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Herbalife Settlement Highlights Risks in China and Provides Insight Regarding DOJ's Compliance Program Expectations

On August 28, 2020, Herbalife Nutrition Ltd. – a global dietary supplement marketing company listed on the New York Stock Exchange – entered into a settlement with the SEC and a DPA with DOJ. Herbalife agreed to penalties exceeding $123 million in connection with payments made by its Chinese subsidiary between approximately 2006 and 2016.[1] However, both U.S. agencies charged the company with violating the FCPA's accounting provisions and not its anti-bribery provisions.

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1. In the Matter of Herbalife Nutrition Ltd., Order Instituting Cease-and-Desist Proceedings, Securities Exchange Act of 1934 Rel. No. 89704, Accounting and Auditing Enforcement Rel. No. 4165, Admin. Proc. File No. 3-19948 (Aug. 28, 2020), https://www.sec.gov/news/press-release/2020-197 (hereinafter "Herbalife Order"); *United States v. Herbalife Nutrition Ltd.*, Document 4-1, Letter to Patrick F. Stokes, *et al.*, Case 1:20-cr-00443-GHW (Sept. 1, 2020), https://www.justice.gov/criminal/fraud/fcpa/cases/herbalife-nutrition-ltd (hereinafter "Herbalife DPA").

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These actions against Herbalife are based on the same conduct at issue in the individual charges brought nearly a year ago against Jerry Li, the former Managing Director of Herbalife China and Senior Vice President of Herbalife, and Mary Yang, Herbalife China's head of External Affairs.[2] As with many China-based enforcement actions, this matter involves excessive gifts, meals, and entertainment, but this settlement is not merely another in that line. The Herbalife case seemingly is less an example of lax controls specifically over dinners and gifts, and more lax controls over expenses generally. The DPA is based on an alleged conspiracy to violate the FCPA's books and records provisions (and overflowing with evidence of the same). Although unnecessary given the absence of charges under the anti-bribery provisions, the DPA also includes examples of "improper payments and benefits" (that would not have been recorded in Herbalife's books) going to individuals or entities other than "foreign officials." The inclusion of these examples signals DOJ's intention to push beyond internships for children and charitable donations to expand the reach of the FCPA. Perhaps most significantly, the Herbalife DPA closed out a summer of updated guidance from the U.S. enforcement agencies by updating DOJ's standard compliance program requirements when entering into a DPA or NPA (often identified as "Attachment C" to settlement papers).

The Allegations: Beyond Gifts, Meals, and Entertainment

One striking element of the Herbalife settlement is the fact that seemingly minor misconduct involving primarily gifts, meals, and entertainment resulted in a monetary sanction of more than $100 million. In some ways similar to last year's Walmart enforcement action,[3] the Herbalife settlement involves what the U.S. government appears to view as major internal controls breakdowns that allowed *quid pro quo* bribery, albeit far outside the statute of limitations, as well as more recent books and records violations possibly covering up something more concerning than whether entertaining clients at the Olympics or the Qingdao Beer Festival can be classified as a business expense.

The Herbalife settlement describes a practice of providing gifts, meals, and entertainment. Although most examples are quite old, they are still worth noting, including:

- in 2012, one manager inviting officials for "expensive meals, alcohol, karaoke, and luxury gifts," another paying for meals for an official and his family during a road trip by the official, and a third manager apparently providing Prada bags as gifts;[4]

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2. *See* Philip Rohlik, "Individual Accountability and Extraterritorial Jurisdiction: DOJ and SEC Charge Employees of Chinese Subsidiary of U.S. Issuer," FCPA Update, Vol. 11, No. 4 (Nov. 2019), https://www.debevoise.com/insights/publications/2019/11/fcpa-update-november-2019.
3. Andrew M. Levine, Philip Rohlik, Jil Simon, "Walmart and U.S. Authorities Reach Long-Awaited FCPA Settlements," FCPA Update, Vol. 10, No. 11 (June 2019), https://www.debevoise.com/insights/publications/2019/06/fcpa-update-june-2019.
4. Herbalife Order ¶24.

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- in 2014, employees allegedly falsifying reports for RMB 20,000 (approximately $2,800) for gifts to officials;[5] and
- a 2012 payment for a shopping trip and spa visit.[6]

The settlement papers also describe a pattern of making cash payments to Chinese officials, both to obtain licenses and to avoid bad news coverage.[7] For example, DOJ and the SEC allege that, starting in late 2006 or early 2007, the company made cash payments to Chinese officials to obtain licenses and lower a fine.[8] Money allegedly was provided also to state-owned media employees to bury bad news in 2013.[9] In 2012, another official was paid to stop an investigation.[10]

"The Herbalife case seemingly is less an example of lax controls specifically over dinners and gifts, and more lax controls over expenses generally."

These improper payments were falsely recorded as "travel and entertainment expenses." According to DOJ and the SEC, in 2012, an employee allegedly was instructed to submit US$91,000 in "falsified reimbursement requests supported by false meal and gift invoices."[11] Over a six-month period in 2012, Yang allegedly submitted expense reports for more than one meal per day, dining with over 4,000 different officials,[12] describing these in his expense reports as "meals and gifts."[13] Finally, in 2015 and 2016, Herbalife China approved reimbursement for the purchase of gifts of fruits and vegetables, with supporting receipts showing the purchase of 30 tons of produce but no evidence that it was shipped,[14] leading the SEC to conclude that food gifts "could not have been the actual purpose" of the $150,000 reimbursed.[15]

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5. Herbalife Order ¶25.
6. Herbalife DPA, Attachment A ¶24(c).
7. Herbalife DPA, Attachment A ¶13; Herbalife Order ¶¶9, 13, 23-24.
8. Herbalife DPA, Attachment A ¶¶19, 24(a); Herbalife Order ¶¶13, 19.
9. Herbalife Order ¶21-22.
10. Herbalife Order ¶19.
11. Herbalife Order ¶18; Herbalife DPA, Attachment A ¶24(b) (referencing "$87,000 of fake meal and gift invoices.").
12. Herbalife Order ¶30.
13. Herbalife DPA ¶25.
14. Herbalife DPA, Attachment A ¶26.
15. Herbalife Order ¶26.

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The SEC and DOJ papers also describe a seemingly lax approach by Herbalife headquarters to gifts, meals, and entertainment in China (regardless of what the money was used for). This lack of oversight likely accounts for the large fine. For example, the day after discussing obtaining cash to be used to obtain a license in 2007, the former head of Herbalife China spoke with a former senior executive of Herbalife in the United States. The conversation, partially transcribed in the Herbalife DPA, involved the former head of Herbalife China complaining about Herbalife's limitations on the frequency of entertaining government officials. In response to these complaints, the former senior executive in the United States suggested that his Chinese counterpart simply disguise the expenses by including different names in the reimbursement reports.[16] Although there is room to debate the appropriate number of times per year a government official may be entertained (and being too strict can implicitly encourage fraud), explicitly encouraging such fraudulent record-keeping is never an acceptable option.

Similarly, the SEC (but not DOJ) highlights the attitude of Herbalife's internal audit department. Various audits of the Chinese subsidiary showed a high level of spending attributed to gifts, meals, and entertainment. When asked by two board members whether such levels of spending were "reasonable within FCPA guidelines," the director of internal audit responded that such expenses were "tolerable."[17] While unclear whether the SEC is faulting that conclusion as a legal matter (and the individual actions against Li and Yang are replete with allegations of how they misled internal audit[18]), the inclusion of these facts suggests that the SEC disagrees with the director of internal audit's characterization.

Stretching the Boundaries of Corrupt Payments to Foreign Officials

As described above, the Herbalife Order and Herbalife DPA contain many examples of (mostly historic) quid pro quo cash payments and numerous expenses disguised using false gift, meal, and entertainment invoices. Given that neither the Order nor the DPA charges violations of the FCPA's anti-bribery provisions, it was not necessary for either agency to include specific examples of persons "corruptly" providing "anything of value" "to a foreign official" "in order to obtain or retain business."

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16. Herbalife DPA, Attachment A ¶22.
17. Herbalife Order ¶32.
18. *See* Rohlik, *supra* note 2.

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DOJ also included two specific examples of "improper payments and benefits" beyond cash and gifts, meals, and entertainment. First, in 2012, Herbalife China provided a false internship review (but no internship) for the son of a government official to provide to his university.[19] Second, in 2013, Herbalife China agreed to open a bank account at a bank "for the purpose of benefitting the son of a [government official] . . . even though there was no legitimate business purpose . . . to open the new account."[20] It is difficult to see how these improper benefits are related to a conspiracy to violate the books and records provisions, as neither involves things that would be recorded on the company's books or records.

As with cases involving charitable donations and hiring practices, these examples involve something of value being offered, promised, or paid, arguably with "corrupt intent." What is much less clear is how such "improper benefits" satisfy the statutory element of being provided "to a foreign official." The second example is particularly noteworthy in this regard: it involves opening a bank account and no transaction with an individual. While the DPA alleges that the bank account was opened without a legitimate business purpose (*i.e.*, "corruptly"), it does not explain how an unexplained incidental benefit to a son of an official can be considered giving something "to" a parent "foreign official."

DOJ Provides Additional Guidance on Corporate Compliance Programs

Every DOJ settlement in an FCPA matter requires the company to sign on to what is called "Attachment C," a list of what DOJ states are the "minimum elements" for a corporate compliance program. As a general rule, the provisions of Attachment C are the same across such settlements. In Herbalife, DOJ updated Attachment C to incorporate some of the new guidance from its June 2020 update to the *Evaluation of Corporate Compliance Programs*, a long list of questions that DOJ uses in evaluating a corporate compliance program after wrongdoing is found.[21]

The *first* of four significant additions to Attachment C is in the "Commitment to Compliance" section, including paragraph 1 of Attachment C. While DPAs as recent as the Novartis Hellas settlement in June 2020 required that "directors and

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19. Herbalife DPA, Attachment A ¶ 24(d).
20. *Id.* ¶ 24(e).
21. U.S. Dept. of Justice, Criminal Division, "Evaluation of Corporate Compliance Programs" (updated June 2020), https://www.justice.gov/criminal-fraud/page/file/937501/download.

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senior management provide strong, explicit, and visible support and commitment to [the company's] corporate policy,"[22] the Herbalife DPA adds:

> and demonstrate rigorous adherence by example. The Company will also ensure that middle management, in turn, reinforce those standards and encourage employees to abide by them. The Company will create and foster a culture of ethics and compliance with the law in its day-to-day operations at all levels of the company.

The new language is derived from the *Evaluation of Corporate Compliance Programs* (and also reflected in the new edition of the Resource Guide). Although arguably implicit in "a culture of ethics and compliance," this new language expressly encompasses "all levels" of personnel within an organization.

The *second* addition is to paragraph 11 in the "Internal Reporting and Investigation" section. In the Novartis Hellas DPA, this paragraph read:

> [The Company] will maintain, or where necessary establish an effective and reliable process with sufficient resources for responding to, investigating, and documenting allegations of violations of the anti-corruption laws or [the Company's] anti-corruption compliance code, policies, and procedures.

The same provision in the Herbalife DPA keeps this language and adds:

> The Company will handle the investigations of such complaints in an effective manner, including routing the complaints to proper personnel, conducting timely and thorough investigations, and following up with appropriate discipline where necessary.

Most of this language is likewise present in the updated *Evaluation of Corporate Compliance Programs*. Again, while arguably implicit in the prior requirement to "establish an effective and reliable process," the new language expands the number of things a company will be required to demonstrate in its DPA reporting obligations, including the timeliness and thoroughness of investigations.

The *third* and arguably most significant addition is to paragraph 14(c), which deals with third-party relationships. Paragraph 14(a) requires companies to have "properly documented due diligence pertaining to the hiring and appropriate and regular oversight of agents and business partners." Paragraph 14(b) requires

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22. United States v. Novartis Hellas S.A.C.I, Document 2, "Deferred Prosecution Agreement," Case 2:20-cr-00538-SDW, at 47 (June 25, 2020), https://www.justice.gov/criminal-fraud/file/1290166/download.

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companies to inform agents and business partners of the company's commitment to abiding by anti-corruption laws. While the prior version of paragraph 14(c) referred to "seeking a reciprocal commitment from agents and business partners," the Herbalife DPA adds:

> The Company will understand and record the business rationale for using a third party in a transaction, and will conduct adequate due diligence with respect to the risks posed by a third-party partner such as a third-party partner's reputation and relationships, if any, with foreign officials. The Company will ensure that contract terms with third parties specifically describe the services to be performed, that the third party is actually performing the described work, and that its compensation is commensurate with the work being provided in that industry and geographical region. The Company will engage in ongoing monitoring of third-party relationships through updated due diligence, training, audits, and/or annual compliance certifications by the third party.

"Perhaps most significantly, the Herbalife DPA closed out a summer of updated guidance from the U.S. enforcement agencies by updating DOJ's standard compliance program requirements when entering into a DPA or NPA…."

Once again, this language largely mirrors language from the revised *Evaluation of Corporate Compliance Programs*.

These changes involving third-party relationships unquestionably add specific record-keeping and control requirements. But what exactly is required? For example:

- How and where should a company "understand and record" the business purpose for using a third party?
- How should a company "ensure" that a contract accurately describes services to be rendered and that such services are performed?
- How can a company record that it has "ensure[d]" commensurate compensation?

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- What kinds of third parties require at least one or more (and which) of the options for monitoring: "updated due diligence, training, audits, and/or annual compliance certifications?"

Such questions of course were inherent in the general language of the prior Attachment C. Now that DOJ has included more specifics requirements, companies doing business internationally will need to grapple with the proper implementation and potentially await future guidance from DOJ.

Finally, the *fourth* change involves a compliance program's "monitoring, testing, and remediation." While the prior Attachment C required periodic reviews and testing, the Herbalife DPA adds the following language to paragraph 18:

> The Company will ensure that compliance and control personnel have sufficient direct or indirect access to relevant sources of data to allow for timely and effective monitoring and/or testing of transactions. Based on such review and testing and its analysis of any prior misconduct, the Company will conduct a thoughtful root cause analysis and timely and appropriately remediate to address the root causes.

Like the new language related to third parties, the new language regarding monitoring, testing, and remediation largely mirrors the updated *Evaluation of Corporate Compliance Programs*. At a minimum, the new language makes explicit that some form of access to data and ongoing or periodic transaction monitoring are required. As we have noted previously, this may be challenging for many companies.

Conclusion

The Herbalife enforcement action is a large-dollar settlement describing problems that go far beyond those typically associated with doing business in a gift-giving culture like China. From these settlements with the SEC and DOJ, the most important lesson relates to record-keeping and controls regarding documentation, not questions such as how many dinners one may have with a government official in a given year. That said, the Herbalife resolutions demonstrate how authorities may suspect fraudulent or other improper practices on a larger scale when confronted with violations of internal rules.

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DOJ also used the Herbalife DPA to update Attachment C, adding more detailed descriptions of certain best practices in the compliance area. By doing so, it seemingly imposes new requirements on companies subject to a DPA and suggests additional expectations of companies doing business abroad.

Kara Brockmeyer

Andrew M. Levine

Philip Rohlik

Kara Brockmeyer is a partner in the Washington, D.C. office. Andrew M. Levine is a partner in the New York office. Philip Rohlik is a counsel in the Shanghai office. Full contact details for each author are available at www.debevoise.com.

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Brazilian Authorities Announce Anti-Corruption Cooperation and Leniency Framework; MPF's 5th Chamber Opposes It

On August 6, 2020, Brazilian enforcement authorities announced a technical cooperation agreement focused on leniency agreements under the country's Anti-Corruption Law (the "TCA").[1] The Comptroller-General's Office (the "CGU"), Attorney-General's Office (the "AGU"), Ministry of Justice and Public Security (the "MJSP"), and Federal Court of Accounts (the "TCU") already have executed the TCA, which the Supreme Court (the "STF") mediated. The Federal Prosecution Service (the "MPF") is listed also as a signatory and discussed in various provisions, but has not yet executed the TCA. Four days after this announcement, the Permanent Advisory Commission on Leniency and Collaboration Agreements of the MPF's 5th Chamber of Coordination and Revision (the "5th Chamber")—which focuses on anti-corruption efforts—issued a detailed Technical Note advising the head of the MPF against doing so.[2]

Background

Starting in 2014, Operation *Lava Jato*, its offshoots, and various other anti-corruption investigations in Brazil have generated countless headlines. During this time, the MPF and judges overseeing related matters have received both praise and criticism; high-profile politicians and powerful businessmen have been indicted and convicted; and Brazil's anti-corruption efforts have reverberated across Latin America and elsewhere around the world.

As these enforcement efforts have proliferated, much attention has focused (understandably) on the role of prosecutors. The MPF has relied on the Anti-Corruption and Administrative Improbity Laws to prosecute corruption-related corporate wrongdoing, though corporate criminal liability exists only for environmental crimes in Brazil. With time, however, administrative and civil bodies

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1. Federative Republic of Brazil, "Acordo de Cooperação Técnica que Entre si Celebram o Ministério Público Federal, a Controladoria-Geral da União (CGU), a Advocacia Geral da União (AGU), o Ministério da Justiça e Segurança Publica (MJSP) e o Tribunal de Contas da União (TCU) em Matéria de Combate à Corrupção no Brasil, Especialmente em Relação aos Acordos de Leniência da Lei No. 12.846, de 2013" [Technical Cooperation Agreement Among the Federal Prosecution Service, Comptroller-General's Office (CGU), Attorney General's Office (AGU), Ministry of Justice and Public Security (MJSP), and Federal Court of Accounts (TCU) Regarding Anti-Corruption in Brazil, Particularly Leniency Agreements Under Law No. 12.846 of 2013] (Aug. 6, 2020), http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/Acordo6agosto.pdf.

2. Federal Prosecution Service, 5th Chamber of Coordination and Revision—Anti-Corruption Enforcement, Permanent Advisory Commission on Leniency and Collaboration Agreements, "Nota Técnica No. 2/2020" [Technical Note No. 2/2020] (Aug. 10, 2020), http://www.mpf.mp.br/pgr/documentos/NotaTecnicaAcordodeCooperacaoFinal.pdf.

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like the CGU (the federal government's internal controls agency) and AGU (the federal government's legal advisory and representation body) have gained increasing prominence, expanding their roles in cross-border enforcement matters.

Amidst this evolution, various companies have executed leniency agreements with Brazilian authorities to settle cases involving corruption and related wrongdoing. As the years went on, questions began to emerge about which authorities are competent to execute leniency agreements; which authorities companies should approach first on such matters; and how the CGU and AGU should treat leniency agreements previously executed by the MPF. Companies, the defense bar, and even regulators have highlighted the many challenges posed by the multiplicity of Brazilian enforcement agencies that, until more recently, showed limited signs of coordinating.[3]

Commentators and authorities have proposed different solutions, ranging from informally improving coordination to creating a new body with representatives of the various interested agencies. And then in August, the TCA emerged, premised largely on addressing this challenge of improving coordination.[4] Although the agencies that have executed the TCA appear to believe it is capable of achieving that goal, the MPF's 5th Chamber disagrees. In a Technical Note, it concluded that, as drafted, the TCA fails to reflect the MPF's authority, is inconsistent with the goal of promoting systematic inter-agency cooperation, and does not increase legal certainty.[5] Whether and how the TCA impacts the future of anti-corruption in Brazil remains to be seen.

The TCA

The TCA articulates various principles intended to govern the agencies' collective efforts, outlines the pillars of leniency agreements under the Anti-Corruption Law, and requires its signatories to take certain concrete actions. Depending on whether and how the TCA is implemented, it potentially could alter dramatically important aspects of Brazil's anti-corruption enforcement framework.

Most significantly, the TCA provides that the CGU and AGU will be responsible for negotiating and executing leniency agreements under the country's Anti-Corruption Law.[6] If the Federal Police, MPF, or TCU identify companies involved in

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3. *See, e.g.*, Andrew M. Levine, Kara Brockmeyer, and Daniel Aun, "Latin America's Evolving Anti-Corruption Landscape: Brazil in Flux and Regional Reverberations," FCPA Update, Vol. 11, No. 3 (Oct. 2019), https://www.debevoise.com/insights/publications/2019/10/fcpa-update-october-2019.
4. *See* Supreme Court, Chief Justice José Antonio Dias Toffoli, Speech Regarding the TCA (Aug. 6, 2020), at 1-3, http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/discursoACTleniencia.pdf; *see also* TCA, *supra* note 1, Preamble, at 3-5.
5. Technical Note, *supra* note 2, at 7-8, 10-12, 44-46.
6. TCA, Second Operational Action, *supra* note 1, at 11.

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wrongdoing, they shall inform the CGU and AGU, which can seek to hold the companies liable under the Anti-Corruption Law.[7] Conversely, if the CGU identifies individuals involved in misconduct under the Anti-Corruption Law, it shall inform the MPF and Federal Police, which can seek to hold the individuals criminally liable, as well as the AGU and MPF, which can seek to hold the individuals liable under the Administrative Improbity Law.[8] The provisions requiring the involvement of other agencies apply if doing so does not put ongoing activities at risk."[9] The TCA further provides that the CGU, AGU, MPF, and Federal Police shall seek to coordinate their efforts in negotiating corporate leniency agreements and potentially parallel individual collaboration agreements; the goal is to resolve simultaneously matters involving corrupt practices under the Anti-Corruption and Administrative Improbity Laws and related criminal statutes.[10]

"The [technical cooperation agreement] articulates various principles intended to govern the agencies' collective efforts, outlines the pillars of leniency agreements under [Brazil's] Anti-Corruption Law, and requires its signatories to take certain concrete actions."

Under the TCA, after the execution of a leniency agreement, the AGU (relying on evidence before it) and MPF (relying on evidence shared with it), either together or separately, may seek to hold other entities or individuals who took part in misconduct revealed by a corporate cooperator liable in court for administrative improbity acts.[11] Similarly, the CGU (relying on evidence before it) and TCU (relying on evidence shared with it) may seek to hold others involved in disclosed misconduct liable at the administrative and external control domains.[12]

Among other things, the TCA also:

- Discusses the TCU's involvement in the assessment of damages and in leniency negotiations;[13]

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7. *Id.*, First Operational Action, Sub-Item (1), *supra* note 1, at 10.
8. *Id.*, First Operational Action, Sub-Item (2), *supra* note 1, at 10.
9. *Id.*, First Operational Action, Sub-Items (2)-(3), *supra* note 1, at 10.
10. *Id.*, First Operational Action, Sub-Item (4), *supra* note 1, at 10-11.
11. *Id.*, Fifth Operational Action, *supra* note 1, at 10-11.
12. *Id.*, Fifth Operational Action, *supra* note 1, at 11.
13. *Id.*, First Operational Action, Sub-Item (3), *supra* note 1, at 10; *id.*, Second Operational Action, Sub-Items (2)- (4), *supra* note 1, at 11.

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- Addresses the sharing of information and evidence among the signatories and the potential use of such against corporate cooperators and third parties;[14]
- States that the CGU, AGU, and TCU shall seek to adopt "standardized parameters" regarding the methodology for assessing damages payments due in connection with leniency agreements;[15]
- Provides that the signatories shall seek to establish "mechanisms to offset and/or deduct" certain types of payments, namely fines paid by companies in connection with conduct captured by more than one law or damages paid to the same "aggrieved entity" arising out of the same facts;[16] and
- Outlines some of the benefits or protections to be afforded to cooperating entities.[17]

Additionally, the parties to the TCA expressed the intention to revise their internal rules and procedures to reflect the terms of the TCA and to seek to adjust previously executed leniency agreements and ongoing proceedings.[18]

The 5th Chamber's Technical Note

The Technical Note objects strongly to the TCA.[19] In particular, the Technical Note asserts that it is unconstitutional to exclude the MPF from negotiating and executing leniency agreements under the Anti-Corruption Law.[20] Relatedly, the Technical Note states that the TCA misinterprets the Anti-Corruption Law and does not properly recognize the MPF's legal role and authority to negotiate and execute such agreements.[21] Moreover, the Technical Note objects to the TCA's reference to the CGU's and AGU's involvement in negotiating individual collaboration agreements parallel to corporate leniency agreements.[22]

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14. *Id.*, Third Systemic Action, Sub-Items (1)-(3), *supra* note 1, at 9-10; *id.*, Third Operational Action, *supra* note 1, at 11-12; *id.*, Fourth Operational Action, *supra* note 1, at 12.
15. *Id.*, Second Operational Action, Sub-Item (1), *supra* note 1, at 11.
16. *Id.*, Sixth Operational Action, *supra* note 1, at 13.
17. *E.g., id.*, Third Systemic Action, Sub-Item (3), *supra* note 1, at 10; *id.*, Fourth Operational Action, *supra* note 1, at 12.
18. *Id.*, Third Systemic Action, *supra* note 1, at 9.
19. On August 12, 2020, the Prosecution Service of the State of Paraná (the "MPPR") publicly endorsed the 5th Chamber's Technical Note and opposed the TCA. *See* Prosecution Service of the State of Paraná, "MPPR Manifesta-se Sobre Cooperação Técnica para Acordos de Leniência" [Prosecution Service of the State of Paraná Expresses Its Views About Technical Cooperation for Leniency Agreements] (Aug. 12, 2020), https://mppr.mp.br/2020/08/22860,10/MPPR-manifesta-se-sobre-cooperacao-tecnica-para-acordos-de-leniencia.html.
20. Technical Note, *supra* note 2, at 7-8, 10, 12, 17, 20, 44.
21. *Id. at* 7-8, 11-12, 18-20, 45.
22. *Id. at* 40.

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Other criticisms of the TCA in the Technical Note include:

- The failure to include and account for other potentially relevant government agencies, such as the Central Bank, Administrative Council for Economic Defense ("CADE"), and Securities & Exchange Commission ("CVM");[23]
- The lack of a centralized body, for example to coordinate relevant activities among the various enforcement agencies and to issue guidelines;[24]
- The substance of particular provisions of the TCA, including regarding evidence sharing,[25] releases to corporate cooperators for damages payments,[26] and other possible benefits to cooperators under leniency agreements;[27]
- The possibility of adjusting prior leniency agreements to the TCA's terms, which may cause "unbearable legal uncertainty";[28]
- The MPF's reliance on the CGU and AGU, following the execution of a leniency agreement, to provide evidence for the MPF to pursue improbity actions against entities and individuals involved in misconduct revealed by a corporate cooperator;[29] and
- The legal basis for the TCA and the STF's mediating role.[30]

The Technical Note concludes that the TCA does not bind the MPF and that the MPF's leniency agreements remain in force.[31] The 5th Chamber also expressed a preference for its earlier proposal to create a "collegiate body"—with representatives of all TCA signatories, as well as the MPF, Central Bank, CADE, and CVM—that would coordinate leniency efforts and issue related guidelines.[32]

To date, the head of the MPF has not yet issued a public statement regarding the Technical Note.

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23. *Id. at* 13-15, 27, 44-45.
24. *Id. at* 22, 45.
25. *Id. at* 31-32, 34-35, 37, 40-41, 43, 46.
26. *Id. at* 24-28, 41, 45-46.
27. *Id. at* 32-34, 46.
28. *Id. at* 28-31, 46.
29. *Id. at* 44.
30. *Id. at* 15-16, 22-24, 45.
31. *Id. at* 47.
32. *Id. at* 7, 17-18, 20-22, 45.

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Looking Ahead

In recent years, Brazilian authorities have engaged in aggressive anti-corruption enforcement, achieving a leading position on the global stage. To a certain extent, potential conflicts and overlapping enforcement were understandable within the context of Brazil's evolving, decentralized system.

At this point, whether through formal (*e.g.*, via the TCA or possibly a collegiate body) or informal means (*e.g.*, the Technip resolutions[33]), it has become increasingly critical for the MPF, CGU, AGU, and TCU to coordinate their anti-corruption efforts and adopt compatible approaches. This ultimately will help promote legal certainty, encourage cooperation, and build on Brazil's collective anti-corruption legacy. In the meantime, we will remain attentive to developments on the ground.

Kara Brockmeyer

Andrew M. Levine

Karolos Seeger

Bruce E. Yannett

Daniel Aun

Kara Brockmeyer is a partner in the Washington, D.C. office. Andrew M. Levine is a partner in the New York office. Karolos Seeger is a partner in the London office. Bruce E. Yannett is a partner in the New York Office. Daniel Aun is a senior associate in the New York office. Full contact details for each author are available at www.debevoise.com.

33. *See, e.g.*, Kara Brockmeyer, David A. O'Neil, and Philip Rohlik, "Skeletons in the Closet: TechnipFMC Settles FCPA Allegations Involving Both of its Predecessor Companies," FCPA Update, Vol. 10, No. 12 (July 2019), https://www.debevoise.com/insights/publications/2019/07/fcpa-update-july-2019.

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Debevoise & Plimpton LLP

919 Third Avenue
New York, New York 10022
+1 212 909 6000
www.debevoise.com

Washington, D.C.
+1 202 383 8000

London
+44 20 7786 9000

Paris
+33 1 40 73 12 12

Frankfurt
+49 69 2097 5000

Moscow
+7 495 956 3858

Hong Kong
+852 2160 9800

Shanghai
+86 21 5047 1800

Tokyo
+81 3 4570 6680

Luxembourg
+352 27 33 54 00

Bruce E. Yannett
Co-Editor-in-Chief
+1 212 909 6495
beyannett@debevoise.com

Andrew J. Ceresney
Co-Editor-in-Chief
+1 212 909 6947
aceresney@debevoise.com

David A. O'Neil
Co-Editor-in-Chief
+1 202 383 8040
daoneil@debevoise.com

Jane Shvets
Co-Editor-in-Chief
+44 20 7786 9163
jshvets@debevoise.com

Philip Rohlik
Co-Executive Editor
+852 2160 9856
prohlik@debevoise.com

Kara Brockmeyer
Co-Editor-in-Chief
+1 202 383 8120
kbrockmeyer@debevoise.com

Andrew M. Levine
Co-Editor-in-Chief
+1 212 909 6069
amlevine@debevoise.com

Karolos Seeger
Co-Editor-in-Chief
+44 20 7786 9042
kseeger@debevoise.com

Erich O. Grosz
Co-Executive Editor
+1 212 909 6808
eogrosz@debevoise.com

Andreas A. Glimenakis
Associate Editor
+1 202 383 8138
aaglimen@debevoise.com

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