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The World Wide Web of Anti-Corruption Enforcement: Direct and Collateral Consequences for U.S. and Non-U.S. Parties (Private and State-Owned)

CONTENTS SNAPSHOT

Key Topics

- Foreign Corrupt Practices Act (FCPA)
- U.S. jurisdiction over foreign parties
- Financial institutions
- Anti-corruption, anti-money laundering nexus
- State-owned enterprises (SOEs)
- Emerging/Developing markets
- Middle East trends (supplement)

Takeaways and Lessons

- Globalized anti-corruption enforcement raises the risk of multi-jurisdiction and multi-party enforcement.
- Political considerations and market forces (*e.g.*, socially responsible investment) shape anti-corruption trends.
- Non-U.S. parties (including public officials) face risks of prosecution, information disclosure, and local enforcement.
- Cross-compliance leverages compliance assets and improves compliance effectiveness. *E.g.*, financial institutions should apply anti-money laundering expertise to anti-corruption compliance.
- Compliance liaisons can improve information collection, processing, and dissemination within firms.
- Incentivize compliance, including by informing personnel and counterparties of the full economic and legal consequences of non-compliance.

Financial institutions, their employees, and their state-owned counterparties and business associates are in the crosshairs of enforcement authorities in the United States and abroad, in connection with corrupt or potentially corrupt practices. Pending investigations of JPMorgan and two recent enforcement actions against financial institution employees and a foreign official —all with links to state-owned enterprises (SOEs)—involve the U.S. Foreign Corrupt Practices Act (FCPA), a federal anti-bribery law that prohibits the direct or indirect offering, promising, or giving of "anything of value" to a "foreign official" for the corrupt purpose of obtaining business advantage.[1]

The cases, which illustrate the forms bribery can take in the financial services industry (and beyond), will likely be studied by financial institutions wishing to avoid similar fact patterns and enforcement consequences. But there is more to be learned. Viewed in the context of a globalized anti-corruption enforcement environment, the prevalence of SOEs (including sovereign wealth funds) in international business, and the complexity of international business regulation, the cases' instructive value transcends specific fact patterns, jurisdictions, and U.S. financial institutions subject to the FCPA. For example, SOEs should know that, in connection with anti-corruption enforcement against their counterparties, their employees are susceptible to U.S. prosecution, they risk disclosure of their sensitive information, and corrupt practices discovered by foreign authorities can trigger enforcement in their home jurisdictions.

This note discusses the globalized anti-corruption enforcement environment and its potential consequences for private businesses and SOEs (whether or not direct targets of enforcement), and provides practical risk management and compliance steps for private firms and SOEs.

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I. RECENT CASES: FINANCIAL INSTITUTIONS AND SOES

Morgan Stanley employee (involving Chinese SOE official) (2012)

Last year a managing director of Morgan Stanley was prosecuted for FCPA violations arising out of his "secret business relationship" with a Chinese SOE official, whom the employee bribed with cash and valuable real estate interests. In exchange, the Chinese official exerted his influence to direct business to Morgan Stanley (some structured by the employee to yield and disguise margins for his and the official's personal gain). In a settlement with the U.S. Securities and Exchange Commission (SEC), the employee was fined, barred from the securities industry, and disgorged of his corruptly obtained gains.[2] Separately, the employee was prosecuted by the U.S. Department of Justice (DOJ) and sentenced to nine months in prison.[3] Notably, Morgan Stanley avoided prosecution because its compliance program, according to the DOJ, was well formulated and sufficiently validated to ensure effectiveness— *i.e.*, the employee's breach was not attributable to weaknesses in Morgan Stanley's compliance program.[4]

The case illustrates the importance of strong compliance programs that are, barring uncontrollable circumstances (*e.g.*, a rogue employee), actually effective; *i.e.*, substantively sound, strengthened with effective education and reinforcement, and well documented. The case also demonstrates that government forbearance toward companies will not necessarily extend to individual executives or other employees.

Prosecution of Venezuelan official and U.S. broker-dealer employees (2013)

In May, the DOJ announced criminal proceedings against two employees of a U.S. broker-dealer and one "senior official" of a Venezuelan state bank, in connection with an alleged corrupt scheme whereby the Venezuelan bank official directed business to the broker-dealer in exchange for kickbacks, which the employees and the official shared. The broker-dealer employees were charged with, *inter alia*, FCPA violations, and the Venezuelan official, who was beyond the FCPA's reach for bribe taking, was charged with related conspiracy, money laundering, and Travel Act (discussed below) offenses. For foreign officials, particularly SOE employees, this case demonstrates the reach of U.S. law and the willingness of U.S. authorities to prosecute foreign officials.

For the financial services industry, the U.S. Attorney's Office provided a takeaway, in the form of a direct warning, stating that: "Today's announcement [of charges] is a wake-up call to anyone in the financial services industry who thinks bribery is the way to get ahead . . . We will not stand by while brokers or others try [to] rig the system to line their pockets, and will continue to vigorously enforce the FCPA and money laundering statutes across all industries."[5]

Pending JPMorgan FCPA Investigations

According to JPMorgan's August and November quarterly reports, U.S. and foreign authorities are scrutinizing the bank's hiring practices, relationships with certain clients and consultants in Asia, and "other matters." In the United States, according to news accounts, the SEC and DOJ are investigating

the bank for potential FCPA violations. Reportedly, the inquiries initially focused on JPMorgan's hiring of the children of a Chinese railway official and a state-owned conglomerate executive, and expanded to include the bank's two-year, $1.8 million consulting arrangement with the daughter of China's former prime minister (reportedly commenced when the prime minister was in office).[6] At least part of the SEC's investigation may have evolved from an informal to a formal investigation—in November, JPMorgan reported its receipt of *subpoenas* from the SEC (suggesting a formal investigation), but mentioned only SEC "requests" in August, indicating an informal inquiry was underway at the relevant time.[7] JPMorgan, which has not been accused of wrongdoing, is internally investigating its global hiring practices and "regularly providing documents" to the SEC and DOJ.[8]

Assuming news reports are accurate, key FCPA issues will be whether the hiring of a foreign official's child was a "thing of value" given to the official with the corrupt intent of obtaining business advantage. Facts, of course, will be determinative. And JPMorgan, depending on its defensive posture and absent evidence clearly showing corrupt intent, might produce neutral justifications for the hiring—referral hiring is common practice and the children of foreign officials often possess (at minimum on paper) the education, language skills, and networks that make candidates attractive to firms competing in foreign markets (and at home).

According to the New York Times, the JPMorgan news "is sending shudders through Wall Street." "Virtually every firm has sought to hire the best-connected executives in China and, more often than not, they are the 'princelings,' the offspring of the ruling elite."[9] Overseas, bankers have balked; some reporting "no plans" to stop hiring the well connected to develop business in China and other emerging markets.[10]

The JPMorgan investigations illustrate that "things of value" can take many forms, multi-jurisdiction enforcement against a single firm can flow from a single act or pattern of conduct, and that an investigation of one act can expand to others (as discussed in Section III). Given the reportedly widespread practice of hiring "princelings" and the DOJ's earlier warning to the financial services industry, similar investigations of other firms may soon surface (as generally discussed below).

The JPMorgan hiring-related investigations are striking not only because they raise questions about the meaning of "things of value" under the FCPA, but because the children of foreign officials are, for anti-money laundering compliance purposes, ***Politically Exposed Persons*** *(****PEPs****) or* ***Senior Foreign Political Figures*** *requiring enhanced due diligence in certain financial transactions under U.S. law, other national law, and prevailing industry standards (e.g., the Wolfsberg Group AML Principles (JPMorgan is a member of the Wolfsberg Group)). While employment relationships are not the concern of AML regulation, the legal treatment of PEPs and the underlying anti-corruption policy reasons for that treatment should trigger caution (not avoidance) in all dealings with PEPs. The AML-Anti-Corruption nexus is addressed below (Section IV), in the discussion of* ***Cross-Compliance*** *approaches for companies generally and financial institutions specifically.*

II. GLOBALIZED ANTI-CORRUPTION ENFORCEMENT: LEGAL, POLITICAL, AND MARKET DRIVERS

Globalized Standards for Anti-Corruption in Business

When the FCPA was enacted in 1977, it was a lonely statute at a time when most jurisdictions' laws punished the taking of bribes by their officials, and not the giving of bribes by private parties. Today, the FCPA is in good and growing company, even as its enforcement remains robust relative to other nations' laws. Other jurisdictions have adopted anti-bribery laws independently and to implement conventions, *e.g.*, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business (1999) and the UN Convention Against Corruption (2005). Both the OECD and UN conventions contain mutual legal assistance provisions that strengthen coordinated anti-corruption enforcement by national authorities (and separately, many countries have entered into bilateral mutual legal assistance agreements).

At the practical level, U.S. enforcement authorities, particularly the DOJ, are setting global standards for enforcement overseas, by example and through educational and training programs with foreign enforcement authorities. For entities not subject to U.S. law, U.S. enforcement trends are nevertheless relevant. In addition, the FCPA should not be regarded as a concern only for American companies and individuals—by itself and in conjunction with other U.S. laws, the FCPA reaches non-U.S. parties and prohibited acts committed outside of the United States (as discussed below).

Globalized Anti-Corruption Enforcement in Action

(1) Derivative, Coordinated, and Reciprocal Enforcement

As the pending JPMorgan investigations indicate, an investigation in one jurisdiction can trigger investigations in others. Fairly recently, the DOJ cooperated with German authorities in an FCPA enforcement action against Siemens AG and three of its subsidiaries, which resulted in guilty pleas and penalties of $1.6 billion.[11] Pending FCPA investigations of Wal-Mart's alleged bribery of Mexican officials have triggered investigations overseas, *e.g.*, in India in connection with potential bribery-related violations of Indian lobbying rules.

In 2010 the World Bank and four of the major multilateral development banks agreed to mutually enforce debarment decisions against violators of their respective anti-corruption policies.[12] Non-multilateral institutions might also recognize their debarment decisions— for example, the U.S. Overseas Private Investment Corporation (OPIC) "reserves the right to not do business prospectively with any person or entity that appears on a debarment list of any other international financial institution including the World Bank."[13]

(2) FCPA: Applicability to U.S. and non-U.S. Persons and Conduct

The FCPA policies bribery in two ways. Through its anti-bribery provisions that prohibit the offering, promising, or giving of "anything of value" to a foreign official with the corrupt intent of obtaining or retaining business advantage.[14] And through its "books and records" provisions that: (i) require Issuers to record and disclose transactions in and dispositions of assets (including corrupt

transactions and dispositions) and (ii) punish the omission or concealment of transactions in or dispositions of assets.[15]

The geographic reach of the FCPA extends beyond the United States. The law applies to prohibited acts committed anywhere in the world, when committed by "Issuers" or "Domestic Concerns."[16] These include United States persons (natural and juridical), issuers of U.S. securities (foreign[17] and domestic), and companies incorporated or with a principal place of business in the United States (see note 16 for fuller definitions). In the case of non- Issuers or Domestic Concerns, the law applies to their acts (bribery and acts in furtherance of bribery) committed within United States territory or by means of the "instrumentalities" of U.S. intestate or foreign commerce. A case illustrating the reach of the "instrumentalities" provisions of the FCPA, involving DPC (Tianjin) Co. Ltd., a Chinese subsidiary of a U.S. company, is discussed at note 18 (endnotes).[18]

Related to FCPA offenses, several U.S. laws effectively extend U.S. jurisdiction over foreign persons and conduct; including anti-money laundering laws, prohibitions on the use of the U.S. mails and wires in furtherance of unlawful activity, and the Travel Act, which punishes "travel in interstate commerce" in furtherance of unlawful acts.[19]

(3) Political Drivers of Globalized Enforcement

Businesses should understand that political considerations inform enforcement decisions in some cases. In an age in which information flows more freely, countries are regularly and publicly ranked by degree of corruptness (*e.g.*, by Transparency International), and citizens are increasingly vocal in their opposition to public corruption, governments do not want to be perceived as permissive of or soft on corruption. Moreover, to project sovereignty, exert control, or demonstrate an anti-corruption stance, governments might be more inclined to punish (or at least investigate) the corrupt activities of foreign firms within their borders or involving their officials, particularly if a foreign authority is investigating the same conduct and/or the matter is well publicized (such as the JPMorgan investigations).

> *Examples of local anti-corruption developments discussed herein are the Chinese President's recent announcement of a clampdown on corruption committed by "tigers and flies," and recent anti-corruption developments (policy, regulation, litigation) in Egypt, Libya, Dubai, and Qatar (see generally the Middle East Supplement).*

(4) Market Enforcement of Anti-Corruption Standards; Corporate Citizenship and Socially Responsible Investment

Market forces are increasingly making anti-corruption and general compliance necessary components of sound commercial practice. Businesses operating across borders can no longer, without cost, practice good corporate citizenship at home, while engaging in non-compliant or other questionable conduct abroad. Like businesses, notions of corporate citizenship have crossed borders—regulators, consumers, and governance advocates expect firms to act responsibly

wherever they operate, including where local law does not proscribe or punish corrupt or other conduct inconsistent with prevailing international standards.

Importantly, the link between compliance and the bottom line is now quantifiable in some market segments. As socially responsible investment gains volume and favor in the private market, so will investors' demands that businesses refrain from corrupt practices. The socially corrosive and economically damaging effects of corruption are well known, and investors concerned with social responsibility will avoid (if they are true to their missions) corruption in the marketplace (real or perceived). Firms of all sizes and across industries have recognized business opportunities afforded by socially responsible investment, and they would be well served to quantify the corollary business value of strong anti-corruption practices.

For some businesses the link between strong compliance and the bottom line will be evident from experience—*e.g.*, following news reports about Wal-Mart's alleged bribery of officials in Mexico, institutional investors and others took note, some initiating derivative suits against the company during the pendency of FCPA investigations.

III. GLOBALIZED ANTI-CORRUPTION ENFORCEMENT: CONSEQUENCES FOR U.S. AND NON-U.S. PARTIES (PRIVATE AND STATE-OWNED)

Derivative Enforcement Risk for Firms and Industries ("But Everyone Does It")

Followers of FCPA enforcement trends know that even a single investigation of one firm can spread to other firms, or to related industries. Particularly when the reaction to an investigation could be "but everyone does it," (as in the hiring "princelings," apparently) the risk of derivative investigations of other firms connected to a single industry or subject parties will be raised. As the SEC has stated, in deciding whether to investigate or charge a firm, the agency considers, *inter alia*, "whether the case involves a possibly widespread industry practice that should be addressed."[20] As a practical matter, information derived from the investigation of one firm could very well reveal potential wrongdoing by other firms, thereby raising derivative investigation risk. For example, the SEC has explained that: "There are various ways that potential FCPA violations come to" its attention, "including . . . [through] information developed in other investigations."[21]

Foreign Officials Can be Prosecuted for Bribery Related Offenses

As discussed above, foreign officials are beyond the FCPA's reach for bribe taking. But they are not beyond the reach of other, FCPA-related U.S. laws (absent a successful assertion of immunity; unlikely where commercial activities are concerned). The DOJ's prosecution of the senior Venezuelan state bank official and the brief discussion (above) of FCPA-related laws, *e.g.*, money laundering, explain this reality.

Information Disclosure Risk for State-Owned and Private Parties; Risk Mitigation

In the context of U.S. government investigations, information requests and subpoenas, for example, are investigative tools. As such, they are framed to procure information that corroborates or disproves investigative theories, helps in guiding an investigation, or reveals broader wrongdoing by a targeted party or others. Thus, the counterparties or associates of a firm under investigation risk the disclosure of their information to authorities, to the extent they are relevant to an investigation (relevance here should be defined broadly). Even where such information is not indicative of wrongdoing under the investigating authority's law, it could nevertheless be shared with authorities in the party's home jurisdiction, particularly if it implicates illegality under local law.

For SOEs, for which utmost confidentiality is prized as a matter of policy, disclosures of information that is legally benign, but telling of an SOE's operations, commercial activities, strategy, or government policies and practices, can have ramifications (including under domestic laws that prohibit the disclosure of SOE information, as may be the case under China's "state secrets" law).[22] (Relatedly, parties served with requests or subpoenas that require the disclosure of information about an SOE or other local parties or matters must take care to not violate local laws prohibiting the export of protected information, such as those regulating state secrets, privacy, or labor).

While the risk of information disclosure for third parties cannot be avoided entirely, SOEs in particular should take steps to ensure that their employees, agents, and other representatives do not violate local anti-bribery laws or entity policy, or risk SOE confidentiality by doing so. Such steps should be designed to incentivize conduct that does not create direct or indirect legal, commercial, or reputational risk, including by:

- Ensuring that SOE employees and representatives are aware of the personal costs of violations, such as prosecution overseas or at home.
- Educating and training employees on anti-corruption to align conduct with local law, foreign law (as relevant), and prevailing international standards. As to local law, the employees (native and expatriate) of state-owned or affiliated enterprises should know that local penalties for corrupt conduct could be enhanced precisely because of a link to an SOE.

  Examples of enhanced penalties imposed on executives of state-affiliated entities come from Dubai—the cases are briefly discussed in the Middle East Supplement to this Note (below).
- Implementing and enforcing anti-corruption protocols that are consistent not only with applicable law and entity standards of conduct, but that are also tied to contractual obligations (*e.g.* employment contracts) requiring employees and others to act reasonably to maintain the confidentiality of SOE information (including by not engaging in corrupt activity that might indirectly jeopardize confidentiality). Where applicable law prohibits the disclosure of "state secrets" or other specially protected information, SOE policies, training, and/or employment contracts should reflect such rules and describe consequences for their breach.

IV. LESSONS: MANAGING DIRECT AND COLLATERAL RISK IN A GLOBALIZED ENFORCEMENT ENVIRONMENT

Foolproof compliance can be achieved in a few steps. Comply. Ensure that all employees, agents, and other representatives comply with all applicable laws, in all jurisdictions, all the time. And document compliance, just in case. Short of this nearly unattainable method—even diligent businesses acting in good faith inadvertently breach—businesses can continue to take steps designed to enhance compliance and diminish risk.

Of course, the content and implementation of any compliance program must be tailored for entity size, industry, organizational structure, jurisdiction(s) of operation, and internal or external resources available to effectively implement compliance programs. However, strong compliance programs should include—*in addition to* training, reporting, auditing, etc.—components that facilitate the proactive identification of problem areas, leverage compliance resources across substantive areas and functions, and motivate personnel to observe compliance mandates. Such components should include, as appropriate:

- **Information awareness and integration** focused on the timely collection, processing, and dissemination of the *right* information (legal and non-legal).
- **Cross-compliance** that maximizes the value of existing compliance assets (knowledge, resources) to improve compliance effectiveness across functions and substantive areas.
- **Incentivizing compliance** across the organization by ensuring that employees and others understand the full scope of potential non-compliance consequences for the business and for themselves individually.

Information Awareness and Integration

Effective compliance and risk mitigation require that information be timely collected, substantively integrated (*i.e.*, connect the dots), and disseminated in a way that resonates with different internal constituencies. In collecting information, businesses should not rely only on legal information—news, outside advisers, business and local grapevines, and other sources (properly screened) can also be informative for compliance purposes.

With this in mind, firms should facilitate information flow across functions and locations, taking care to avoid unnecessary containment or filtering of information along functional lines. In typical internal organizational structures, key parties will likely process information in a way that is limited to their own expertise or function, resulting in blockage of information flow (containment). Where relevance is defined too narrowly, parties best positioned to process information for compliance purposes might never receive it, or receive it when it is too late (filtering).

Practically, internal separation along functional lines is sometimes reflected in the limited interaction between legal and business personnel, with the latter often seeking out legal assistance when problems arise (or a transaction is in its later stages). Such an approach is fine for putting out fires,

but compliance is about fire prevention. Organizations would be well served to promote proactive information flow and substantive integration at strategic points in the organizational continuum.

Steps for collecting, integrating, and disseminating information might include:

(1) Appoint Compliance Liaisons

To efficiently manage and disseminate information (particularly in larger organizations), firms should appoint internal compliance liaisons to serve as dot connectors who collect and process compliance-relevant information and disseminate it to internal constituencies in a way that resonates with their respective functions. Through compliance liaisons, relevant commercial, legal, news, and other information can be pieced together and put to effective compliance use in a timely manner. This function would also aid **cross-compliance** (discussed below).

(2) Monitor and Report Local (Anti-) Corruption Developments

Where foreign operations are concerned, information about local corruption perceptions and anti-corruption initiatives should be followed closely. For example, when a government announces an anti-corruption initiative—as recently happened in China when "President Xi Jinping launched a high-profile anti-corruption campaign, vowing to catch both tigers and flies—big and small corrupt officials"[23]—such a development could influence local decisions to pursue, independently or in response to enforcement by foreign authorities, action against private parties (local and foreign) and corrupt officials (with whom a firm might be doing business). Moreover, unlike corruption data generated externally or published on an annual or other periodic basis, locally sourced information can reveal specific areas or persons of corruption concern in real time. When obtained, such data should be shared with appropriate legal and compliance personnel, within the jurisdiction or abroad, as appropriate.

Importantly, information about local anti-corruption initiatives should be analyzed not only from the organization's perspective, but also from the perspective of other relevant parties (such as foreign law enforcement). When a government announces an anti-corruption initiative, foreign authorities might be more inclined to bring enforcement action involving that country's officials or SOEs, as negative diplomatic consequences can be diminished when foreign authorities act, or are perceived to be acting, consistently with local policy. Alternatively, foreign authorities might be interested in highlighting corruption in a specific jurisdiction or industry, regardless of local policy, to incentivize local authorities to address corruption or for other policy reasons.

Finally, businesses should be careful to not define relevance too narrowly when identifying information relevant to anti-corruption enforcement. Particularly in jurisdictions experiencing economic growth, development, and formalization (*i.e.*, formal corporate governance, greater regulation, convergence with international standards), developments outside of anti-corruption can and should inform expectations and compliance protocols.

For example, as discussed in the Middle East Supplement below, the elevation of Dubai and Qatar to Emerging Market (from Frontier Market) status and those jurisdictions' movements to

raise their standing as commercial and finance centers will likely bring with them greater enforcement of anti-corruption and other rules.

(3) Facilitate Vertical and Horizontal Information Flow

Take steps to ensure that relevant pieces of high-level information about a foreign market (often provided to the board and senior management in the early stages of foreign market entry) trickle down to the right people, in business, legal, and compliance functions. Where foreign market entry and operations are concerned, it is important that commercial information, particularly about strategy, barriers to entry or operation, etc. be shared with legal, compliance, and/or other personnel.

For example, if a component of foreign market strategy is to engage with state-owned or affiliated enterprises, involves public procurement or a protected industry (*e.g.*, defense), requires the hiring of or frequent interaction with politically entrenched parties, requires government or political decision makers to exercise discretion (more than usual), or involves the procurement of numerous licenses or other approvals, non-business personnel should be informed early on, and preferably at the outset so that they can formulate situation specific compliance procedures and checks designed to internally detect potential problem areas.

E.g., according to the New York Times' very detailed reporting of the alleged Wal-Mart bribery in Mexico (now under investigation), Wal-Mart obtained real estate authorizations, e.g., zoning clearances, construction permits, fairly quickly (and perhaps irregularly quickly by local standards and under the circumstances reported by the Times). This aspect of the Times' reporting is notable here. In some cases and in some markets, unusual speed or success can be a red flag for internal compliance purposes (and should be addressed without diminishing morale).

As a general matter, when local legal, procedural, or business hurdles are cleared in a way that is contrary to informed expectations (i.e., informed by local law, industry custom, actual practice, others' experiences, etc.), internal examination might be warranted. Companies should, at early market entry or transaction stages (updated regularly), establish expectations based on good information and design compliance checks to detect potential problem areas when (well-informed) expectations are contradicted in a way that might suggest wrongdoing (purposeful or inadvertent). Importantly, such context-specific protocols should include relevant departments (e.g., an internal real estate department where construction and permitting is involved) so that those professionals can both assist in defining "unusual" activity and timely report occurrences of such activity to designated compliance personnel.

(4) Provide Business Training for Legal and Compliance Personnel

Provide periodic business education or training to legal and compliance personnel to enhance their understanding of the business (or specific business lines, depending on organization), to enable them to more quickly connect legal, regulatory, and commercial dots. Typically, only

legal and compliance training is given to non-legal and compliance personnel (sometimes for the pro forma purposes of satisfying certification requirements and creating a paper trail). In the interest of informed compliance, internal education should run both ways.

Businesses that maintain legal panels or rely on specific outside firms frequently or over long periods might consider inviting outside counsel to attend such sessions, subject to attorney-client privilege and confidentiality and if appropriate for the organization and its relationship(s) with external counsel.

Cross-Compliance: Illustration; Corruption, Money Laundering, and Financial Institutions

As appropriate, organizations should adopt cross-compliance approaches to maximize existing compliance assets and enhance overall compliance effectiveness, such as where substantive legal obligations applicable to a firm's business overlap. Here, the substantive links between anti-corruption and anti-money laundering in the financial services context are discussed, to illustrate one application of cross-compliance.

As discussed above, U.S. authorities are investigating JPMorgan's hiring of the children of foreign officials, for potential violations of the FCPA. While financial institutions subject to the FCPA or other anti-corruption mandates are not forbidden from hiring foreign officials' family members, their dealings with them should be approached with special caution. For anti-money laundering (AML) purposes, some consumer-facing dealings with public officials *and their close family members* require enhanced due diligence to detect, block, and report attempts to cleanse corruptly gained funds through the financial system. In U.S. law terms, public officials *and their immediate family members* are Senior Foreign Political Figures (SFPFs); they are Politically Exposed Persons (PEPs) in international terms.[24]

(1) PEPs/SFPFs

Where anti-corruption compliance is concerned, financial institutions should take a cross-compliance approach by leveraging existing AML knowledge and resources to enhance anti-corruption compliance across functions. This would mean, for example, that PEPs (officials and their close family members) would be treated with special caution in all contexts (including in hiring). Where financial institutions are in doubt as to the transferability of AML knowledge to anti-corruption compliance, they should take guidance from the actions of regulators and standard-setting bodies. For example, in 2012, the Financial Action Task Force (FATF) expanded its mandatory requirements for the treatment of PEPs, by enlarging the definition of PEP to conform to the UN Convention Against Corruption.[25] The FATF change not only informs AML protocols, but also underscores the factual and policy links between official corruption and money laundering (as reflected also by U.S. law, discussed above).

(2) Know Your Customer (and other counterparties)

In addition, financial institutions should apply Know Your Customer (KYC) investigative approaches more broadly in some jurisdictions (including to third party intermediaries),

particularly where the true ownership of financial interests is not readily ascertainable, aliases or name variations are frequently used, and the true nature of businesses is not readily ascertainable.

Contractual Risk and Loss Mitigation

Contracts with third parties acting in concert with or on behalf of a business should include anti-corruption covenants, representations and warranties, and/or indemnification provisions, to the extent permitted by governing law, business custom, and the parties' respective bargaining positions.

In addition, in some contracting scenarios and where commercially and legally feasible, businesses should consider additional mechanisms for reducing the risk and mitigating the costs of non-compliance by others, including by attaching anti-corruption compliance obligations to ancillary instruments, such as sureties, parent or personal guarantees, and parent-subsidiary control obligations contained in comfort letters and similar instruments.

Incentivizing Anti-Corruption Compliance: High Costs of Non-Compliance for Firms and Individuals

Even impeccable compliance programs are breached by employees, agents, and others. In a further effort to incentivize compliance, businesses should create internal incentives for compliance and inform employees of the scope of potential legal and business consequences of non-compliance.

(1) Link Compliance, Compensation, and Success Metrics

In qualitative terms, companies should approach legal and compliance functions as asset or value centers, rather than cost centers, to illustrate the link between compliance and the bottom line. Along these lines, methods for tying compliance effectiveness with success (*e.g.*, for business units or divisions) and compensation (particularly bonuses) should be considered, both to underscore the importance of compliance to the business and incentivize compliant behavior. Just as business units and their managers are rewarded for positive financial performance, compliance underperformance within their spheres of authority should be reflected in internal assessments. Such approaches fit thematically with the books and records provisions of the FCPA and corporate governance mandates that attach responsibility to control persons.

(2) Debarment

For government contractors and other firms that transact significant business with governments or institutions (*e.g.*, multilateral lenders), debarment is a particularly costly (and potentially business ending) outcome. Like firms, individuals can be debarred. Employees and others should be informed of the clear link between compliance and jobs, which would likely increase employee vigilance and reporting with respect to potential FCPA violations involving others, if not themselves.

(3) Exclusion from other government programs

Individual and firm violators of the FCPA and other anti-corruption protocols can be excluded from government programs, such as the loans, guarantees, and insurance products provided by the Export Import Bank of the United States (EXIM) or the U.S. Overseas Private Investment Corporation (OPIC) (as noted above). By law, EXIM must require applicants to disclose violations of the FCPA and is authorized to deny applications based on a transaction party's prior fraud or corruption.[26] (Notably, in 2011, a bill was introduced in Congress, but not enacted, to debar FCPA violators from any "contract or grant awarded by the Federal Government," except in cases where debarment is waived by the head of a federal agency or the violating party self-reported the violation. Overseas Contractor Reform Act, H.R. 3588, 112th Cong. (2011)).

(4) Local law consequences

An FCPA or other violation might also constitute a violation of another country's laws (*e.g.*, the country of the foreign official or in which bribery occurred). Businesses and individuals that violate the FCPA, particularly in high profile cases or in cases in which the offense stokes political sensitivities, might find themselves facing local penalties that they were not aware were possible or that are imposed specially in a specific case (including, *e.g.*, the revocation or delay of, or refusal to grant or renew, an authorization to conduct business).

For individual targets of local enforcement, legal proceedings can be especially onerous, particularly where procedures and legal concepts diverge with expectations.

(5) Derivative lawsuits

In addition to official sanctions, private lawsuits (including shareholder, investor, or competitor suits) might flow from FCPA violations, against firms, executives, and others implicated in wrongdoing. As noted above, investigations of Wal-Mart's potential FCPA violations in Mexico were followed by shareholder actions.[27]

(6) Related Legal Enforcement (e.g., Antitrust, Securities)

Corrupt practices designed to obtain business advantage are, by nature and in effect, anti-competitive. Depending on the scale of bribery and/or the number of parties involved in conduct, parties engaged in corrupt practices might find themselves under investigation for other violations of substantive law, such as antitrust (competition) laws. The case of the Morgan Stanley employee (discussed above) provides an example of additional enforcement related to FCPA offenses—as noted, the employee, formerly an investment adviser, was permanently barred from the securities industry for breaches of fiduciary duty (self-dealing, misappropriation).

(7) Economic loss

Economic loss of the kind that deprives firms of business can flow from FCPA violations (proven or under investigation, if publicized). The Wal-Mart Mexico investigations exemplify this—in response to extensive news reports of the company's potential FCPA violations, its shares

plunged shortly after the revelations, and its joint venture with a firm in India (recently a target market for Wal-Mart) has dissolved. Some have opined that the undoing of the India JV might be partly attributable to concerns about Wal-Mart's FCPA woes.[28]

(8) Individual Financial Liability for Willful FCPA Violations (Insurance, Indemnification)

For willful violations of the FCPA committed by individuals, the FCPA prohibits companies from directly or indirectly paying the fines of individuals.[29] Thus, by law, those who commit willful violations will be deprived of insurance (*e.g.*, D&O insurance) or indemnification that might otherwise be available or expected (willful conduct would likely be excluded by insurance terms). As fines are significant, individual knowledge of financial liability might further incentivize compliance (including self-reporting).

V. CONCLUSION

The world wide web is no longer just virtual. Businesses of all sizes are increasingly crossing borders to seize opportunities in new markets. Since the onset of the financial crisis, capital flows to emerging and developing markets in Asia, the Middle East, and Africa have regained strength. Commercially, emerging and developing markets offer opportunities across sectors. Legally, doing business across borders comes with greater, more complex, and sometimes conflicting obligations.

As anti-corruption standards and enforcement practices become more uniform, cooperation among enforcement authorities will increase in frequency and effectiveness. In the FCPA enforcement context and in others, authorities have imposed record-setting fines, and likely will continue to do so with greater frequency, particularly where violations are egregious, widespread, or have broad impact. In such an environment, monetary penalties for avoidable violations may no longer be absorbable as the cost of doing business. As a matter of good business practice, companies of all sizes should take steps to strengthen compliance programs appropriately for their industries, organizational structures, home obligations, and the jurisdictions in which they do business.

The World Wide Web of Anti-Corruption Enforcement: Direct and Collateral Consequences for U.S. and Foreign Parties (Private and State-Owned)

MIDDLE EAST SUPPLEMENT

Political and market forces are bringing corruption into focus in the Middle East. In the "Arab Spring" countries, particularly Egypt, Tunisia, and Libya, official corruption is high on the agenda. In Gulf Cooperation Council (GCC) states, corruption in business might be of greater concern, as the business cultures of GCC states continue to move toward formalization. This Supplement discusses direct and ambient elements driving anti-corruption and governance generally in the Middle East.

Egypt

Following the February 2011 uprising, the Egyptian public, the first interim government, and the public prosecutor focused their attention on allegedly corrupt Mubarak-era sales and other dispositions of state-owned assets, *e.g.*, agricultural land, Red Sea land and property, and retail and manufacturing enterprises. Shortly after February 2011, lawsuits and other challenges were mounted, bringing dispositions of state assets under judicial review. Central to many cases was (and is) the assertion that, owing to official corruption, state assets were sold or transferred to private parties below market value. Transactions involving both Egyptian and foreign investors have been contested, and in some cases, they have been nullified by court order (*e.g.*, the Omar Effendi department store (Saudi investor)) or undone by agreement between authorities and investors.

Successive post-2011 Egyptian governments, starting with the government of interim Prime Minster Essam Sharaf in 2011 and continuing through the present interim government, have attempted to attract domestic and foreign investment and avoid (further) litigation by offering to negotiate some investment disputes. This approach has worked in some cases. In others, investors (foreign and Egyptian dual nationals) have initiated legal action, including at the World Bank's International Centre for the Settlement of Investment Disputes (ICSID) where several arbitrations against Egypt have been registered in the past three years.

Notwithstanding its turmoil, Egypt remains attractive to foreign investors, to whom the country's demographics, geography, and infrastructure and other needs appeal. For now, many interested foreign investors have taken a wait and see approach. GCC-based investors in particular are likely to step up investment activity in Egypt in the near term, and some have initiated or expanded investment activity since 2011.

Businesses entering or operating in Egypt should take care to independently ensure and diligently document that all applicable laws and administrative procedures are strictly followed, to strengthen their positions should transactions be scrutinized *post hoc*.

Libya

In Libya, corruption within state-owned enterprises, including the Libyan Investment Authority (LIA), the country's sovereign wealth fund, became a subject of public and official interest shortly after that country's revolution. The LIA's prior investments have received special attention—some are believed to have lacked economic merit (made for political purposes) and corruption within the LIA's former ranks is widely suspected. Recently, Prime Minister Ali Zidan announced plans to tackle corruption in state enterprises, government procurement, and hiring by state-owned enterprises. It is unclear what form the planned anti-corruption efforts will take. Given the current unrest in Libya and the government's relative weakness vis-à-vis militias and political factions, the government might face practical challenges in implementing and eventually enforcing anti-corruption measures. Nevertheless, private parties doing business in Libya should be mindful of government and public perceptions of corruption, which likely will influence dealings with private parties, particularly where state-owned entities/assets or concessions are involved.

Qatar

In his first major economic speech recently given, Qatar's new emir identified anti-corruption as a priority going forward, particularly in connection with government procurement for the World Cup and other projects. Notwithstanding the statement's specificity, the Qatari government's anti-corruption posture is likely to extend to other areas of economic activity, as Qatar continues efforts to position itself as a financial services center and a global player generally. Qatar's forthcoming upgrade by MSCI from Frontier Market to Emerging Market Status (along with the UAE) might further incentivize the government to require greater governance and compliance within the financial services industry in particular. On the legal front, Qatar has taken steps to bolster the rule of law, and is building its legal infrastructure in cooperation with outside parties. Recently, for example, the country's judges entered into an MOU with Turkish judicial authorities to mutually improve judicial capacity. In addition, Qatar has engaged the assistance of senior English judges to strengthen its arbitration capacity generally, and specifically to prepare the Qatari International Court to hear disputes arising out of World Cup-related contracts.

UAE/Dubai

As noted above, the UAE will soon be upgraded to Emerging Market status by MSCI (previously Frontier Market). This status change might strengthen the UAE's position in the financial services space, and may bring compliance further into focus.

In Dubai, which leads the Middle East in positioning for financial center status, the government has shown its willingness to prosecute corruption, and did so with vigor in 2009, following revelations of graft in and involving state-affiliated enterprises. Dubai followers will recall that executives of several state-affiliated enterprises were prosecuted or charged (some fled, others are in jail). The standout cases involved former executives of state-affiliated Dubai Islamic Bank (DIB), Istithmar, Nakheel, and real estate development firm Deyaar.

Notably at prosecution, the Deyaar executive was treated as a public official and handed an enhanced penalty on the theory that he abused his official power. Reportedly, two former DIB executives, Pakistan nationals, were also treated as public officials, owing to the Dubai Government's ownership stake (minority) in the bank. Parties doing business with or employed by state-affiliated enterprises should take careful note of the Deyaar and DIB cases. If followed, they could justify enhanced penalties not only for the direct targets of local anti-corruption enforcement, but for counterparties and associates implicated in corruption involving state-linked entities.

FCPA Note: Parties subject to the U.S. Foreign Corrupt Practices Act (FCPA) (discussed above) and similar laws (such as the United Kingdom's Bribery Act (effective July 2011)) that punish the bribery of foreign officials should be particularly mindful of the Deyaar and DIB cases, which raise a Dubai-specific question as to the definition, under the FCPA for example, of "foreign official." U.S. authorities consider as a factor local law and classifications of official status when determining whether a bribe recipient is a foreign official under the FCPA. Thus, the treatment of an individual as a public official in local proceedings, as in the cases of the former Deyaar and DIB executives, would be relevant, even if not determinative for FCPA purposes.

Also in response to financial crisis revelations of fraud, corruption, and poor governance, Dubai expanded the powers and strengthened the enforcement capacity of the Dubai Financial Audit Department (FAD), an affiliate of the Ruler's Court.[1] In summary, the FAD's mandate is to oversee and audit the finances, governance, and organizational efficiency of public bodies (*e.g.*, government departments) and enterprises in which the Dubai Government has an ownership stake of 25% or more. In addition, the FAD may, at its discretion, audit enterprises in which the Dubai Government holds less than 25 per cent. Further, non-state owned or affiliated enterprises may also be audited or inspected by the FAD, if the Ruler of Dubai or the Chairman of the Executive Council orders such an audit or inspection. Importantly, the FAD has the authority to inspect, to the extent relevant to an investigation, firms related to "financial violations" committed by or involving public, semi-private, or other parties under inspection by the FAD. The FAD has subpoena power, and entities that refuse to cooperate with FAD could face "penal and disciplinary" consequences.

As to corruption, the FAD Law is very clear: "accepting or requesting [a] bribe . . . abuse of position, unlawful earning, [or] conflict of interest" constitutes a "financial violation" under the law, where such an act is committed by an official or employee of entities within the FAD's scope. (Article 19(9)).

Parties with operations in or doing business with state-owned or affiliated enterprises in Dubai should be aware of the FAD and its scope of authority.

[1] Law No. (8) of 2010, On the Financial Audit Department ("FAD Law"). This discussion of the FAD Law is based solely on an English translation, which is assumed, but not guaranteed, to be consistent with the original Arabic.

GCC: Family-Owned, Other Private Companies Going Public (Maybe)

It is expected that in the near and medium term, some of the GCC's large family or other privately owned companies will go public. Some companies have publicly expressed interest in doing so; others took steps toward public status and retreated. Statements made by some company leaders indicate that these privately owned firms accustomed to doing business without external oversight and public disclosure are reticent. Nevertheless, it appears that the benefits of public company status might outweigh concerns for some of the GCC's large privately held enterprises. As the GCC's family and other privately owned companies prepare themselves to go, and eventually become public, formalized governance, including enhanced compliance, will follow. Given the importance of large family and other privately owned firms to the economy and business culture of the GCC, their transition to public status and formalized governance will influence business conduct more widely, even among privately held firms.

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ABOUT MASSPOINT

MassPoint Legal and Strategy Advisory PLLC is a Washington, D.C. law and strategy advisory firm that measures its success by the success of its clients. The firm works with diverse parties on matters of finance (conventional and Islamic), compliance and governance, and investment (structuring, market entry, political and legal risk management). The firm's regional focuses are the Middle East, Africa, and the United States. MassPoint distinguishes itself by taking a multi-disciplinary approach to matters and providing legal and strategy services that are innovative, of the highest quality, based on collaborative client relationships, and merge global perspective with meticulous detail. For more information about MassPoint, please visit www.masspointpllc.com or contact the firm at info@masspointpllc.com.

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Hdeel Abdelhady's practice is multi-disciplinary and spans industries, regions, and cultures. Her experience includes representing conventional and Islamic financial institutions in commercial finance and regulatory compliance matters; advising companies on Foreign Corrupt Practices Act (FCPA) and other anti-corruption compliance; and representing parties in investment treaty disputes. Her regional experience includes matters in or involving the United States, the United Arab Emirates, Kuwait, Saudi Arabia, Qatar, Egypt, South Africa, Ghana, Nigeria, and European and Latin American jurisdictions. Having served twice as in-house (secondment) counsel to financial institutions (in Washington, D.C. and in Dubai), Ms. Abdelhady brings to matters an informed appreciation of client priorities. Prior to founding MassPoint, Ms. Abdelhady was in private practice with two U.S.-based international law firms, including in Dubai for three years. Prior to law school, she was a political associate with an award-winning political media strategy firm in Washington, D.C., where she was responsible for research and analysis of congressional, gubernatorial, and mayoral campaigns and elections; ballot referenda; and corporate issues media.

ENDNOTES

[1] Foreign Corrupt Practices Act of 1977, as amended, 15 U.S.C. §§ 78dd-1, et seq.

[2] Press Release, U.S. Securities and Exchange Commission, SEC Charges Former Morgan Stanley Executive with FCPA Violations and Investment Adviser Fraud (April 25, 2012) (with accompanying civil complaint), http://1.usa.gov/1avNw9f.

[3] Chad Bray, *Morgan Stanley Ex-Official in China Sentenced to 9 Months in Prison*, Wall St. Journal, Aug. 16, 2012, http://on.wsj.com/1h46VlL.

[4] Press Release, U.S. Department of Justice, Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA (April 25, 2013), http://1.usa.gov/1e1C2u3.

[5] Press Release, U.S. Department of Justice, Three Former Broker-dealer Employees Plead Guilty in Manhattan Federal Court to Bribery of Foreign Officials, Money Laundering and Conspiracy to Obstruct Justice (Aug. 30, 2013), http://1.usa.gov/Ihz3Tg (with accompanying criminal complaint and civil forfeiture complaint).

[6] David Barboza, Jessica Silver-Greenberg, and Ben Protess, *JPMorgan's Fruitful Ties to a Member of China's Elite*, N.Y. Times, Aug. 19, 2013, http://nyti.ms/1b0qrNP.

[7] JPMorgan Chase & Co., Quarterly Report (Form 10-Q) (Nov. 1, 2013), http://bit.ly/1aEViga; JPMorgan Chase & Co. Quarterly Report (Form 10-Q) (Aug. 7, 2013), http://bit.ly/1hVSRw8.

[8] Jessica Silver-Greenberg and Ben Protess, *U.S. Broadens Investigation of JPMorgan's Hiring in Asia*, N.Y. Times, Nov. 1, 2013, http://nyti.ms/1eaLmfJ.

[9] Andrew Ross Sorkin, Hiring the Well-Connected Isn't Always a Scandal, N.Y. TIMES, Aug. 19, 2013, http://nyti.ms/1bDSlxr.

[10] Enoch Yiu and George Chen, *Banks will not end connected hiring; Financial institutions say employing the children of government officials or important people happens all over the world*, South China Morning Post (Hong Kong), Sept. 16, 2013, http://bit.ly/1aMeaq0.

[11] Press Release, U.S. Department of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fine, Coordinated Enforcement Actions by DOJ, SEC and German Authorities Result in Penalties of $1.6 Billion (Dec. 15, 2008), http://1.usa.gov/1djbtUE.

[12] *See* Agreement Mutual Enforcement of Debarment Decisions (the African Development Bank Group, Asian Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank Group, and World Bank Group), http://bit.ly/19JtFPi.

[13] Overseas Private Investment Corporation Anti-Corruption Polices and Strategies Handbook (2006), at 11.

[14] FCPA, *supra* n. 1.

[15] 15 U.S.C. §§ 78(m), 78ff.

[16] The FCPA applies to: "Domestic Concerns" that are natural U.S. persons who are U.S. citizens, nationals, or residents of the United States; (2) "Issuers" that are foreign and domestic issuers of securities (including shares represented by American Depository Receipts) traded on a U.S. exchange or quoted over-the-counter in the United States; (3) other "Domestic Concerns" that are incorporated or unincorporated business or other organizations or associations that have their principal place of business in, or are organized under the laws of, the United States or any of its subdivisions; and (4) the officers, directors, employees, or agents of Issuers or Domestic Concerns, and their stockholders or others acting on their behalf. 15 U.S.C. § 78ddd-1 (issuers); 15 U.S.C. § 78dd-2.

[17] According to the SEC, as of December 31, 2012, 946 foreign companies are registered or reporting with the SEC. Number of Foreign Companies Registered and Reporting with the U.S. Securities and Exchange Commission as of December 31, 2012, http://www.sec.gov/divisions/corpfin/internatl/foreignsummary2012.pdf.

[18] In 2005, following a DOJ criminal investigation, a Chinese subsidiary of a U.S. company pled guilty to one count of violating the FCPA. The Chinese company, DPC (Tianjin) Co. Ltd., made corrupt payments to the medical personnel of a Chinese government-owned hospital (a state-controlled enterprise or instrumentality of China). The American parent company, Diagnostics Products Corporation (DPC) had no knowledge of the illicit payments, and all of the corrupt acts of the subsidiary were done outside of the United States. Because Tianjin transmitted by email, from its base in China to its parent's base in California, a monthly report "concerning the allowance of payments to doctors and laboratory personnel employed by hospitals owned by the Chinese government to assist in obtaining or retaining agreements for the sale of" its goods, Tianjin came within the "instrumentality of interstate commerce" based jurisdiction of the FCPA. Plea Agreement for DPC (Tianjin) Co. Ltd., United States v. DPC (Tianjin) Co. Ltd., No. 05-CR-482 (C.D. Cal. May 20, 2005), http://www.justice.gov/criminal/fraud/fcpa/cases/dpc-tianjin/05-19-05dpc-tianjin-plea-agree.pdf).

[19] 18 U.S.C. § 1952 (2013).

[20] U.S. Department of Justice and U.S. Securities and Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, 53-54, http://bit.ly/18Hw3GT.

[21] *Id*. at 53.

[22] *See, e.g*., Sigrid Ursula Jernudd, *Comment: China State Secrets, and the Case of Xue Feng: the Implication for International Trade*, 12 CHI. J. INT'L L. 309 (Summer 2011).

[23] *Lijia Zhang, Author: In China, 'everyone is guilty of corruption,'* CNN.com, Oct. 23, 2013, http://cnn.it/1as9utN.

[24] *See, e.g*., Financial Action Task Force*, Guidance, Politically Exposed Persons (Recommendations 12 and 22)*, June 2013 (discussing, *inter alia*, treatment of PEPs and close family members) ("FATF Guidance"); the Wolfsberg Group, *Frequently Asked Questions on Politically Exposed Persons* (2008); Special Due Diligence for Correspondent Accounts and Private Banking Accounts, Definitions, 31 C.F.R. 1010.605 (2013) (SFPF definition includes, *inter alia*, senior executives of "foreign government owned enterprises" and their "immediate family members.").

[25] FATF Guidance, 3, *supra* n. 24.

[26] 12 U.S.C. § 635 (2013).

[27] *See, e.g*., Randall Chase, *Judge in no rush to hear Wal-Mart bribery lawsui*t, The Associated Press, July 16, 2012.

[28] *See, e.g.*, *The Bharti-Walmart Breakup: Where Does FDI in India Go Next?,* Knowledge@Wharton, Nov. 1, 2013, http://knowledge.wharton.upenn.edu/article/bharti-walmart-breakup-fdi-india-go/.

[29] 15 U.S.C. §§ 78dd-2(g)(3), 78dd-3(e)(3), 78ff(c)(3).