FCPA Update

A Global Anti-Corruption Newsletter

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Indian Anti-Corruption Laws at the Cross-Roads

In the coming months, India is expected to bring into force two key pieces of legislation aimed at strengthening its anti-corruption framework: (i) the Prevention of Corruption (Amendment) Bill, 2013 (the "PCA Bill"); and (ii) the Whistle Blowers Protection Act 2011 (the "WBPA").

The PCA Bill, expected to be debated in the Indian Parliament later this year, would amend the existing Prevention of Corruption Act 1988 ("PCA 1988"), bringing it in line with the requirements of the United Nations Convention against Corruption ("UNCAC").[1] Since it was enacted, the PCA 1988 has served as the primary law regulating public corruption in India. The PCA Bill modifies the definitions of taking a bribe; habitual offenders; and abetting the offense of taking a bribe (paying a bribe is not explicitly criminalized under the PCA 1988).

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1. United Nations Convention against Corruption, G.A. Res. 58/4, U.N. Doc. A/RES/58/4 (Oct. 31, 2003).

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The PCA Bill also proposes the attachment and forfeiture of property procured by corruption, and effects changes to penalties for corrupt behavior.

The WBPA was passed by the Indian Parliament on February 21, 2014, and it received the President of India's assent on May 9, 2014. Despite this history, the Act has not yet come into force because a number of national security and sovereign power issues are yet to be resolved.[2] Press reports suggest the WBPA will come into force towards the end of the year. When it comes into force, the WBPA will provide enhanced powers to the Indian authorities to protect whistleblowers who report instances of corruption by public servants. The WBPA hopes to align India's position on anti-corruption law with those of the United States, the United Kingdom, and Canada, which have long provided legal safeguards against retaliatory behavior against whistleblowers.[3]

While both pieces of legislation aim to strengthen Indian law relating to corruption, critics have pointed out a number of shortcomings of the laws as currently drafted.

Prevention of Corruption (Amendment) Bill

The PCA 1988 has been the primary law in India regulating public corruption. It applies to corruption in government and public sector businesses and targets public servants who receive bribes in any form. It does not expressly prohibit the giving of bribes, but instead criminalizes the bribe giver as an abettor to the bribe receiver's criminal conduct. Given this feature, the law does not match the requirements of UNCAC, which India ratified in May 2011. Hence, Parliament introduced the PCA Bill in August 2013. The key PCA Bill provisions make changes as follows:

- Giving a bribe would become a specific offense. The distinction between a coerced bribe giver (someone forced to give a bribe under some kind of pressure), and a collusive bribe giver (someone giving a bribe on his or her own volition) will fall away under the new law.
- "Passive bribery" (which includes the solicitation and acceptance of bribe by a public servant through intermediaries) would be made an offense.
- Assets obtained through bribery would be subject to seizure by the Government.
- Liability will be applied to commercial organizations whose employees bribe public servants. This is probably the most important change.

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2. *See* Garga Chatterjee, "Truth Versus National Security in Land of Satyamev Jayate," *DNA India* (Jan. 9, 2015), http://www.dnaindia.com/analysis/column-truth-versus-national-security-in-land-of-satyamev-jayate-2050968.
3. *See, e.g.*, False Claims Act, 31 U.S.C. §§ 3729-33 (2012); Whistleblower Protection Act of 1989, 5 U.S.C. § 1201 *et seq.* (2012); Public Interest Disclosure Act, Ch. 23 1998 2 July 1998 (Eng.); Public Servants Disclosure Protection Act, 2005 (Can.).

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While the PCA Bill addresses many important aspects of corruption in India, critics note that several shortcomings remain:

- Prosecution of corruption will still require government approval, which causes delay and raises the risk of political interference.
- The PCA Bill removes the immunity previously given to bribe givers who provide evidence in corruption matters. This may dissuade bribe givers from assisting as prosecution witnesses.

Corporate Liability

As noted, the PCA Bill will usher in large changes in how commercial organizations are treated through the establishment of a corporate offense for bribing public officials (the "Corporate Liability Provisions").[4]

"[U]nlike the [U.K. Bribery Act], there is no provision for the government to give guidance on what constitutes 'adequate procedures,' and it remains to be seen whether any will be forthcoming."

Sections 8 through 10 of the PCA Bill make "commercial organizations"[5] culpable for their employees' acts. Section 9, clearly and explicitly influenced by the so-called "corporate offence" of the United Kingdom's Bribery Act 2010 ("Bribery Act"), provides that a commercial organization will be found guilty and punishable with a fine if any person associated with the organization promises or gives financial or any other advantage to a public servant for obtaining or receiving business or an advantage in the conduct of the business for such organization. As with the Bribery Act, commercial organizations have a defense if they can prove they have had "adequate procedures" in place to prevent bribery.[6] However, unlike the law in the United Kingdom, there is no provision for the government to give guidance on what constitutes "adequate procedures," and it remains to be seen whether any will be forthcoming.

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4. Prevention of Corruption (Amendment) Bill, 2013 (India), proposed new section 9.
5. *See id.* § 9(3).
6. *See id.* § 9(1).

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Furthermore, Section 10 of the PCA Bill provides that if any organization has been found guilty under Section 9, "every person" in charge of and responsible for the conduct of the business of the organization at the time of the offense shall be deemed to be guilty of the offense unless they can prove that the offense was committed without their knowledge or that they had exercised "all due diligence" to prevent the commission of the offense.[7]

It is unclear how the potential offender under Section 10(1) of the PCA Bill can satisfy the "all due diligence" standard to escape culpability. The standard is an amorphous one and overlaps with the "adequate procedures" standard imposed on corporations. It is also unclear what "every person" means. This lack of clarity creates a significant risk of broad individual criminal liability and concomitant duties to perform diligence on an individual level. It should also be noted that since the definition of "commercial organization" extends to corporations outside of India, overseas employees may also be exposed.

Another potential issue is the possibility that the Corporate Liability Provisions will apply retrospectively to offenses committed prior to enactment. This potentially exposes employees on an individual level for corporate conduct predating the Act.

Recent Anti-Corruption Measures Introduced by the New Government

The WBPA and PCA Bill were both initiatives of the previous Indian government. While the new government of Prime Minister Narendra Modi has generally followed through on the anti-corruption measures introduced by the previous government, it has also sought to put its own stamp on measures.

Most significantly, in 2014, shortly after Modi took office, the government decided to submit the PCA Bill to the Law Commission of India for its views. The Law Commission recently published its report[8] and criticized the current draft of the PCA Bill for substantially replicating some Bribery Act provisions without accounting for fundamental differences between the Bribery Act and those parts of PCA 1988 that are not expected to be changed by the PCA Bill.[9]

In particular, while Indian corruption laws apply to public servants only, the Bribery Act applies to public servants and private persons.[10] The Indian Law Commission considered it curious that the PCA Bill did not go the extra mile to cover private sector bribery. Further, the Law Commission criticized the Corporate Liability Provisions in the PCA Bill as being overly broad. The Law Commission

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7. *See id.* § 10(1).
8. Law Commission of India, *The Prevention of Corruption (Amendment) Bill, 2013*, Report No. 254 (Feb. 12, 2015).
9. *See* Prevention of Corruption (Amendment) Bill, proposed new section 1.6.
10. *See id.* § 1.8.

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said only those officials of a corporation whose consent or connivance is proved should be held liable under the Corporate Liability Clause, not "every person".

The government is currently assessing the Indian Law Commission's report and has announced its plans under separate legislation to amend the Indian Penal Code to criminalize private sector bribery.[11] The Prevention of Bribery of Foreign Public Officials and Officials of Public International Organizations Bill, 2011, which prohibits the giving and taking of bribes involving foreign public officials outside India is also pending enactment.

Finally, on February 28, 2015, the government announced that a new anti-tax evasion law will be introduced in 2015 to tackle the concealment of income and proceeds from tax evasion, known colloquially as "black money."[12] This proposed law could impose on guilty persons prison terms of up to 10 years and fines of up to 300 percent on the taxes due.

Whistle Blowers Protection Act

India's Central Vigilance Commission ("CVC") – its senior anti-corruption vigilance agency – has maintained a whistleblowing program since 2004 to receive and investigate whistleblower reports and tip-offs, but it has received only a few hundred tips annually. The low reporting rate has been attributed in large part to whistleblowers' fears of retaliation and intimidation:[13] in the last decade, there has been a series of violent and deadly reprisals against whistleblowers in India.[14]

The WBPA affords protections to persons who report a public servant's conduct to a designated "Competent Authority" in circumstances in which the conduct constitutes either: (a) the attempt or commission of an offense under the PCA 1988; (b) a willful misuse of power or discretion where the Government has suffered demonstrable loss or where the public servant or a third party has made a demonstrable wrongful gain; or (c) a criminal offense attempted or committed by a public servant.[15]

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11. *See* Pradeep Thakur, "Bill Soon to Criminalize Bribery in Private Sector," *The Times of India* (Mar. 2, 2015), http://timesofindia.indiatimes.com/india/Bill-soon-to-criminalize-bribery-in-private-sector/articleshow/46424950.cms.
12. *See* PTI, "Budget 2015: New Tough and Comprehensive Law on Black Money Proposed Says FM Arun Jaitley," *The Economic Times* (Feb. 28, 2015), http://articles.economictimes.indiatimes.com/2015-02-28/news/59612971_1_finance-minister-arun-jaitley-benami-property-black-money.
13. *See* Kaushiki Sanyal, "Legislative Brief: The Public Interest Disclosure and Protection to Persons Making the Disclosures Bill, 2010," *PRS Legislative Research* (Jan. 24, 2011), 4, http://www.prsindia.org/uploads/media/Public%20Disclosure/Legislative%20Brief%20-%20Public%20Interest%20Disclosure%20Bil.pdf.
14. *See* Mehul Srivastava and Andrew MacAskill, "In India, Whistle-Blowers Pay with Their Lives," *Bloomberg Business* (Oct. 20, 2011), http://www.bloomberg.com/bw/magazine/in-india-whistleblowers-pay-with-their-lives-10202011.html.
15. Whistle Blowers Protection Act, 2011 (India), § 3(d).

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The WBPA entrusts the Competent Authority with the responsibility to protect whistleblowers from retaliation or "victimization" and empowers it to issue protective and remedial directions.[16] The relevant Competent Authority varies on a case-by-case basis and depends on the public servant against whom a whistleblowing report is made.[17] In most cases, the Competent Authority will be the CVC (for central government officials) or the relevant State Vigilance Commission (for state government officials), but the Prime Minister, Speaker of the Legislative Assembly, or High Court of India can also be the Competent Authority in certain circumstances.

To invoke the protections of the WBPA, a whistleblower needs only to report that they have suffered victimization. The whistleblower does not need to prove such victimization at the time the report is made; rather, the burden of disproving victimization lies on the respondent public authority.[18] If the Competent Authority finds there is victimization or the risk of victimization, it may give directions at its discretion to the public servant or public authority against whom the report is made to protect the whistleblower. As a counterbalance, the WBPA safeguards against abuses of process by providing for jail terms and fines for anyone knowingly making false or frivolous reports.[19] The WBPA also imposes some measure of finality on whistleblower allegations; the law provides that a Competent Authority shall not investigate any whistleblowing disclosure made seven years after the action complained against is alleged to have taken place.[20]

Any person who does not comply with CVC directions under the Act could be liable for a penalty of INR30,000, or about $500.[21]

Critics have highlighted two major drawbacks to the WBPA:

- The powers of the Competent Authority are invoked only on the application of the victimized whistleblower. The WBPA does not define "victimization" and does not provide for sanctions for victimization. As a result, there is no deterrent for public servants against victimizing whistleblowers. The effectiveness of the WBPA in protecting against retaliation therefore depends on how the Competent Authority, particularly the CVC, exercises its

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16. *See id.* § 11(1)-(3).
17. *See id.* § 3(b).
18. *See id.* § 11(2).
19. *See id.* § 17. *See* Sanyal, note 13, *supra*, at 2-3, 5.
20. Whistle Blowers Protection Act, 2011 (India), § 6(3).
21. *See id.* § 11(5).

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discretion in applying directions. Yet under existing law, the CVC has taken action on only a small proportion of cases referred to it.[22]

- The WBPA does not allow anonymous reporting,[23] although it requires that the identity of the whistleblower be kept confidential[24] except in circumstances in which the whistleblower himself has already disclosed it to another office or authority when making his report.[25] Any person disclosing a whistleblower's identity without proper approval is liable to imprisonment or a fine.[26] Nonetheless, the lack of anonymity is out of step with the whistleblower legislation in the United States, England and Wales, and Canada.

"The WBPA does not define 'victimization' and does not provide for sanctions for victimization. As a result, there is no deterrent for public servants against victimizing whistleblowers."

The WBPA also does not provide whistleblowers with a monetary incentive for whistleblowing, unlike the United States, but like many other countries.

Whistleblowers might also be deterred by the risk of criminal sanction (*e.g.*, for making a false or frivolous report) or civil action (*e.g.*, for defaming a public servant). The WBPA does not exempt them from these liabilities.

Finally, the WBPA contains no provision for leniency for whistleblowers who were themselves involved in the corrupt behavior. This is unlike the United Kingdom, which has a leniency policy[27] that has been influenced and shaped by the United States Department of Justice's amnesty regime for whistleblowers.

Given these shortcomings, it is unclear to what extent the WBPA will incentivize whistleblowing.

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22. Harish V. Nair, "Poor Show by CVC in Tackling Graft in Govt Depts Upsets Whistleblowers," *India Today* (Feb. 23, 2015), http://indiatoday.intoday.in/story/graft-corruption-government-departments-cvc-prashant-bhushan-parivartan-supreme-court-whistleblowers-cbi/1/420418.html.
23. Whistle Blowers Protection Act, § 4(6).
24. *See id.* §§ 5(2) and 7(4).
25. *See id.* § 5(1)(b). *See also id.* § 13.
26. *See id.* § 16.
27. *See* The Serious Organised Crime and Police Act 2005 (UK), §§ 71-75.

Conclusion

Overall, the PCA Bill and the WBPA evidence India's deliberative approach towards tackling corruption. When finally passed into law, they will constitute positive steps in the direction of modernizing India's anti-corruption laws. They will reinforce the message that organizations should take anti-corruption compliance seriously.

For the rest of 2015, the international legal and business communities will wait to see whether the Law Commission's recommendations on the PCA Bill are adopted and whether criticisms of the WBPA are addressed before enactment.

Whatever form the PCA Bill and WBPA finally take, the relevant enforcement authorities in India must be adequately resourced and empowered and must ensure that their independence is safeguarded. If this is achieved, India can legitimately claim to be moving towards a robust anti-corruption regime in line with international best practices.

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Brazil Further Regulates Its Anti-Corruption Framework

On April 8, 2015, roughly three weeks after issuance of Decree No. 8,420 (the "Decree")[1] implementing Law No. 12,846, the so-called Clean Company Act (the "Act"),[2] Brazil's Comptroller-General of the Union (the "CGU") issued four new regulations further clarifying the Act.[3] These new regulations took effect immediately and help fill out the details of the government's expectations for companies and the process by which it will enforce the Act and Decree. We outline below the key features of the new laws and how they fit in with the provisions of the Act and Decree.

I. The Clean Company Act and the Decree

The Act, also known as Brazil's Anti-Corruption Law, imposes strict civil and administrative liability on corporate entities doing business in Brazil for their corrupt conduct or bribery of Brazilian or foreign public officials, as well as fraud in connection with public tenders. It applies broadly to corporations, partnerships, and proprietorships, and to other for-profit and non-profit entities. The Act provides for monetary fines ranging from 0.1% to 20.0% of a company's annual gross revenues.

While passage of the Act was a major milestone, different aspects of its implementation remained uncertain until issuance of the Decree last month. Awaited for more than a year, the Decree clarified the process – known as the PAR (the *Processo Administrativo de Responsabilização*) – for imposing administrative liability on legal entities for acts of bribery or corruption under the Act. It also set forth guidelines for calculating fines, laid out rules governing leniency agreements, and established general parameters for evaluating a company's compliance program. But as the most recent regulations demonstrate, the Decree contained gaps and left open certain questions.

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1. *See* Andrew M. Levine, Bruce E. Yannett, Steven S. Michaels, Daniel Aun, and Bernardo Becker Fontana, "Brazil Issues Long-Awaited Decree Implementing the Clean Company Act," *FCPA Update*, Vol. 6, No. 8 (Mar. 2015) (hereinafter, "Brazil Issues Decree"), http://www.debevoise.com/insights/publications/2015/03/fcpa-update-march-2015.
2. *See* Andrew M. Levine, Bruce E. Yannett, Renata Muzzi Gomes de Almeida, Steven S. Michaels, and Ana L. Frischtak, "Brazil Enacts Long-Pending Anti-Corruption Legislation," *FCPA Update,* Vol. 5, No. 1 (Aug. 2013), http://www.debevoise.com/insights/publications/2013/08/fcpa-update.
3. The new CGU regulations are available at: http://pesquisa.in.gov.br/imprensa/jsp/visualiza/index.jsp?data=08/04/2015&jornal=1&pagina=2&totalArquivos=84.

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II. The New CGU Regulations

A. Compliance Programs

As we noted previously,[4] the Act and the Decree provide that the adoption and implementation of a robust anti-corruption compliance program shall be a mitigating factor when the government is called upon to calculate fines applicable to a company's breach of the Act. They also established that leniency agreements must contain a provision requiring the adoption, application, or improvement of an existing compliance program by the breaching company.[5]

The Decree anticipated that the CGU would issue further regulations and guidelines detailing the government's expectations and standards for anti-bribery compliance programs. Recently issued Ordinance No. 909 (the "Compliance Ordinance"), arguably the most immediately pertinent of all four new CGU regulations, furthers the compliance-oriented goals set out in the Decree. In particular, it provides further guidance on how companies ought to structure compliance programs and details how authorities will assess the adequacy and effectiveness of the same in various settings.

The Compliance Ordinance establishes that companies under investigation must submit a profile report identifying key facts about the firm and risk factors faced by the business, as well as a report on the company's implementation of and adherence to a compliance program. Under the new rules, the assessment of a breaching company's compliance program shall take into account the company's assertions as corroborated by its profile and conformity reports. In particular, the degree to which the fine is reduced will be influenced by the operational adequacy of the company's compliance program vis-à-vis the company's profile and the program's actual effectiveness.

The profile report must: (*i*) indicate the industries in which the company operates, whether in Brazil or elsewhere; (*ii*) set out the company's structure, hierarchy, and decision-making process, and the role of its boards, management, and divisions; (*iii*) provide data on the size of the company's workforce; (*iv*) supply detail and context for the company's interactions with domestic or foreign government entities, including the relevance of obtaining authorizations, licenses and permits for its business, the number and value of government contracts (whether in force or not) executed within the last three years and their relevance

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4. *See* Andrew M. Levine et al., *Brazil Issues Decree*, *supra* note 1, at pp. 16, 22.

5. *Id*, at pp. 17-18.

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for the company's annual profits, and the relevance of, and frequency with which, intermediaries have been used in the company's interactions with the public sector; and, finally (*v*) identify the company's ownership stakes, including whether it controls, is controlled by, is associated with, or is a member of a consortium with another company.

With reference to its assessment of the parameters for compliance programs set forth in the Decree,[6] the Compliance Ordinance establishes that the report addressing the implementation of a compliance program (the "observance report")

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must: (*i*) detail the company's compliance program by indicating which of the compliance parameters set out in the Decree have been implemented, how these parameters have been implemented, and the relevance of each of the implemented parameters for the avoidance of misconduct under the Act, given the specific characteristics of that particular company; (*ii*) demonstrate the functioning of the compliance program in the company's daily life, *e.g.*, through the provision of historical data, statistics, and concrete examples; and (*iii*) explain how the compliance program achieves the deterrence, identification, and remediation of the specific misconduct at issue.

Under the Compliance Ordinance, the company bears the burden of proving the contentions in its profile and observance reports. This may be achieved through a range of documents, including e-mails, letters, minutes of meetings, reports, manuals, memoranda, declarations, photos, videos and audio recordings, purchase orders, invoices, and accounting records. The authorities may also conduct interviews and request additional documents in the context of their assessment.

The Compliance Ordinance provides that the maximum reduction in the amount of the fine (*i.e.*, two-thirds of the applicable fine, as set out in the Act) is expressly

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6. *Id.* These include: *(i)* the commitment of the company's upper management to the program; *(ii)* the standards of conduct and codes of ethics applicable to employees, managers, and, as appropriate, third-party service providers; *(iii)* periodic training; *(iv)* internal controls; *(v)* specific procedures to prevent fraud and wrongdoing in the context of bidding procedures and the performance of government contracts, among other contexts; *(vi)* the independence and authority of the internal body responsible for applying and overseeing the program; and *(vii)* disciplinary measures applicable in the event of violations.

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conditioned on satisfactory compliance with the requirements for the observance report. If a company's compliance program was not established until after the specific misconduct at issue, the third prong of the observance report requirements will be automatically deemed unfulfilled, and a fine reduction (or at least the largest one possible) based on the existence of a robust compliance program may not follow. In addition, the Compliance Ordinance provides that a perfunctory compliance program that is ineffective in deterring sanctionable misconduct will be disregarded for fine reduction purposes.

Ordinance No. 910, discussed further below, touches on compliance programs in the context of leniency agreements. It provides that, prior to entering into a leniency agreement with a breaching company, the CGU will evaluate, among other things, the firm's compliance program. It further notes that, in negotiating a leniency agreement with a breaching company, the CGU will propose specific provisions in the agreement that will seek to ensure the breaching company's commitment to change its governance structure so as to avoid further misconduct. This is consistent with the Decree's provisions that all leniency agreements mandate the adoption, application, or improvement of an existing compliance program.

B. Leniency Agreements and Administrative Liability Processes

Under both the Act and the Decree, a company that has violated the Act or certain provisions of Brazil's legislation on public bids and government contracts may enter into a leniency agreement as a means to mitigate possible sanctions. Ordinance No. 910 restates and elaborates on several such provisions regarding leniency agreements. While the new rules shed no light on the competence of other authorities to enter into leniency agreements with breaching companies, they describe in more detail how the CGU will process leniency applications. Upon receipt of a leniency application, the CGU's Executive Secretary will convene a commission to lead the negotiations. This commission will assess whether the company has met the requirements under the Act and Decree and is therefore entitled to enter into a leniency agreement with the CGU. The commission is required to produce a reasoned report on whether it would be appropriate to enter into the leniency agreement, and, if so, recommending the benefits to which the breaching company should be entitled and the applicable fine.

In addition, Ordinance No. 910 expressly provides that – consistent with the terms of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (adopted by Brazil in 2000) – decisions concerning the commencement, conduct, or termination of any investigations, PARs, or leniency agreements are not to be influenced by considerations relating to Brazil's economic interest, the potential effect upon the country's relations with

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another nation, or the identity of the individuals or companies involved.

Ordinance No. 910 also clarifies the operation of the PARs. In addition to restating many rules of the Decree – including on the CGU's competence to act in the event of inaction by the authority originally tasked with handling the PAR – the new rules further elaborate on the issue of jurisdiction to initiate a PAR. Specifically, the Ordinance provides further guidance on the CGU's concurrent jurisdiction to act in extraordinary circumstances (*e.g.*, in complex or relevant cases), stating that the Comptroller might act at the request of the public entity harmed by the corrupt practice. However, the new regulation does not explain how potentially broad terms such as "complex" or "relevant" matters should be interpreted under the Brazilian anti-corruption framework. This question therefore remains open.

Ordinance No. 910 also establishes that the CGU, through its Corrections Office, will oversee the activity of other entities at the federal administrative level, including Ministries and other agencies also tasked with applying the Act and the Decree. The CGU's oversight activity might include visits and inspections at those other federal entities to ensure they comply with the PAR procedure set forth by the new rules.

C. Other Provisions

The CGU also issued two additional regulations. Instruction No. 1 contains rules that will guide determination of a company's gross revenues for fine calculation purposes – which, under the Act, may range from 0.1% to 20.0% of a company's gross revenues. Instruction No. 1 differentiates between companies subject to the regular Brazilian corporate income tax regulations and those subject to a simplified tax system, and provides that a company's gross revenues will be calculated according to the applicable tax profile.

Finally, Instruction No. 2 complements the Act and the Decree in regulating the operation of the national registries publicizing details about sanctioned and debarred entities. As to the National Registry of Unfit and Suspended Companies ("CEIS") (*Cadastro Nacional de Empresas Inidôneas e Suspensas*), Instruction No. 2 provides that the CEIS also may publicize information about sanctions applied to a company by international organizations, foreign cooperation agencies, or multilateral entities, *e.g.*, such as the World Bank, the Inter-American Development Bank, or similar organizations. As to the National Registry of Sanctioned Companies ("CNEP") (*Cadastro Nacional de Empresas Punidas*), Instruction No. 2 clarifies the provisions of the Decree in providing, among other things, that authorities must use CNEP to publicize information regarding leniency agreements executed with breaching companies, the sanctions applied to these companies under the agreements, and any breach of the commitments undertaken by companies under such agreements.

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III. Conclusion

As anti-corruption protests continue in Brazil, the CGU has now further clarified key aspects of Brazil's anti-corruption legal framework, including those concerning compliance programs and leniency agreements. In light of ongoing investigations, it is only a matter of time before the government starts taking action under the new rules. It is thus ever more critical that companies doing business in Brazil take measures to ensure compliance with Brazil's anti-bribery regime.

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SEC Brings First-of-Its-Kind Enforcement Action for Agreement that Interferes with Whistleblowing

Approximately a year ago, the Chief of the U.S. Securities and Exchange Commission's ("SEC's") Office of the Whistleblower, Sean McKessy, publicly warned companies and their counsel against drafting contracts that attempt to dissuade would-be whistleblowers from reporting company wrongdoing to the SEC.[1] McKessy stressed that his office was "actively looking for examples of confidentiality agreements, separation agreements, [and] employee agreements" that condition certain benefits on not reporting activities to regulators, including the SEC.

This month, the SEC held true to its word and announced a first-of-its-kind enforcement action against Houston-based technology and engineering firm, KBR, Inc. ("KBR"), in which KBR agreed to settle allegations that certain of its confidentiality agreements could be read to impede employees from reporting wrongdoing to the SEC.[2]

While neither admitting nor denying the findings, KBR agreed to pay a $130,000 penalty and to amend its confidentiality agreement language. Companies, including those with significant foreign operations that may implicate the FCPA, should take note of the KBR action and the SEC's concern regarding how confidentiality provisions and other employment-related agreements might improperly impede whistleblower reporting.

The SEC's order does not make clear whether the confidentiality agreement at issue was used only with U.S.-based employees or whether it was also used with non-U.S. employees. Regardless, because of the number of tips the SEC receives from outside the United States[3] and the potential for SEC enforcement actions against even foreign-based U.S. issuers that violate the whistleblower anti-retaliation provisions of the Dodd-Frank Act, the action serves as a further caution to all U.S.-listed companies when drafting such agreements.

When it implemented the whistleblower provisions of Dodd-Frank, the SEC broadly interpreted the anti-retaliation protections of the Act through Exchange

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1. *See* Debevoise & Plimpton LLP, Client Update: Head of SEC Whistleblower Office Warns against Interference with Potential Whistleblowers (Apr. 24, 2014), http://www.debevoise.com/insights/publications/2014/04/head-of-sec-whistleblower-office-warns-against-i__.
2. SEC Exchange Act Release No. 74619, In the Matter of KBR, Inc. (Apr. 1, 2015), http://www.sec.gov/litigation/admin/2015/34-74619.pdf.
3. The SEC received nearly 450 complaints from whistleblowers in other countries last year. *See* SEC, 2014 Annual Report to Congress on the Dodd-Frank Whistleblower Program 29 (2014), http://www.sec.gov/about/offices/owb/annual-report-2014.pdf.

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Act Rule 21F-17, which – among other protections – prohibits "any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement."[4] The KBR action is the first time the SEC has sought to enforce that provision.

The SEC order alleges that KBR regularly conducts internal investigations of potential wrongdoing at the company, and, as part of these investigations, typically interviews KBR employees. At the start of the interviews, internal investigators ask the employees to sign confidentiality statements regarding the interview and the information provided. Specifically, the SEC alleges, KBR witnesses had to agree to the following contractual provision:

I understand that . . . I am prohibited from discussing any particulars regarding this interview and the subject matter discussed during the interview, without the prior authorization of the Law Department. I understand that unauthorized disclosure . . . may be grounds for disciplinary action up to and including termination of employment.[5]

According to the SEC, such language could discourage a witness-employee from bringing wrongdoing to the attention of the SEC without approval from KBR's law department. Even though the SEC acknowledged that it knew of no instances when a KBR employee was, in fact, prevented from communicating with the SEC, or when KBR sought to enforce the confidentiality agreement or prevent such communications, the SEC found the potential for such interference sufficient to bring the action.

In light of the KBR action, companies publicly listed on U.S. exchanges should avoid broad confidentiality language in contracts with employees that do not contain an express carve out for reporting to governmental entities.[6] This includes not only confidentiality agreements or statements like the one KBR used for internal investigations, but also employment agreements, Codes of Conduct, and – perhaps most significantly – separation agreements or settlements with departing employees, including those who have threatened or filed employment-related litigation.

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4. 17 C.F.R. § 240.21F-17(a).
5. In the Matter of KBR, Inc. ¶ 6.
6. By example, the KBR Confidentiality statement now contains the following language:
Nothing in this Confidentiality Statement prohibits me from reporting possible violations of federal law or regulation to any governmental agency or entity, including but not limited to the Department of Justice, the Securities and Exchange Commission, the Congress, and any agency Inspector General, or making other disclosures that are protected under the whistleblower provisions of federal law or regulation. I do not need the prior authorization of the Law Department to make any such reports or disclosures and I am not required to notify the company that I have made such reports or disclosures.

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The fact that the Second Circuit Court of Appeals has held that the Dodd-Frank anti-retaliation provisions do not apply extraterritorially should not provide comfort to companies that seek to use these agreements with foreign employees.[7] That case was in the context of a foreign whistleblower plaintiff seeking to bring an anti-retaliation claim in U.S. court based on a statutory provision of Dodd-Frank with no clear extraterritorial reach. The potential liability at issue here concerns SEC enforcement of an SEC rule against issuers of securities registered with the SEC.[8]

Employers do not need to be concerned that all agreements to maintain confidentiality with employees may run afoul of SEC rules. In particular, provisions which seek to maintain confidentiality for the purpose of preserving the attorney-client privilege are permitted specifically by the SEC's rules.[9] For example, if during an internal investigation, an attorney conducts an interview of a company employee, the company may request that the employee treat confidential information discussed at the meeting to preserve the attorney-client privilege. While not explicitly required under the plain language of the SEC's whistleblower rules, companies should consider whether to expressly inform the employee that reporting to the government any independent knowledge of wrongdoing (that is, information known apart from the privileged conversation) is always permitted. Until this area of the law develops more fully, this precautionary step appears to be the safest course to ensure that the SEC cannot allege any interference with would-be whistleblowers.

"While not explicitly required under the plain language of the SEC's whistleblower rules, companies should consider whether to expressly inform the employee that reporting to the government any independent knowledge of wrongdoing (that is, information known apart from the privileged conversation) is always permitted."

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7. *See Liu v. Siemens AG*, 763 F.3d 175, 179 (2d Cir. 2014); *see also Asadi v. G.E. Energy (USA),* No. 4:12-345, 2012 U.S. Dist. LEXIS 89746 (S.D. Tex. June 28, 2012), *aff'd on other grounds*, 720 F.3d 620 (5th Cir. 2013).

8. *See* SEC Exchange Act Rel. 73174, In the Matter of the Claim for Award in connection with [Redacted] (Sept. 22, 2014), http://www.sec.gov/rules/other/2014/34-73174.pdf. While it is conceivable that a foreign private issuer named in an enforcement proceeding under Rule 21F-17 might eventually challenge in court the application of the Rule to agreements with foreign employees, as the Rule stands now, the potential for liability still exists.

9. Rule 21F-17 specifically excludes from its prohibitions "agreements dealing with information covered by § 240.21F-4(b)(4)(i) and § 240.21F-4(b)(4)(ii) of this chapter related to the legal representation of a client." 17 C.F.R. § 240.21F-17(a). Rule 21F-4(b)(4)(i) states that "original information" – required for a whistleblower to be eligible for an SEC award – excludes "information [obtained] through a communication that was subject to the attorney-client privilege." 17 C.F.R. 240.21F-4(b)(iv)(4)(i).

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While the KBR action may be the first action brought under Rule 21F-17, it is unlikely to be the last. As widely reported in the media earlier this year, the SEC has sent inquiries to numerous companies requesting a wide range of non-disclosure, employment and other agreements, presumably to review whether these agreements contain overly broad provisions that may chill whistleblower reporting. We expect the SEC's focus on whistleblower issues to continue and perhaps even intensify over the near term.[10]

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10. The SEC, moreover, is not the only federal agency that has expressed concern with company efforts to maintain confidentiality during the course of internal investigations. In 2012, the National Labor Relations Board, in *In re Banner Health System d/b/a Banner Estrella Medical Center and James A. Navarro*, No. 28-CA-023438 (NLRB July 30, 2012), found that a company had violated U.S. labor law by issuing a "blanket" confidentiality directive to employees in connection with an internal investigation. The Board's order was appealed to the U.S. Court of Appeals for the D.C. Circuit, which vacated it on other grounds upon the agency's request following the U.S. Supreme Court's decision in *Noel Canning v. NLRB*, 134 S. Ct. 2550 (2014), which held certain NLRB Board appointments invalid under the recess appointments clause of the Constitution. The case remains pending at the NLRB.

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