchi, "Mensagens Apontam que Moro Interferiu em Negociações de Delações" [Messages Indicate that Moro Interfered in Plea Negotiations], Folha (July 18, 2019), https://www1.folha.uol.com.br/poder/2019/07/mensagens-apontam-que-moro-interferiu-em-negociacao-de-delacoes.shtml.
10. "The Capacity to Combat Corruption (CCC) Index," *supra* note 1; Ernesto Londoño and Letícia Casado, "Ex-President 'Lula' Is Freed from Prison in Brazil After Supreme Court Ruling," New York Times (Nov. 8, 2019), https://www.nytimes.com/2019/11/08/world/americas/lula-brazil-supreme-court.html.

COVID-19 and Combatting Corruption in Latin America
Continued from page 14

Such concerns about Brazil's anti-corruption efforts mirror the recent suggestion by former Minister of Justice Moro that President Bolsonaro's administration does not "respect the rule of law and . . . the autonomy of the law agencies [that] investigate and prosecute crimes."[11] According to former Minister Moro – who was appointed by President Bolsonaro after the 2018 election and resigned earlier this year in protest of the President's alleged interference with federal investigations – Brazil's "anti-corruption agenda has suffered setbacks since 2018."[12]

Other Latin American countries likewise have experienced challenging developments in their anti-corruption environments in 2019, as reflected in the CCC Index. Contributing factors highlighted by the CCC report include, among others, the:

- lack of enforcement collaboration by Colombia with other countries, including relating to Odebrecht;
- lack of progress in long-term institutional reforms in Mexico, which the report noted maintains a "poor" ability to detect, punish, and prevent corruption, despite President Andrés Manuel López Obrador having championed anti-corruption efforts during his campaign;
- concerns about the future of Argentina's Anti-Corruption Office in light of the continued criminal investigations into Vice President Fernández de Kirchner, as well as a decline in the country's broader mobilization against corruption; and
- social unrest and political crisis in Chile.[13]

Nevertheless, the report considered such negative factors to have had relatively small effects on these countries' overall capacities to fight corruption – at least in comparison to Brazil – given that some were partially offset by positive changes.[14] This appears to have been the case especially for Argentina, with an overall score that dropped only 0.2% compared to the previous year, in part due to positive factors such as the implementation of new campaign financing legislation in 2019.[15]

Meanwhile, in contrast to other Latin American economies, the CCC Index reflects that Peru experienced net positive developments to its anti-corruption landscape in 2019. Of note, the CCC report deemed Peru's newly created Junta Nacional de Justica ("JNJ") (National Board of Justice) – in charge of appointing

Continued on page 16

11. Bryan Harris, "Anti-Corruption Drive Floundering Under Bolsonaro, Says Ex-Minister," Financial Times (July 26, 2020), https://www.ft.com/content/710f9fe2-9f06-411b-a5e6-ec3b5b23cbb6.
12. *Id.*
13. "The Capacity to Combat Corruption (CCC) Index," *supra* note 1.
14. *Id.*
15. *Id.*

judges and prosecutors, and removing those who do not fulfill their duties[16] – a substantial improvement to the country's judicial system and law enforcement. Prospects of improvements to Peru's campaign financing practices also have contributed to its enhanced position.[17]

Uruguay also embodies a comparatively positive story. Despite not being covered by the CCC Index initially, it now leads the 2020 rankings. The CCC report attributes the country's relative success to a variety of factors, including the efficiency and independence of its anti-corruption bodies, as well as the high degree of democracy of its institutions. The country's strengths are illustrated by, among other things, new anti-money laundering legislation passed in 2018 and the election in 2019 of a president who promised to work with opposing members of the government.[18]

Despite Peru's improvement and Uruguay's positive story, the worsening – or, at the very least, stagnation (as appears to be Argentina's case) – in the anti-corruption landscape of the majority of Latin America's largest economies in 2019 signals a potential for increased problems in 2020. This is especially the case when coupled with the unique challenges presented by COVID-19, which postdated the relevant period covered by the new CCC Index.

Corruption and Fraud in Light of COVID-19

With respect to the pandemic, Latin America has emerged as a significant area of concern, including to the World Health Organization, given the region's record-breaking number of daily COVID-19 infections and death rates, especially in its largest country, Brazil.[19] Furthermore, the pandemic has left many Latin American governments in states of emergency, seeking significant funds notwithstanding that public debt already was skyrocketing,[20] which can be particularly difficult for countries entering 2020 with decreased capacities to fight corruption.[21] The rapid influx of emergency funding and aid for health-related projects in Latin America often has been accompanied by looser controls, including suspended regulations

Continued on page 17

16. *Id.*; Republic of Peru, National Board of Justice, https://www.gob.pe/jnj.
17. "The Capacity to Combat Corruption (CCC) Index," *supra* note 1.
18. *Id.*
19. Anthony Boadle, "WHO Says the Americas are New COVID-19 Epicenter as Deaths Surge in Latin America," Reuters (May 26, 2020), https://www.reuters.com/article/us-health-coronavirus-latam/who-says-the-americas-are-new-covid-19-epicenter-as-deaths-surge-in-latin-america-idUSKBN2322G6.
20. Michael Stott and Andres Schipani, "Fears Mount of a Fresh Latin American Debt Crisis," Financial Times (July 20, 2020), https://www.ft.com/content/a86e0382-8f63-4f4f-839c-51c5a9ccc9e5.
21. Geert Aalbers, "Headwinds Fighting Corruption in Latin America," Ethisphere Magazine (2020), https://magazine.ethisphere.com/latin-america-corruption-index.

COVID-19 and Combatting Corruption in Latin America
Continued from page 16

governing public contracting and suspended rules requiring greater transparency, which creates opportunity for corruption.[22] The move to remote working also has posed barriers to some anti-corruption enforcement, including decreased face-to-face cooperation among some authorities and slowed international sharing of evidence.[23]

In Brazil, which has spent about 285 billion reais and expects to spend a total of 510 billion reais (approximately $95 billion) on fighting COVID-19,[24] the government has invoked the escape clause of the constitutional expenditure ceiling to accommodate exceptional spending needs. Emergency measures will not be subject to the federal fiscal target, and include transfers from federal to state governments to support higher health spending.[25] The Brazilian government also has suspended public bidding requirements for the procurement of certain health-related purchases, and is accepting certain donations subject to conditions imposed by donors.[26]

Brazil's emergency funding also has included some unusual sources. Notably, at the request of the Public Prosecutors' Office ("MPF"), Brazil has allocated proceeds from *Lava Jato*-related settlements to fight the pandemic, including part of the funds from J&F Investimentos' leniency agreement with Brazilian prosecutors in 2017 and a portion of the funds from Petrobras's settlement with Brazilian authorities in 2018.[27] Settlement funds represent a significant source of future income for Brazil, with over 14 billion reais ($2.6 billion) agreed to be paid to the government and only 4.3 billion reais ($800 million) paid thus far.[28] The use of such funds for fighting the pandemic, however, has not been without controversy. In an apparent reversal of its earlier position – given its reported prior agreement with MPF on the topic –

Continued on page 18

22. Natalie Kitroeff and Mitra Taj, "Latin America's Virus Villains: Corrupt Officials Collude with Price Gougers for Body Bags and Flimsy Masks," New York Times (June 20, 2020), https://www.nytimes.com/2020/06/20/world/americas/coronavirus-latin-america-corruption.html.
23. Clara Hudson, "Pandemic Poses Challenges for Building Relationships Abroad, US Enforcers Say," Global Investigations Review (July 15, 2020), available at https://globalinvestigationsreview.com.
24. National Treasury of Brazil, "Monitoramento dos Gastos da União com Combate à Covid-19" [Monitoring Federal Expenditures on Fighting Covid-19] (July 22, 2020), https://www.tesourotransparente.gov.br/visualizacao/painel-de-monitoramentos-dos-gastos-com-covid-19.
25. International Monetary Fund, "Policy Responses to Covid-19" (July 17, 2020), https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19.
26. "Corruption in Times of Covid-19: A Regional Perspective on Public Procurement," Lawyers Council for Civil & Economic Rights, Cyrus R. Vance Center for International Justice (May 20, 2020), https://www.vancecenter.org/wp-content/uploads/2020/05/Corruption-in-times-of-COVID-19-a-regional-perspective-on-public-procurement.-Lawyers-Council.pdf.
27. *See* Will Barbieri, "Brazil's Use of Settlement Funds to Fight Covid-19 Pandemic in Limbo," Global Investigations Review (July 15, 2020), https://globalinvestigationsreview.com/article/1229026/brazils-use-of-settlement-funds-to-fight-covid-19-pandemic-in-limbo.
28. Public Prosecutors' Office of Brazil (MPF), "Nota de Esclarecimento sobre Destinação de Recursos para o Combate ao Coronavírus" [Clarifying Note about Destination of Resources for the Fight Against Coronavirus] (July 14, 2020), http://www.mpf.mp.br/pr/sala-de-imprensa/noticias-pr/nota-de-esclarecimento-sobre-destinacao-de-recursos-para-o-combate-ao-coronavirus.

COVID-19 and Combatting Corruption in Latin America
Continued from page 17

the Attorney General's Office ("AGU") now has petitioned the Brazilian Supreme Court to block any portions of settlement funds from being specifically allocated to fighting the pandemic, as opposed to the usual practice of allocating them to the entities injured by the conduct encompassed by the settlements. The continued availability of such funds for fighting the pandemic is consequently in question and has been suspended by judicial order until the Supreme Court issues a decision.[29]

Not surprisingly, the increased availability of funds for health-related projects, coupled with less strict controls, has fueled numerous reports of corruption related to COVID-19 procurement. Government officials, including governors, in several Brazilian states are being investigated on suspicion of misuse of public funds totaling more than $200 million,[30] including alleged embezzlement and bribery in connection with schemes to inflate artificially the price of medical equipment.[31]

"While it is too early to predict the precise magnitude of the pandemic's impact on corruption and fraud in the region, the experience of the pandemic stands as a powerful reminder of the importance of bolstering throughout the region the capacity to combat corruption and similar societal ills."

Reports of corruption related to COVID-19 procurement also have arisen in other Latin American countries, including Colombia, which has created a National Emergency Mitigation Fund and is allowing for faster direct public contracting under some circumstances.[32] Claims of related corruption in Colombia extend to lucrative contracts allegedly granted to political campaign donors,[33] as well as cost overruns in the procurement of medical equipment.[34] Colombia's Attorney General's Office reportedly is investigating 10 mayors, and its Inspector General reportedly has launched 512 disciplinary proceedings involving 26 provincial governments and 271 mayor's offices.[35]

Continued on page 19

29. *Id.*; Will Barbieri, *supra* note 27; "Repasse de Valores Recuperados na Lava Jato para COVID-19 é Suspenso" [Pass-Through of Amounts Recovered in Lava Jato for COVID-19 is Suspended], Veja (July 28, 2020), https://veja.abril.com.br/politica/repasse-de-valores-recuperados-na-lava-jato-para-covid-19-e-suspenso.
30. *See* Natalie Kitroeff and Mitra Taj, *supra* note 22.
31. *See* Bryan Harris, Andres Schipani, and Gideon Long, "Coronavirus Corruption Cases Spread Across Latin America," Financial Times (July 7, 2020), https://www.ft.com/content/94c87005-7eb1-47c4-9698-5afb2b12ab54.
32. *See* International Monetary Fund, *supra* note 25.
33. *See* Natalie Kitroeff and Mitra Taj, *supra* note 22.
34. *See* Luis Jaime Acosta, "Colombia Issues Arrest Warrants for 10 Mayors for Alleged Graft," Reuters (May 21, 2020), https://www.reuters.com/article/us-health-coronavirus-colombia-corruptio/colombia-issues-arrest-warrants-for-10-mayors-for-alleged-graft-idUSKBN22Y00L.
35. *Id.*

COVID-19 and Combatting Corruption in Latin America
Continued from page 18

In Mexico, the government has adopted measures to increase funds for the Ministry of Health, removed red tape in the procurement of medical equipment and materials, and accelerated the public tender processes.[36] As in Colombia, Mexico has seen purchases of medical equipment at seemingly inflated prices: up to 85 percent higher than the cheapest option.[37]

In Argentina, the government has exempted the procurement of certain supplies from the competitive bidding requirement, allowing for no-bid contracts under some circumstances during the COVID-19 emergency.[38] Additionally, the government is facing allegations that it purchased products from politically connected providers at inflated prices, which has led to several criminal investigations and requests for indictments.[39]

Although Peru fared better than many other Latin American countries in the updated CCC Index, it too has not escaped the headlines regarding alleged wrongdoing involving COVID-19 procurement. Among other alleged misconduct, Peruvian authorities are investigating potential collusion between police officials and equipment suppliers in connection with the government's purchase of low-quality or faulty health products, such as diluted sanitizer and masks and gloves that break instantly.[40] Peruvian prosecutors also reportedly have identified over 653 potentially illicit acts committed by public officials since a state of emergency was declared due to the pandemic.[41]

Efforts To Combat Pandemic-Related Misconduct

Given the heightened corruption and fraud risks stemming from pandemic-related procurement, mitigating measures such as boosting transparency have assumed the utmost importance. To that end, for governments combatting misconduct such as

Continued on page 20

36. *See* International Monetary Fund, *supra* note 25.
37. *See* Natalie Kitroeff and Mitra Taj, *supra* note 22.
38. "Corruption in Times of Covid-19: A Regional Perspective on Public Procurement," *supra* note 26.
39. *Id.*
40. *See* Natalie Kitroeff and Mitra Taj, *supra* note 22.
41. "Fiscalía: Hubo 653 de Casos de Corrupción Durante Emergencia por Covid-19" [Office of the Prosecutor: There Have Been 653 Corruption Cases During Covid-19 Emergency], Gestión (June 1, 2020), https://gestion.pe/peru/politica/coronavirus-peru-hubo-653-de-casos-de-corrupcion-durante-emergencia-por-covid-19-nndc-noticia.

COVID-19 and Combatting Corruption in Latin America
Continued from page 19

fraud and corruption during the crisis, including impropriety related to COVID-19, Transparency International has recommended best practices including:[42]

- Publishing information on government contracting in an open data format accessible to all audiences, such as an official website;
- Avoiding emergency procurement procedures that encourage price gouging, hoarding, or other collusive or monopolistic behavior;
- Monitoring resources used during the emergency to ensure procurement processes comply with applicable laws and adjustments for the emergency; and
- Reporting on the origin of resources, effects on budgets, and justifications for allocations, as well as on results of the allocations of funds at the end of the emergency.

Several Latin American countries already have started adopting measures in line with these recommendations. For instance, several watchdog organizations in Mexico have established portals to improve transparency. Specifically, Transparencia Mexicana and Tojil have created a tracker for plans, programs, and actions related to COVID-19, while Derechos Humanos y Litigio Estratégico Mexicano has created a whistleblower platform to receive reports of corruption related to COVID-19 and to track operational failures by providers of medical supplies in hospitals.[43]

Although criticized for loosening requirements in the electronic management of federal records,[44] Argentina has implemented price controls for certain health care products in order to prevent price gouging. It also has placed export restrictions on, and centralized the sale of, certain medical supplies.[45]

In Chile, the directorate in charge of public procurement, ChileCompra, has issued several recommendations for the public sector regarding purchases during the pandemic, especially regarding the method of contracting. ChileCompra recommends using framework agreements as opposed to direct contracting, and provides that any decision to contract directly must be duly justified by the authorizing resolution. In addition, ChileCompra has created a section on its

Continued on page 21

42. "Corruption Could Cost Lives in Latin America's Response to the Coronavirus," Transparency International (March 31, 2020), https://www.transparency.org/en/news/corruption-could-cost-lives-in-latin-americas-response-to-the-coronavirus; "Public Procurement During States of Emergency: Minimum Requirements to Ensure the Integrity of Contracts Awarded During Crises," Transparency International (2020), https://images.transparencycdn.org/images/EN_Latin-America_emergency_procurement_COVID_19.pdf.
43. "Corruption in Times of Covid-19: A Regional Perspective on Public Procurement," *supra* note 26.
44. *Id.*
45. *See* International Monetary Fund, *supra* note 25.

COVID-19 and Combatting Corruption in Latin America
Continued from page 20

website listing goods and services procured during the pandemic,[46] and Peru has created similar databases for public access.[47]

Likewise, the Brazilian government has launched online tools detailing public contracts related to COVID-19,[48] including purchases that were exempted from the public tender process,[49] as well as a hotline dedicated specifically to receiving complaints related to services and conduct by public officials in connection with COVID-19.[50]

Despite entering 2020 with lesser capacities – as reflected in the CCC Index – to fight corruption than a year before, countries in the region increasingly are developing ways to mitigate at least partially the various pandemic-related compliance risks. Notwithstanding such initiatives, serious corruption and fraud risks persist in Latin America, exacerbated by the continuing toll of the pandemic. Indeed, both the strains of the pandemic itself and the efforts to remedy its impact present ample opportunities for abuse, especially when intermingled with weakened controls, even when well intentioned in the context of a public health crisis. While it is too early to predict the precise magnitude of the pandemic's impact on corruption and fraud in the region, the experience of the pandemic stands as a powerful reminder of the importance of bolstering throughout the region the capacity to combat corruption and similar societal ills.

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Continued on page 22

46. "Corruption in Times of Covid-19: A Regional Perspective on Public Procurement," *supra* note 26.
47. *Id.*
48. Federal Government of Brazil, "CGU Lança Painel Para Dar Transparência a Contratações Relacionadas à COVID-19" [CGU Launches Dashboard to Provide Transparency to Contracts Related to COVID-19], (July 3, 2020), https://www.gov.br/cgu/pt-br/assuntos/noticias/2020/07/cgu-lanca-painel-para-dar-transparencia-a-contratacoes-relacionadas-a-covid-19.
49. Federal Government of Brazil, "Governo Lança Site com Detalhes das Compras Feitas com Dispensa a Licitação no Combate ao Covid-19"[Government Launches Website with Details on Purchases Made with Exemption from Public Tender in Fight Against Covid-19], (April 9, 2020), https://www.gov.br/cgu/pt-br/governo-aberto/noticias/2020/4/ministerio-da-economia-lanca-site-para-divulgacao-emonitoramento-das-compras-relacionadas-ao-novo-coronavirus.
50. Federal Government of Brazil, "FAQ Coronavirus," (May 12, 2020), https://www.gov.br/cgu/pt-br/coronavirus/faq-coronavirus.

French Bar Provides Best Practices for Attorneys Conducting Internal Investigations

On July 2, 2020, France's National Bar Council ("CNB") – the national body governing French attorneys – released an 80-page white paper providing best practices to attorneys carrying out internal investigations in France (the "Guide").[1] The Guide builds upon the ethical recommendations previously provided by the Paris Bar in the *Vademecum* issued on September 13, 2016, and updated on December 10, 2019.[2]

Internal investigations are not new to French legal practitioners, but the relatively recent adoption of the anticorruption *Sapin II* Law, which created the French Anti-Corruption Agency (the "AFA") and the French-style deferred prosecution agreement (known as the "CJIP"), as well as the subsequent guidelines jointly issued by the AFA and the French Financial National Prosecutor (commonly referred to as the "PNF") encouraging self-reporting and cooperation of corporate wrongdoers,[3] necessarily expand the use of internal investigations in France.

Given its issuing body, the Guide has no normative value, but constitutes a useful reference. Of particular relevance, the Guide includes discussions and recommendations regarding: (1) the definition of the scope and purpose of the investigation; (2) the collection of evidence; (3) attorney-led witness interviews; (4) privilege considerations; (5) production of information to foreign authorities; and (6) cross-border investigations.

Scope and Purpose of the Internal Investigation

The Guide advises attorneys and their clients to pay particular attention to three elements when drafting engagement letters:

First, the engagement letter should specifically define the scope of the investigation and the attorney's specific role.[4] A well-defined mission statement will certainly impose discipline and accountability on attorneys, particularly given the risk that large internal investigations can become wasteful.

Continued on page 23

1. Conseil National des Barreaux, L'avocat français et les enquêtes internes (June 12, 2020), *available at* https://www.cnb.avocat.fr/sites/default/files/guide-cnb_enquetes-internes_juin2020.pdf. The Guide was adopted by the CNB on June 12, 2020 and released to the public on July 2, 2020.
2. Ordre des Avocats du Barreau de Paris, Vademecum de l'avocat chargé d'une enquête interne, *available at* http://www.avocatparis.org/mon-metier-davocat/publications-du-conseil/annexe-xxiv-vademecum-de-lavocat-charge-dune-enquete. The update was released to the public on May 28, 2020.
3. See our July 9, 2019 update on the PNF/AFA's guidelines, *available at* https://www.debevoise.com/insights/publications/2019/07/french-cjip-guidelines.
4. Guide at 17.

French Bar Provides Best Practices for Attorneys Conducting Internal Investigations

Continued from page 22

Second, the engagement letter should also memorialize the purpose of the investigation.[5] Such precaution can later help establish the legitimacy of privilege claims over attorney work product created in the course of the investigation.

Third, while French professional rules of conduct require attorneys to obtain their client's approval before communicating with any prosecutorial or administrative bodies,[6] the Guide recommends crafting carefully the conditions and processes associated with such communication.[7] The CNB also emphasizes that even in the role of the investigator, attorneys must act in the best interest of their clients.

Collection of Evidence

The Guide advises that, in addition to ethical considerations, the collection of evidence (through document review or witness interviews) should be tailored to the internal investigation's purpose. In the French criminal system, evidence submitted by private parties is generally admissible irrespective of how it is collected.[8] However, its probative force can be increased during the internal investigation (*e.g.*, by having the interviewees assisted by their own counsel).[9]

French labor, civil, and administrative jurisdictions also admit evidence collected by any means, but it must be obtained legitimately (*e.g.*, an interview should not be recorded without the interviewee's approval).[10] Such precautions are particularly important if the purpose of the internal investigation is to identify and subsequently sanction potential wrongdoers.

Attorney-Led Witness Interviews

The Guide addresses several important features of attorney-led witness interviews:

- **Non-coercive nature.** The Paris Bar's *Vademecum* already provides that the attorney must not put pressure on the interviewee.[11] The CNB adds that the non-coercive nature of the interview must be stated clearly, which implies that the interviewee is free to attend the interview, remain silent, or leave the interview at any moment, subject to the interviewee's accountability obligations and related labor law consequences.[12]

Continued on page 24

5. *Id.* at 34.
6. *Id.* at 16, citing an April 28, 2015 decision of the Paris Bar's disciplinary board.
7. *Id.* at 17.
8. *See* our May 22, 2019 guide "10 Things U.S. Criminal Defense Lawyers Should Know About Defending a Case in France," *available at* https://www.debevoise.com/insights/publications/2019/05/10-things-us-criminal-defense-lawyers.
9. *Id.* at 25.
10. *Id.* at 26.
11. *See supra* note 2, article 1.
12. Guide at 26-27.

French Bar Provides Best Practices for Attorneys Conducting Internal Investigations

Continued from page 23

- **Language.** The CNB advises to conduct the interview in the interviewee's preferred language, or to provide a translator.[13]
- **Right to counsel.** *The Vademecum* already recommends that the interviewee must be notified of her/his right to counsel if it appears before or during the interview that the interviewee has likely committed misconduct.[14] The Guide recommends, however, to (i) notify in writing the interviewee of her/his right to counsel if the commission of some wrongdoing is already apparent or (ii) suspend the interview if such commission is identified during the interview and resume it once the interviewee has retained her/his own counsel.[15]

"In an area where legal certainty is still relatively limited, this Guide represents a valuable roadmap to French practitioners and their clients, as well as a confirmation that the practice of internal investigations is increasingly becoming an ordinary part of the French legal landscape."

- ***Upjohn*-style warning.** In addition to highlighting at the beginning of the interview its non-coercive nature and the right to counsel, the Guide stresses the importance of providing a sort of equivalent of the *Upjohn* warning typically provided by U.S. lawyers (from the seminal U.S. Supreme Court case *Upjohn Co. v. United States*).[16] Such warning includes an explanation that the attorney conducting the interview represents the company, not the interviewee, and that although the interview is covered by attorney-client privilege, that privilege belongs to the company not the interviewee.[17]
- The Guide also recommends to note that the investigation is confidential and to ask the interviewee to retain all of their professional documents.
- To document that all abovementioned warnings have been made, the Guide recommends to (i) make them in writing in advance of the interview, (ii) record them at the beginning of the interview (provided that the interviewee gives her/his consent), or (iii) memorialize them in the interview verbatim minutes (if any).[18]

Continued on page 25

13. *Id.* at 27.
14. *See supra* note 2, article 8.
15. Guide at 27.
16. *Upjohn Co. v. United States*, 449 U.S. 383 (1981).
17. The *Vademecum* also includes that recommendation (*see supra* note 2, article 3).
18. Guide at 28.

French Bar Provides Best Practices for Attorneys Conducting Internal Investigations
Continued from page 24

- **Interview verbatim minutes.** The Guide notes that, in certain circumstances, the interview should be memorialized in a verbatim manner. In such circumstances, the interviewee should have the opportunity to review and approve the minutes. A copy of the minutes can be provided to the interviewee, unless the confidentiality of the investigation prevents it.[19]

Privilege Considerations

French attorney-client privilege protects confidential communications between attorney (other than in-house counsel) and client against disclosure to third parties. During searches, these communications are thus in general protected from seizure, especially if they involve defense work. Accordingly, even if there is no case law on this specific topic, the CNB is of the view that attorney-led investigations are protected by the client-attorney privilege. In fact, internal investigations are a key component of a company's criminal defense, because they seek to determine whether internal policies, regulations, or laws have been violated, and, as a result, are indispensable in remediating the misconduct and preparing a defense. The CNB is thereby sending a message to French authorities that, in its view, materials produced in the course of an internal investigation cannot be seized.[20]

To facilitate the swift identification of privileged materials, the Guide recommends marking such documents as "Confidential – Protected by the Client-Attorney Privilege" and/or "Document Prepared in the Interest of the Company's Defense."[21]

Production of Information to Foreign Authorities

In connection with internal investigations with extraterritorial implications, French companies can be requested by foreign authorities to produce information concerning their activities or employees. The Guide advises that the information may only be produced in compliance with the French Blocking Statute and the GDPR, and recommends that French companies should communicate upfront with foreign authorities and coordinate the issuance of formal MLAT requests.[22]

The CNB's advice echoes France's recent objective to control its own white-collar enforcement landscape.[23]

Continued on page 26

19. *Id.* at 28.
20. *Id.* at 33.
21. *Id.* at 34-36.
22. *Id.* at 55-56.
23. *See also* our July 1, 2019 update, *available at* https://www.debevoise.com/insights/publications/2019/06/policing-your-own-jardin.

French Bar Provides Best Practices for Attorneys Conducting Internal Investigations
Continued from page 25

Cross-border Internal Investigations

In the case of cross-border investigations, the CNB notes in general that local rules governing the collection and review of employee emails; the conduct of employee interviews; the cross-border data transfer; the access, treatment, and transfer of personal data; and the nature and scope of client-attorney privilege must be considered *in combination*.[24] This can be a challenging exercise, requiring an analysis of conflict of laws and practices. And more stringent laws in one jurisdiction, particularly in the area of data transfer, can create additional difficulties when negotiating with a foreign authority.

With respect to privilege considerations, the Guide explains that the French client-attorney privilege applies everywhere vis-à-vis French authorities, but not necessarily foreign authorities. Accordingly, it may be necessary to prepare in advance to address that issue, in particular to determine whether hiring a local counsel is necessary.

Ultimately, and while cross-border internal investigations are a vast subject, the Guide provides useful considerations for practitioners. For example, what are the potential charges faced in each jurisdiction? Their related penalties? The local procedures and timing? What are the MLATs in place? Are the other jurisdictions applying the *ne bis in idem* principle?

Conclusion

As the number of internal investigations is set to increase in France, French courts will probably have many opportunities to shed light on issues of interest both to companies in need of internal investigations and to their counsel.

In the meantime, the CNB's Guide provides useful insight with respect to how the French Bar is approaching these issues. In an area where legal certainty is still relatively limited, this Guide represents a valuable roadmap to French practitioners and their clients, as well as a confirmation that the practice of internal investigations is increasingly becoming an ordinary part of the French legal landscape.

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24. Guide at 60-64.

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