Assistant Attorney General Lanny A. Breuer said that in September 2010 Attorney General Eric Holder issued an order directing the Department's Criminal Division, the U.S. Attorneys' Offices, and the FBI to ensure that they are focusing on attacking domestic and international organized crime threats. Breuer previously announced plans to merge the Criminal Division's Organized Crime and Racketeering Section with the DOJ's Gang Unit. These prosecutors have specific experience in prosecuting organized criminal enterprises, and with this new section, the DOJ will be able to sue their expertise against a broad spectrum of criminal groups, in partnership with the U.S. attorneys' Offices.

The DOJ is also using the International Organized Crime Intelligence and Operations Center (IOC-w) that permits prosecutors and agents to coordinate across jurisdictions to target illegal activities of a group operating in more than one city. Federal state, and local agents and prosecutors are synchronizing their efforts and using proactive techniques to investigate these cases, including Title III wiretaps and consensual recordings.[9]

Mr. Breuer said the case illustrates that, while the Justice Department continues to pursue traditional organized crime groups, as shown by a recent major case brought against alleged members of La Cosa Nostra, it is also focusing on all TOC groups, including those from the former Soviet Union.

IX. TRANSNATIONAL CORRUPTION AND ASSET FORFEITURE

A. Compliance in Brazil: Current and Future Perspectives

by Carlos Henrique da Silva Ayres[1]

In recent years, it has been possible to note in the Brazilian business environment an expansion of compliance programs. Although these programs add value to companies, providing more security to investors and avoiding reputational damage, aside from other benefits, they are mostly implemented by Brazilian subsidiaries of American companies subject to the Foreign Corrupt Practices Act ("FCPA") legislation. It remains difficult to find a Brazilian company not subject to the FCPA that has a compliance program in place.

Additionally, the compliance programs of Brazilian subsidiaries consist mainly of translated versions of the programs used by the US headquarters. These programs often disregard the size, nature, and particularities of Brazilian business, as well as the local risks and legal requirements pertaining to the Brazilian subsidiaries.

In February 2010, the Brazilian Executive branch introduced draft bill No. 6.826/2010 in order to comply with international agreements for combating bribery to which Brazil is a signatory. The draft bill addresses civil and administrative liability for corporations for corrupt acts relating to Brazil's national and foreign public administration.

Inspired in the U.S. model of corporate criminal responsibility - although the sanction in the draft bill are civil and administrative - the draft embraces a respondeat superior notion that legal entities will be held liable for acts committed by any of its agents or any body that represents the entity. The legal entity can be held strictly liable

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[9] U.S. Department of Justice, *Assistant Attorney General Lanny A. Breuer of the Criminal Division Speaks at Armenian Power Takedown Press Conference*, Feb. 16, 2011.

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for the acts of its agents, and this liability might be imposed even if the act does not bring any benefit to the company.

The sanctions proposed in the draft bill for companies are harsh: fines of 1% to 30% of the company's gross revenue; publication of the condemnatory ruling (which can cause serious problems for the company's reputation); debarment from public contracts, among other sanctions. Many situations and sanctions introduced in the draft bill already exist in laws surrounding Brazilian competition, public bids and improbity. The draft bill, however, fills some gaps in these laws and addresses acts relating to foreign public officials. It should be more easily applied than current laws that, as general rule, do not allow for strict liability and require a finding of fault by the individuals involved.

The part of draft bill that addresses the application of sanctions has a feature that might stimulate and promote the compliance program in Brazil to reach beyond the companies that are subject to the FCPA. The draft bill sets forth that "the existence of mechanisms and internal integrity procedures, audit and incentive denunciation of irregularities inapplying the code of conduct and ethics within the legal entity," in addition to other factors, will be taken into consideration when determining the sanctions to be applied. Such feature allows a company to get a smaller sanction if it had a pre-existing and effective compliance program in place. The draft bill does not present a list of mechanisms that the company must have in order to qualify for a reduction in sanctions. However, in areas and activities where the likelihood of corruption is high, it seems that the company will be required to have more rigorous policies to avoid bribery. In any case, the mere creation and revision of compliance programs are not enough: the programs must also be effective. Furthermore, employees must observe these programs, and this has been a problem in Brazil.

Another important feature of the draft bill is that it sets forth that "the cooperation with investigation of infractions, through means such as communication of the illegal act to the public authorities before the initiation of a proceeding, and the celerity to provide information in the course of the investigation" will also be taken into consideration when determining the sanction to be applied. Compliance programs, therefore, might help companies to detect and remediate in a timely manner any improper acts that might occur. With such information the company can, if it so chooses, voluntarily disclose any wrongdoing.

With respect to cooperation with investigations, individuals in Brazil (with exception of public officials) have no duty to report a criminal act. However, in environmental, tax and regulatory areas, there are some duties to report to and involve public authorities, depending on the case. In general, companies are not obliged to report to the authorities the illegalities that they find.

On the one hand, cooperation with public authorities could render the company some civil or administrative penalty advantages, as it would show that the company is willing to make all the necessary efforts to stop any wrongdoing within its organization. On the other hand, once the authorities are involved and a police investigation is initiated upon a company's request, the police have the right and the duty to investigate any facts and information about any conduct, individuals or crimes (including any other irregularities within the company) that any party (including the individuals who allegedly committed the wrongdoings) bring to the police's attention. In other words, once a criminal investigation has been initiated, the control of the investigation belongs exclusively to the authorities (not to the company), and they will be able to investigate whatever issues they deem necessary.

Brazilian companies usually take a more conservative and defensive approach when dealing with local authorities. Their cooperation with authorities could render slight favor for the company and minimize its penalties, however, companies in Brazil do not yet have a strong culture of cooperation. In 2000, a leniency program was established to give administrative and criminal immunity to individuals and companies. However, this program is

applicable only in antitrust cases and not more than a few dozens of such cases have been initiated since the program was created. Also, Brazilian prosecutors - unlike in the U.S - do not have great discretion in deciding whether or not to bring a criminal case and what charges to file, in cases where the evidence would justify prosecution.

It is important to mention that, in Brazil, with the exception of environment-related offenses, corporations cannot be held criminally liable for the acts and omissions of their employees and agents. Criminal liability is personal - meaning that only the person who is directly related to the crime may be held liable for the illicit act. However, all of a corporation's employees and agents who have committed any criminal act can be held liable for the offense, even if the offender acted on behalf of the corporation. Making corrupt payments to national and foreign public officials might subject individuals to imprisonment of up to twelve years, although the enforceability of corrupt payments to foreign officials is not easy for many reasons. It is important to mention that although corporations cannot be held criminally liable for crimes other than environmental-related offenses, they still might be subject to civil and/or administrative liability for those acts.

The draft bill is another indication that Brazilian authorities are closing ranks against corruption. Brazil has signed three important conventions against corruption: The United Nations Convention against Corruption; The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; and The Inter-American Convention Against Corruption. In 2010, the Brazilian Federal Police conducted 270 special operations to combat corruption, money laundering and related crimes. As a result, 2,734 individuals were arrested, and a number of foreign multinationals - including U.S. and other companies subject to the FCPA or other similar foreign legislation - were implicated. In some cases, information obtained by the Brazilian authorities was shared with the U.S. authorities. If passed, draft bill No. 6.826/2010 will likely continue to stimulate the development of compliance programs in Brazil.

B. U.K. Postpones Indefinitely Implementation of New Bribery Laws

by Bruce Zagaris

On February 1, 2011, the British Ministry of Justice (MOJ) announced that it has delayed indefinitely the implementation of its new anti-bribery law until it finishes guidance on the due diligence procedure businesses should adopt.[1]

The Bribery Act was to have been effective in April. It requires business to adopt anti-bribery due diligence procedures as a means to prevent incurring harsh fines or their personnel receiving prison sentences.

Last month the MOJ said it was reconsidering some of the new bribery laws as part of a "Growth Review" the government is performing to identify obstacles to the U.K.'s economic growth. An MOJ spokesman has said the guidance is intended to make the Act practical and comprehensive for business. Once it is published, there will be a three month notice period before the Act is implemented.[2]

In July 2010, the U.K. government delayed implementation for the first time the first significant reform of U.K. anti-corruption rules in more than one century after criticism from the Organization for Economic Co-operation and Development, which is threatening to blacklist U.K. exporters if the U.K. government delays further. In 2006,

[1] Ali Qassim, *U.K. Delays New Bribery Laws Until Business Guidelines Published*, DAILY REP. FOR EXEC., Feb. 2, 2011, at EE-6.

[2] *Id.*