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

This is the Middle East Supplement to a MassPoint Occasional Note on globalized anti-corruption enforcement. The full publication is available [here](#). Both this Supplement and the Occasional Note are published for discussion purposes only. Their content is not intended to be, and should not be construed as, legal advice. For more information about this Supplement, the Occasional Note, or the topics discussed therein, please contact [MassPoint PLLC](#).

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 Minister 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) 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.

See the full [Occasional Note](#) for a discussion of the FCPA.

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

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.

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.

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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