



2017 Mid-Year Cross-Border Government Investigations and Regulatory Enforcement Review

BakerHostetler

Table of Contents

Introduction	3
Cross-Border Regulatory and Enforcement Updates	5
Securities Fraud	6
Anti-Money Laundering	17
Corruption Investigations in International Sports - FIFA	21
Trade Sanctions and Export Controls	23
International Parallels In Law Enforcement Methods and Priorities	25
Whistleblower Programs	26
Deferred Prosecution Agreements	27
U.S. Government's Authority to Seize Data Stored Overseas	30
Practical Considerations In Defending Against Cross-Border Regulatory Investigations	32
Data Privacy	33
Legal Privileges	34

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Introduction

Welcome to BakerHostetler's semi-annual *Cross-Border Government Investigations and Regulatory Enforcement Review*, with this edition delivering news, analysis and insights into key developments in the cross-border investigations and enforcement landscape during the first half of 2017. Perhaps more than any other period covered by this report, the first half of 2017 saw a marked, and by some measures unprecedented, uptick in international coordination in cross-border civil and criminal investigations and enforcement. U.S. authorities continue aggressive enforcement in parallel with their international counterparts, targeting a wide range of abusive practices – from securities fraud, to money laundering, to manipulation of benchmark interest rates – that have effects across multiple borders. Meanwhile, U.S. criminal and regulatory authorities are increasingly joining forces with law enforcement agencies in other countries to cooperatively investigate and prosecute cases. The level of cooperation has become so extensive that it often operates on an informal basis, with prosecutors across jurisdictions sharing information without resorting to formal channels. As Acting Principal Deputy Assistant Attorney General Trevor N. McFadden has put it, reciprocal information sharing is giving rise to an emerging trend: “an increase in multi-jurisdictional prosecutions of criminal conduct, particularly when that conduct is transnational in nature and when several countries have prosecutorial authority over it.”¹

While, from a regulator's perspective, informal reciprocal information sharing is likely to increase the efficiency of cross-border investigations, it can also raise concerns about the protection of individuals and corporations against unwarranted invasions of personal or financial privacy. While such targets could benefit from decreased costs of defending multi-jurisdictional investigations – and possibly even see smaller penalties when considered in the aggregate – the duty to comply with the often-conflicting laws and regulatory requirements of multiple jurisdictions means compliance can boil down to a choice between a rock and a hard place. For that reason, it is crucial for individuals, corporations and counsel operating in multiple countries to stay current on the rapidly evolving and unpredictable cross-border investigations and enforcement landscape.

BakerHostetler's *2017 Mid-Year Cross-Border Government Investigations and Regulatory Enforcement Review* serves as an important guide to navigating the challenges of complying with the myriad international legal and regulatory regimes, and the implications of operating in a cross-border environment. Part I of this report provides updates and analysis of cross-border investigations and enforcement actions, highlighting the role that increased information cross-sharing plays in the enforcement of violations that reach across national boundaries. Part II discusses the various parallels in law enforcement methods and priorities for the first half of 2017, including the increased use of deferred prosecution agreements to obtain cooperation in investigations, as well as the U.S. government's continued efforts to seize data stored overseas. Finally, Part III highlights some key practical considerations in defending against cross-border investigations and enforcement actions, with a focus on data privacy concerns and developments in the law surrounding the attorney-client privilege in non-U.S. jurisdictions. We encourage you to read this report in conjunction with BakerHostetler's other year-end reviews that concern cross-border regulatory and enforcement

¹ Remarks, Acting Principal Deputy Assistant Attorney General Trevor N. McFadden, São Paulo Brazil (May 24, 2017), <https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-speaks-american>.

Introduction

issues, including: *Foreign Corrupt Practices Act 2017 Mid-Year Update*, *2017 Mid-Year Securities Litigation and Enforcement Highlights*, *2016 Class Action Year-End Review*, *Financial Services 2016 Year-End Report*, *Data Security Incident Response Report*, and *Securities & Governance Bulletin*. Please feel free to contact any member of the BakerHostetler White Collar Defense and Corporate Investigations team listed at the end of this report with any questions.



Cross-Border Regulatory and Enforcement Updates

Securities Fraud

Cross-Border Regulatory and Enforcement Updates

The alleged conduct involved in complex securities fraud, in particular market manipulation and abuse, frequently crosses national boundaries. For that reason, securities fraud is one of the more prevalent areas of cross-border regulation and enforcement. In the first half of 2017, U.S. and foreign regulators have continued their enforcement activities against alleged “spoofing” and manipulation of the London Interbank Offered Rate (LIBOR) and foreign-exchange spot markets (the FX market). Regulators have also maintained their focus on alleged insider trading and transparency in the credit default swaps markets.

Market Manipulation

“Spoofing”

In the first half of 2017, regulators in the U.S. and abroad have continued aggressively pursuing criminal and civil liability for market participants engaged in spoofing. Spoofing is a trading tactic in which traders place sham orders to artificially inflate or depress the price of a security, with the intent to cancel the order and profit off the manipulated price. Spoofing activity is expressly prohibited under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act), which Congress passed soon after regulators credited spoofing as the main cause of the May 6, 2010, “Flash Crash” that saw the Dow Jones Industrial Average plummet 1,000 points in minutes. Foreign regulators have followed suit as this manipulative practice spread overseas and began impacting the foreign securities markets.

There have been several significant spoofing-related events this year. Chief among them is the Seventh Circuit Court of Appeals’ recent ruling in *United States v. Coscia*. As reported in our [2016 Mid-Year Report](#), Michael Coscia is the first person to stand trial for violating the anti-spoofing laws under the Dodd-Frank Act. In November 2015, a federal jury in Chicago found him guilty,² and months later, he was sentenced to three years in prison and two years of supervised release.³ Last year, Coscia appealed the jury verdict under the legal theory that the anti-spoofing laws under the Dodd-Frank Act were unconstitutionally vague because they encompass innocuous conduct that commodities traders routinely undertake.⁴ On August 7, 2017, the Seventh Circuit Court of Appeals unanimously rejected Coscia’s legal arguments and affirmed the jury verdict against him.⁵ Chief among the rejected arguments was that the anti-spoofing provision under the Commodity Exchange Act is unconstitutionally vague. The Seventh Circuit Court of Appeals held that the provision’s text provides sufficient notice as to what conduct falls under the crime of spoofing.⁶ It also held that the application of this provision to this case was not arbitrary, and the appellate record supported the jury’s guilty verdict.⁷ This ruling will likely embolden U.S. regulators to continue targeting companies and individuals involved in spoofing-related activity.

2 Press Release, U.S. Department of Justice, “High Frequency Trader Convicted of Disrupting Commodity Futures Market in First Federal Prosecution of ‘Spoofing’” (Nov. 3, 2015), <http://www.justice.gov/usao-ndil/pr/high-frequency-trader-convicted-disrupting-commodity-futures-market-first-federal>.

3 *United States v. Coscia*, No. 14-cr-551 (N.D. Ill. 2016) (Dkt. No. 124).

4 *United States v. Coscia*, No. 16-3017, 2017 WL 3381433 (7th Cir. Aug. 7, 2017).

5 *Id.*

6 *Id.* at *6-7.

7 *Id.* at *8-13.

Cross-Border Regulatory and Enforcement Updates

Another significant spoofing-related event this year was the successful U.S. prosecution of a former Deutsche Bank AG futures trader in Singapore, David Liew, marking the first time that a trader at one of the world's biggest financial institutions has been criminally prosecuted for spoofing. On May 24, 2017, the U.S. Department of Justice (the DOJ) brought charges against Liew in Chicago federal court over allegations of manipulating contracts for gold, silver, platinum and palladium by placing (and then canceling) orders he never intended to fill, creating a false sense of supply or demand that allowed him to profit.⁸ On June 1, 2017, Liew pleaded guilty to one count of conspiracy to commit wire fraud for his role in this spoofing scheme.⁹ Liew's conviction represents the first significant result in a broader federal criminal investigation into whether traders at various large global financial institutions have conspired to manipulate prices in the precious metals markets.¹⁰

Also on June 1, 2017, Liew settled the U.S. Commodities Futures Trading Commission (CFTC) enforcement action that ran parallel to his criminal proceeding. The CFTC charged Liew for "engaging in numerous acts of spoofing, attempted manipulation, and, at times, manipulation of the gold and silver futures markets."¹¹ As part of his settlement, Liew received a lifetime ban from trading commodity interests.¹² Liew also agreed to cooperate with government officials in connection with his settlement in exchange for the CFTC agreeing not to impose a civil monetary penalty against him.¹³ According to the CFTC's Director of Enforcement, James McDonald, the resolution of this enforcement action "demonstrates that the [CFTC] will aggressively pursue individuals who manipulate and spoof in our markets. [The] action also shows that while holding individuals accountable for their conduct, the [CFTC] will give meaningful cooperation credit to those who acknowledge their own wrongdoing, enter into a Cooperation Agreement and provide substantial assistance to the Division in its investigations and enforcement actions against others who have engaged in illegal conduct."¹⁴

In addition to the enforcement action against Liew, the CFTC has been very active in prosecuting spoofing-related activity this year. On January 19, 2017, the second-to-last day in Timothy Massad's tenure as CFTC Chairman, the CFTC announced that it settled spoofing-related charges with Citigroup.¹⁵ Citigroup agreed to pay a \$25 million penalty to settle the CFTC's allegations that five of Citigroup's traders repeatedly placed orders that they intended to cancel, so as to manipulate the market prices of those securities for profit.¹⁶ This alleged scheme occurred between July 2011 and December 2012 on the Chicago Mercantile Exchange (CME).¹⁷ Although Citigroup neither admitted nor denied the charges, this settlement is significant because it was the first of its kind featuring a major U.S. financial institution.

8 Criminal Information, *United States v. Liew*, No. 17 Cr. 001 (N.D. Ill. May 24, 2017).

9 Plea Agreement, *United States v. Liew*, No. 17 Cr. 001 (N.D. Ill. June 1, 2017), <https://www.justice.gov/criminal-fraud/file/972986/download>.

10 Tom Schoenberg, "Ex Trader Linked to Deutsche Bank is Aiding U.S. Spoof Probe," Bloomberg (June 2, 2017), <https://www.bloomberg.com/news/articles/2017-06-02/trader-pleading-guilty-in-metals-probe-tied-to-deutsche-bank>.

11 *Order, In the Matter of: David Liew*, CFTC Docket No. 17-14 (June 2, 2017).

12 *Id.* at § VII(C).

13 *Id.* at § VII(B).

14 Press Release, U.S. Commodities and Futures Trading Comm'n, "CFTC Finds Former Trader David Liew Engaged in Spoofing and Manipulation of the Gold and Silver Futures Markets and Permanently Bans Him from Trading and Other Activities in CFTC-Regulated Markets," Rel. No. pr7567-17 (June 2, 2017).

15 Press Release, U.S. Commodities and Futures Trading Comm'n, "CFTC Orders Citigroup Global Markets Inc. To Pay \$25 Million for Spoofing in U.S. Treasury Futures Markets and for Related Supervision Failures," Rel. No. 7516-17 (January 19, 2017), <http://www.cftc.gov/PressRoom/PressReleases/pr7516-17>.

16 *Id.*

17 *Id.*

Cross-Border Regulatory and Enforcement Updates

The new CFTC administration, under Chairman J. Christopher Giancarlo, continued right where the former administration left off. In March 2017, the CFTC issued two orders settling charges against two of the former Citigroup traders referenced above – Stephen Gola and Jonathan Brims – for spoofing.¹⁸ The settlement against Gola imposes a \$350,000 civil monetary penalty,¹⁹ and the settlement against Brims imposes a \$200,000 penalty.²⁰ The settlements also imposed a six-month futures and swaps trading ban against the former Citigroup traders.²¹ According to the orders, Gola and Brims “each engaged in the disruptive practice of spoofing more than 1,000 times in various CME U.S. Treasury futures products.”²² Their spoofing “strategy involved placing bids or offers of 1,000 lots or more with the intent to cancel those orders before execution.”²³ The spoofing orders were placed in the U.S. Treasury futures markets after another smaller bid or offer was placed on the opposite side of the same or a correlated futures or cash market.”²⁴ On June 29, 2017, three of the other Citigroup traders referenced above – Jeremy Lao, Daniel Liao (who was based in Tokyo) and Shlomo Salant – entered into non-prosecution agreements with the CFTC, agreeing to cooperate in the CFTC’s ongoing investigation into alleged spoofing in return for avoiding sanctions.²⁵

Market participants can expect the CFTC’s prosecution of spoofing-related activity to continue. In May 2017, the CFTC launched a new initiative called “LabCFTC” which promotes responsible financial technology innovation, with the goal of improving the quality and competitiveness of the markets the CFTC oversees.²⁶ According to Giancarlo, LabCFTC is “intended to help us bridge the gap from where we are today to where we need to be: Twenty-First century regulation for 21st century digital markets.”²⁷ Further, Giancarlo contended that “[t]he purpose of LabCFTC is twofold: The first is to provide greater regulatory certainty that encourages market-enhancing FinTech innovation to improve the quality, resiliency, and competitiveness of our markets. The second is to identify and utilize emerging technologies that can enable the CFTC to carry out its mission more effectively and efficiently in the new digital world.”²⁸ In other words, the CFTC is working toward bridging the regulatory gap between technologically advanced trading violations, like spoofing, and the agency’s regulatory efforts to curb such practices.

18 Press Release, U.S. Commodities and Futures Trading Comm’n, “CFTC Orders Former Citigroup Global Markets Inc. Traders Stephen Gola and Jonathan Brims to Pay \$350,000 and \$200,000, Respectively, and Bans Them from Trading for 6 Months for Spoofing in U.S. Treasury Futures Markets,” Rel. No. 7542-17 (March 30, 2017), <http://www.cftc.gov/PressRoom/PressReleases/pr7542-17>.

19 Order, *In the Matter of: Stephen Gola*, U.S. Commodities and Futures Trading Comm’n, CFTC Docket. No. 17-12 (Mar. 30, 2017), <http://www.cftc.gov/ido/groups/public/@lrenforcementactions/documents/legalpleading/enfgolaorder033017.pdf>.

20 Order, *In the Matter of: Jonathan Brims*, U.S. Commodities and Futures Trading Comm’n, CFTC Docket. No. 17-13 (Mar. 30, 2017), <http://www.cftc.gov/ido/groups/public/@lrenforcementactions/documents/legalpleading/enfjbrimsorder033017.pdf>.

21 *Id.* at § VII(C); Gola Order, at § VII(C).

22 *See supra* note 18.

23 *Id.*

24 *Id.*

25 Press Release, U.S. Commodities and Futures Trading Comm’n, “CFTC Enters into Non-Prosecution Agreements with Former Citigroup Global Markets Inc. Traders Jeremy Lao, Daniel Liao, and Shlomo Salant,” Rel. No. 7581-17 (June 29, 2017), <http://www.cftc.gov/PressRoom/PressReleases/pr7581-17>.

26 Press Release, U.S. Commodities and Futures Trading Comm’n, “CFTC Launches LabCFTC as Major FinTech Initiative,” Rel. No. pr7558-17 (May 17, 2017), <http://www.cftc.gov/PressRoom/PressReleases/pr7558-17>.

27 Speech, “Address of CFTC Acting Chairman J. Christopher Giancarlo before the New York FinTech Innovation Lab” (May 17, 2017), <http://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-23>.

28 *Supra* note 26.

Cross-Border Regulatory and Enforcement Updates

Last but not least, on March 10, 2017, the U.S. Securities and Exchange Commission (SEC) announced fraud charges against a Ukrainian trading firm, Avalon FA Ltd. (Avalon); a New York-based brokerage firm, Lek Securities Corporation (Lek); and others based on spoofing-related activity.²⁹ The SEC alleges that Avalon made more than \$21 million by placing hundreds of thousands of trade orders and later canceling them after tricking others into buying or selling stocks at artificial prices.³⁰ The SEC further alleges that Lek facilitated this spoofing-related scheme by providing Avalon with direct access to the U.S. securities markets and assisting in Avalon's illegal trading activity.³¹ Lek and its principal, Samuel Lek, refuted the charges and opposed the SEC's motion for a preliminary injunction freezing assets, asserting that placing an order and subsequently canceling it is not an illegal act or otherwise prosecutable under the U.S. securities laws.³² They followed up with a motion to dismiss on June 2, 2017, which was denied on August 25, 2017.³³ In denying the motion, the court held that the SEC had adequately alleged that Avalon violated federal securities fraud provisions by engaging in a scheme designed to manipulate U.S. securities, and that Lek and its principal aided and abetted Avalon's scheme.³⁴ With respect to the defendants' arguments about Avalon's intentions, the court held that such arguments were factual in nature and, hence, improper at this stage of the litigation.³⁵ This case remains ongoing.³⁶

U.S. regulators' recent successes in prosecuting spoofing-related activity have perhaps emboldened foreign regulators to do the same. In March 2017, Dennis Tey Thean Yang, a former trader at DBS Group Holdings Ltd.'s brokerage unit, pleaded guilty to charges that he attempted to artificially move prices through fraudulent trades in Singapore's first criminal spoofing case.³⁷ The Singapore district judge overseeing this case sentenced Yang to 16 weeks in prison, noting that it is important to root out spoofing in order to restore confidence in the financial markets and protect market participants. Also, in July 2017, the Japan Exchange Group commenced a spoofing-related disciplinary action against Morgan Stanley MUFG Securities Co., Ltd. (Morgan Stanley).³⁸ This action comes on the heels of regulatory findings that in 2015 Morgan Stanley had placed multiple small-quantity buy orders that it had no intention of filling.³⁹ Morgan Stanley faces a suspension and a \$714,203 fine.⁴⁰

29 Press Release, Sec. & Exch. Comm'n, "SEC Charges Firms Involved in Layering, Manipulation Schemes," Rel. No. 2017-63, <https://www.sec.gov/news/pressrelease/2017-63.html>.

30 Complaint, *Sec. & Exch. Comm'n v. Lek Sec. Corp.*, No. 17-cv-1789 (S.D.N.Y. Mar. 10, 2017), ¶ 35 (ECF No. 1).

31 *Id.* at ¶ 6.

32 Opp. to Mot. for Prelim. Injunction, *Sec. & Exch. Comm'n v. Lek Sec. Corp.*, No. 17-cv-1789 (S.D.N.Y. Apr. 7, 2017) (ECF No. 51).

33 Opinion and Order, *Sec. & Exch. Comm'n v. Lek Sec. Corp.*, No. 17-cv-1789 (S.D.N.Y. Aug. 25, 2017) (ECF No. 101).

34 *Id.* at pp. 12-26.

35 *Id.* at pp. 26-29.

36 Also pending is an enforcement action brought against Lek and its CEO, Samuel F. Lek, by the U.S. Financial Industry Regulatory Authority (FINRA) and various stock exchanges, including the New York Stock Exchange. Press Release, "FINRA and Exchanges Charge Lek Securities and CEO Samuel F. Lek with Aiding and Abetting Securities Fraud" (Mar. 27, 2017), <https://www.finra.org/newsroom/2017/finra-exchanges-charge-lek-securities-its-ceo-aiding-abetting-securities-fraud>. This action also alleges that the defendants aided and abetted securities fraud through their facilitation of Avalon's manipulative trading scheme. *Id.*

37 Andrea Tan and Livia Yap, "Ex-DBS Trader Convicted in Singapore's First Spoofing Case," Bloomberg (Mar. 9, 2017), <https://www.bloomberg.com/news/articles/2017-03-10/singapore-regulator-secures-first-market-spoofing-admission>.

38 Press Release, Jap. Exch. Grp., "TSE and OSE Impose Disciplinary Action against Morgan Stanley MUFG Securities Co., Ltd." (July 19, 2017), <http://www.jpx.co.jp/english/news/1060/20170719.html>.

39 *Id.*

40 *Id.*

Cross-Border Regulatory and Enforcement Updates

It bears watching whether the accelerated pace of spoofing-related enforcement in the U.S. and abroad will continue in the coming months. CFTC Chairman Giancarlo indicated in March 2017 that the CFTC may be backing away from prosecuting complex securities violations,⁴¹ which some perceived to refer to spoofing-related enforcement actions. But so far, the CFTC and other federal regulators under the Trump administration appear to be prosecuting spoofing-related activity as aggressively as in the recent past.

LIBOR

In July, the Second Circuit Court of Appeals created a potentially serious obstacle to the U.S.'s cross-border enforcement efforts. Reversing the DOJ's high-profile convictions of Rabobank's former global head of liquidity and finance, Anthony Allen, and former derivatives trader Anthony Conti for rigging the LIBOR, the court ruled that the Fifth Amendment prohibits use of compelled testimony in American criminal proceedings even when a foreign sovereign has compelled the testimony.⁴² The Court also ruled that when the government makes use of a witness who had substantial exposure to a defendant's compelled testimony, it is required to prove that the witness's review of the compelled testimony did not "taint" the evidence used by the government.⁴³

The case, *United States v. Allen*, arose out of parallel investigations conducted by the U.S. Financial Conduct Authority (FCA) and the DOJ into the alleged manipulation of the LIBOR by Rabobank employees.⁴⁴ In connection with the investigation, Rabobank traders and U.K. citizens Allen and Conti were interviewed by the FCA in 2013 pursuant to the FCA's statutory authority to compel interviews.⁴⁵ In November 2013, the FCA initiated an enforcement action against a third Rabobank trader, Paul Robson and following its normal procedure, disclosed the relevant evidence against him.⁴⁶ This included transcripts of the compelled testimony of Allen and Conti.⁴⁷

The following year, a grand jury in the SDNY indicted Robson and two other Rabobank derivative traders.⁴⁸ Robson subsequently pleaded guilty and entered into a cooperation agreement with the DOJ pursuant to which he was required to provide evidence against other Rabobank employees in connection with the LIBOR scandal.⁴⁹ Based on statements made by Robson in connection with his cooperation agreement, Allen and Conti were indicted on multiple counts of wire fraud and conspiracy to commit wire fraud in connection with their roles in the scandal.⁵⁰

Prior to their criminal trial, Allen and Conti attempted unsuccessfully to suppress Robson's testimony pursuant to the Supreme Court's seminal ruling in *Kastigar v. United States* because it was based on Allen and Conti's compelled testimony to the FCA.⁵¹ The district court ruled in favor of the prosecution, finding that Robson's review of Allen and Conti's FCA testimony did

41 See Speech, U.S. Commodities and Futures Trading Comm'n Chairman J. Christopher Giancarlo, "Transforming the CFTC" (Mar. 30, 2017), <http://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-21>.

42 *United States v. Allen*, 864 F.3d 63, 68 (2d Cir. 2017).

43 *Id.* at 68-69.

44 *Id.* at 76.

45 *Id.*

46 *Id.*

47 *Id.* at 76-77.

48 *Id.* at 77.

49 *Id.* at 78.

50 *Id.*

51 *Id.*

Cross-Border Regulatory and Enforcement Updates

not taint statements he later gave to the DOJ because the DOJ demonstrated that Robson's statements were based on his own personal experience and observations.⁵² Allen and Conti were subsequently convicted, and each was sentenced to more than a year in prison.

On appeal, Allen and Conti argued that their Fifth Amendment right against self-incrimination was violated when the DOJ used "tainted evidence" from Robson that was based on statements they were compelled to make to the FCA.⁵³ The DOJ argued that the Fifth Amendment did not apply to testimony compelled by a foreign government and that the testimony was untainted in any case.⁵⁴ The Second Circuit disagreed, holding that incriminating statements obtained by foreign governments must be voluntary in order to be admissible in U.S. courts, even if the statements were made lawfully.⁵⁵

The Second Circuit's decision in *United States v. Allen* will create considerable difficulties for U.S. authorities engaged in cross-border criminal investigations with law enforcement counterparts in the U.K., Latin America and elsewhere. Going forward, the DOJ and other U.S. agencies will have to take care to coordinate with these foreign counterparts to ensure witnesses have not been exposed to involuntary statements made overseas.

In other U.S. enforcement activities concerning the alleged manipulation of the LIBOR, in March, Deutsche Bank's London subsidiary, DB Group Services (U.K.) Limited, was sentenced for its role in manipulating the LIBOR in the District of Connecticut.⁵⁶ DB Group Services pleaded guilty on April 23, 2015, to one count of wire fraud for its role in the scandal.⁵⁷ DB Group Services signed a plea agreement in which it admitted to its criminal conduct and agreed to pay a \$150 million fine, which the court imposed in its sentence.⁵⁸ According to the plea agreement, from at least 2003 through early 2010, numerous Deutsche Bank derivatives traders – whose compensation was directly connected to their success in trading financial products tied to the LIBOR – engaged in efforts to move the benchmark rates in a direction favorable to their trading positions.⁵⁹

In the U.K., in April 2017, the U.K. Serious Fraud Office (the SFO) was dealt another blow in terms of prosecuting individuals allegedly involved in rigging the LIBOR. After they were tried a second time, a London jury found former Barclays PLC derivatives traders Stylianos Contogoulas and Ryan Reich not guilty of dishonestly rigging the LIBOR in order to boost their profits.⁶⁰ During their first trial in June 2016, a jury was unable to reach a verdict.⁶¹ This follows the acquittal of five former brokers who were charged with conspiring with former UBS and Citigroup trader Tom Hayes to manipulate the LIBOR in January 2016.⁶²

52 *Id.* at 79.

53 *Id.*

54 *Id.*

55 *Id.* at 68.

56 Press Release, U.S. Department of Justice, "Deutsche Bank's London Subsidiary Sentenced for Manipulation of LIBOR," Rel. No. 17-327 (March 28, 2017), <https://www.justice.gov/opa/pr/deutsche-bank-s-london-subsiary-sentenced-manipulation-libor>.

57 *Id.*

58 *Id.*

59 *Id.*

60 Alex Davis, *Ex-Barclays Traders Acquitted in Libor Rigging Retrial*, Law 360 (April 6, 2017), https://www.law360.com/whitecollar/articles/910051/ex-barclays-traders-acquitted-in-libor-rigging-retrial?nl_pk=7d552c11-ea47-4657-8ff6.

61 *Id.*

62 Melissa Lipman, *Jury Acquits 5 Ex-Brokers in London Libor Rigging Trial*, Law 360 (January 27, 2016), <https://www.law360.com/articles/751362/>.

Cross-Border Regulatory and Enforcement Updates

Also in April 2017, BBC News uncovered a leaked secret recording of a conversation between two former Barclays bankers that implicates the Bank of England in the alleged LIBOR manipulation.⁶³ Since the LIBOR scandal first came to the public's attention in 2012, the Bank of England has consistently maintained that it was not aware of LIBOR manipulation until much later.⁶⁴ However, the secret recording, which dates back to 2008, appears to contradict the Bank of England's claim.⁶⁵ The recording involves senior Barclays manager Mark Dearlove and Barclays submitter Peter Johnson, and suggests that Barclays had "some very serious pressure from the U.K. government and the Bank of England about pushing" its LIBOR rates lower.⁶⁶ Thus far, the Bank of England has maintained it had no involvement in the LIBOR scandal, despite the 2008 recording, emphasizing that the LIBOR and other global benchmarks were not regulated in the UK during that time and that the Bank of England has been assisting the SFO's LIBOR investigations on a voluntary basis.⁶⁷ There has not been any indication that any U.K. authority is investigating the Bank of England's role in the LIBOR scandal.

Finally, in a surprising development, both the U.S. and the U.K. have indicated plans to phase out the LIBOR benchmark over the coming years. In the U.S., the Alternative Reference Rates Committee (ARRC) announced a preference for a broad Treasuries repo financing rate on June 22.⁶⁸ According to the ARRC, the broad Treasuries repo financing rate, which the Federal Reserve Bank of New York has proposed publishing in cooperation with the Office of Financial Research, represents best practice for use in certain new U.S. dollar derivatives and other financial contracts.⁶⁹ Similarly, the FCA announced in July that it would begin to work on a plan to phase out the LIBOR benchmark by 2021 because banks no longer wish to participate in setting the rate.⁷⁰

The FX Market

The FX market manipulation cases relating to the alleged foreign currency exchange antitrust conspiracy – including some involving the world's biggest banks – continue. While the U.K. closed its investigations last year without charges, the U.S. is still actively pursuing cases.⁷¹ To date, the U.S. has now charged six individuals in connection with the probe.⁷²

Jason Katz, a former trader for Barclays and BNP Paribas, pleaded guilty in federal court in Manhattan on January 4, 2017 to participating in a price-fixing conspiracy.⁷³ Katz worked on the New York FX desks of three successive financial institutions, dealing in Central and Eastern

63 Lianna Brinded, *Secret Recording Reportedly Implicates the Bank of England in LIBOR Fixing*, Business Insider (April 10, 2017), <http://www.businessinsider.com/bbc-report-secret-recording-allegedly-implicates-bank-of-england-boe-libor-fixing-2017-4?r=UK&IR=T>.

64 *Id.*

65 *Id.*

66 Andy Verity, *Libor: Bank of England Implicated in Secret Recording*, BBC News (April 10, 2017), <http://www.bbc.com/news/business-39548313>.

67 *Id.*

68 *Id.*

69 Press Release, Alternative Reference Rates Committee, "The ARRC Selects a Broad Repo Rate as its Preferred Alternative Reference Rate," (June 22, 2017), <https://www.newyorkfed.org/medialibrary/microsites/arrc/files/2017/ARRC-press-release-Jun-22-2017.pdf>.

70 Max Colchester, *Scandal-hit Libor to Be Phased Out* (July 17, 2017), <http://www.marketwatch.com/story/scandal-hit-libor-to-be-phased-out-2017-07-27>.

71 Chad Bray, *Ex-Traders in Britain to Face Currency-Rigging Charges in U.S.*, NYTimes (June 13, 2017), <http://www.nytimes.com/2017/06/13/business/dealbook/currency-usd-trader-britain-exchange.html>.

72 Jody Godoy, *3 More Ex-Currency Traders Charged With Forex Rate Rigging*, Law360 (Jan. 10, 2017), <https://www.law360.com/securities/articles/879265>.

73 Press Release, U.S. Department of Justice, "Foreign Currency Exchange Dealer Pleads Guilty to Antitrust Conspiracy: First Individual Plea in Ongoing Investigation," Rel. No. 17-002 (Jan. 4, 2017), <https://www.justice.gov/opa/pr/foreign-currency-exchange-dealer-pleads-guilty-antitrust-conspiracy>; Chad Bray, *Former Barclays Trader Pleads Guilty in Currency Manipulation Conspiracy*, NYTimes (Jan. 4, 2017), <https://www.nytimes.com/2017/06/13/business/dealbook/currency-usd-trader-britain-exchange.html>.

Cross-Border Regulatory and Enforcement Updates

European, Middle Eastern and African currencies. Katz is the first person in this conspiracy to admit to criminal wrongdoing. Katz admitted to conspiring to “suppress competition by fixing prices in currencies from countries in Central and Eastern Europe, the Middle East and Africa” from January 2007 to July 2013.⁷⁴ Katz has also entered into a consent agreement that requires him to cooperate with the investigation and bars him from the banking industry.⁷⁵

Mark Johnson and Stuart Scott, former HSBC executives who were charged last year, currently await trial. Johnson and Scott allegedly misused information provided to them by an HSBC client pertaining to a planned sale of a subsidiary of the client.⁷⁶ They then purportedly schemed to execute a foreign exchange transaction by misusing confidential information about the client’s transaction and purchasing pound sterling for HSBC proprietary accounts that were held until execution of the client’s transaction.⁷⁷ Johnson and Scott allegedly misrepresented to the client about the transactions, and caused the \$3.5 billion foreign exchange transaction to be executed in a way that would spike the value of the Pound Sterling for the benefit of HSBC and themselves at the expense of the client.⁷⁸ Johnson was arrested at JFK International Airport and has pleaded not guilty.⁷⁹ He is currently free on bail pending trial.⁸⁰ Scott was arrested in the U.K. in early June at the request of the U.S. authorities and is expected to appear in a London court to contest extradition.⁸¹

Meanwhile, a grand jury on January 10, 2017 indicted three former traders of major banks for their alleged roles in a conspiracy to manipulate currency in the FX market. Richard Usher, Rohan Ramchandani and Christopher Ashton was charged on a one-count indictment.⁸² Richard Usher was former head of G11 FX Trading-UK at an affiliate of RBS and was a former managing director at an affiliate of JP Morgan Chase; Rohan Ramchandani was a former managing director and head of G10 FX spot trading at a Citigroup affiliate; and Christopher Ashton was former head of Spot FX at a Barclays PLC affiliate.⁸³ According to the indictment, the three former traders conspired to fix prices and rig bids for the euro from at least December 2007 through January 2013. The three defendants agreed to waive extradition from the U.K. and, on July 17, 2017, appeared in a federal court in New York and pled not guilty. These developments follow the agreements from May 20, 2015, when Barclays PLC, Citicorp, JPMorgan Chase & Co. and The Royal Bank of Scotland plc pleaded guilty to “conspiring to fix prices and rig bids for U.S. dollars and euros exchanged in the FX spot market and agreed to pay criminal fines totaling more than \$2.5 billion.”⁸⁴ More recently, BNP Paribas has been ordered to pay a federal fine as well as a state fine in New York. The

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Press Release, U.S. Department of Justice, “Global Head of HSBC’s Foreign Exchange Cash-Trading Desks Arrested for Orchestrating Multimillion-Dollar Front Running Scheme,” Rel. No. 16-842 (July 20, 2016), <https://www.justice.gov/opa/pr/global-head-hsbc-s-foreign-exchange-cash-trading-desks-arrested-orchestrating-multimillion>.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Chad Bray, *Ex-Traders in Britain to Face Currency-Rigging Charges in U.S.*, NYTimes (June 13, 2017), <http://www.nytimes.com/2017/06/13/business/dealbook/currency-usd-trader-britain-exchange.html>.

⁸¹ *Id.*

⁸² Press Release, U.S. Department of Justice, “Three Former Traders for Major Banks Indicted in Foreign Currency Exchange Antitrust Conspiracy,” Rel. No. (Jan. 10, 2017), <https://www.justice.gov/opa/pr/three-former-traders-major-banks-indicted-foreign-currency-exchange-antitrust-conspiracy>.

⁸³ *Id.*

⁸⁴ *Id.*

Cross-Border Regulatory and Enforcement Updates

Federal Reserve Board ordered BNP to pay \$246 million after finding that BNP failed to detect and address its traders' use of electronic chat rooms to communicate with competitors about their trading positions.⁸⁵ The New York State Department of Financial Services (the DFS) announced on May 24, 2017, that BNP Paribas and its New York branch will pay \$350 million in fines as part of a consent order with the state.⁸⁶

Authorities in South Africa have also been investigating issues of currency manipulation. After a two year investigation, the Competition Commission found evidence that 17 banks⁸⁷ were involved in price fixing, market allocation of the South African rand and U.S. dollar, and colluding on the rand-to-dollar exchange.⁸⁸ The Competition Commission referred the 17 banks to the Tribunal for prosecution on February 17, 2017, and the commission is seeking the Tribunal to order and declare that the banks have violated the Competition Act and the banks are liable for administrative penalties equal to 10 percent of their annual turnover.⁸⁹ The commission, in its investigation, found that traders at the banks were using electronic platforms such as the Reuters currency trading platform and the Bloomberg instant messaging system as well as telephones and meetings in order to coordinate the alleged collusion.⁹⁰ Commissioner Tembinkosi Bonakele stated, "The referral of this matter to the Tribunal marks a key milestone in this case as it now affords the banks an opportunity to answer for themselves."⁹¹

Insider Trading

Despite shake-ups at the helms of both the SEC and the DOJ, regulators and law enforcement personnel continue to aggressively pursue insider trading, bringing parallel criminal and civil actions against purported wrongdoers whose alleged illegal securities activities have both domestic and foreign implications.

In February 2017, the SEC froze brokerage accounts holding profits allegedly obtained through insider trading before Comcast Corp.'s purchase of DreamWorks Animation SKG, Inc. (DreamWorks), in the previous year.⁹² Regulators alleged that Shoahua "Michael" Yin, a partner of a Hong Kong-based private equity firm, used five brokerage accounts of Chinese nationals to acquire over \$56 million worth of DreamWorks shares before the acquisition was officially announced.⁹³ The SEC also filed a motion for a temporary restraining order, contending that Yin

85 Press Release, Board of Governors of the Federal Reserve System, "Federal Reserve Board announces \$246 million fine against BNP Paribas S.A. and certain of its U.S. subsidiaries for unsafe and unsound practices," (July 17, 2017), <https://www.federalreserve.gov/newsevents/pressreleases/enforcement20170717a.htm>.

86 Press Release, NYS Dep't of Financial Services, "DFS Fines BNP Paribas \$350 Million for Illegal, Unsafe and Unsound Conduct in Connection With BNPP's Foreign Exchange Trading Business," (May 24, 2017), <http://www.dfs.ny.gov/about/press/pr1705241.htm>.

87 The 17 banks include Bank of America Merrill Lynch International Limited, BNP Paribas, JP Morgan Chase & Co, JP Morgan Chase Bank N.A., Investec Ltd., Standard New York Securities Inc., HSBC Bank Plc, Standard Chartered Bank, Credit Suisse Group, Standard Bank of South Africa Ltd., Commerzbank AG, Australia and New Zealand Banking Group Limited, Nomura International Plc., Macquarie Bank Limited, ABSA Bank Limited, Barclays Capital Inc. and Barclays Bank plc.

88 Media Statement, South Africa Competition Commission, "Competition Commission prosecuted banks (currency traders) for collusion," (Feb. 15, 2017), <http://www.compcom.co.za/wp-content/uploads/2017/01/Competition-Commission-prosecutes-banks-currency-traders-for-collusion-15-Feb-2016.pdf>; Lynsey Chutel, *Banks were colluding on Forex deals while South Africans fretted about a volatile rand*, Quarts Africa (February 16, 2017), <https://qz.com/912507/south-africas-competition-commission-prosecutes-17-banks-for-collusion-manipulating-currency-exchange/>.

89 *Id.*

90 *Id.*

91 *Id.*

92 *U.S. Securities and Exchange Commission v. Yin, et al.*, 17-cv-00972 (JPO) (S.D.N.Y. Feb. 10, 2017) (ECF. 3).

93 Carmen Germaine, *HK Investor Agrees to Freeze in DreamWorks Trading Case*, Law360 (Mar. 24, 2017), <https://www.law360.com/articles/905849/hk-investor-agrees-to-freeze-in-dreamworks-trading-case>.

Cross-Border Regulatory and Enforcement Updates

and the account holders could attempt to transfer the profits abroad, since there was evidence that they had already been requesting withdrawals.⁹⁴ Yin's alleged activities indicate how foreign nationals, who may not understand U.S. securities laws and the severity of its penalties, can be implicated in serious financial crimes.

In May 2017, the SEC announced a settlement with three traders from Peru who had been charged with trading on nonpublic information ahead of a merger announcement between two mining companies.⁹⁵ In September 2016, the SEC had filed a complaint, alleging that Nino Coppero del Valle, a Peruvian national who worked at the Canada-based HudBay Minerals, Inc. (HudBay), provided Julio Antonio Castro Roca and Ricardo Carrion with information related to HudBay's acquisition of Augusta Resource Corporation.⁹⁶ Ultimately, Coppero and Castro made more than \$112,000 in profits from their allegedly illicit activities, while Carrion's brokerage firm obtained a profit of \$73,000.⁹⁷ The SEC settlement requires Coppero and Castro to disgorge \$53,607.70 and \$59,300.02, respectively, plus interest, while Carrion will pay a total disgorgement of \$54,144.10 plus interest.⁹⁸ Castro and Carrion will also have to pay penalties.⁹⁹ This case indicates the SEC's continued efforts to hold accountable foreign traders who may otherwise think their offshore activities won't show on the radar of U.S. regulators and prosecutors.

In April 2017, the SEC filed a civil complaint and froze assets in two brokerage accounts worth more than \$1 million that were allegedly obtained through insider trading profits related to a merger between Liberty Interactive Corporation and General Communication Inc.¹⁰⁰ The complaint alleged that two unnamed traders used brokerage accounts based in the U.K. and Lebanon to buy call option contracts through U.S.-based brokerages and U.S.-based exchanges just a few days prior to the public announcement of the merger.¹⁰¹ The SEC contends that the circumstances surrounding the trades, compounded by the fact that no other recent trades had been executed by these accounts, raise doubts as to the bona fides of these transactions.¹⁰² As the SEC remarked, the agency will opt to freeze an account while it investigates it for suspicious activity rather than allow alleged dubious trades to continue before it can file formal charges.¹⁰³ Traders and brokerage firms should take care to document their internal information flows and operation flows, as well as create barriers when necessary between trading and sales divisions, to avoid any pause in activity to respond to regulators' investigations. The SEC amended the complaint on July 13, 2017 to include three Lebanese traders as defendants.

94 *Id.*

95 Press Release, U.S. Sec. & Exch. Comm'n, *Overseas Traders Paying Back All Profits Plus Penalties in Insider Trading Case*, Rel. No. 2017-70 (Mar. 24, 2017), <https://www.sec.gov/news/press-release/2017-70>.

96 *U.S. Sec. & Exch. Comm'n v. Del Valle, et al.*, 16-cv-07591 (S.D.N.Y., Sept. 28, 2016) (ECF 1).

97 Press Release, U.S. Sec. & Exch. Comm'n, *SEC Files Insider Trading Charges Against Peruvian Traders Using Overseas Accounts*, Rel. No. 2016-198 (Sept., 28, 2016), <https://www.sec.gov/news/pressrelease/2016-198.html>.

98 *Supra*, note 95.

99 *Id.*

100 Press Release, U.S. Sec. & Exch. Comm'n, *SEC Freezes Brokerage Accounts Behind Alleged Insider Trading*, Rel. No. 2017-80 (Apr. 14, 2017), <https://www.sec.gov/news/press-release/2017-80>.

101 *U.S. Sec. & Exch. Comm'n v. One or More Unknown Traders in the Securities of Gen. Commc'ns*, Compl. 17-cv-2659 (S.D.N.Y., Apr. 13, 2017).

102 *Id.*

103 *Supra*, note 100

Cross-Border Regulatory and Enforcement Updates

In the U.K., the FCA is also continuing its efforts to hold violators of insider trading laws accountable. In June 2017, regulators charged a compliance officer from UBS Group AG and a day trader with illegally trading shares worth approximately \$1.8 million.¹⁰⁴ The FCA alleged that Fabiana Abdel-Malek and Walid Choucair used information Abdel-Malek obtained through Abdel-Malek's work at UBS to trade shares of Elizabeth Arden, Kabel Deutschland Holding AG and BRE Properties Inc.¹⁰⁵ If found guilty, the defendants face a maximum prison sentence of seven years.¹⁰⁶

The FCA recently noted in its annual report that abuses of market protection laws are appearing more frequently, and it revealed that suspicious activities take place in approximately one in every five deals.¹⁰⁷ Given these findings, the FCA is ramping up its efforts, analyzing insider activity and urging boards to enhance their oversight. The report also noted that whistleblower claims have declined for the third year in a row, despite initiatives to protect those who report misconduct.¹⁰⁸ These findings will most likely prompt the FCA to implement a rigorous plan to address wrongdoings, especially in light of the Brexit deal already casting doubt on whether the city of London will remain Europe's financial hub.

Market Transparency – Credit Default Swaps

During the first half of 2017, U.S. and European regulators have continued to work together to increase regulatory visibility into the derivatives and swaps markets. The European Union (EU) has been pursuing a landmark legislation called the European Market Infrastructure Regulation (EMIR), which will require derivatives contracts to be traded on exchanges or electronic trading platforms, impose central clearing of over-the-counter derivatives and implement other measures designed to reduce risk in the credit derivatives markets.¹⁰⁹ Although the EU previously announced that EMIR would have a September 2016 start date, the European Commission announced on June 10, 2016, that this body of legislation would take effect sometime before mid-2017.¹¹⁰ But in May 2017, the European Commission proposed more amendments to EMIR, further postponing its implementation.¹¹¹ Among other things, these amendments aim to (i) streamline the reporting requirements to make it easier for businesses to be compliant, (ii) increase transparency into the central clearing platforms and (iii) pave the way for pension funds to take part in central clearing.¹¹² The European Commission hopes that these proposals will further EMIR's objective to make the derivatives markets more transparent for supervisors and efficient for users while at the same time reducing systemic risks.

104 Suzi Ring, *Ex-UBS Compliance Officer in Court on \$1.8 Million Insider Case*, Bloomberg (Jun. 16, 2017), <https://www.bloomberg.com/news/articles/2017-06-16/ex-ubs-compliance-officer-in-u-k-court-on-insider-trading-case-j3zo2x3s>.

105 *Id.*

106 Caroline Binham, *Former UBS compliance officer appears in court over insider trading*, Financial Times (Jun. 16, 2017), <https://www.ft.com/content/5167fce4-527f-11e7-bfb8-997009366969?mhq5j=e1>.

107 Mark Taylor, *FCA Reveals City Rife With Insider Trading and Market Abuse*, Law360 (Jul. 5, 2017), https://www.law360.com/whitecollar/articles/941098/fca-reveals-city-rife-with-insider-trading-and-market-abuse?nl_pk=7d552c11-ea47-4657-8ff6-0e0f9a23d050&utm_source=newsletter&utm_medium=email&utm_campaign=whitecollar.

108 *Id.*

109 Sia Partners, "EMIR II: Requirements, improvements, developments" Banking & Insurance (Aug. 11, 2015), <http://en.finance.sia-partners.com/emir-ii-requirements-improvements-developments>.

110 Press Release, European Commission, "Daily News 10/06/2016" (June 10, 2016), http://europa.eu/rapid/press-release_MEX-16-2171_en.htm.

111 Press Release, European Commission, "Questions and Answers on the proposal to amend the European Market Infrastructure Regulation (EMIR)" (May 4, 2017), http://europa.eu/rapid/press-release_MEMO-17-1145_en.htm.

112 *Id.*

Cross-Border Regulatory and Enforcement Updates

The CFTC continues to work with the European Commission to ensure that there are no material inconsistencies between the U.S. and European regulatory schemes with respect to swap dealers. On February 1, 2017, the CFTC issued a no-action letter that granted swap dealers relief in connection with swaps subject to EMIR margin requirements through May 8, 2017.¹¹³ On April 18, 2017, the CFTC extended this time window, effectively permitting swap dealers that are subject to U.S. and European regulatory schemes to comply only with EMIR's margin requirements.¹¹⁴ This essentially buys the CFTC time to determine whether EMIR's margin requirements are sufficiently comparable to those under the CFTC such that they satisfy the CFTC's so-called Cross-Border Margin Rule. The CFTC passed the Cross-Border Margin Rule in May 2016 to permit entities subject to requirements comparable to those of the CFTC to comply only with such comparable requirements of the other jurisdiction.¹¹⁵ Time will tell how the CFTC will change its course, if at all, under the guidance of newly confirmed chairman Giancarlo. In June 2017, Giancarlo affirmed that the CFTC remained fully committed to the agreement it struck with the European Commission last year to achieve regulatory equivalence with respect to swap trading.¹¹⁶ But in March 2017, Giancarlo commented during a speech that he would scale back the CFTC's regulatory powers in this area to incentivize market participation.¹¹⁷

Lastly, in China, the Hong Kong Securities and Futures Commission announced in March 2017 that it plans to relax position limits on trading listed derivatives to broaden appeal of the region's futures and options markets.¹¹⁸ This announcement comes after the Asian securities watchdog consulted with market participants last September on whether to lift the cap on excess position limits above the statutory limit. Such an action would allow more derivatives trading to move from over-the-counter markets onto larger market exchanges in the hope of making such trading more transparent and less risky. This is consistent with how European regulators are working to improve swap and derivative trading under EMIR.

Anti-Money Laundering

The Panama Papers

The global fallout from the revelation and disclosure of the Panama Papers – a collection of over 11.5 million financial and legal documents relating to more than 200,000 offshore entities – continued in the first half of 2017. The information discovered in the Panama Papers has led to, among other things, arrests, resignations of top government officials and an increased push to strengthen money-laundering and tax-evasion regulations around the world.

113 Press Release, U.S. Commodities and Futures Trading Comm'n, "CFTC's Division of Swap Dealer and Intermediary Oversight Issues Time-Limited No-Action Relief for Swap Dealers Doing Business in EU" Rel. No. 7525-17 (February 1, 2017), <http://www.cftc.gov/PressRoom/PressReleases/pr7525-17>.

114 No-Action Letter, U.S. Commodities and Futures Trading Comm'n, "Extension of Time Limited No-Action for Swap Dealers Complying with European Union Uncleared Swap Margin Requirements" No. 17-22 (April 18, 2017), <http://www.cftc.gov/ido/groups/public/@irlettergeneral/documents/letter/17-22.pdf>.

115 Press Release, U.S. Commodities and Futures Trading Comm'n, "CFTC Issues Final Cross-Border Margin Rule" Rel. No. 7370-16 (May 24, 2016), <http://www.cftc.gov/PressRoom/PressReleases/pr7370-16>.

116 Statement, U.S. Commodities and Futures Trading Comm'n Chairman J. Christopher Giancarlo, "Statement of Acting Chairman J. Christopher Giancarlo before the Market Risk Advisory Committee Meeting" (June 20, 2017) <http://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement062017>.

117 Speech, U.S. Commodities and Futures Trading Comm'n Chairman J. Christopher Giancarlo, "Transforming the CFTC" (Mar. 30, 2017), <http://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-21>.

118 Press Release, Securities and Futures Commission, "SFC concludes consultation on position limit regime" March 21, 2017, <http://www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=17PR38>.

Cross-Border Regulatory and Enforcement Updates

The two founders of Mossack Fonseca – the Panama law firm at the epicenter of the Panama Papers – were arrested in Panama in February 2017 on charges of money laundering and corruption.¹¹⁹ Both Ramón Fonseca Mora and Jügran Mossack were arrested after Panamanian authorities raided Mossack Fonseca's Panama City headquarters as part of an unrelated investigation into a Brazilian bribery scandal.¹²⁰ Although the Panamanian authorities publicly deny that Fonseca Mora's and Mossack's arrests are directly related to conduct revealed in the Panama Papers, Mossack Fonseca has been in the crosshairs of the Panamanian authorities since the Panama Papers were made public.¹²¹ Both Fonseca Mora and Mossack are currently awaiting trial and have been granted bail.¹²²

In Spain, the country's top anti-corruption prosecutor, Manuel Moix, resigned in June 2017 after local news reported that information in the Panama Papers showed he and his brothers owned a 25 percent stake in a company set up by Mossack Fonseca.¹²³ Moix had been in his position for only four months, but political opposition forced his resignation, showing again how toxic the Panama Papers have become for anyone involved – even if the involvement is somewhat attenuated.¹²⁴

On the regulatory side, and as discussed in full in our 2016 Year-End [Report](#), the EU's Fourth Anti-Money Laundering Directive,¹²⁵ which placed new and increased reporting requirements on financial institutions to monitor “suspicious” transactions in order to prevent money laundering and use of the financial system to fund terrorism, came into full effect on June 26, 2017.¹²⁶ The directive strengthened regulations concerning beneficial ownership identification and record-keeping requirements regarding ultimate beneficial ownership, expanded the definition of “gambling” as applied to anti-money laundering procedures, and lowered the required “cash payment” threshold, which triggers anti-money laundering procedures, to €10,000, down from €15,000.¹²⁷ As part of this directive, the European Parliament established a committee of inquiry, known as the PANA Committee, to investigate money laundering, tax avoidance and evasion.¹²⁸ The PANA Committee has been investigating the Panama Papers scandal since June 2016 and, on July 10, 2017, presented highly critical findings to the European Council and put pressure on EU officials to draft and implement regulations that would go far beyond the Fourth Anti-Money Laundering Directive.¹²⁹

The PANA Committee accused the European Commission – the executive branch of the EU – of lacking commitment and desire to create meaningful reforms in the money laundering and tax-

119 AJ Willingham, *Men at the Center of Panama Papers Scandal Arrested*, CNN (Feb. 15, 2017), <http://cnn.it/2kzH4q8>.

120 *Id.*

121 See Elida Moreno, *Panama Detains Mossack Fonseca Founders on Corruption Charges*, Reuters (Feb. 11, 2017), <http://reut.rs/2v33fhl>.

122 *Founders of Panama Papers Law Firm Given Bail*, Voice of America (Apr. 21, 2017), <http://bit.ly/2uGcaTS>.

123 Saim Saeed, *Spanish Prosecutor Resigns Over Panama Papers Link*, Politico (June 1, 2017), <http://politi.co/2v2QhjM>.

124 Manuel Moix, *Spain's Anti-corruption Chief, Quits Over Offshore Company*, BBC News (June 1, 2017), <http://bbc.in/2sxqrAK>.

125 Directive 2015/849 of the European Parliament of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No. 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, 2015 O.J. (L 141/73), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32015L0849>.

126 *Id.*; see Richard Crump, *Lawmakers Push EU to Commit to Panama Papers Reforms*, Law 360 (July 11, 2017), <http://bit.ly/2w40E3S>.

127 See Directive 2015/849, *supra* note 125.

128 European Parliament Committees: PANA, <http://www.europarl.europa.eu/committees/en/pana/home.html>.

129 Richard Crump, *Lawmakers Push EU to Commit to Panama Papers Reforms*, Law 360 (July 11, 2017), <http://bit.ly/2w40E3S>.

Cross-Border Regulatory and Enforcement Updates

avoidance areas. The Czech co-rapporteur of the PANA Committee went so far as to accuse the European Commission of complicity, saying that the “practices revealed in the Panama Papers would not have happened if member states and the European Commission had taken their responsibility seriously.”¹³⁰ The PANA Committee recommended that the EU:

- Impose tougher sanctions and provide better protection for whistleblowers;
- Create an international and cross-bloc definition of what constitutes an “offshore financial center,” “tax haven,” “secrecy haven,” “non-cooperative tax jurisdiction,” and “high risk country;” and
- Increase resources to fight money laundering and create a bloc-wide list of “high risk countries.”¹³¹

At this time, it is unclear whether the PANA Committee’s report and publicity will cause the European Commission to act further, but there is now increased political pressure on the commission to take some additional action, even as the EU’s Anti-Fraud Office (OLAF) is investigating several European politicians and civil servants for tax evasion, based on information revealed in the Panama Papers.¹³²

In the U.K., new anti-money laundering regulations (2017 Regulations) came into effect on June 26, 2017, bringing the U.K. into compliance with the EU’s Fourth Anti-Money Laundering Directive, as discussed above.¹³³ The 2017 Regulations, which replace the Money Laundering Regulations 2007, now (i) require regulated entities to provide a written assessment of money laundering risk; (ii) prescribe some features of effective internal anti-money laundering controls; (iii) detail when different categories of customer due diligence must be conducted, and describe what steps must be taken; and (iv) specify beneficial ownership information that trusts must provide for inclusion on a central register.¹³⁴ The 2017 Regulations also include two new criminal offenses: prejudicing an investigation into a breach of the Regulation and making false or misleading statements in purported compliance with a requirement imposed under the Regulations.¹³⁵ Violations of these criminal offenses laws can result in two years’ imprisonment and/or unlimited fines.¹³⁶

U.S. Anti-Money Laundering Enforcement Efforts

Guinea mining case

In the first half of 2017, U.S. prosecutors have continued their aggressive targeting of transnational bribery and money laundering, securing the conviction on May 3, 2017 of former Guinea mining minister Mahmoud Thiam, a U.S. citizen, on money laundering charges stemming from a scheme to accept bribes in exchange for granting a Chinese conglomerate mining rights.¹³⁷ Prosecutors alleged Thiam accepted over \$8.5 million in payments from Chinese tycoon Sam Pa, and in exchange Thiam helped secure lucrative mining rights in Guinea for Chinese entities with close ties to Pa. Prosecutors alleged that Thiam used the money to fund a “lavish lifestyle” including a

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Florence Autret, *Panama Papers: l’OLAF Enquête sur des Responsables Européens* (“Panama Papers: OLAF Investigates European Officials”), *La Tribune* (June 4, 2017), <http://bit.ly/2tH5xyZ>, for English translation <http://www.euractiv.com/section/economy-jobs/news/olaf-investigates-eu-leaders-in-panama-papers-scandal/>.

¹³³ Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (2017/692).

¹³⁴ See *id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Brendan Pierson, *Ex-Guinea minister convicted of laundering bribes*, *Reuters* (May 3, 2017), <http://www.reuters.com/article/us-usa-guinea-corruption-idUSKBN17Z2KJ>.

Cross-Border Regulatory and Enforcement Updates

mansion and private schools for his children in New York. Thiam was alleged to have then returned to New York and transferred the money he received to bank accounts there while trying to conceal its source in violation of U.S. anti-money laundering laws. Thiam's lawyer has said he will press for a post-trial acquittal before Judge Cote and, if necessary, the Second Circuit.

Intesa Sanpaolo

More locally, New York State regulators imposed a multi-million dollar fine on Italy's largest retail bank, Intesa Sanpaolo S.p.A., and its New York branch over violations of New York's Bank Secrecy Act and anti-money laundering (BSA/AML) regulations.¹³⁸ DFS Superintendent Maria T. Vullo announced the \$235 million fine on December 15, 2016, ending a yearslong investigation into Intesa's New York branch that uncovered a number of BSA/AML violations stemming from improper management of its transaction monitoring system and the failure of compliance personnel to identify thousands of suspicious transactions. The fines come on the heels of the DFS's adoption of a new risk-based anti-terrorism and anti-money laundering regulation that aims to shore up financial institutions' transaction monitoring and filtering programs to minimize BSA/AML violations.¹³⁹ The new regulation requires New York-regulated institutions to strengthen their anti-money laundering programs and requires either an annual board resolution or senior officer compliance finding to certify to the DFS that those new, strengthened programs meet the DFS rule.¹⁴⁰

Western Union

On January 19, 2017, U.S. federal authorities announced agreements that the Western Union Company would forfeit \$586 million, stemming from allegations of aiding and abetting wire fraud.¹⁴¹ The DOJ charged Western Union with facilitating a scheme by Chinese immigrants to fund human smugglers through money transactions dispersed in small increments to avoid detection.¹⁴² In resolving the criminal prosecution, Western Union made extensive factual admissions detailing violations of the Bank Secrecy Act and U.S. anti-fraud statutes, including the knowing facilitation of fraudulent transactions by Western Union employees in exchange for a cut of the proceeds.¹⁴³ As part of a parallel settlement with the Federal Trade Commission,¹⁴⁴ Western Union agreed to an order prohibiting it from transmitting a money transfer that it knows or reasonably should know is fraud-induced, requiring payment of a monetary judgment of \$586 million and requiring implementation of an anti-fraud program and training for its agents and their frontline associates.¹⁴⁵

138 Press Release, New York State Dep't of Financial Services, "DFS Fines Intesa Sanpaolo \$235 Million for Repeated Violations of Anti-Money Laundering Laws" (Dec. 15, 2016), <http://www.dfs.ny.gov/about/press/pr1612151.htm>.

139 Press Release, New York State Dep't of Financial Services, *DFS Issues Final Anti-Terrorism Transaction Monitoring and Filtering Program Regulation* (Dec. 15, 2016), <http://www.dfs.ny.gov/about/press/pr1606301.htm>. N.Y. St. Reg. DFS-501500004-A.

140 N.Y. St. Reg. DFS-501500004-A.

141 Press Release, United States Dep't of Justice, *Western Union Admits Anti-Money Laundering and Consumer Fraud Violations, Forfeits \$586 Million in Settlement with Justice Department and Federal Trade Commission* (Jan. 19, 2017), <https://www.justice.gov/opa/pr/western-union-admits-anti-money-laundering-and-consumer-fraud-violations-forfeits-586-million>.

142 *Id.*

143 *Id.*

144 *Federal Trade Commission v. The Western Union Co.*, 1:17-cv-001100-CCC (M.D. Pa. Jan. 19, 2017) [ECF No. 1].

145 Press Release, FTC, *Western Union Admits Anti-Money Laundering and Consumer Fraud Violations, Forfeits \$586 Million in Settlement with Justice Department and Federal Trade Commission* (Jan. 19, 2017), <https://www.ftc.gov/news-events/press-releases/2017/01/western-union-admits-anti-money-laundering-violations-settles>.

Cross-Border Regulatory and Enforcement Updates

Foreign Anti-Money Laundering Enforcement Efforts

U.K. authorities have also continued their aggressive anti-money laundering enforcement efforts in 2017, with the FCA announcing on January 31, 2017, that it was imposing a £163 million fine on Deutsche Bank AG over its failure to maintain an adequate anti-money laundering control framework during the period between January 1, 2012, and December 31, 2015.¹⁴⁶ The FCA had charged the bank with maintaining an inadequate system for monitoring and screening of money laundering transactions and facilitating roughly \$10 billion in transfers from Russia to offshore bank accounts that were “highly suggestive of financial crime.”¹⁴⁷ In particular, the FCA found that Deutsche Bank’s Corporate Banking and Securities division in the U.K. had deficient anti-money laundering policies, which enabled Deutsche Bank’s Russia-based subsidiary to execute more than 2,400 suspicious trades between April 2012 and October 2014.¹⁴⁸

Corruption Investigations in International Sports - FIFA

The DOJ and the attorney general of Switzerland (OAG) have continued their investigations into the wide-ranging conspiracy and corruption of high-ranking officials within the Fédération Internationale de Football Association (FIFA). In the end of March 2017, FIFA concluded its 22-month-long internal investigation, handing over its findings and supplementary documents to the OAG.¹⁴⁹ The Swiss authorities are expected to share the findings with other related government entities investigating the corruption, particularly the DOJ.¹⁵⁰

On June 27, 2017, FIFA released a 430-page report on the allegations of corruption in selecting Russia and Qatar as host nations for the 2018 and 2022 World Cup tournaments.¹⁵¹ Called the “Garcia report” because it was compiled by independent ethics investigator Michael Garcia, the report details several instances of corruption within the highest ranks of FIFA, including members of the executive committee.¹⁵² Despite the findings of corruption within the high ranks, there is nothing in the report that will lead to either Russia or Qatar being stripped of the World Cup.¹⁵³

The DOJ’s own investigation has also continued, with the department securing guilty pleas of Hector Trujillo, former judge of the Constitutional Court of Guatemala and general secretary of the Guatemalan soccer federation from 2009 to 2015, and former Swiss bank managing director Jorge Luis Arzuaga.¹⁵⁴ The charges against Trujillo stemmed from his alleged participation in a scheme to accept kickbacks amounting to hundreds of thousands of dollars.¹⁵⁵ Trujillo, alongside other

¹⁴⁶ Press Release, Financial Conduct Authority, *FCA fines Deutsche Bank £163 million for serious anti-money laundering controls failings* (Jan. 31, 2017), <https://www.fca.org.uk/news/press-releases/fca-fines-deutsche-bank-163-million-anti-money-laundering-controls-failure>.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Rebecca Ruiz, *FIFA Shares Results of Investigation and Tries to Turn the Page*, NYTimes (March 31, 2017).

¹⁵⁰ *Id.*

¹⁵¹ Marissa Payne, *FIFA releases full “Garcia report,” outlining further corruption but no smoking gun in World Cup bids*, The Washington Post (June 27, 2017), https://www.washingtonpost.com/news/early-lead/wp/2017/06/27/fifa-releases-full-garcia-report-outlining-further-corruption-but-no-smoking-gun-in-world-cup-bids/?utm_term=.44140889e622.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Press Release, U.S. Dep’t of Justice, *Former Secretary of Guatemalan Soccer Federation Pleads Guilty to Wire Fraud Charges*, (June 2, 2017), <https://www.justice.gov/usao-edny/pr/former-general-secretary-guatemalan-soccer-federation-pleads-guilty-wire-fraud-charges>.

¹⁵⁵ *Id.*

Cross-Border Regulatory and Enforcement Updates

FIFA officials, agreed to accept kickbacks from Media World, a Miami-based sports marketing company, in exchange for media and marketing rights to the Guatemalan soccer teams' qualifier matches leading up to the 2018 and 2022 World Cups.¹⁵⁶ Trujillo has agreed to forfeit \$175,000 and faces up to 20 years' imprisonment.¹⁵⁷

Arzuaga also pleaded guilty on June 15, 2017¹⁵⁸ to charges of money laundering in connection with his role facilitating millions of dollars in bribes to soccer officials.¹⁵⁹ Arzuaga facilitated the flow of bribe money through the Swiss and American banking systems by opening bank accounts for shell companies on behalf of soccer officials and transferring funds to the officials and their families in exchange for bonus payments. His actions directly aided those involved in the international soccer corruption.¹⁶⁰ In his plea, Arzuaga has agreed to forfeit the approximately \$1,046,000 in bonus payments.¹⁶¹

In April 2017, Guam Football Association President Richard Lai was officially suspended by FIFA's ethics committee after pleading guilty to wire fraud conspiracy charges in a U.S. federal court. Lai was the first Asian soccer official to be convicted in connection with the FIFA corruption scandal.¹⁶² Lai, who was also on the executive board of the Asian Football Confederation and appointed to the FIFA audit and compliance committee, told a U.S. judge that he accepted around \$1 million in bribes.¹⁶³ This testimony implicated the former president of the Asian Football Confederation, Mohamed Bin Hammam, as well as two other Asian soccer officials.¹⁶⁴ Lai told the court he accepted bribes from both sides of "rival factions" who were trying to influence the election for FIFA president.¹⁶⁵ Lai told the court he accepted \$100,000 from Hamman alone, as well as over \$850,000 in bribes spanning from November 2009 to late 2014 to advance the interests of opposing bodies within Asian football as well as identify other officials who may be open to receiving bribes.¹⁶⁶ The DOJ said that Lai's "breach of trust was particularly significant given his position as a member of the FIFA Audit and Compliance committee, which must play an important and independent role if corruption within FIFA is to be eliminated."¹⁶⁷ Lai pleaded guilty to two convictions of wire fraud and is facing decades in prison for those offenses.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Press Release, U.S. Dep't of Justice, *Former Managing Director At Swiss Bank Pleads Guilty To Money Laundering Charge In Connection With Soccer Bribery Scheme*, (June 15, 2017), <https://www.justice.gov/usao-edny/pr/former-managing-director-swiss-bank-pleads-guilty-money-laundering-charge-connection>.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Patricia Hurtado and Tariq Panja, *FIFA Scandal Spreads as Asia Official Admits Taking Bribes*, Bloomberg (April 28, 2017), <https://www.bloomberg.com/news/articles/2017-04-28/fifa-scandal-spreads-as-asia-official-pleads-guilty-to-bribery>.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

Cross-Border Regulatory and Enforcement Updates

Finally, French prosecutors have joined the United States and Switzerland in investigating the FIFA corruption scandal. In April 2017, French prosecutors launched an investigation into the bidding process for the 2018 and 2022 World Cups, which were awarded to Russia and Qatar.¹⁶⁸ On April 20, 2017, French authorities questioned Mr. Sepp Blatter, former FIFA president, over the matter.¹⁶⁹

Trade Sanctions and Export Controls

Trade Sanctions

In the first half of 2017, the U.S. Treasury's Office of Foreign Assets Control (OFAC) continued to levy significant fines against foreign banks and other corporations for violating U.S. trade sanctions programs. For example, in June 2017, OFAC imposed sanctions on the Chinese-based Bank of Dandong in connection with allegations the bank facilitated millions of dollars worth of transactions connected to North Korea's arms expansion.¹⁷⁰ These sanctions are part of a larger economic scheme to penalize North Korea, as it continues to disregard international treaties and laws. OFAC also imposed sanctions on two Chinese citizens, Sun Wei and Li Hong Ri, for their involvement in establishing front companies to facilitate transactions to promote North Korea's weapons program and conducting financial transactions for the rogue nation, respectively.¹⁷¹

OFAC also entered into a number of other Settlement Agreements and Findings of Violations with foreign entities in the first half of 2017:

1. OFAC entered into a Settlement Agreement with Aban Offshore Limited of Chennai (Aban), India, for \$17,500 in connection with its apparent violation of the Iranian Transactions and Sanctions Regulations. In June 2008, Aban's Singapore subsidiary placed an order for oil rig supplies from a vendor in the United States with the intention to re-export the supplies from the United Arab Emirates "to a jack-up oil drilling rig located in the South Pars Gas Fields in Iranian territorial waters."¹⁷²
2. OFAC entered into a Settlement Agreement with TD Bank for \$516,105 in connection with 167 apparent violations of the Cuban Assets Control Regulations (CACR) and Iranian Transactions and Sanctions Regulations (ITSR). OFAC alleged that TD Bank's global trade finance business, based in Canada, violated U.S. sanction regulations when it engaged in a series of trade finance transactions that "appear to have generally involved import export letters of credit for TD Bank's Canadian customers that the bank failed to screen for any potential nexus to an OFAC-sanctioned country or entity prior to processing related transactions through the U.S. financial system."¹⁷³ Additionally, OFAC issued a Finding of a Violation to TD Bank as a result of violations of the CACR and ITSR by its subsidiaries, Internaxx Bank SA and TD Waterhouse Investment Services Ltd.¹⁷⁴

¹⁶⁸ Murad Ahmed and Michael Stothard, *French launch investigation into football World Cup bids*, Financial Times (April 27, 2017), <https://www.ft.com/content/9d6f9442-2b6c-11e7-9ec8-168383da43b7?mhq5j=e3>.

¹⁶⁹ *Id.*

¹⁷⁰ Reuters, *Blacklisted China Bank Cited as a North Korea Conduit to Global Finance*, The New York Times (Jun. 30, 2017), https://www.nytimes.com/reuters/2017/06/30/business/30reuters-usa-northkorea-china-sanctions-dandong.html?_r=0.

¹⁷¹ Press Release, U.S. Dep't of the Treasury, Treasury Acts to Increase Economic Pressure on North Korea and Protect the U.S. Financial System (Jun. 29, 2017), <https://www.treasury.gov/press-center/press-releases/Pages/sm0118.aspx>.

¹⁷² Press Release, U.S. Dep't of the Treasury, Settlement Agreement between OFAC and Aban Offshore Limited; Settlement Agreement between OFAC and an Individual and the Alliance for Responsible Cuba Policy Foundation (Jan. 12, 2017), https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20170112_44.aspx.

¹⁷³ Enforcement Action for Jan. 13, 2017, OFAC, https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20170113_td_bank.pdf.

¹⁷⁴ Press Release, U.S. Dep't of the Treasury, Settlement Agreement between the U.S. Department of the Treasury's Office of Foreign Assets Control and TD Bank; Issuance of Finding of Violation to Internaxx SA (Jan. 13, 2017), https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20170113_33.aspx.

3. OFAC issued Finding of Violation to B Whale Corporation (BWC), a company based in Taipei, Taiwan and a member of the TMT Group of shipping companies, for a violation of ITSR. “Between on or about August 30, 2013 and on or about September 2, 2013, BWC violated . . . ITSR when its vessel conducted a ship-to-ship transfer with, and received 2,086,486 barrels of condensate crude oil from, a vessel owned by the National Iranian Tanker Company.”¹⁷⁵

Sanctions Regulations

CACR

On June 16, 2017, President Trump announced a policy directive regarding sanctions regulations governing the United States relationship with Cuba which will effectively undo some of the sanctions relief Cuba received under the Obama administration. As a result, OFAC published a frequently asked questions memorandum discussing the implementation of the Treasury-specific changes stemming from the amendments to its CACR.¹⁷⁶ The amended regulation will primarily impact (1) United States citizens’ travel to Cuba and (2) trade with Cuban state entities related to the military, intelligence or security services.

The new amendment effectively will prohibit “individual people-to-people” travel to Cuba for tourism purposes. U.S. citizens will now have to be part of an organized group tour or “group people-to-people travel” tour in order to travel to Cuba. Additionally, the amendment to the CACR may prohibit individuals from engaging in direct financial transactions with entities under the control of Cuban military, intelligence or security services personnel unless the engagements were in place prior to amendment of the regulation.

Iran Sanctions Regulations

Trump has indicated that his administration will be reviewing the Joint Comprehensive Plan of Action (JCPOA), an international agreement between Iran, the so-called P5+1¹⁷⁷ and the European Union that seeks to promote a peaceful Iranian Nuclear Program.¹⁷⁸ The JCPOA was adopted on October 18, 2015 and implemented on January 16, 2016.¹⁷⁹ In the meantime, OFAC has added a number of individuals and entities to the Iran-related Designations and Non-proliferation Designations list, which bans U.S. – and often non-U.S. persons – from engaging in transactions with listed parties.¹⁸⁰

175 Press Release, U.S. Dep’t of the Treasury, OFAC Issues a Finding of Violation to B Whale Corporation, a Member of the TMT Group of Shipping Companies, for a Violation of the Iranian Transactions and Sanctions Regulations (Feb. 3, 2017), https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20170203_33.aspx.

176 Frequently Asked Questions on President Trump’s Cuba Announcement, U.S. Dep’t of the Treasury, OFAC (June 16, 2017), https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_faqs_20170616.pdf.

177 P5+1 refers to the five permanent members of the UN Security Council – the U.S., U.K., France, Russia, and China – and Germany.

178 *Joint Comprehensive Plan of Action*, U.S. Dep’t of State, <https://www.state.gov/e/eb/tfs/spi/iran/jcpoa/>

179 *Id.*

180 Iran-related Designations; Non-proliferation Designations, U.S. Dep’t of Treasury, OFAC (May 17, 2017).



International Parallels In Law Enforcement Methods and Priorities

Whistleblower Programs

International Parallels In Law Enforcement Methods and Priorities

On June 28, 2017, the head of the SEC's whistleblower program, Jane Norberg, explained that regardless of which administration is in charge or who is chair of the SEC, "the SEC's whistleblower program is open for business and we are moving forward as we have in the past."¹⁸¹ Norberg stressed that the SEC is taking in tips "just as rapidly as we have in the past" and is "still moving forward."¹⁸² This comes along with changes that the CFTC has made to its whistleblower program, including new provisions that allow whistleblowers to notify Congress, another law enforcement agency or a foreign regulator first and still be eligible for an award.¹⁸³ The changes give whistleblowers 180 days after tipping another oversight body to share the information with the CFTC and still qualify for an award, up from the previous rule, which allowed 120 days.¹⁸⁴

Even as the SEC's program moves forward, the Supreme Court will weigh in on the scope of statutory whistleblower protections in the next term. On June 26, 2017, the Court granted certiorari in *Somers v. Digital Realty Trust Inc.*, in order to resolve a circuit split on the question of whether an individual must report alleged misconduct to the SEC in order to bring a claim against his or her former employer under the anti-retaliation provisions of the Dodd-Frank Act. In *Somers*, the plaintiff sued his former employer, alleging that he had been fired for making internal complaints, even though he did not provide any information to the SEC. The Ninth Circuit allowed the claim to proceed and held that the "anti-retaliation provision unambiguously and expressly protects from retaliation all those who report to the SEC and who report internally."¹⁸⁵ The Second Circuit had previously reached the same conclusion,¹⁸⁶ but the Fifth Circuit has disagreed and held that an individual must report to the SEC in order to qualify for whistleblower protections under Dodd-Frank.¹⁸⁷ Considering the number of foreign jurisdictions that look to the United States to shape their whistleblower regulations and the worldwide reach of many domestic companies, this decision could have international implications.

Based on the continuing success of the SEC's whistleblower program, other countries have increased the scale and scope of their whistleblower programs. As fully reported in our 2016 Year-End [Report](#), the U.K., Canada, and Germany have all recently focused on their whistleblower programs.

In April 2017, the British bank Barclays faced questions from the FCA regarding actions taken by the bank's CEO, James Staley.¹⁸⁸ Staley was investigated by the FCA and another British regulator, the Prudential Regulation Authority, after a whistleblower sent letters to Barclay's officials

181 Carmine Germaine, *SEC Whistleblower Program Is Business As Usual, Chief Says*, Law 360 (June 28, 2017), <http://bit.ly/2wsSceD>.

182 *Id.*

183 Jack Newsham, *CFTC Says Rule Changes Will Improve Whistleblower Program*, Law 360 (May 22, 2017), <http://bit.ly/2wt0ALu>.

184 *Id.*

185 *Somers v. Digital Realty Trust, Inc.*, No. 15-17352 (9th Cir. Mar. 8, 2017) (emphasis added).

186 *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2015).

187 *Asadi v. G.E. Energy (USA) LLC*, 720 F.3d 620 (2013).

188 Kate Kelly and Chad Bray, *Barclays C.E.O. Investigated Over Treatment of Whistle-Blower*, NYTimes (Apr. 10, 2017), <http://nyti.ms/2v1WDQw>.

International Parallels In Law Enforcement Methods and Priorities

regarding the conduct of the recently hired global chairman, Tim Main.¹⁸⁹ Staley, who was personal friends with Main, twice asked Barclays' internal security team to undercover the identity of the whistleblower, potentially in violation of the U.K.'s strict whistleblower anti-retaliation laws.¹⁹⁰ While the investigation by both regulators is ongoing and may take several months to complete, public and shareholder pressure forced Staley to publicly apologize, stating that he "made a mistake in becoming involved in an issue which [he] should have left to the business to deal with."¹⁹¹

In Canada, the Ontario Securities Commission (OSC) issued its Statement of Priorities on June 30, 2017, setting out areas in which the OSC will focus its resources and actions.¹⁹² Part of this statement includes a focus on its whistleblower program, which was established in July 2016. The OSC plans on promoting a "better understanding of the anti-retaliation protections for whistleblowers" and will develop "a more proactive outreach program to reach potential high-value whistleblowers."¹⁹³ The current whistleblower program allows the OSC to compensate individuals who provide tips, up to \$5 million CAD, and it also allows the OSC to take enforcement action against firms that retaliate against or try to silence whistleblowers.¹⁹⁴

In Germany, the country's Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht, known as BaFin)¹⁹⁵ worked in the first half of 2017 to make it easier for anonymous whistleblowers, focusing on bank employees, to report money laundering or corruption directly to the Authority.¹⁹⁵ BaFin introduced, in January 2017, an online portal that "guarantees the absolute anonymity of the whistleblower, but also makes it possible for BaFin to get in contact with the whistleblower."¹⁹⁶ Before this system, whistleblowers had to use potentially traceable communication methods to contact BaFin.

Deferred Prosecution Agreements

The selective use of Deferred Prosecution Agreements (DPAs) by authorities in the U.K. over the past six months has provided greater insight into how prosecutors there are determined to utilize this law enforcement tool that is relatively new to the U.K.

In January, the U.K. SFO entered into only its third DPA. Rolls-Royce signed an \$800 million global resolution to pay restitution to the governments of the U.S., the U.K. and Brazil for bribing government officials to obtain government contracts.¹⁹⁷ Rolls-Royce signed DPAs agreeing to the criminal charges with each respective government.¹⁹⁸ Although assessed hefty fines, Rolls-Royce escaped possible conviction – as long as it continues to abide by the terms of the DPAs. The DPAs also require Rolls-Royce to cooperate with the SFO's ongoing investigations into individuals.

189 *Id.*

190 *Id.*; see Ben Martin, *How the Whistleblowing Scandal at Barclays Unfolded*, The Telegraph (Apr. 10, 2017), <http://bit.ly/2v1WMDJ>.

191 Ben Martin, *How the Whistleblowing Scandal at Barclays Unfolded*, The Telegraph (Apr. 10, 2017), <http://bit.ly/2v1WMDJ>.

192 Press Release, Ontario Securities Commission, "Ontario Securities Commission Publishes 2017-2018 Statement of Priorities" (June 30, 2017), <http://bit.ly/2v3AxsG>.

193 *Id.*

194 Press Release, Ontario Securities Commission, "OSC Launches Office of the Whistleblower" (July 14, 2016), <http://bit.ly/2vNlu8x>.

195 Ben Knight, *Germany Sets Up Banking Whistleblower Portal*, DW (Jan. 4, 2017), <http://p.dw.com/p/2VGrX>.

196 *Id.*

197 Press Release, U.S. Dep't of Justice, "Rolls-Royce plc Agrees to Pay \$170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case" (Jan. 17, 2017), <http://bit.ly/2xDCIpl>.

198 *Id.*

International Parallels In Law Enforcement Methods and Priorities

After the DPAs with Rolls-Royce were signed, a three-year investigation revealed decades of bribes in numerous countries around the world, yielding significant profits for Rolls-Royce and allowing the U.K. government to recover almost half a billion pounds.¹⁹⁹ The SFO received a great deal of criticism for giving Rolls the DPA in January because of the enormity of the case and the depth of the fraud. Ben Morgan, a joint head of bribery and corruption at the SFO, made a speech on March 8 addressing the severity of the conduct and defending the DPA.²⁰⁰ Morgan discussed the serious commitment that entering into a DPA is for a corporation, one that many companies instinctively do not want to do but that Rolls-Royce fully committed to, emphasizing the high level of Rolls-Royce's cooperation.²⁰¹ "[T]here is little more they could have done to put right what had happened."²⁰²

On April 10, the SFO entered into another DPA following a two-year investigation of Tesco Stores Limited on false accounting charges.²⁰³ The SFO opened its investigation into Tesco in October 2014 following disclosure that due to questionable accounting principles, Tesco had overstated profits by £263 million.²⁰⁴ According to the SFO, Tesco substantially aided the government investigation over the past two and a half years.²⁰⁵ This DPA is notable as it is the SFO's first DPA for an offense other than bribery.²⁰⁶ Simultaneous with the announcement of the SFO's DPA with Tesco requiring a £128,992,500 penalty, the FCA also ordered Tesco PLC to pay an estimated £85 million to investors for committing market abuses.²⁰⁷ This simultaneous resolution demonstrates an increased level of cooperation between the SFO and FCA.

In late June, British authorities charged Barclays and four of its former top executives with conspiracy to commit fraud and unlawful financial assistance related to Barclays' 2008 fundraising efforts.²⁰⁸ Seeking to avoid the need for a government bailout, Barclays had raised about \$15 billion through dealings with Qatar's sovereign wealth funds.²⁰⁹ As part of the prosecution, the SFO has been examining the propriety of an agreement between Barclays and Qatar which allegedly led the bank to pay more than £300 million for "advisory services."²¹⁰ Barclays' board of directors recently convened to consider whether the corporation would plead guilty.²¹¹ According to reports, the SFO has not offered Barclays a DPA.²¹² The suggestion of a DPA for Barclays was first floated in 2015; however, DPAs are, according to SFO Director David Green, "only for companies that

199 Ben Morgan, Joint Head of Bribery and Corruption for the Serious Fraud Office, Speech at Norton Rose Fulbright LLP: *The future of Deferred Prosecution Agreements after Rolls-Royce*, Serious Fraud Office (Mar. 8, 2017), <http://bit.ly/2vxJgZG>.

200 *Id.*

201 *Id.*

202 *Id.*

203 News Release, Serious Fraud Office, "SFO agrees Deferred Prosecution Agreement with TESCO" (Apr. 10, 2017), <http://bit.ly/2wtxF1r>.

204 Maria Lemos Stein, *SFO, Tesco Seal Deferred-Prosecution Agreement*, Wall Street Journal (Apr. 10, 2017), <http://on.wsj.com/2eLU7Vf>.

205 *Id.*

206 Paul Hodgson, *Tesco, the SFO, and the FCA come to terms*, Compliance Week (Apr. 5, 2017), <http://bit.ly/2eLTpaT>.

207 Jon Yeomans & Ashley Armstrong, *Tesco Pays £129 m to Settle Serious Fraud Office Probe into Accounting Scandal*, The Telegraph (Mar. 28, 2017), <http://bit.ly/2iNkHBX>.

208 Chad Bray, "Barclays and Former Executives Charged in Qatar Fund-Raising" NYTimes, (June. 20, 2017), <http://nyti.ms/2wtENnQ>.

209 Mark Taylor, *SFO Breaks New Ground with Barclays Criminal Probe*, Law360, (June 20, 2017), <http://bit.ly/2iMKIkO>.

210 *Supra* note 208.

211 *Id.*

212 *Id.*

International Parallels In Law Enforcement Methods and Priorities

co-operated with the SFO and accepted wrongdoing.”²¹³ As Barclays does not accept criminality related to its deals with Qatar, it has not been offered a DPA.²¹⁴

The absence of a DPA in the Barclays case has helped mollify, to some extent, many critics of the SFO in the financial and legal community following the Rolls-Royce resolution. The SFO’s decision to charge Barclays counters the concern that DPAs would become the SFO’s standard mechanism for addressing corporate wrongdoing, no matter how egregious the underlying criminality might appear to be.²¹⁵ Over time, as the SFO resolves more corporate investigations with DPAs rather than with criminal charges, the standards by which it makes its decisions will become clearer.

Meanwhile, the criminal charges against Barclays have halted the U.K. FCA’s parallel investigation.²¹⁶ The FCA, which had already threatened Barclays with £50 million in fines for its “reckless”²¹⁷ breaching of the disclosure rules, is “pleased”²¹⁸ that the public is aware of Barclays’ actions.

The DOJ and SEC, however, are still currently investigating the Barclays matter.²¹⁹ A separate civil suit filed by the DOJ against Barclays last December for fraudulently misleading the public in the sale of billions of dollars in mortgage-backed securities is also currently ongoing.²²⁰

Both Canada and Australia are considering the use of DPAs as a positive tool in aiding the authorities in investigating corporate crime and misconduct. On July 12, 2017, Transparency International Canada recommended the Canadian government adopt legislation creating a DPA scheme in order to promote compliance and increase transparency.²²¹ The report says that Canada should consider a DPA scheme because DPAs “have gained increasing visibility and prominence in the international fight against corruption.”²²² The report notes that not only has the United States had significant experience with DPAs, but the U.K. and France have also both incorporated DPAs into their enforcement regimes, and gained acceptance doing so.²²³ Additionally, the Australian government published a public consultation paper in April 2017 outlining a proposed model for DPAs. After it was described as “a key focus of the Australian Government’s consideration of options to facilitate a more effective and efficient response to corporate crime by encouraging greater self-reporting by companies,”²²⁴ there is a push for Australia to join the ranks of many other countries and incorporate DPAs into its enforcement regimes.

²¹³ Caroline Binham, *Position Taken by Barclays Ruled out DPA Deal with Fraud Agency*, Financial Times (June 22, 2017), <http://on.ft.com/2vQKri5>.

²¹⁴ *Id.*

²¹⁵ *Supra* note 208.

²¹⁶ *Supra* note 209.

²¹⁷ *Supra* note 208.

²¹⁸ *Supra* note 209.

²¹⁹ *Supra* note 208.

²²⁰ *Id.*

²²¹ Richard L. Cassin, *TI-Canada Recommends a Deferred Prosecution Agreement Scheme (With Conditions)* (July 12, 2017), <http://bit.ly/2xDaN9d>.

²²² *Id.*

²²³ *Id.*

²²⁴ Australian Government Attorney-General’s Department, *Proposed Model for a Deferred Prosecution Agreement Scheme in Australia* (May 1, 2017), <http://bit.ly/2vQWmFT>.

International Parallels In Law Enforcement Methods and Priorities

In the U.S., regulators' heavy reliance on DPAs continues unabated. In fact, the CFTC has recently indicated that it may utilize more non-prosecution agreements going forward. In June, the CFTC entered into non-prosecution agreements with Jeremy Lao, Daniel Lao and Shlomo Salant, three former Citigroup Inc. traders who admitted to spoofing U.S. Treasury futures markets.²²⁵ The CFTC's use of non-prosecution agreements may signal a shift in its practice under new enforcement Chief James McDonald, who stated that the agreements with the three targets "expedited our investigation and strengthened our cases against the other wrongdoers."²²⁶

A recent decision by the Second Circuit has secured the continued utility of DPAs. HSBC and the DOJ entered into a DPA after the DOJ brought charges against HSBC for a failure to prevent alleged money laundering schemes. In the DPA, the parties agreed that HSBC would pay a \$1.92 billion fine and allow a five-year inspection into the bank's enhanced procedures by a third-party monitor. An individual suing the bank on mortgage loan modifications petitioned for disclosure of the monitor's report.²²⁷ In this case, the government and the bank both opposed disclosure of the reports; however, the court ordered that a redacted version of the report be released.²²⁸ Both the government and the bank appealed this decision to the Second Circuit, which agreed and reversed the district court's ruling that the reports were a "judicial document" subject to presumptive right of public access.²²⁹ The Second Circuit explained, "[b]y sua sponte invoking its supervisory power at the outset of this case to oversee the government's entry into and implementation of the DPA, the district court impermissibly encroached on the Executive's constitutional mandate to 'take Care that the Laws be faithfully executed.'"²³⁰ This ruling is positive for the existence of DPAs. Before the Second Circuit overruled the district court, there was uncertainty in the continued existence of DPAs, because having associated reports be discoverable might prevent parties from cooperating, as the cooperation may not be confidential.²³¹

U.S. Government's Authority to Seize Data Stored Overseas

On May 24, 2017, the Senate Judiciary Committee's Subcommittee on Crime and Terrorism held a hearing titled "Law Enforcement Access to Data Stored Across Borders"²³² to gather insight on the continuing debate surrounding U.S. technology companies' rights and obligations when faced with a request by U.S. law enforcement for data stored abroad. Witnesses included Brad Wiegmann, deputy assistant attorney general at the DOJ; Paddy McGuinness, U.K. deputy national security advisor; and Microsoft president and chief legal officer Brad Smith. The hearing came on the heels of Microsoft's landmark win in the so-called Microsoft-Ireland case, when the Second Circuit Court

225 Matt Robinson, *Ex-Citigroup Traders Admit Spoofing, Reach Accord With CFTC*, Bloomberg (June 29, 2017), <https://www.bloomberg.com/news/articles/2017-06-29/ex-citigroup-traders-admit-spoofing-reach-accord-with-cftc>.

226 *Id.*

227 Peter J. Henning, *HSBC Case Tests Transparency of Deferred Prosecution Agreements*, NYTimes (Feb. 8, 2016), <http://nyti.ms/2wY5KU4>.

228 *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763 (JG), 2016 WL 347670 (E.D.N.Y. Jan. 28, 2016).

229 *United States v. HSBC Bank USA, N.A.*, 863 F.3d 125 (2017).

230 *Id.*

231 *Id.*

232 Senate Committee on the Judiciary, "Law Enforcement Access to Data Stored Across Borders: Facilitating Cooperation and Protecting Rights," (May 24, 2017), <https://www.judiciary.senate.gov/meetings/law-enforcement-access-to-data-stored-across-borders-facilitating-cooperation-and-protecting-rights>.

International Parallels In Law Enforcement Methods and Priorities

of Appeals in January 2017 denied the DOJ's bid to have the court rehear its decision overturning a lower court decision that enforced a search warrant targeting data stored in Microsoft servers overseas.²³³ The Second Circuit had previously held²³⁴ that warrants for user data that an internet provider stores outside U.S. borders are unenforceable because the federal statute authorizing data-centered search warrants – the Stored Communications Act²³⁵ – only has territorial effect.²³⁶ That decision is widely viewed as a victory for internet and technology companies that store data of U.S. citizens overseas. The DOJ has petitioned for review by the U.S. Supreme Court.²³⁷

At the May 24 hearing, Wiegmann called for legislation that would reverse the Second Circuit's decision, citing its "serious impact on public safety by preventing access to critical evidence stored abroad." He also called for a more collaborative approach to navigating cross-border data-sharing quandaries, reviving a 2016 proposal that would allow the U.S. to enter into reciprocal agreements with other countries to facilitate the DOJ's ability to obtain electronic data stored abroad.²³⁸ During the second half of 2016, the Obama administration was working on a series of reciprocal agreements with foreign governments that would allow those governments to serve U.S. technology companies with foreign warrants for email searches and wiretaps.²³⁹ According to Wiegmann, foreign investigators would be able to serve a warrant directly on a U.S. firm to see a suspect's stored emails or intercept their messages in real time, as long as the surveillance didn't involve U.S. citizens or residents. Such deals would also give U.S. investigators reciprocal authority to search data in those countries.

Microsoft's Brad Smith, for his part, agreed with the notion of reciprocal agreements but said that legislation overturning Microsoft-Ireland would force internet companies into the untenable position of deciding what country's laws they want to break when faced with a subpoena from U.S. law enforcement personnel. For example, Smith pointed out that the European General Data Protection Regulation, set to take effect in May 2018, imposes harsh penalties for turning over to U.S. authorities data concerning European citizens.²⁴⁰

It is unclear whether cross-border data sharing will continue to be a top priority for the DOJ under the Trump administration. Nevertheless, the complex policy issues surrounding the Microsoft-Ireland decision will likely continue to play out in the courts, Congress and the international arena in 2017 and beyond.

233 Petition for Rehearing and Rehearing En Banc filed, *Microsoft Corporation v. United States of America*, Docket No. 14-2985 (Oct. 13, 2016), https://www.justsecurity.org/wp-content/uploads/2016/10/Microsoft_14-2985-United-States-Appellee-Petition.pdf.

234 *In re: Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corp.*, 13-MJ-2814 (S.D.N.Y. July 31, 2014) (ECF 84).

235 18 U.S.C. §§ 2701–2712.

236 *Supra* note 234.

237 Petition for a Writ of Certiorari, *Matter of Warrant to Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corp.*, No. 17-2 (June 2017), https://www.justice.gov/sites/default/files/briefs/2017/06/28/17-2_microsoft_corp_petition.pdf.

238 Peter J. Kaszik, *Letter to Vice President of the United States Joseph R. Biden*, (Jul. 15, 2016), <https://www.documentcloud.org/documents/2994379-2016-7-15-US-UK-Biden-With-Enclosures.html#document/p1>.

239 Devline Barret and Jay Greene, *U.S. to Allow Foreigners to Serve Warrants on U.S. Internet Firms*, *The Wall Street Journal* (July 15, 2016), <https://www.wsj.com/articles/obama-administration-negotiating-international-data-sharing-agreements-1468619305>.

240 Carson, Angelique, *Reverse Microsoft v. US? Judiciary subcommittee wrestles with cross-border data sharing*, *The Privacy Adviser* (May 25, 2017), <https://iapp.org/news/a/reverse-microsoft-v-u-s-judiciary-subcommittee-wrestles-with-cross-border-data-sharing/>.



Practical Considerations In Defending Against Cross-Border Regulatory Investigations

**Practical Considerations In
Defending Against
Cross-Border Regulatory
Investigations**

Data Privacy

In this increasingly global regulatory environment, companies face significant practical challenges in defending against cross-border government investigations and enforcement activities. This Section provides updates to two of the prevalent considerations regarding a company's cross-border internal investigation and defense strategy: data privacy and legal privilege laws of foreign jurisdictions.

As predicted, we have seen the continued strengthening of data privacy laws around the globe, particularly in regions with previously under-developed regulations. Notably, in late 2016, the first specific piece of national data protection legislation²⁴¹ was issued in the Middle East, when Qatari Law No.13 of 2016 Concerning the Protection of Personal Data Privacy (the Qatar Data Protection Law) was issued by the emir of Qatar. Historically, the protection of personal information across the Middle East has been addressed by a combination of constitutional rights and criminal laws, so the Qatar Data Protection Law is being viewed with great interest in the region.

In addition to the already existing State Secret laws, China's new Cybersecurity Law became effective on June 1, 2017.²⁴² In adopting, modifying and codifying existing industry-specific rules regarding handling personal information in China,²⁴³ the law focuses on protecting personal information and individual privacy and standardizes the collection and usage of personal information.²⁴⁴ Under the law, in addition to having data-protection measures, companies regulated by the law²⁴⁵ will now be required to store sensitive data – for instance, information on Chinese citizens or relating to national security, although the government has been unclear on precisely what constitutes “sensitive data” – on domestic servers.²⁴⁶ Unauthorized collection, disclosure and receipt of a citizen's personal information now constitutes a criminal offense.²⁴⁷

Another layer of complication is added by the yet-to-be-finalized Measures for Security Assessment of Personal Information and Important Data Leaving the Country (the Measures), which will likely require foreign companies doing business in China to adjust their business practices surrounding handling data.²⁴⁸ Based on the draft document that was published in April 2017, the Measures would expand the data localization requirement to all network operators, essentially requiring all personal information and important data collected by network operators within the People's Republic of China to be stored within China and not leave China other than for “genuine business need” and after a security assessment.²⁴⁹ This could translate to significant burdens on multinational corporations and NGO's operating in China.

²⁴¹ Although not a national data protection law, the Qatar Financial Centre (the QFC), a financial services free zone within Qatar, has a legislative regime that includes a comprehensive data protection law, which is modeled on European data protection principles and applicable to companies established in the QFC.

²⁴² Sara Xia, China Cybersecurity and Data Protection Laws: Change is Coming, China Law Blog (May 10, 2017), <http://www.chinalawblog.com/2017/05/china-cybersecurity-and-data-protection-laws-change-is-coming.html>.

²⁴³ *Id.*

²⁴⁴ Sophia Yan, China's new cybersecurity law takes effect today, and many are confused, CNBC (June 1, 2017), <http://www.cnbc.com/2017/05/31/chinas-new-cybersecurity-law-takes-effect-today.html>.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Supra* note 242.

²⁴⁹ *Supra* note 242.

Legal Privileges

Practical Considerations In Defending Against Cross-Border Regulatory Investigations

In May 2017, the U.K. High Court of Justice, Queen's Bench Division, rendered a decision in *Serious Fraud Office v. Eurasian Natural Resources Corporation Ltd.* ("ENRC") that narrowed the scope of the U.K. litigation and legal advice privileges (the U.K. counterparts to the U.S. work product doctrine and attorney-client privilege, respectively) in the context of an internal investigation.²⁵⁰ In this case, ENRC, a U.K. mining and natural resource company that is part of a multi-national group of companies, retained counsel to conduct an internal investigation into a whistleblower's allegations of fraud in connection with the company's expansion into various parts of Africa.²⁵¹ During the investigation, the company received a letter from the SFO encouraging the company to consider the SFO's 2009 Self-Reporting Guidelines while it undertook its internal investigation.²⁵² Shortly thereafter, the company's outside counsel started a dialogue with the SFO, which, according to the SFO, was a part of the SFO's Self-Reporting Guidelines.²⁵³ Between August 2011 and March 2013, there were over 30 meetings and discussions between the company's outside counsel and the SFO.²⁵⁴

In April 2013, the SFO ended informal discussions with the company and launched its own criminal investigation into the alleged corrupt activities.²⁵⁵ As part its investigation, the SFO issued notices to the company pursuant to section 2(3) of the Criminal Justice Act 1987, seeking documents generated during the phase of the company's internal investigation that preceded the SFO's formal criminal investigation.²⁵⁶ Among other documents, the SFO sought: (1) interview notes created by the company's outside counsel of interviews they conducted of current and former employees and officers of the company, and its subsidiary companies; and (2) materials generated by the company's forensic accountants, which were part of a books and records review they carried out in connection with identifying controls and systems weaknesses and potential improvements.²⁵⁷ The company declined to comply with the SFO's notices, claiming that the documents sought by the SFO were protected by the U.K. litigation and/or legal advice privileges.²⁵⁸

A central issue in this case was whether the company reasonably contemplated litigation that was adversarial (as opposed to investigative or inquisitorial) with the SFO during its internal investigation, because those are two of the factors that must be present under U.K. law for the litigation privilege to attach.²⁵⁹ The court found that to make this showing, ENRC had to demonstrate that it reasonably contemplated a criminal prosecution by the SFO.²⁶⁰ The court

250 *Serious Fraud Office v. Eurasian Natural Resources Corporation Ltd.* [2017] EWHC 1017 (QB) (Eng.). For a broader discussion of ENRC and its implications, see Patrick T. Campbell and Darley Maw, *Serious Fraud Office v. Eurasian Natural Resources Corp. Ltd. and Beyond: Attorney-Client Privilege and Work Product Doctrine in Cross-Border Investigations*, Bloomberg BNA's Corporate Counsel Weekly (Sept. 13, 2017).

251 *Id.*

252 *Id.* at 11.

253 *Id.*

254 *Id.*

255 *Id.* at 125.

256 *Id.* at 5.

257 *Id.* at 25-36.

258 *Id.* at 28.

259 *Id.* at 51.

260 *Id.* at 154.

Practical Considerations In Defending Against Cross-Border Regulatory Investigations

held that, at most, the company demonstrated that it was aware of a real likelihood of the SFO commencing a criminal investigation into the company, which it reasoned was not “adversarial” because a SFO investigation is a preliminary step taken, and completed, before any decision to prosecute is made.²⁶¹ Further, even if the company reasonably contemplated criminal proceedings at the relevant time, none of the documents generated during the company’s internal investigation were created for the “dominant purpose” of defending against such a criminal proceeding, which is the third factor that must be present for the U.K. litigation privilege to apply.²⁶² The court found that the purpose of the company’s internal investigation was to access the veracity of the whistleblower’s claims and to prepare for potential SFO investigations.²⁶³

The other main issue in the case was whether the interviewees fell within the definition of the “client” for the legal advice privilege to attach to those communications such that the company would not have to turn over interview notes created by the company’s outside counsel.²⁶⁴ The court held that the notes were not covered by the legal advice privilege, because the company did not provide any evidence to support that the interviewees were authorized to seek or obtain legal advice on behalf of the company, which is what is required under U.K. law.²⁶⁵

The ENRC case highlights the importance of understanding the differences between the rules applicable to legal privileges in the U.S. and abroad. Due to the U.K.’s relatively strict “choice of law” principles, U.K. legal privilege rules will likely apply to internal investigations that take place in the U.K.²⁶⁶ For one, the litigation privilege in the U.K. appears to be more narrowly applied than its counterpart in the U.S., the work product doctrine.²⁶⁷ In the U.S., the commencement of a government investigation is typically enough for a party to be able to assert work product protection.²⁶⁸ Moreover, according to *ENRC*, U.K. courts apply a “dominant purpose” test, where the sole or primary purpose for the creation of documents sought to be protected must be to defend against litigation. Rather, most U.S. federal courts only require the party seeking to assert work product protection to show that the document was prepared “because of” the prospect of litigation.²⁶⁹ There is no requirement that the document be produced to assist in the conduct of litigation, much less primarily or exclusively to assist in the conduct of litigation.²⁷⁰

261 *Id.* at 117, 144.

262 *Id.* at 164.

263 *Id.* at 158.

264 *Id.* at 62.

265 *Id.* at 171.

266 Generally, U.K. rules of legal privilege apply in proceedings in U.K. courts. *In re RBS Rights Issue Litig.*, [2016] EWHC 3161 (Ch) (Eng.). On the other hand, most U.S. federal courts follow the “touch base” test, which states that “a court should apply the law of the country that has the predominant or the most direct and compelling interest in whether [the] communications should remain confidential, unless that foreign law is contrary to the public policy of this forum.” *Anwar v. Fairfield Greenwich Ltd.*, 982 F. Supp. 2d 260, 264 (S.D.N.Y. 2013) (quotation omitted); see *Gucci Am., Inc. v. Guess?, Inc.*, 271 F.R.D. 58, 64–65 (S.D.N.Y.2010).

267 Campbell and Maw, *supra* note 250.

268 *E.g.*, *In re Gen. Motors LLC Ignition Switch Litig.*, 80 F.Supp.3d 521, 532 (S.D.N.Y. 2015); (holding work product doctrine applies to materials generated in light of pending DOJ investigation); *S.E.C. v. Nacchio*, Civil Action No. 05-cv-00480-MSK-CBS, 2007 WL 219966, at *6 (D. Colo. Jan. 25, 2007) (noting that “courts have acknowledged that an investigation by a federal agency presents more than a remote prospect of future litigation.”) (quotation omitted).

269 *E.g.*, *In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.)*, 357 F.3d 900, 907 (9th Cir. 2004); *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998); *Senate of Puerto Rico v. U.S. Dep’t of Justice*, 823 F.2d 574, 581 (D.C. Cir. 1987).

270 *Gen. Motors LLC*, 80 F.Supp.3d 521, 532; see also, *e.g.*, *In re Grand Jury Subpoena*, 357 F.3d at 908 (“The ‘because of’ standard does not consider whether litigation was a primary or secondary motive behind the creation of a document.”); *Adlman*, 134 F.3d at 1198 (work product doctrine protects documents prepared “because of” existing or prospective litigation, even if purpose of documents is not to assist in litigation).

Practical Considerations In Defending Against Cross-Border Regulatory Investigations

Companies also need to understand the identity of the “client” for the purposes of the attorney-client privilege and its overseas analogs.²⁷¹ As illustrated in *ENRC*, U.K. courts use standard similar to the “control group” test and apply the legal advice privilege only to communications between company counsel and employees who are authorized by the company to seek or obtain legal advice. U.S. federal courts have long rejected the “control group” test; rather, the U.S. attorney-client privilege extends to communications between company counsel and employees as long as “[t]he communications concerned matters within the scope of the employees’ corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice.”²⁷²

²⁷¹ Campbell and Maw, *supra* note 241.

²⁷² *Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981); *see also MF Glob. Holdings Ltd. v. PricewaterhouseCoopers LLP*, 232 F. Supp. 3d 558, 569 (S.D.N.Y. 2017); *Gen. Motors LLC*, 80 F. Supp. 3d at 530-31.

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