



# 2018 Year-End Cross-Border Government Investigations and Regulatory Enforcement Review

**BakerHostetler**

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## Introduction

In the second year of the Trump administration, U.S. white collar law enforcement priorities became clearer, particularly with regard to transnational crime. While certain reports suggest that white collar prosecutions are generally on the decline, the U.S. Department of Justice (DOJ), the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC) continue to aggressively pursue investigations and actions against foreign nationals and companies for alleged conduct that occurs substantially outside of the U.S.'s borders in coordination with foreign law enforcement authorities. As detailed in this report, in 2018, many of these cross-border investigations and actions focused on cybercrime, trade secrets theft and anti-corruption/anti-money laundering enforcement. Similarly, the U.S. continued to prioritize the enforcement of trade sanctions laws, especially regarding enforcement of Iranian and North Korean sanctions. Also seen in 2018 were significant DOJ and CFTC enforcement actions regarding "spoofing," and several international securities fraud actions brought by the DOJ and the SEC against foreign nationals and companies. U.S. cross-border actions for alleged Libor and forex market manipulation continue, as well as for accounting fraud. Finally, as the use of blockchain technology and cryptocurrency becomes more wide-spread, so too have international law enforcement investigations, actions and efforts to regulate it.

However, there were also several significant legal developments in 2018 that might curtail U.S. law enforcement's broad jurisdictional approach. The Second Circuit Court of Appeals, in *United States v. Hoskins*, held that the DOJ cannot bring charges against foreign nationals who allegedly conspire to violate the Foreign Corrupt Practices Act (FCPA) unless they are agents of a U.S. issuer or domestic concern or engage in conduct in the U.S. – limiting the DOJ's former more expansive approach to conspiracy and aiding and abetting liability under the FCPA. DOJ cross-border prosecutions are becoming more difficult against foreign defendants who gave compelled testimony to an overseas regulator because of Fifth Amendment issues. In one notable development that might have far-reaching consequences, U.K. courts recently decided not to extradite a U.K. citizen facing forex market manipulation charges in the U.S., on the bases, among other things, that the defendant had no significant connection with the U.S. and most of the alleged improper trading took place in the U.K.

Law enforcement authorities in various different countries also adopted new policies in 2018 that reflect the increased coordination among them, as well as the influence of U.S. practices. The DOJ's extension of its FCPA Corporate Enforcement Policy, which provides a declination presumption under certain circumstances where companies voluntarily self-disclose alleged misconduct, to other criminal actions impacted several multi-jurisdictional resolutions in 2018. So too has the DOJ's recent anti-piling on policy. Other countries continue to adopt and consider variations on U.S. whistleblower policies and non- and deferred prosecution agreements (DPAs). In April 2018, the European Commission proposed a new whistleblower protection law that seeks to increase protection of whistleblowers and create some level of consistency in standards across the EU. Also seen in 2018 were an additional three French DPAs and adoptions of DPA regimes in Singapore and Canada.

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Finally, there were significant developments in 2018 in overseas data protection and attorney-client privilege laws that will have a substantial impact on the manner in which cross-border international investigations will be conducted. Companies need to ensure that they comply with the General Data Protection Regulation (GDPR), which took effect on May 25, 2018, or face significant sanctions. Companies and their counsel must also be cognizant of the differences between the privilege laws of the U.S. and those of other countries when conducting internal investigations. The widely-reported U.K. Court of Appeal decision in *SFO v. ENRC*, found that certain materials generated in the course of an internal investigation were protected under U.K. privilege laws. However, the decision further illustrated the significant differences between U.K. privilege laws and their U.S. analogs.

We hope that BakerHostetler's 2018 Year-End Cross-Border Government Investigations and Regulatory Enforcement Review will serve as a useful resource for companies and their counsel when they are confronted with cross-border regulatory or enforcement issues. Additional updates from BakerHostetler's White Collar team will follow throughout 2019.



U.S. Cross-Border Enforcement  
Trends and Developments

## U.S. CROSS-BORDER ENFORCEMENT TRENDS AND DEVELOPMENTS

### Cybercrime

In February 2018, the DOJ announced the creation of a “Cyber-Digital Task Force” to study how domestic and foreign hackers have infiltrated U.S. economic and political institutions, manipulated or stole data and frustrated law enforcement operations.<sup>1</sup> In July 2018, the Cyber-Digital Task Force issued a report to then-Attorney General Jeffrey Sessions that highlighted that most of the major cybersecurity threats facing the U.S. are “posed by malign foreign influence operations.”<sup>2</sup> In line with this law enforcement priority, several of the U.S. cybercrime actions in 2018 were directed against foreign nationals, often working on behalf of, or in concert with, foreign governments.

#### The Special Counsel Investigation

Perhaps the most well-known of these prosecutions involves the Russian actors that the Office of the Special Counsel charged with interfering with the 2016 presidential election. On February 16, 2018, a federal grand jury in the District of Columbia indicted 13 Russian nationals and three Russian companies, characterized as “Russian government operatives,” for allegedly interfering in the U.S. political process through various means “to promote discord in the United States and undermine public confidence in democracy.”<sup>3</sup> The defendants allegedly conspired to support the presidential campaign of then-candidate Donald J. Trump and disparage the campaign of Hillary R. Clinton. Together, the defendants purportedly impersonated Americans on social media, organized rallies on behalf of Trump’s campaigns in key states and conducted millions of dollars of research on American voters. The defendants were charged with aggravated identity theft, conspiracy to commit wire fraud and bank fraud and conspiracy to defraud the U.S. Indicative of the difficulties U.S. law enforcement faces in cross-border cybercrime cases, no arrests have yet been made because the accused individuals reside in Russia, which does not have an extradition treaty with the U.S.<sup>4</sup>

In another case pursued by the Office of the Special Counsel, on July 13, 2018, a federal grand jury in the District of Columbia indicted 12 Russian military officers for conspiring to interfere with the 2016 presidential election.<sup>5</sup> The indictment alleges that the defendants worked for two units of Russia’s Main Intelligence Directorate of the Russian General Staff – one unit would hack and steal information and the other unit would disseminate it. Among other things, the defendants allegedly hacked into the computer networks of a congressional campaign committee, a national political committee and the email accounts of volunteers and employees of the Clinton presidential campaign, including its chairman, John Podesta. The defendants allegedly created fictitious online personas, including “DCLeaks” and “Guccifer 2.0,” and used these personas to disseminate the hacked and stolen information. The defendants were charged with conspiring to access computers without authorization, aggravated identity theft and money laundering. No arrests have been made.

1 Press Release, U.S. Dep’t of Just., “Attorney General Sessions Announces New Cybersecurity Task Force” (Feb. 20, 2018), <https://www.justice.gov/opa/pr/attorney-general-sessions-announces-new-cybersecurity-task-force>.

2 Press Release, U.S. Dep’t of Just., “Attorney General Sessions Announces Publication of Cyber-Digital Task Force Report” (July 19, 2018), <https://www.justice.gov/opa/pr/attorney-general-sessions-announces-publication-cyber-digital-task-force-report>.

3 Press Release, U.S. Dep’t of Just., “Grand Jury Indicts Thirteen Russian Individuals and Three Russian Companies for Scheme to Interfere in the United States Political System” (Feb. 16, 2018), <https://www.justice.gov/opa/pr/grand-jury-indicts-thirteen-russian-individuals-and-three-russian-companies-scheme-interfere>.

4 Kate Fazzini, *The US has a rocky history convincing Russia to extradite computer criminals – but it’s not impossible*, CNBC (Jul. 16, 2018), <https://www.cnbc.com/2018/07/16/extradition-has-been-tough-for-accused-russian-hackers.html>.

5 Press Release, U.S. Dep’t of Just., “Grand Jury Indicts 12 Russian Intelligence Officers for Hacking Offenses Related to the 2016 Election” (July 13, 2018), <https://www.justice.gov/opa/pr/grand-jury-indicts-12-russian-intelligence-officers-hacking-offenses-related-2016-election>.

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### Other U.S. Cross-Border Cybercrime Actions

U.S. cross-border cybercrime actions were not limited to the 2016 presidential election. For example, on February 14, 2018, in the District of New Jersey, Russian nationals Vladimir Drinkman and Dmitriy Smilianets were sentenced for their roles in an alleged worldwide hacking and data breach scheme that targeted major corporate networks, compromised 160 million credit card numbers and resulted in hundreds of millions of dollars in losses.<sup>6</sup> The DOJ characterized the scheme as one of the largest data breaches ever prosecuted in the U.S. In an unusual development for U.S. actions against Russian nationals, the defendants previously were arrested in the Netherlands and extradited to the U.S. Drinkman pleaded guilty to conspiracy to commit unauthorized access of protected computers and conspiracy to commit wire fraud in a manner affecting a financial institution and was sentenced to 144 months in prison. Smilianets pleaded guilty to conspiracy to commit wire fraud in a manner affecting a financial institution and was sentenced to 51 months and 21 days in prison. Smilianets also was ordered to pay \$302 million in restitution.<sup>7</sup> The DOJ noted the “collaborative efforts” of the Dutch Ministry of Security and Justice and the National High Tech Crime Unit of the Dutch National Police. Three Russian and Ukrainian alleged co-conspirators remain at large.

On March 23, 2018, the DOJ unsealed an indictment against nine Iranian nationals accused of one of the largest state-sponsored cyber-theft conspiracies.<sup>8</sup> The indictment, filed in the Southern District of New York, alleged that the defendants conducted a coordinated hacking campaign into computer systems belonging to 144 U.S. universities, 176 universities in 21 foreign countries, 47 domestic and foreign private sector companies, the U.S. Department of Labor, the U.S. Federal Energy Regulatory Commission, the States of Hawaii and Indiana, the United Nations and the United Nations Children’s Fund. The defendants purportedly were employed by the Iranian Revolutionary Guard Corps. and other Iranian government entities to steal personal information as part of an intelligence-gathering operation. FBI Director Christopher A. Wray stated that the indictment sends a powerful message that those who commit cybercrimes will be held accountable “no matter where they attempt to hide.” None of the defendants are under arrest and it is not expected that any of them will be extradited to the U.S.

On May 7, 2018, defendants Teodor Laurentiu Costea and Robert Codrut Dumitrescu, who are Romanian nationals, were arraigned in a Georgia federal court for their role in an alleged phishing scheme to defraud U.S. citizens into disclosing bank account numbers, personal identification numbers and Social Security numbers, causing an alleged estimated \$18 million in financial losses.<sup>9</sup> The defendants were charged with wire fraud, computer fraud, conspiracy and aggravated identity theft. The DOJ successfully extradited the defendants, along with their co-conspirator Cosmin Draghici, from Romania to the U.S. to stand trial.<sup>10</sup> All three pleaded guilty to the charges.

6 Press Release, U.S. Dep’t of Just., “Two Russian Nationals Sentenced to Prison for Massive Data Breach Conspiracy” (Feb. 15, 2018), <https://www.justice.gov/opa/pr/two-russian-nationals-sentenced-prison-massive-data-breach-conspiracy>.

7 Order of Restitution, *United States v. Smilianets*, No. 09-cr-00626-JBS-6 (D.N.J. Apr. 12, 2018) (ECF No. 125).

8 Press Release, U.S. Dep’t of Just., “Nine Iranians Charged With Conducting Massive Cyber Theft Campaign on Behalf of the Islamic Revolutionary Guard Corps” (Mar. 23, 2018), <https://www.justice.gov/opa/pr/nine-iranians-charged-conducting-massive-cyber-theft-campaign-behalf-islamic-revolutionary>.

9 Press Release, U.S. Dep’t of Just., “Two Romanian citizens extradited to Atlanta to face cyber and fraud charges in connection with a ‘vishing and smishing’ scheme” (May 4, 2018), <https://www.justice.gov/usao-ndga/pr/two-romanian-citizens-extradited-atlanta-face-cyber-and-fraud-charges-connection>.

10 Press Release, U.S. Dep’t of Just., “Three Romanian citizens plead guilty to participating in a multi-million dollar ‘vishing and smishing’ scheme” (Mar. 8, 2019), <https://www.justice.gov/usao-ndga/pr/three-romanian-citizens-plead-guilty-participating-multi-million-dollar-vishing-and>.

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On May 29, 2018, a federal judge sentenced Karim Baratov, who is a Canadian resident, to five years of imprisonment for running a “hacker-for-hire” business out of Ontario.<sup>11</sup> The DOJ accused Baratov of hacking into the email accounts of thousands of U.S. citizens, stealing personal information and selling it to Russian actors. One of these Russian actors was Dmitry Dokuchaev, who is alleged to have designed a scheme to hire hackers to break into Yahoo networks. Baratov was detained in Canada and, in August 2017, after waiving extradition to the U.S., was transferred to the Northern District of California. In November 2017, Baratov pleaded guilty to one charge of conspiracy to commit computer fraud and abuse and eight counts of aggravated identity theft.

### Trade Secrets Theft

In 2018, the DOJ continued to prioritize the prosecution of foreign nationals and companies for the theft of trade secrets. In particular, 2018 saw increased emphasis on the prosecution of trade secret laws against Chinese nationals and companies. On November 1, 2018, then-U.S. Attorney General Sessions issued the “China Initiative.”<sup>12</sup> According to Attorney General Sessions, the aim of the China Initiative is to “identify priority Chinese trade theft cases, ensure that we have enough resources dedicated to them and make sure that we bring them to an appropriate conclusion quickly and effectively.”

At the same time that he announced the China Initiative, Attorney General Sessions announced an indictment against Chinese and Taiwanese companies and individuals, accusing them of stealing trade secrets from Micron Technology, Inc. (Micron), an Idaho-based company that develops and manufactures dynamic random access memory (DRAM) integrated circuits.<sup>13</sup> Taiwan-based United Microelectronics Corp. (UMC), China’s state-backed Fujian Jinhua Integrated Circuit Co. Ltd. and three Taiwanese individuals were charged with conspiring to commit and committing theft of trade secrets and economic espionage.<sup>14</sup> According to the indictment, defendant Stephen Chen had worked at Micron’s subsidiary in Taiwan before joining UMC, where he allegedly recruited Micron employees to work together to siphon Micron’s trade secrets regarding the design and manufacturing process of DRAM. Prosecutors also filed a civil suit in California federal court seeking to halt any further transfer of the allegedly stolen trade secrets and to prevent the defendant companies from exporting to the U.S. any products related to the stolen intellectual property.

More recently, on December 20, 2018, two Chinese nationals associated with the China Ministry of State Security were indicted, in the Southern District of New York, for allegedly conducting global campaigns of computer intrusions targeting, among other data, intellectual property

11 Press Release, U.S. Dep’t of Just., “International Hacker-For-Hire Who Conspired With and Aided Russian FSB Officers Sentenced to 60 Months in Prison” (May 29, 2018), <https://www.justice.gov/opa/pr/international-hacker-hire-who-conspired-and-aided-russian-fsb-officers-sentenced-60-months>.

12 Press Release, U.S. Dep’t of Just., “Attorney General Jeff Sessions Announces New Initiative to Combat Chinese Economic Espionage” (Nov. 1, 2018), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-announces-new-initiative-combat-chinese-economic-espionage>.

13 *Id.*; see also Dean Saul, *US Accuses State-Owned Chinese Co. of Stealing Micron’s IP*, Law360 (Nov. 1, 2018), <https://www.law360.com/articles/1098105/us-accuses-state-owned-chinese-co-of-stealing-micron-s-ip>.

14 Press Release, U.S. Dep’t of Just., “PRC State-Owned Co., Taiwan Co., and Three Individuals Charged with Econ. Espionage” (Nov. 1, 2018), <https://www.justice.gov/opa/pr/prc-state-owned-company-taiwan-company-and-three-individuals-charged-economic-espionage>; see also Indictment, *United States v. United Microelectronics Corp.*, No. 3:18-cr-00465 (N.D. Cal. Sept. 27, 2018).



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and confidential business and technological information at managed service providers.<sup>15</sup> These managed service providers are companies that remotely manage the information technology infrastructure of businesses and governments around the world, including for more than 45 technology companies in at least a dozen U.S. states and U.S. government agencies. The defendants allegedly engaged in this activity as members of the prominent Chinese hacking group Advanced Persistent Threat 10 (APT10). APT10 targeted businesses across various industries such as aviation, banking and finance, pharmaceutical manufacturing and oil and gas exploration and production. The defendants are charged with conspiracy to commit computer intrusions, conspiracy to commit wire fraud and aggravated identity theft.

On January 28, 2019, federal prosecutors announced charges in the Western District of Washington State against two affiliates of China's Huawei Technologies Co. Ltd. (Huawei) for allegedly stealing information to duplicate a T-Mobile phone-testing robot, "Tappy."<sup>16</sup> This case stems from Huawei engineers who allegedly were allowed to use Tappy to test Huawei phones. Instead of complying with confidentiality and nondisclosure agreements, the employees purportedly measured and photographed T-Mobile's robot and even went so far as to steal a piece of the robot so that Huawei engineers in China could replicate it. On the same day, the DOJ also announced charges in the Eastern District of New York against Huawei, its Chief Financial Officer Wanzhou Meng and two Huawei affiliates for allegedly misrepresenting their relationship with the Chinese smartphone maker's Iranian subsidiary, Skycom Tech Co. Ltd. (Skycom), to avoid U.S. sanctions on Iran.<sup>17</sup> Meng faces bank fraud, wire fraud and conspiracy charges. Meng was arrested in Vancouver, Canada, at the request of U.S. authorities, and is fighting extradition to the U.S. The result of this case will be one to monitor closely in 2019.

Even before the announcement of the China Initiative, U.S. law enforcement increasingly focused on alleged trade secret thefts by Chinese nationals and companies. For example, on April 27, 2018, the DOJ filed a superseding indictment against a Chinese national and other defendants for economic espionage and conspiracy to steal trade secrets from a marine materials unit of a Swedish engineering firm.<sup>18</sup> A Chinese company and its U.S.-based affiliate also were indicted for their roles in the alleged conspiracy. According to the superseding indictment, the Chinese company intended to sell the stolen trade secrets, related to a material known as syntactic foam, to state-owned enterprises in China to advance China's national goal of developing its marine engineering industry for both civil and military uses.

Finally, on October 30, 2018, the U.S. charged two Chinese intelligence officers and eight others working under their direction for alleged computer hacking over several years that aimed to steal

15 Press Release, U.S. Dep't of Just., "Two Chinese Hackers Associated With the Ministry of State Security Charged with Global Computer Intrusion Campaigns Targeting Intellectual Property and Confidential Business Information" (Dec. 20, 2018), <https://www.justice.gov/opa/pr/two-chinese-hackers-associated-ministry-state-security-charged-global-computer-intrusion>.

16 Press Release, U.S. Dep't of Just., "Chinese Telecommunications Device Manufacturer and its U.S. Affiliate Indicted for Theft of Trade Secrets, Wire Fraud, and Obstruction of Justice" (Jan. 28, 2019), <https://www.justice.gov/opa/pr/chinese-telecommunications-device-manufacturer-and-its-us-affiliate-indicted-theft-trade>.

17 Press Release, U.S. Dep't of Just., "Chinese Telecommunications Conglomerate Huawei and Huawei CFO Wanzhou Meng Charged with Financial Fraud" (Jan. 28, 2019), <https://www.justice.gov/usao-edny/pr/chinese-telecommunications-conglomerate-huawei-and-huawei-cfo-wanzhou-meng-charged>.

18 Superseding Indictment, *United States v. Shi*, No. 17-CR-00110-CRC (D.D.C. Apr. 26, 2018) (ECF No. 110); see also Press Release, U.S. Dep't of Just., "Two Businessmen Charged With Conspiring to Commit Economic Espionage for Benefit of Chinese Manufacturing Company" (Apr. 27, 2018), <https://www.justice.gov/opa/pr/two-businessmen-charged-conspiring-commit-economic-espionage-benefit-chinese-manufacturing>.

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American and European intellectual property related to aerospace technology.<sup>19</sup> The intelligence officers and other co-conspirators worked for the Jiangsu Province Ministry of State Security (JSSD), an intelligence arm of China's Ministry of State Security.<sup>20</sup> According to the indictment, from at least January 2010 to May 2015, the intelligence officers and a recruited team of five hackers worked to steal the technology underlying a turbofan engine used in U.S. and European commercial airliners. In a development that the DOJ characterized as unprecedented for a Chinese intelligence officer, on October 9, 2018, one of the defendants, Yanjun Xu, was extradited to the U.S. from Belgium.<sup>21</sup> Defendant Zhang Zhang-Gui also is charged, along with Chinese national Li Xiao, in a separate hacking conspiracy, which asserts that Zhang Zhang-Gui and Li Xiao illegally leveraged the JSSD-directed conspiracy's intrusions, including the hack of a San Diego-based technology company, for their own ends. The DOJ received assistance from France's General Directorate for Internal Security and the Cybercrime Section of the Paris Prosecutor's Office in its investigation of the matter.

### Anti-Corruption and Money Laundering

In 2018, the U.S. government continued its aggressive cross-border enforcement of the FCPA and anti-money laundering laws against foreign companies and nationals for conduct substantially occurring overseas. In 2018, the DOJ resolved 21 actions and the SEC 17. This was comparable in number to 2017, when the DOJ resolved 29 actions and the SEC 10. In 2018, however, 16 companies paid a record \$2.89 billion to resolve FCPA actions.<sup>22</sup>

The largest recovery from those enforcement actions was against *Petróleo Brasileiro S.A. – Petrobras* (Petrobras). In September 2018, the DOJ and SEC, working with Brazilian law enforcement, assessed penalties and disgorgement of \$1.78 billion against the Brazilian state-owned and controlled energy company to resolve FCPA violations in connection with Petrobras's alleged role in facilitating payments to politicians and political parties in Brazil.<sup>23</sup> Petrobras entered into a non-prosecution agreement with the DOJ that assessed a criminal penalty of \$853 million and an administrative order with the SEC that required disgorgement of \$933 million. This resolution followed the DOJ's new policy against "piling on" (further described below). The DOJ agreed to credit 90 percent of its criminal penalty from Petrobras's payments to the *Ministerio Publico Federal* in Brazil and the SEC. In connection with the resolution, Assistant Attorney General Brian A. Benczkowski of the DOJ's Criminal Division stated, "This case is just the most recent example of our ability to work with our foreign counterparts to investigate companies and other criminal actors whose conduct spans multiple international jurisdictions."

There were also several other important developments in the area of cross-border enforcement of the FCPA and anti-money laundering laws in 2018.

19 Press Release, U.S. Dep't of Just., "Chinese Intelligence Officers and Their Recruited Hackers and Insiders Conspired to Steal Sensitive Commercial Aviation and Technological Data for Years" (Oct. 30, 2018), <https://www.justice.gov/opa/pr/chinese-intelligence-officers-and-their-recruited-hackers-and-insiders-conspired-steal>.

20 Indictment, *United States v. Zhang-Gui*, No. 3:13-cr-03132 ¶ 1 (S.D. Cal. Oct. 25, 2018).

21 Press Release, U.S. Dep't of Just., "Chinese Intelligence Officer Charged with Economic Espionage Involving Theft of Trade Secrets from Leading U.S. Aviation Companies" (Oct. 10, 2018), <https://www.justice.gov/opa/pr/chinese-intelligence-officer-charged-economic-espionage-involving-theft-trade-secrets-leading>.

22 Richard L. Cassin, *2018 FCPA Enforcement Index*, The FCPA Blog (Jan. 2, 2019), <http://www.fcpablog.com/blog/2019/1/2/2018-fcpa-enforcement-index.html>.

23 Press Release, U.S. Dep't of Just., "Petróleo Brasileiro S.A. – Petrobras Agrees to Pay More Than \$850 Million for FCPA Violations" (Sept. 27, 2018), <https://www.justice.gov/opa/pr/petr-leo-brasileiro-sa-petrobras-agrees-pay-more-850-million-fcpa-violations>.

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#### PDVSA Investigations and Proceedings

In one significant development, the DOJ continued to bring criminal charges and secure guilty pleas in connection with alleged bribery and money-laundering schemes concerning Venezuelan state oil company Petróleos de Venezuela, S.A. (PDVSA). The DOJ's investigations into PDVSA truly are transnational in nature, as the DOJ has recognized assistance from Spain, the U.K., Italy, Switzerland, Malta and the Cayman Islands.

One of the DOJ's long-running investigations involves alleged bribery in connection with securing energy contracts from PDVSA, with funds allegedly laundered through the U.S. As of December 2018, the DOJ has announced the guilty pleas of 15 individuals in connection with this investigation.

On February 12, 2018, money laundering charges were unsealed in the Southern District of Texas against five former Venezuelan government officials for their alleged participation in the PDVSA bribery scheme.<sup>24</sup> The indictment alleged that the five defendants, all of whom were officials of PDVSA and its subsidiaries or former officials of other Venezuelan government agencies or instrumentalities, were known as the "management team" and wielded significant influence within PDVSA. Members of this purported "management team" allegedly conspired with each other and others to solicit several PDVSA vendors, including vendors in the U.S., for bribes and kickbacks in exchange for providing assistance to those vendors in connection with their PDVSA business. The indictment further alleges that the co-conspirators then laundered the proceeds of the bribery scheme through a series of complex international financial transactions, including involving bank accounts in the U.S., and, in some instances, laundered the bribe proceeds in the form of real estate transactions and other investments in the U.S.

In October 2017, four of the defendants – Luis Carlos De Leon Perez (De Leon), Nervis Gerardo Villalobos Cardenas (Villalobos), Cesar David Rincon Godoy (Cesar Rincon) and Rafael Ernesto Reiter Munoz (Reiter) – were arrested in Spain by Spanish authorities. Cesar Rincon and De Leon were extradited from Spain to the U.S. On April 19, 2018, Caesar Rincon pled guilty to conspiracy to commit money laundering.<sup>25</sup> On July 16, 2018, De Leon, who is also a U.S. citizen, pled guilty to conspiracy to violate the FCPA.<sup>26</sup> Villalobos and Reiter remain in Spanish custody pending extradition. The fifth defendant, Alejandro Isturiz Chiesa, remains at large.

In another alleged scheme involving PDVSA, several foreign nationals were alleged to have participated in a billion-dollar international scheme to launder funds embezzled from PDVSA. On July 25, 2018, Matthias Krull, a German national and Panamanian resident who was the managing director and vice chairman of a Swiss bank, and Gustavo Adolfo Hernandez Frieri, a Colombian national and naturalized U.S. citizen, were charged with conspiracy to commit money laundering in a criminal complaint filed in the Southern District of Florida.<sup>27</sup> The complaint also charged

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24 Press Release, U.S. Dep't of Justice, "Five Former Venezuelan Government Officials Charged in Money Laundering Scheme Involving Foreign Bribery" (Feb. 12, 2018), <https://www.justice.gov/opa/pr/five-former-venezuelan-government-officials-charged-money-laundering-scheme-involving-forei-0>.

25 Press Release, U.S. Dep't of Justice, "Former Venezuelan Official Pleads Guilty to Money Laundering Charge in Connection with Bribery Scheme" (Apr. 19, 2018), <https://www.justice.gov/opa/pr/former-venezuelan-official-pleads-guilty-money-laundering-charge-connection-bribery-scheme>.

26 Press Release, U.S. Dep't of Justice, "Former Venezuelan Official Pleads Guilty to Money Laundering Charge in Connection with Bribery Scheme" (July 16, 2018), <https://www.justice.gov/opa/pr/former-venezuelan-official-pleads-guilty-money-laundering-charge-connection-bribery-scheme-0>.

27 Press Release, U.S. Dep't of Justice, "Two Members of Billion-Dollar Venezuelan Money Laundering Scheme Arrested" (July 25, 2018), <https://www.justice.gov/opa/pr/two-members-billion-dollar-venezuelan-money-laundering-scheme-arrested>.

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Venezuelan national Abraham Eduardo Ortega, other Venezuelan nationals, a Portuguese national and a Uruguayan national for their alleged participation in the scheme.

According to the criminal complaint, the conspiracy began in December 2014 with a currency exchange scheme that was designed to embezzle funds from PDVSA through bribery and fraud. The proceeds purportedly were laundered through Miami, Florida real estate transactions and sophisticated false-investment schemes. The complaint alleged that surrounding and supporting these false-investment laundering schemes were complicit money managers, brokerage firms, banks and real estate investment firms in the U.S. and around the world, operating as a network of professional money launderers. The alleged conspirators include former PDVSA officials, professional third-party money launderers and members of the Venezuelan elite.

On August 22, 2018, Krull pleaded guilty to conspiracy to commit money laundering.<sup>28</sup> On October 31, 2018, Ortega, who was PDVSA's executive director of financial planning, pleaded guilty to conspiracy to commit money laundering.<sup>29</sup> Frieri was arrested in Italy and his extradition proceeding remains ongoing. The other defendants remain at large.

### ***United States v. Hoskins***

The most significant cross-border FCPA development might have come in the Second Circuit's August 24, 2018 decision in *United States v. Hoskins*.<sup>30</sup> In *Hoskins*, the Second Circuit rejected the DOJ's expansive theory of conspiracy and accomplice liability under the FCPA for foreign nationals and held that the FCPA does not impose liability on foreign nationals who are not agents, employees, officers, directors or shareholders of a U.S. issuer or domestic concern – unless that person commits a crime within U.S. territory.

The DOJ brought FCPA conspiracy charges against several defendants, including Lawrence Hoskins, alleging that they were part of a scheme to bribe officials in Indonesia so that their company could secure a \$118 million contract from the Indonesian government.<sup>31</sup> Hoskins worked for Alstom S.A. (Alstom), a global company headquartered in France that provides power and transportation services. During the time of the alleged conspiracy, Hoskins was employed by Alstom's U.K. subsidiary, but was assigned to work with another subsidiary called Alstom Resources Management, which is in France (Alstom France).

The alleged bribery scheme centered on Alstom's U.S. subsidiary, Alstom Power, Inc. (Alstom U.S.). The DOJ alleged that Alstom U.S. and various individuals associated with Alstom retained two consultants to bribe Indonesian officials who could help secure the \$118 million contract. Hoskins never worked for Alstom U.S. in a direct capacity. But the DOJ alleged that Hoskins, while working from France for Alstom France, was one of the people responsible for authorizing the payments to the consultants.

28 Press Release, U.S. Dep't of Just., "Former Swiss Bank Executive Pleads Guilty to Role in Billion-Dollar International Money Laundering Scheme Involving Funds Embezzled from Venezuelan State-Owned Oil Company" (Aug. 22, 2018), <https://www.justice.gov/opa/pr/former-swiss-bank-executive-pleads-guilty-role-billion-dollar-international-money-laundering>.

29 Press Release, U.S. Dep't of Just., "Former Executive Director at Venezuelan State-Owned Oil Company, Petroleos De Venezuela, S.A., Pleads Guilty to Role in Billion-Dollar Money Laundering Conspiracy" (Oct. 31, 2018), <https://www.justice.gov/opa/pr/former-executive-director-venezuelan-state-owned-oil-company-petroleos-de-venezuela-sa-pleads>.

30 902 F.3d 69 (2d Cir. 2018); see also BakerHostetler, *Second Circuit Rejects DOJ's Expansive Theory of Conspiracy and Accomplice Liability Under the FCPA for Foreign Nationals* (Sept. 5, 2018), <https://www.bakerlaw.com/alerts/second-circuit-rejects-doj's-expansive-theory-of-conspiracy-and-accomplice-liability-under-the-fcpa-for-foreign-nationals>.

31 *Hoskins*, 902 F.3d at 72.

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The government alleged that several parts of the purported scheme occurred within the U.S. However, the DOJ conceded that, although Hoskins allegedly repeatedly e-mailed and called U.S.-based coconspirators regarding the scheme while they were in the U.S., Hoskins did not travel to the U.S. while the alleged bribery scheme was ongoing.

Hoskins moved the district court for dismissal of the FCPA conspiracy count against him.<sup>32</sup> He argued that the FCPA prescribes liability only for narrowly-circumscribed groups of people: (i) U.S. companies and citizens; (ii) their agents, employees, officers, directors and shareholders; and (iii) foreign persons acting on U.S. soil. Hoskins argued that the government could not circumvent those limitations by charging him with conspiring to violate the FCPA, or aiding and abetting a violation of it, if he did not fit into one of the statute's categories of defendants. The district court agreed and granted Hoskins' motion, deciding that the government could not charge him with conspiracy to violate the FCPA without demonstrating that he fell into one of these three categories.

The Second Circuit affirmed the district court's decision, holding that the text and legislative history of the FCPA showed that Congress did not intend for persons outside of the FCPA's delimited categories to be subject to conspiracy charges.<sup>33</sup> This ruling represents a significant defeat for DOJ, which has increasingly been charging foreign nationals with conspiracy to violate the FCPA.

### Panama Papers

U.S. authorities continue to prosecute actions in connection with the leak of documents from Panamanian-based global law firm, Mossack Fonseca & Co. (Mossack), referred to as the "Panama Papers." In December 2018, the DOJ charged four individuals – Ramses Owens, a Panamanian attorney who worked for Mossack; Dirk Brauer, who worked as an investment manager for Mossack Asset Management, S.A., an asset management company closely affiliated with Mossack; Richard Gaffey, a U.S.-based accountant; and Harald Joachim Von der Goltz, a former U.S. resident and taxpayer – with wire fraud, tax fraud, money laundering and other offenses in connection with their roles in an alleged decades-long criminal scheme perpetrated by Mossack and related entities.<sup>34</sup> The indictment alleged that Owens and Brauer conspired with others to help U.S. taxpayer clients of Mossack illegally conceal assets and investments from the IRS. To achieve this purpose, Owens and Brauer purportedly established and managed opaque offshore trusts and undeclared bank accounts on behalf of U.S. taxpayers. Von der Goltz was one of Mossack's U.S. taxpayer clients. He allegedly evaded his tax reporting obligations, with the assistance of Owens and Gaffey, by setting up a series of shell companies and bank accounts and hiding his beneficial ownership of the shell companies and bank accounts from the IRS. Gaffey and Owens purportedly also helped another U.S. taxpayer client of Mossack defraud the IRS.

Brauer was arrested in Paris, France, but was extradited from Paris to Germany, where he reportedly is cooperating with German prosecutors against certain of his former clients under

<sup>32</sup> *Id.* at 73.

<sup>33</sup> *Id.* at 83-84.

<sup>34</sup> Press Release, U.S. Dep't of Just., "Four Defendants Charged In Panama Papers Investigation" (Dec. 4, 2018), <https://www.justice.gov/usao-sdny/pr/four-defendants-charged-panama-papers-investigation>.

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investigation in Germany.<sup>35</sup> Von der Goltz was arrested in London, U.K., and Gaffey was arrested in Massachusetts. Owens was arrested in Panama, but because Panama does not have an extradition treaty with the U.S., it is unclear whether he will be extradited to the U.S.

### Trade Sanctions Violations

U.S. law enforcement continues to bring actions against foreign nationals for violations of U.S. trade sanctions laws based on conduct that occurs substantially overseas.

In one significant development, Mehmet Hakan Atilla, a Turkish banker who allegedly participated in a billion-dollar scheme to violate U.S. economic sanctions imposed on Iran, lost a jurisdictional challenge to his U.S. criminal prosecution.<sup>36</sup> In 2017, Atilla faced charges of conspiracy to violate laws governing sanctions, such as the International Emergency Economic Powers Act (IEEPA), as well as for bank fraud and money laundering.<sup>37</sup> Atilla allegedly used his position at the Turkish bank to engage in transactions involving billions of dollars' worth of petroleum revenues held by the Central Bank of Iran and the National Iranian Oil Company. In particular, he and others purportedly facilitated and protected the ability of a bank customer to supply currency and gold to, and facilitate international financial transactions for, Iran and Iranian entities. Many of those financial transactions involved unwitting U.S. financial institutions, in violation of U.S. sanctions against Iran. Atilla and others allegedly disguised these transactions as humanitarian in nature to fall under an exception to the U.S. sanctions on Iran. On January 3, 2018, after a five-week jury trial, Atilla was convicted of, among other things, conspiracy to violate the IEEPA.

At the close of the DOJ's case, Atilla moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(a), arguing that he could not be prosecuted for sanctionable conduct committed outside of the U.S.<sup>38</sup> On February 7, 2018, the district court rejected Atilla's jurisdictional defense, finding that there was a sufficient nexus between his and his co-conspirators' actions, and the U.S. The court relied, in part, on the fact that there were "significant meetings" between Atilla and other employees at the bank and high ranking U.S. officials who were in charge of implementing the U.S. sanctions on Iran, including one meeting at the Department of Treasury.<sup>39</sup> On May 16, 2018, Atilla was sentenced to 32 months in prison.

In another cross-border trade sanctions case, on October 25, 2018, Singaporean businessman Tan Wee Beng was indicted in the Southern District of New York for conducting business with multiple North Korean entities including Daedong Credit Bank, which has been sanctioned by the U.S. for assisting in the financing of North Korea's nuclear weapons.<sup>40</sup> The indictment charges

35 *Former Mossack Fonseca Employee Extradited to Germany*, OCCRP (Jan. 18, 2019), <https://www.occrp.org/en/daily/9138-former-mossack-fonseca-employee-extradited-to-germany>.

36 See Decision & Order, *United States v. Atilla*, No. 15 CR 867 (RMB) (S.D.N.Y. Feb. 7, 2018).

37 Superseding Indictment, *United States v. Zarrab*, No. S4 15 Cr. 867 (RMB) (Sept. 6, 2017); Press Release, U.S. Dep't of Just., "Turkish Banker Mehmet Hakan Atilla Sentenced To 32 Months For Conspiring To Violate U.S. Sanctions Against Iran And Other Offenses" (May 16, 2018), <https://www.justice.gov/usao-sdny/pr/turkish-banker-mehmet-hakan-atilla-sentenced-32-months-conspiring-violate-us-sanctions>.

38 *United States v. Atilla*, No. 15 Cr. 867 (RMB), 2018 WL 791348 (S.D.N.Y. Feb. 7, 2018).

39 *Id.* at \*3-4.

40 Press Release, U.S. Dep't of Just., "Manhattan United States Attorney Announces Charges Against Owner And Director Of Singapore-Based Commodities Company For North Korea Sanctions Evasion And Money Laundering Offenses" (Oct. 25, 2018) <https://www.justice.gov/usao-sdny/pr/manhattan-united-states-attorney-announces-charges-against-owner-and-director-singapore>; Press Release, U.S. Dep't of the Treasury, "Treasury Sanctions Bank, Front Company, and Official Linked to North Korean Weapons of Mass Destruction Programs" (June 27, 2013), <https://www.treasury.gov/press-center/press-releases/Pages/j11994.aspx>; John Petrick, *Feds Say Singapore Businessman Evaded N. Korea Sanctions*, Law360 (Oct. 25, 2018), <https://www.law360.com/articles/1095746/feds-say-singapore-businessman-evaded-n-korea-sanctions>.

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Beng with conspiring to use companies in Singapore, Thailand, Hong Kong and elsewhere to violate the IEEPA, conspiracy to commit bank fraud, laundering money from Daedong Credit Bank and using that money to pay his shipment company and conspiracy to defraud the U.S.<sup>41</sup> Beng is a Singapore national, and the DOJ has stated that it looks forward to working with its “foreign partners to bring Beng to the U.S. to answer for his alleged crimes.”<sup>42</sup> Presently, the U.S. and Singapore have an extradition treaty listing the offenses that require extradition, however, this list does not include money laundering.<sup>43</sup> It will be interesting to see whether Singaporean authorities will cooperate with the U.S.’s request.

Finally, on November 8, 2018, in federal court in Washington, D.C., an Iranian citizen, Arash Sepehri, pleaded guilty to charges of conspiracy to unlawfully export goods to Iran in violation of the IEEPA and to defraud the U.S from 2010 to 2016.<sup>44</sup> Sepehri was an employee and a member of the board of directors of an Iranian company, Tajhiz Sanat Shayan, or Tajhiz Sanat Company (TSS). On May 23, 2011, the European Union sanctioned these defendants for their involvement in the “procurement of components for the Iranian nuclear programme.”<sup>45</sup> Sepehri and others purportedly conspired to obtain controlled technology such as high-resolution sonar equipment from the U.S. without obtaining proper licenses and circumventing economic sanctions. To avoid detection, Sepehri and his purported co-conspirators allegedly used aliases, a shipping company based in Hong Kong as an intermediary and companies based in the United Arab Emirates as front companies to pay for the products.

### Spoofing

The past year saw a continued focus by U.S. regulators on alleged “spoofing” activities conducted by institutions and/or traders who are located overseas but whose actions purportedly had an impact in the U.S. The CFTC and DOJ have made several statements regarding their increased focus on the enforcement of spoofing laws, including recent comments by the CFTC Director of Enforcement, James McDonald, that the CFTC will pursue spoofing and manipulation activity that stretches across different markets and international boundaries.<sup>46</sup> The CFTC also announced that 2018 was one of the most vigorous years in its history with regard to enforcement, with the largest number of market manipulation cases ever brought.<sup>47</sup>

The CFTC and DOJ started off 2018 with a significant parallel action concerning alleged spoofing. In January 2018, the CFTC and DOJ announced the filing of enforcement and criminal actions, respectively, against several domestic and foreign individuals in the Northern District of Illinois and

41 Superseding Indictment, *United States v. Tan Wee Beng a/k/a “WB”*, No. S1 18 Cr. 144 (S.D.N.Y. Oct. 25, 2018).

42 Press Release, U.S. Dep’t of Just., “Manhattan United States Attorney Announces Charges Against Owner And Director Of Singapore-Based Commodities Company For North Korea Sanctions Evasion And Money Laundering Offenses” (Oct. 25, 2018), <https://www.justice.gov/usao-sdny/pr/manhattan-united-states-attorney-announces-charges-against-owner-and-director-singapore>.

43 U.S. Dep’t of State, “Countries/Jurisdictions of Primary Concern – Singapore,” <https://www.state.gov/j/inl/rls/nrcrpt/2016/vol2/253428.htm>.

44 Press Release, U.S. Dep’t of Just., “Iranian National Pleads Guilty to Conspiring to Illegally Export Products From the United States to Iran” (Nov. 8, 2018), <https://www.justice.gov/opa/pr/iranian-national-pleads-guilty-conspiring-illegally-export-products-united-states-iran>.

45 European Union, Council Implement Regulation (EU), “Implement Regulation (EU) No 961/2010 on Restrictive Measures Against Iran,” No 503/2011 (May 23, 2011), <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:136:0026:0044:EN:PDF>.

46 Press Release, U.S. Commodity Futures Trading Comm’n, “CFTC Orders Futures Trader and Trading Firm to Pay \$2.3 Million in Penalties for Cross-Market and Single-Market Spoofing and Manipulative Scheme” (Sept. 19, 2018), <https://www.cftc.gov/PressRoom/PressReleases/7796-18>.

47 Jody Godoy, *For CFTC, 2018 Was One Of The ‘Most Vigorous’ In Its History*, Law360 (Nov. 15, 2018), <https://www.law360.com/articles/1102130/for-cftc-2018-was-one-of-the-most-vigorous-in-its-history>.

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the District of Connecticut. In these cases, the CFTC and DOJ allege that the defendants, among other things, engaged in spoofing to manipulate the market for precious metals futures contracts traded on the Chicago Mercantile Exchange (CME), the Chicago Board of Trade (CBOT) and the Commodity Exchange Inc.<sup>48</sup>

Notably, on April 25, 2018, a Connecticut jury acquitted one of the defendants, Andre Flotron, a Swiss national who worked at UBS's trading desks in Stamford, Connecticut and Zurich, Switzerland, of conspiracy to commit commodities fraud.<sup>49</sup> At trial, prosecutors provided testimony from two cooperators, both former UBS traders, one of whom testified that Flotron taught him how to "spoofer."<sup>50</sup> Prosecutors focused on Flotron's trading data, telling the jury that the data was "the best evidence of what he did and what he knew."<sup>51</sup> The defense, however, successfully argued that Flotron was a trader in an independently oriented and hypercompetitive environment at UBS that wasn't conducive to the kind of collaboration needed to sustain a conspiracy, and that the government's selective quantitative analysis of Flotron's trading activity was not enough to prove intent.<sup>52</sup> The DOJ's criminal case against Flotron demonstrates the difficulty prosecutors face in establishing the requisite intent in spoofing-related cases using quantitative analysis of the defendant's trading activity. After Flotron's acquittal, in December 2018, the CFTC settled its case against him. He agreed to a \$100,000 fine and a one-year ban from commodities trading.<sup>53</sup>

On November 16, 2018, another one of the defendants, Jiongsheng Zhao, an Australian national who was a trader at a proprietary trading firm in Sydney, Australia, was extradited to the U.S. from Australia and, on January 28, 2019, he pleaded guilty to spoofing.<sup>54</sup> The DOJ noted that the Australian Securities and Investments Commission provided substantial assistance in the case. Zhao is scheduled to be sentenced later in 2019.

In a separate matter, in September 2018, the CFTC announced the resolution of charges against Mizuho Bank, Ltd. for engaging in spoofing-related activity in connection with futures contracts on the CME and CBOT.<sup>55</sup> Notably, Mizuho engaged in this activity through one of its traders in Mizuho's Singapore office. The settlement requires Mizuho to pay a \$250,000 civil monetary penalty and cease and desist from violating the Commodity Exchange Act's (CEA) prohibition against spoofing.

Finally, constitutional challenges to anti-spoofing laws still are making their way through U.S. courts. On May 14, 2018, the Supreme Court denied Michael Coscia's petition for writ of certiorari

48 Press Release, U.S. Dep't of Just., "Eight Individuals Charged With Deceptive Trading Practices Executed on U.S. Commodities Markets" (Jan. 29, 2018), <https://www.justice.gov/opa/pr/eight-individuals-charged-deceptive-trading-practices-executed-us-commodities-markets>.

49 Jury Verdict, *United States v. Flotron*, No 3:17-cr-00220-JAM (D. Conn. Apr. 25, 2018) (ECF No. 213).

50 Jon Hill, *Case Against Ex-UBS Trader In Spoofing Trial Heads To Jury*, Law360 (April 24, 2018), <https://www.law360.com/articles/1036533/case-against-ex-ubs-trader-in-spoofing-trial-heads-to-jury>.

51 *Id.*

52 *Id.*

53 Dean Seal, *CFTC, Ex-UBS Trader Unveil \$100K Spoofing Settlement*, Law360 (Dec. 21, 2018), <https://www.law360.com/articles/1114007/cftc-ex-ubs-trader-unveil-100k-spoofing-settlement>.

54 Press Release, U.S. Dep't of Justice, "Australian Commodities Trader Pleads Guilty to Spoofing on U.S. Futures Exchange" (Jan. 28, 2019), <https://www.justice.gov/opa/pr/australian-commodities-trader-pleads-guilty-spoofing-us-futures-exchange>.

55 Press Release, U.S. Commodity Futures Trading Comm'n, "CFTC Finds Mizuho Bank, Ltd. Engaged in Spoofing of Treasury Futures and Eurodollar Futures" (Sept. 21, 2018), <https://www.cftc.gov/PressRoom/PressReleases/7800-18>.



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and refused to hear an appeal of his November 2015 spoofing conviction.<sup>56</sup> As we have previously reported,<sup>57</sup> Coscia was the first person ever convicted under the CEA's anti-spoofing provision, when a federal jury in Chicago convicted him of spoofing and commodities fraud in November 2015. In 2017, a unanimous Seventh Circuit Court of Appeals panel denied his legal challenges to the CEA's anti-spoofing provision and affirmed his conviction.<sup>58</sup> In his petition for writ of certiorari, Coscia argued the anti-spoofing provision of the CEA is unconstitutionally vague because it covers innocuous conduct that commodities traders routinely undertake. Coscia also argued that even if the statute provides adequate notice of the proscribed conduct, the parenthetical definition of spoofing encourages arbitrary enforcement, noting that high-frequency traders in general cancel 98 percent of their orders and the statute does not provide any parameters to distinguish lawful from unlawful high-frequency trading.<sup>59</sup> The Seventh Circuit panel had rejected both of these arguments.

This denial of certiorari was an important victory for the DOJ. However, the Supreme Court did not address the merits of Coscia's constitutional arguments, and it is possible that another Circuit Court may find that the CEA's anti-spoofing provision is unconstitutional, thereby causing a Circuit split that the Supreme Court would likely be forced to resolve.

### Securities Fraud

In 2018, regulators continued to aggressively enforce federal securities antifraud laws against foreign nationals and companies for conduct substantially taking place outside the U.S.

For example, in March 2018, the DOJ and SEC announced charges in New York federal court against U.K.-based broker-dealer, Beaufort Securities Ltd. ("Beaufort"), and two of its managers in connection with an alleged \$50 million securities fraud and money laundering "pump-and-dump" scheme.<sup>60</sup> The government alleges that the defendants, along with several other foreign firms and nationals, manipulated stock prices and laundered illegal proceeds through offshore bank accounts and the art world.

While some of the defendants involved in this case are pending extradition, prosecutors so far have resolved charges as to three defendants. Beaufort manager, Arvinsingh Canaye, a Mauritanian citizen, became the first person to plead guilty in this case, admitting in July 2018 to money laundering conspiracy.<sup>61</sup> In September 2018, William Hirschy pled guilty to securities fraud and conspiracy to commit securities fraud.<sup>62</sup> Hirschy, who allegedly worked with an undercover FBI

56 *Coscia v. United States*, 866 F.3d 782 (7th Cir. 2017), cert. denied, 138 S. Ct. 1989.

57 BakerHostetler. *2017 Year-End Cross-Border Government Investigations and Regulatory Enforcement Review*, <https://www.bakerlaw.com/webfiles/Litigation/2018/Alerts/03-21-18-2017-Year-End-Cross-Border-Government-Investigations-and-Regulatory-Enfor-.pdf>.

58 *Coscia*, 866 F.3d at 785-87.

59 *Id.* at 793-94.

60 Press Release, U.S. Dep't of Just., "Six Individuals And Four Corporate Defendants Indicted In \$50 Million International Securities Fraud And Money Laundering Schemes" (Mar. 2, 2018), <https://www.justice.gov/usao-edny/pr/six-individuals-and-four-corporate-defendants-indicted-50-million-international>; Press Release, U.S. Sec. & Exch. Comm'n, "SEC Charges U.K. Brokerage Firm, Investment Manager, CEO, and Others for Manipulative Trading in U.S. Microcap Stocks" (Mar. 2, 2018), <https://www.sec.gov/news/press-release/2018-28>.

61 Plea, *United States v. Kyriacou*, No. 1:18-cr-00102 (E.D.N.Y. July 26, 2018) (ECF No. 39).

62 Plea Agreement Hearing as to William Hirschy, *United States v. Mancino*, No. 1:18-cr-00296-KAM-2 (E.D.N.Y. Sept. 17, 2018) (ECF No. 26); see also Jack Newsham, *Trader In Beaufort-Linked Manipulation Case Cops To Fraud*, Law360 (Sept. 17, 2018), <https://www.law360.com/articles/1083621/trader-in-beaufort-linked-manipulation-case-cops-to-fraud>.

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agent to make manipulative penny-stock trades with the help of a Beaufort broker, agreed to forfeit \$1.4 million as part of the plea deal, and is currently awaiting sentencing. In September 2018, Adrian Baron, who is a citizen of the U.K. and Saint Vincent and the Grenadines, was extradited from Hungary and pleaded guilty to conspiring to defraud the U.S.<sup>63</sup> Baron admitted to setting up numerous opaque offshore bank accounts in order to evade detection by U.S. authorities in violation of the Foreign Account Tax Compliance Act, the first conviction of its kind. In January 2019, Baron was sentenced to a \$20,000 fine and time served, receiving credit for the time he was incarcerated in Hungary pending extradition.<sup>64</sup>

In another alleged international “pump-and-dump” scheme, on May 15, 2018, the SEC charged four individuals for allegedly manipulating the market for, and illegally selling stock of, microcap issuer Biozoom Inc. (Biozoom), generating nearly \$34 million in profits.<sup>65</sup> Three of the four defendants resided in Spain and Canada.<sup>66</sup> According to the SEC, the defendants hid the ownership and sales of Biozoom through the use of offshore bank accounts, sham legal documents and anonymizing techniques. The defendants purportedly also concealed their involvement by acting through brokerage and bank nominees in the names of ten Argentine residents.

In October 2018, Roger Knox, the head of a Swiss asset management firm, was indicted by a federal grand jury in Massachusetts for allegedly orchestrating a global “pump-and-dump” securities scheme consisting of over 100 stocks and generating an estimated \$164 million in proceeds over three years.<sup>67</sup> Knox is a citizen of the U.K. who resides in Switzerland. On October 3, 2018, he was arrested at Boston’s Logan International Airport.<sup>68</sup>

The indictment alleged that Knox helped facilitate market manipulation schemes by selling large quantities of microcap securities on behalf of “control groups” who secretly owned the stock through Knox’s Swiss asset management firm’s accounts at brokerages in the U.S., Malta, Dubai, Mauritius, Canada and the U.K. Simultaneously, Knox allegedly orchestrated promotional campaigns and other efforts to artificially inflate the price and trading volume of those shares. Knox then purportedly funneled the proceeds of the securities fraud to co-conspirators in the U.S. and elsewhere through a complex money transfer system that disguised the source and nature of the funds.

On October 24, 2018, Knox pleaded not guilty to securities fraud and conspiracy to commit securities fraud.<sup>69</sup> Two international tax attorneys who worked at Switzerland-based Anaford

63 Press Release, U.S. Dep’t of Just., “Former Executive of Loyal Bank Ltd Pleads Guilty to Conspiring to Defraud the United States by Failing to Comply with Foreign Account Tax Compliance Act (FATCA)” (Sept. 11, 2018), <https://www.justice.gov/usao-edny/pr/former-executive-loyal-bank-ltd-pleads-guilty-conspiring-defraud-united-states-failing>; see also Stewart Bishop, *Feds Nab First-Ever FATCA Conviction With Bank Exec’s Plea*, Law360 (Sept. 11, 2018), <https://www.law360.com/articles/1081684>.

64 Judgment, *United States v. Kyriacou*, No. 18-cr-00102, (E.D.N.Y. Jan. 29, 2019) (ECF No. 74).

65 Press Release, U.S. Sec. & Exch. Comm’n, “SEC Files Charges in International Manipulation Scheme” (May 15, 2018), <https://www.sec.gov/news/press-release/2018-85>.

66 Complaint, *SEC v. Villena*, No. 18-cv-4309 (S.D.N.Y. May 15, 2018).

67 Press Release, U.S. Dep’t of Just., “Founder of Swiss Brokerage Firm Indicted in Connection with Global Securities Fraud Scheme” (Oct. 23, 2018), <https://www.justice.gov/usao-ma/pr/founder-swiss-brokerage-firm-indicted-connection-global-securities-fraud-scheme>.

68 Complaint, *United States v. Knox*, No. 18-mj-06268 (D. Mass. Sept. 17, 2018) (ECF No. 4); see also Aaron Leibowitz, *3 Men Connected to Global Pump & Dump To Plead Guilty*, Law360 (Dec. 5, 2018), [https://www.law360.com/whitecollar/articles/1108406/3-men-connected-to-global-pump-dump-to-plead-guilty?nl\\_pk=82503858-21e4-4460-8f7f-81f7947f2c5b&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=whitecollar](https://www.law360.com/whitecollar/articles/1108406/3-men-connected-to-global-pump-dump-to-plead-guilty?nl_pk=82503858-21e4-4460-8f7f-81f7947f2c5b&utm_source=newsletter&utm_medium=email&utm_campaign=whitecollar).

69 Mike Caswell, *SEC defendant “Rocket” Knox pleads not guilty*, StockWatch Daily (Oct. 25, 2018), [https://www.stockwatch.com/News/Item.aspx?bid=Z-U:\\*SEC-2674224&symbol=\\*SEC&region=U](https://www.stockwatch.com/News/Item.aspx?bid=Z-U:*SEC-2674224&symbol=*SEC&region=U).

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AG during the period of the alleged scheme cooperated against Knox and, in December 2018, pleaded guilty to conspiracy to commit securities fraud.<sup>70</sup>

The SEC filed a parallel civil complaint against Knox and co-conspirator Michael T. Gastauer.<sup>71</sup> In connection with this case, a Massachusetts federal judge ordered a preliminary injunction and asset freeze on the over 100 accounts around the globe connected to Knox's alleged "pump-and-dump" scheme.<sup>72</sup>

Finally, in November 2018, Seref Dogan Erbek, a Swiss banker wanted by the U.S. for years for an alleged market manipulation scheme, was extradited to the U.S. from Algeria, where he was previously arrested and held in prison.<sup>73</sup> A 2015 indictment alleged that Erbek aided private equity CEO Benjamin Wey in committing securities fraud through the use of reverse merger transactions between U.S. shell companies and Chinese companies in order to conceal ownership interests.<sup>74</sup> Erbek is accused of aiding Wey's scheme by opening offshore brokerage accounts for Wey's family in order to avoid public disclosure requirements and conceal the proceeds.<sup>75</sup> Additionally, Erbek allegedly conducted stock trading in these accounts in order to artificially boost the value of the Chinese companies, obtaining tens of millions of dollars of profits for the family brokerage accounts.<sup>76</sup>

Erbek pleaded guilty to failure to disclose ownership in excess of five percent of publicly traded stock.<sup>77</sup> On December 12, 2018, he was sentenced to time-served on the basis that he spent 11 months in Algerian prison under extraordinarily difficult conditions. In August 2017, the DOJ dropped its charges against Wey after a district judge in the Southern District of New York found that FBI agents disregarded constitutional principles under the Fourth Amendment when searching and seizing evidence from Wey's home.<sup>78</sup>

U.S. regulators also continue to bring insider trading charges against foreign nationals based on conduct substantially occurring outside of the U.S. For example, on May 4, 2018 the SEC brought insider trading charges against a Thai citizen who, alongside his brother, allegedly reaped millions in illegal gains by trading in advance of the May 2013 announcement that Shuanghui International Holdings would acquire Smithfield Foods. The SEC alleged that the defendants traded on Smithfield securities through multiple accounts in Singapore and Thailand after learning of the potential acquisition from a close personal friend working as an investment broker.<sup>79</sup> In its

70 Leibowitz, *supra* note 68.

71 Press Release, U.S. Sec. & Exch. Comm'n, "SEC Halts Microcap Fraud Scheme Orchestrated Through International Accounts" (Oct. 2, 2018), <https://www.sec.gov/news/press-release/2018-228>.

72 Press Release, U.S. Sec. & Exch. Comm'n, "SEC Obtains Preliminary Injunction in International Microcap Fraud Scheme" (Oct. 30, 2018), <https://www.sec.gov/litigation/litreleases/2018/lr24327.htm>; see also Aaron Leibowitz, *UK Broker's Assets Frozen in SEC Pump-And-Dump Case*, Law360 (Oct. 26, 2018), <https://www.law360.com/articles/1096335>.

73 Stewart Bishop, *US Nabs Swiss Banker Wanted In Failed Case Against PE CEO*, Law360 (Nov. 20, 2018), <https://www.law360.com/articles/1103887/us-nabs-swiss-banker-wanted-in-failed-case-against-pe-ceo>.

74 *Id.*

75 *Id.*

76 *Id.*

77 Judgment in Criminal Case, *United States v. Wey*, No. 15-cr-00611 (S.D.N.Y. Dec. 20, 2018).

78 Dismissal of Counts, *United States v. Wey*, No. 15-cr-00611 (S.D.N.Y.)

79 Press Release, U.S. Sec. & Exch. Comm'n, "SEC Charges Thailand-Based Trader with Insider Trading Ahead of Smithfield Foods Acquisition Announcement" (May 7, 2018), <https://www.sec.gov/litigation/litreleases/2018/lr24136.htm>.

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press release announcing the action, the SEC noted the assistance it received from the Monetary Authority of Singapore and the Securities and Exchange Commission of Thailand.

The SEC's allegations mirror those in a previous federal indictment that was filed in 2014 in the Northern District of Illinois.<sup>80</sup> In August 2018, one of the defendants, Bovorn Rungruangnavarat, was arrested in connection with the indictment.<sup>81</sup> The SEC proceeding has been stayed pending resolution of the parallel criminal proceeding.<sup>82</sup>

### Benchmark Rate Manipulation

The U.S.'s cross-border actions related to alleged benchmark rate manipulation continued in 2018, but with increased challenges to the expansive reach of U.S. authorities.

#### *United States v. Usher*

On May 4, 2018, in *United States v. Usher*, Judge Richard M. Berman of the Southern District of New York issued a significant decision related to the DOJ's ability to bring Sherman Act actions against foreign nationals for conduct that occurs substantially overseas.<sup>83</sup> On January 10, 2017, three former currency traders from the U.K. affiliates of The Royal Bank of Scotland PLC, Citicorp and Barclays PLC were indicted on conspiracy to violate the Sherman Act for allegedly suppressing competition for the purchase and sale of Euros and U.S. dollars in the U.S. and elsewhere by manipulating prices in the foreign exchange (forex) market.<sup>84</sup> The defendants moved to dismiss the indictment, claiming that (i) the indictment alleged conduct outside of the Sherman Act's extraterritorial scope because it charged three British citizens, working for banks in London, with conspiring to manipulate a global market through trades made entirely outside the U.S., (ii) the indictment violated the Due Process Clause of the U.S. Constitution, and (iii) the district court should decline on international comity grounds to exercise jurisdiction over foreign defendants who engaged in entirely foreign conduct.<sup>85</sup>

The court denied the defendants' motion and allowed the case to proceed. The court found that the alleged manipulative conduct was within the reach of the Sherman Act because the conduct had a "direct, substantial and reasonably foreseeable effect" on American commerce – the indictment alleged that the defendants received orders from customers in the U.S., that they "fulfilled those orders through money traded at manipulated prices, often through trades with U.S. counterparties," and that U.S. dollars were the goods whose prices were fixed as an object of the alleged conspiracy.<sup>86</sup> The court further found that the indictment did not violate the defendants' constitutional due process rights because the alleged conduct had a substantial nexus to the U.S. and the defendants had fair warning that their conduct could be criminal because, among other things, the U.K. SFO investigated the same defendants and conduct and indicated that the activity

80 See Indictment, *United States v. Rungruangnavarat*, No. 14-cr-00548 (N.D. Ill. Sept. 30, 2014) (ECF No. 3).

81 *Id.* at ECF No. 28 (Arraignment Hearing).

82 See Minute Entry, *SEC v. Bovorn Rungruangnavarat*, No. 18-cv-03196 (N.D. Ill. Sept. 24, 2018) (ECF No. 19).

83 *United States v. Usher*, No. 17 Cr. 19(RMB), 2018 WL 2424555 (S.D.N.Y. May 4, 2018).

84 *Id.* at \*1.

85 *Id.* at \*2.

86 *Id.* at \*5-7.

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may be prosecutable in other jurisdictions.<sup>87</sup> Finally, the court rejected the defendants' international comity claim because, among other considerations, there was no true conflict between U.S. and U.K. law, the conduct at issue could be of greater importance to the U.S. than the U.K. and the relief would likely be acceptable in the U.S. if it were ordered by a U.K. court under similar circumstances.<sup>88</sup>

The court's decision in *Usher* is particularly noteworthy not only because the conduct occurred overseas, but also because the U.K. SFO had previously declined to prosecute the defendants for the conduct alleged in the indictment due to lack of sufficient evidence. This decision might encourage U.S. regulators to bring charges against foreign defendants based on foreign conduct even when its foreign law enforcement counterparts decide not to pursue charges.

Ultimately, in late October 2018, after a two-week jury trial, the defendants in *Usher* were acquitted.<sup>89</sup> The government's primary challenge in these types of cases is establishing fraudulent intent, and its case was damaged in this regard when its cooperating witness, an alleged fourth member of the price-fixing conspiracy, denied that he and the defendants had any intent to commit a crime.<sup>90</sup> In addition, the defendants' expert witness, a professor of finance at the University of California San Diego's management school and a forex market expert, suggested the defendants' trades were legitimate and poked holes in the government's theory of the case.<sup>91</sup> Notably, while much of the government's evidence centered around near-daily chatroom conversations between and among the alleged coconspirators about customer names, orders and trades and risk positions, the expert testified that chatrooms just are efficient ways for traders at market-makers to share market color and other information.<sup>92</sup>

### The Fifth Amendment and Aftermath of *United States v. Allen*

As we reported previously, U.S. law enforcement must now contend with significant Fifth Amendment issues in their cross-border prosecutions following the Second Circuit's 2017 decision in *United States v. Allen*. In that case, the appeals court dismissed the convictions of two former Rabobank traders, ruling that direct or indirect use of a defendant's compelled testimony taken abroad by a foreign regulator violates the Fifth Amendment right against self-incrimination.<sup>93</sup>

The *Allen* decision impacted at least one high profile Libor manipulation case in 2018, *United States v. Connolly*. In *Connolly*, two former traders were indicted in June of 2016 for alleged Libor manipulation. One of the Defendants, Gavin Black, relying on the *Allen* decision, moved for a Kastigar hearing and challenged his indictment on the basis that the DOJ used prior testimony that he was compelled to give to the FCA to secure it. On October 19, 2017, the Southern District of New York granted Black's motion for a hearing, holding that the indictment against him must be dismissed if the DOJ's presentation to the grand jury was directly or indirectly derived from Black's

87 *Id.* at \*7-8.

88 *Id.* at \*8-10.

89 Bob Van Voris, *British Cartel Traders Acquitted of Rigging Currency Market*, Bloomberg (October 26, 2018), <https://www.bloomberg.com/news/articles/2018-10-26/jury-rejects-charge-that-chatroom-was-used-to-fix-fx-prices>.

90 *Id.*

91 Stewart Bishop, *Expert in Forex 'Cartel' Trial Says Trades Seem Legit*, Law360 (Oct. 22, 2018), [https://www.law360.com/securities/articles/1094682/expert-in-forex-cartel-trial-says-trades-seem-legit?nl\\_pk=40be814d-d483-4682-834e-5ca3db600dde&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=securities](https://www.law360.com/securities/articles/1094682/expert-in-forex-cartel-trial-says-trades-seem-legit?nl_pk=40be814d-d483-4682-834e-5ca3db600dde&utm_source=newsletter&utm_medium=email&utm_campaign=securities).

92 *Id.*

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

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compelled testimony to the FCA, and the use of such compelled testimony was not harmless beyond a reasonable doubt.<sup>94</sup>

In April 2018, the court-ordered Kastigar hearing took place, and, in May 2018, the judge held that the DOJ's presentation to the grand jury was not tainted by Black's compelled FCA testimony and ordered that Black proceed to trial.<sup>95</sup> Ultimately, in October 2018, Connolly and Black were convicted of Libor manipulation. During the trial, another potential Fifth Amendment issue arose – whether statements made by Black to his former employer and its lawyers during an internal investigation were inadmissible under the Fifth Amendment's protection against self-incrimination. In a post-trial motion, Black has argued that the government directed and oversaw the internal investigation and that his statements were involuntary because he would have been terminated if he did not agree to be interviewed.<sup>96</sup> Black argues that, as a result, his statements were compelled, fairly attributable to a governmental actor for Fifth Amendment purposes and inadmissible under an extension of the Supreme Court decision in *Garrity v. New Jersey*, which held that statements obtained from public employees under the threat of termination are involuntary under the Fifth Amendment.<sup>97</sup>

It is expected that 2019 will see post-trial litigation on both of these Fifth Amendment issues. It is also expected that defense counsel will continue utilizing the holding in *Allen* and the arguments put forth in *Connolly* to defend clients in cross-border criminal actions.

### U.S. Blocked from Extraditing U.K. National Allegedly Involved in Forex Manipulation

In October 2018, the U.K. Court of Appeal denied a U.S. request to appeal a July 31, 2018 decision by the U.K. High Court blocking the U.S.'s attempt to extradite Stuart Scott, a U.K. national who served as HSBC Bank PLC's former head of currency trading.<sup>98</sup> On July 20, 2016, Scott was charged in the Southern District of New York with 11 counts of wire fraud on allegations that he and his former boss, Mark Johnson, manipulated the forex market.<sup>99</sup> The former HSBC currency traders allegedly defrauded a bank client that hired HSBC to execute a foreign exchange transaction related to a planned sale of one of its foreign subsidiaries, which involved converting approximately \$3.5 billion in sale proceeds into British Pound Sterling.<sup>100</sup> Johnson and Scott purportedly misused confidential information provided to them by the client and caused the \$3.5 billion foreign exchange transaction to be executed in a manner that was designed to spike the price of the British Pound, to the benefit of HSBC and at the expense of their client.<sup>101</sup>

94 Decision & Order, *United States v. Connolly*, No. S1 16 CR 370 (cn) (S.D.N.Y. Oct. 19, 2017) (ECF No. 145).

95 *Id.* at ECF No. 262 (Decision on Gov'ts. Motion in Limine).

96 *Id.* at ECF No. 395 (Memorandum of Law In Support of Defendant Gavin Campbell Black's Motion for *Kastigar* Relief).

97 385 U.S. 493, 497 (1967).

98 Jeremy Hodges, *Ex-HSBC FX Trader Wins Rare U.K. Order Blocking Extradition*, Bloomberg (July 31, 2018), <https://www.bloomberg.com/news/articles/2018-07-31/ex-hsbc-forex-trader-wins-u-k-order-blocking-extradition-to-u-s>.

99 *Id.*

100 Richard Crump, *Ex-HSBC Forex Trader Wins Appeal Against Extradition to US*, Law360 (July 31, 2018), [https://www.law360.com/whitecollar/articles/1068514/ex-hsbc-forex-trader-wins-appeal-against-extradition,-to-us?nl\\_pk=7d552c11-aa47-4657-8ff6-0e0f9a23d050&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=whitecollar](https://www.law360.com/whitecollar/articles/1068514/ex-hsbc-forex-trader-wins-appeal-against-extradition,-to-us?nl_pk=7d552c11-aa47-4657-8ff6-0e0f9a23d050&utm_source=newsletter&utm_medium=email&utm_campaign=whitecollar).

101 *Id.*

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A lower U.K. court initially granted the U.S.'s extradition request.<sup>102</sup> Scott petitioned the High Court to reconsider, and it did, citing to three factors that in its view weighed against extradition: (i) most of the trading at issue took place in the U.K.; (ii) Scott had a strong connection to the U.K. and no significant connection with the U.S.; and (iii) any alleged harm to the integrity of U.S. financial markets was both unquantified and, in any event, no less harmful to the integrity of U.K. markets.<sup>103</sup> The U.K. Court of Appeal rejected the U.S.'s request to appeal the High Court's decision, finding that it was not an issue of general importance.<sup>104</sup> U.S. prosecutors have conceded that they are unable to compel Scott to come to the U.S. to face his charges.<sup>105</sup>

Notably, the U.K. SFO investigated this matter in 2016 but decided not to proceed with an action.<sup>106</sup> The U.S.'s failed attempt at extraditing Scott could be a sign that U.K. courts are pushing back at the U.S.'s expansive view of its jurisdiction to bring these cases, in particular when a local law enforcement agency declines to prosecute.

Johnson, however, was arrested at JFK International Airport the night before the charges were unsealed.<sup>107</sup> While Scott was fighting extradition from the U.K., on October 23, 2017, Johnson became the first person in the U.S. to be convicted by a jury of currency manipulation.<sup>108</sup> On April 26, 2018, Johnson was sentenced to two years of imprisonment, but on June 20, he was released from prison pending appeal of his jury verdict. Among other things, Johnson has argued to the Second Circuit that his conviction violates his due process rights because he lacked fair warning that his alleged conduct violated U.S. law.<sup>109</sup>

### Accounting Fraud

The DOJ continues to prosecute cross-border accounting fraud actions as well. In April 2018, U.K. citizen Sushovan Hussain, former CFO of the U.K. software company Autonomy Corporation PLC (Autonomy), was convicted in federal district court in San Francisco of felony wire fraud charges stemming from Hewlett-Packard Co.'s (HP) takeover of Autonomy that ended in HP writing off \$8.8 billion.<sup>110</sup> U.S. prosecutors charged Hussain with engaging in a scheme to mislead HP about the true performance of Autonomy's business in an effort to overinflate the price of Autonomy's shares and entice HP into the deal.<sup>111</sup> As we reported previously, in October 2017, District Judge Charles R. Breyer denied Hussain's motion to dismiss the charges on the basis that the relevant events took place outside the U.S. and that the DOJ had exceeded its jurisdictional reach. Alex Tse,

102 *Id.*

103 *Id.*

104 Jonathan Browning, *U.K. Court Makes it Official: Ex-HSBC Trader Won't be Extradited*, Bloomberg (Oct. 31, 2018), <https://www.bloomberg.com/news/articles/2018-10-31/u-k-court-makes-it-official-ex-hsbc-trader-won-t-be-extradited>.

105 *Id.*

106 *Id.*

107 Press Release, U.S. Dep't of Just., "Global Head of HSBC's Foreign Exchange Cash-Trading Desks Arrested for Orchestrating Multimillion-Dollar Front Running Scheme" (July 20, 2016), <https://www.justice.gov/opa/pr/global-head-hsbc-s-foreign-exchange-cash-trading-desks-arrested-orchestrating-multimillion>.

108 Jeremy Hodges, *EX-HSBC Trader Wins Rare U.S. Order Blocking Extradition*, Bloomberg (July 31, 2018), <https://www.bloomberg.com/news/articles/2018-07-31/ex-hsbc-fx-trader-wins-u-k-order-blocking-extradition-to-u-s>.

109 Brief and Special Appendix for Defendant-Appellant, *United States v. Johnson*, No. 18-1503 (2d Cir. Aug. 30, 2019) (ECF No. 60).

110 Joel Rosenblatt, *Former Autonomy Executive Sushovan Hussain Convicted of Accounting Fraud*, Bloomberg (Apr. 30, 2018), <https://www.bloomberg.com/news/articles/2018-04-30/former-autonomy-executive-hussain-convicted-of-accounting-fraud>.

111 Press Release, U.S. Dep't of Just., "Former Autonomy CFO Charged With Wire Fraud" (Nov. 14, 2016), <https://www.justice.gov/opa/pr/former-autonomy-cfo-charged-wire-fraud>.

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then-Acting U.S. Attorney for the Northern District of California, stated that the jury verdict “affirms that corporate criminals who cook their company’s books to the detriment of victims in the United States, and specifically this district, will be held to account in our courts.”<sup>112</sup> Tse also acknowledged U.S. cooperation with the U.K. Financial Reporting Counsel and SFO in the matter.<sup>113</sup>

Meanwhile, U.S. prosecutors continued to press forward against other Autonomy executives involved in the HP deal, filing charges in November 2018 in San Francisco against former CEO Michael Lynch and Vice President of Finance Stephen Chamberlain – both U.K. citizens – with 14 counts ranging from conspiracy to commit wire fraud to criminal forfeiture.<sup>114</sup> Lynch and Chamberlain are accused of engaging, along with Hussain, in a scheme to deceive purchasers and sellers of Autonomy securities about the true performance of Autonomy’s business. They are currently awaiting trial. Meanwhile, Hussain and Lynch also are defending a parallel civil case in the U.K. by HP seeking upwards of \$5 billion in damages,<sup>115</sup> in one of the biggest cases to appear in the British courts for decades. Trial is set to start in that case in March 2019.

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112 Rosenblatt, *supra* note 110.

113 *Id.*

114 Press Release, U.S. Dep’t of Just., “Defendant Allegedly Defrauded Hewlett-Packard Company in the Acquisition of Autonomy for \$11 Billion” (Nov. 29, 2018), <https://www.justice.gov/usao-ndca/pr/former-autonomy-ceo-charged-wire-fraud>.

115 *Autonomy Corp. v. Lynch & another*, HC-2015-001324 (*High Court of Justice*); see also Anthony Croft, *Autonomy former CFO seeks to overturn California fraud conviction*, Financial Times (May 28, 2014), <https://www.ft.com/content/71c118e8-5f5a-11e8-9334-2218e7146b04>.





## Blockchain and Cryptocurrency

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### Initial Coin Offerings

In 2018, the SEC reaffirmed the position it took in its July 2017 Report of Investigation (DAO Report) concerning DAO Tokens that initial coin offerings (ICOs) may constitute securities offerings.<sup>116</sup>

On February 6, 2018, in official remarks to the U.S. Senate Committee on Banking, Housing and Urban Affairs, SEC Chairman Jay Clayton stated that ICOs “have largely been” sales of unregistered securities.<sup>117</sup> In testimony before the Financial Services and General Government Subcommittee of the House Committee on Appropriations made on April 26, 2018, Chairman Clayton commented again on ICOs, stating that “[t]here are none that I’ve seen that are not securities.”<sup>118</sup>

However, in a June 6, 2018 interview with CNBC, Chairman Clayton clarified that bitcoin is not a security.<sup>119</sup> Similarly, in public remarks made on June 14, 2018, William Hinman, SEC Director of the Division of Corporation Finance, stated that “current offers and sales of Ether are not securities transactions.”<sup>120</sup> In the same remarks, Director Hinman emphasized the importance of the *Howey* test and warned, “simply labeling a digital asset a “utility token” does not turn the asset into something that is not a security.” In an apparent effort to provide further clarity, on October 18, 2018, the SEC announced the creation of the Strategic Hub for Innovation and Financial Technology, a centralized resource on the SEC’s fintech initiatives, including those relating to blockchain.<sup>121</sup> In November 2018, Director Hinman announced that the SEC intends to release “plain English” guidance to assist ICO issuers in determining whether the SEC will consider ICO tokens to be a security.<sup>122</sup> As of March 1, 2019, the guidance has yet to be issued; however, in a speech on February 8, 2019, SEC Commissioner Hester M. Peirce confirmed that the guidance would be forthcoming.<sup>123</sup>

Despite the above warnings, the ICO market boomed in the first half of 2018, with almost \$14 billion raised through ICOs, more than doubling the \$6 billion raised in ICO events in all of 2017.<sup>124</sup>

116 On July 25, 2017, the SEC issued a report pursuant to Section 21(a) of the Securities Exchange Act of 1934 concluding that, according to the U.S. Supreme Court decision in *SEC v. W.J. Howey Co.*, tokens sold by a Decentralized Autonomous Organization – a term used to describe a “virtual” organization embodied in computer code and executed on a distributed ledger or blockchain – which investors could subsequently monetize on various web platforms, qualified as “securities” under the federal securities laws and thus, an organization’s offering had to either be registered with the SEC or subject to a valid exemption from registration. Report of Investigation, Exchange Act Release No. 81207 (Jul. 25, 2017).

117 Virtual Currencies: The Oversight Role of the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission, Testimony before the Committee on Banking, Housing, and Urban Affairs United States Senate (2018) (statement of Jay Clayton, Chairman, U.S. Sec. and Exch. Comm’n).

118 Testimony before the Financial Services and General Government Subcommittee of the House Committee on Appropriations (2018) (statement of Jay Clayton, Chairman, U.S. Sec. and Exch. Comm’n).

119 Kate Rooney, *SEC chief says agency won’t change securities laws to cater to cryptocurrencies*, CNBC (Jun. 8, 2018), <https://www.cnbc.com/2018/06/06/sec-chairman-clayton-says-agency-wont-change-definition-of-a-security.html>.

120 William Hinman, Director, Div. of Corp. Fin., U.S. Sec. and Exch. Comm’n, “Remarks at the Yahoo Finance All Markets Summit: Crypto” (Jun. 14, 2018), <https://www.sec.gov/news/speech/speech-hinman-061418>.

121 Press Release, U.S. Sec. and Exch. Comm’n, “SEC Launches New Strategic Hub for Innovation and Financial Technology” (Oct. 18, 2018), <https://www.sec.gov/news/press-release/2018-240>.

122 Nikhilesh De & Arron Stanley, *SEC Official Says ‘Plain English’ Guidance On ICOs Is Coming*, coindesk (Nov. 5, 2018), <https://www.coindesk.com/sec-official-says-plain-english-guidance-on-icos-is-coming>.

123 Hester M. Peirce, Comm’r, U.S. Sec. and Exch. Comm’n, “Remarks at Protecting the Public While Fostering Innovation and Entrepreneurship: First Principles for Optimal Regulation” (Feb. 8, 2019), <https://www.sec.gov/news/speech/peirce-regulation-view-inside-machine>.

124 Coindesk ICO Tracker, <https://www.coindesk.com/ico-tracker>.

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The SEC has responded by issuing subpoenas to as many as 80 companies and individuals involved in ICO events,<sup>125</sup> announcing plans to examine up to 100 hedge funds dealing with cryptocurrencies<sup>126</sup> and working with regulators in Canada and U.S. states to launch a coordinated series of international enforcement actions dubbed “Operation Cryptosweep.”<sup>127</sup> Some of the more notable actions taken by the SEC include those against Centra Tech,<sup>128</sup> AriseBank<sup>129</sup> and Titanium Blockchain Infrastructure Services Inc.<sup>130</sup> In the case of AriseBank, in December 2018, the SEC obtained an order from a federal court in Texas requiring the former CEO and COO of AriseBank to pay \$2.7 million to settle registration and anti-fraud violations.<sup>131</sup> According to the North American Securities Administrators Association, as of August 28, 2018, there were more than 200 ICOs and cryptocurrency-related investment products under active investigation.<sup>132</sup>

Based on a report issued in September 2018, the ICO boom appears to have subsided in the latter half of the year. According to the report, nearly half of all ICOs since 2017 failed to raise any funds, and the month of August 2018 showed the lowest rates of return on startup ICOs since May 2017, with such efforts raising only \$326 million compared with the \$3 billion-per-month average observed during the first three months of 2018.<sup>133</sup> Another report issued in September stated that 70 percent of tokens issued in ICOs have seen their value fall below the token value at the time of the ICO. The report also stated that of the tokens that completed an ICO in 2017-2018, over one-third of those, having raised more than \$2.3 billion, have not yet listed their tokens on any exchange.<sup>134</sup>

While some foreign jurisdictions have allowed ICOs to continue unregulated or have even adopted new ICO-friendly laws and regulations, others have followed the SEC’s lead in seeking to enforce their securities laws. One jurisdiction of note is Malta, which in late 2018 had three new laws take effect: (i) The Malta Digital Innovation Authority Act, which establishes an agency that will regulate the blockchain industry, protect consumers and financial markets and promote transparency; (ii) The Innovative Technological Arrangement and Service Act, which establishes a regime for the registration and certification of technology service providers and lays the groundwork for future technology developments; and (iii) The Virtual Financial Asset Act, which establishes the “financial instruments test.” The “financial instruments test” provides guidance on whether a cryptocurrency or token issued in an ICO constitutes a security under Malta law. Any

125 Nathaniel Popper, *Subpoenas Signal S.E.C. Crackdown on Initial Coin Offerings*, N.Y. Times (Feb. 28, 2018), <https://www.nytimes.com/2018/02/28/technology/initial-coin-offerings-sec.html>.

126 Dave Michaels, *Crypto-Focused Hedge Funds on SEC’s Radar*, The Wall St. J. (Mar. 22, 2018), <https://www.wsj.com/articles/crypto-focused-hedge-funds-on-secs-radar-1521757104>.

127 Press Release, N. Am. Sec. Admin’r Ass’n, “State and Provincial Securities Regulators Conduct Coordinated International Crypto Crackdown” (May 21, 2018), <http://www.nasaa.org/45121/state-and-provincial-securities-regulators-conduct-coordinated-international-crypto-crackdown-2/>.

128 Press Release, U.S. Sec. and Exch. Comm’n, “SEC Halts Fraudulent Scheme Involving Unregistered ICO” (Apr. 2, 2018), <https://www.sec.gov/news/press-release/2018-53>.

129 Press Release, U.S. Dep’t of Just., “Cryptocurrency CEO Indicted After Defrauding Investors of \$4 Million” (Nov. 28, 2018), <https://www.justice.gov/usao-ndtx/pr/cryptocurrency-ceo-indicted-after-defrauding-investors-4-million>.

130 Press Release, U.S. Sec. and Exch. Comm’n, “SEC Obtains Emergency Order Halting Fraudulent Coin Offering Scheme” (May 29, 2018), <https://www.sec.gov/news/press-release/2018-94>.

131 Press Release, U.S. Sec. and Exch. Comm’n, “Executives Settle ICO Scam Charges” (Dec. 12, 2018), <https://www.sec.gov/news/press-release/2018-280>.

132 Press, Release, N. Am. Sec. Admin’r Ass’n, “NASAA Updates Coordinated Crypto Crackdown” (Aug. 28, 2018), <http://www.nasaa.org/45901/nasaa-updates-coordinated-crypto-crackdown/>.

133 Olga Kharif, *Funding For ICOs Drops to the Lowest in 16 Months*, Bloomberg (Sept. 10, 2018), <https://www.bloomberg.com/news/articles/2018-09-10/crypto-ico-funding-dropped-in-august-to-lowest-in-16-months?srnd=cryptocurrencies>.

134 *Burning Billions: Tokens Cents on the Dollar Against Raised Capital*, Diar (Sept. 24, 2018), <https://diar.co/volume-2-issue-38/>.

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asset that does not squarely pass the test will be deemed a “virtual financial asset” regulated by the new law.<sup>135</sup>

Another noteworthy example is Hong Kong, which was once friendly to ICOs but in 2018 took several actions against such offerings, including sending warning letters to exchanges listing ICO tokens,<sup>136</sup> taking action against ICO issuers<sup>137</sup> and issuing cautionary statements to the public.<sup>138</sup> In January 2018, the SEC suspended trading of a Hong Kong blockchain company’s stock based on unusual and unexplained market activity,<sup>139</sup> and in July 2018 the SEC obtained a final judgment against two individuals involved in the activity.<sup>140</sup> Despite actions such as these, it appears that U.S. and foreign governments alike have had difficulties keeping pace with ICOs and token-related securities laws violations as they proliferate in a largely borderless economy, and amidst an inconsistent and constantly changing international regulatory landscape.

### Select U.S. and International Law Enforcement Actions Involving Cryptocurrency

#### U.S. Cross-Border Actions

U.S. cross-border investigations and actions alleging price manipulation, securities fraud, criminal fraud and anti-money laundering violations involving cryptocurrency have been widespread. One of the most notable of these investigations involves the foreign cryptocurrency exchange Bitfinex and Tether, an affiliated company that issues a cryptocurrency that the company claims is backed 1:1 by U.S. dollar reserves. On December 6, 2017, the CFTC sent subpoenas to Bitfinex and Tether.<sup>141</sup> Although the subject of the subpoenas is unknown, some have speculated that they relate to a possible bitcoin price manipulation scheme, and foreign news sources claim to have linked Bitfinex to a potential money laundering scheme.<sup>142</sup>

Bitfinex has denied any wrongdoing and, in June 2018, Tether announced that a U.S. law firm confirmed that Tether’s bank deposits had U.S. dollars sufficient to back every unit of Tether cryptocurrency in circulation.<sup>143</sup> An analysis by Bloomberg appears to support a similar conclusion.<sup>144</sup> However, suspicions of price manipulation have continued amid Tether’s issuance of

135 Roger Aitken, *Crypto Investors Flocking To ‘Blockchain Island’ Malta in Droves*, Forbes (Oct. 29, 2018), <https://www.forbes.com/sites/rogeraitken/2018/10/29/crypto-investors-flocking-to-blockchain-island-malta-in-droves/#374755b5ff96>.

136 Press Release, Sec. and Futures Comm’n, “SFC warns of cryptocurrency risks” (Feb. 9, 2018), <https://www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=18PR13>.

137 Amanda Lee, *Hong Kong’s regulator halts initial coin offering, orders Black Cell to return tokens to investors*, South China Morning Post (Mar. 19, 2018), <https://www.scmp.com/business/banking-finance/article/2137918/hong-kongs-regulator-halts-initial-coin-offering-orders>.

138 Julia Leung, Deputy Chief Exec. Officer and Exec. Dir., Intermediaries, Sec. and Futures Comm’n, Speech at the Hong Kong Investment Funds Association Luncheon, “New Technologies and Asset Management: A time of great promise and great peril?” (Apr. 30, 2018).

139 *In the matter of UBI Blockchain Internet, Ltd.*, Order of Suspension of Trading, File No. 500-1 (Jan. 5, 2018).

140 Press Release, U.S. Sec. and Exch. Comm’n, “SEC Obtains Final Judgments Against Attorney and Law Firm Business Manager Charged with Illegal Sales of Ubi Blockchain Internet Stock” (Jul. 9, 2018), [https://www.sec.gov/litigation/litreleases/2018/lr24190.htm?utm\\_source=dvtr.it&utm\\_medium=linkedin](https://www.sec.gov/litigation/litreleases/2018/lr24190.htm?utm_source=dvtr.it&utm_medium=linkedin).

141 Matthew Leising, *U.S. Regulators Subpoena Crypto Exchange Bitfinex*, Tether, Bloomberg (Jan. 30, 2018), <https://www.bloomberg.com/news/articles/2018-01-30/crypto-exchange-bitfinex-tether-said-to-get-subpoenaed-by-cftc>.

142 Simon Golstein, *Bitfinex is Mixed Up with Colombian Cocaine*, Polish Media Reports, Finance Magnates (Aug. 4, 2018), <https://www.financemagnates.com/cryptocurrency/news/bitfinex-mixed-colombian-cocaine-polish-media-reports/>.

143 Matthew Leising, *Tether Hired Former FBI Director’s Law Firm to Vet Finances*, Bloomberg (Jun. 20, 2018), <https://www.bloomberg.com/news/articles/2018-06-20/tether-hired-former-fbi-director-s-law-firm-to-vet-finances>.

144 Matthew Leising, *Crypto-Mystery Clues Suggest Tether Has the Billions It Promised*, Bloomberg (Dec. 18, 2018), <https://www.bloomberg.com/amp/news/articles/2018-12-18/crypto-mystery-clues-suggest-tether-has-the-billions-it-promised>.

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\$250 million worth of new Tether cryptocurrency units on May 20,<sup>145</sup> as well as the departure of a senior Bitfinex executive<sup>146</sup> and allegations of price manipulation in an analysis published on June 25 by two professors at the University of Texas at Austin.<sup>147</sup>

Another investigation into alleged price manipulation of cryptocurrency was launched in May 2018 by the CFTC and the DOJ. According to Bloomberg News, the DOJ “opened a criminal probe into whether traders are manipulating the price of Bitcoin and other digital currencies.”<sup>148</sup>

In a recent decision of note that tested U.S. regulators’ jurisdictional reach, a New York federal court rejected foreign defendants’ jurisdictional challenges to an SEC securities fraud action. In *SEC v. PlexCorps*, the SEC alleged that the defendants, two Canadian residents, violated the securities laws and misappropriated more than \$15 million from investors through false and misleading statements regarding the PlexCoin ICO.<sup>149</sup> The defendants, who developed and launched the PlexCoin ICO in Canada, moved to dismiss the action for lack of personal and subject matter jurisdiction, arguing that while many U.S. investors bought into the company’s offering of digital currency, the Canadian business attempted to exclude U.S. persons from the ICO. According to the defendants, those steps included requiring investors to accept terms and conditions on the company’s website that barred U.S. residents from participating in the offering.

On August 9, 2018, the court denied the defendants’ motion to dismiss, finding that the SEC had established that defendants conducted significant dealings in the U.S.<sup>150</sup> Regarding the exclusion clause on PlexCorp’s website that barred U.S. investors, the court found that this clause was removed from the website after fundraising began and that at least three investors said they never checked any box that required them to affirm citizenship or residency outside the U.S. The court further found that PlexCorp’s use of social media and the internet also engaged U.S. parties. The SEC provided evidence that the company’s websites, including [www.plexcoin.com](http://www.plexcoin.com), were registered with U.S.-based web hosting companies through which investors could register for the ICO, and that one of company’s founders visited Boston around the time of the ICO in order to register two websites related to PlexCoin. Finally, the court found that PlexCorp employed U.S.-based payment services to facilitate PlexCoin transactions. In September, the SEC submitted a letter to the PlexCoin court seeking sanctions and a default judgment against PlexCorps’ founders for ignoring court orders concerning accounting and repatriation of digital assets and discovery.<sup>151</sup>

2018 saw numerous other U.S. cross-border fraud and money laundering actions involving cryptocurrency. One multi-agency cross-border investigation of an alleged \$36 million fraud scheme involving bitcoin resulted in the extradition of a British citizen, Renwick Haddow, from

145 Maxwell William, *Tether Mints \$250 Mln of New USDT Tokens, Rekindles Controversy*, Cointelegraph (May 20, 2018), <https://cointelegraph.com/news/tether-mints-250-mln-of-new-usdt-tokens-rekindles-controversy>.

146 Anna Irrera, *Bitfinex chief strategy officer departs*, Reuters (Jun. 22, 2018), <https://www.reuters.com/article/us-cryptocurrencies-bitfinex/bitfinex-chief-strategy-officer-departs-idUSKBN1J2IN>.

147 John M. Griffin & Amin Shams, *Is Bitcoin Really Un-Tethered?* (2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3195066](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3195066).

148 Matt Robinson & Tom Schoenberg, *U.S. Launches Criminal Probe into Bitcoin Price Manipulation*, Bloomberg (May 24, 2018), <https://www.bloomberg.com.cdn.ampproject.org/c/s/www.bloomberg.com/amp/news/articles/2018-05-24/bitcoin-manipulation-is-said-to-be-focus-of-u-s-criminal-probe>.

149 Complaint, *SEC v. PlexCorps*, No. 17-CV-7007 (E.D.N.Y. Dec. 1, 2017) (ECF No. 1).

150 *SEC v. PlexCorps*, No. 17-CV-7007 (CBA) (RML), 2018 WL 4299983 (E.D.N.Y. Aug. 9, 2018).

151 Daniel Palmer, *SEC Seeks Court Sanction Against PlexCoin ICO Founders*, coindesk (Sept. 26, 2018), <https://www.coindesk.com/sec-seeks-court-sanction-against-plexcoin-ico-founders>.

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Morocco to the U.S.<sup>152</sup> In another cross-border action, two Canadian men were charged with money laundering and operating an unlicensed money remitting business, Payza, that allegedly assisted in laundering up to \$250 million.<sup>153</sup> In July 2017, Greek law enforcement arrested a Russian national, Alexander Vinnik, on U.S. charges related to his involvement with BTC-e, a cryptocurrency exchange alleged to have facilitated over \$4 billion in money laundering, while he was vacationing in Greece.<sup>154</sup> He has been indicted on 21 charges including identity theft, facilitating drug smuggling and over \$4 billion in money laundering through bitcoin. Vinnik faces additional charges in his native Russia. He is also subject to a European arrest warrant issued by France. In 2017, the Greek supreme court ruled that Vinnik should be extradited to the U.S. This ruling was muddled in 2018, when another Greek court authorized his extradition to Russia instead.<sup>155</sup> Further complicating matters, in December 2018, the Greek Supreme Court affirmed a lower court decision authorizing his extradition to France. If Vinnik is extradited to France, this may eventually result in his extradition to the U.S. On the other hand, if extradited to Russia, Vinnik likely will be beyond the reach of U.S. authorities. There have been reports that the extradition proceedings ultimately may be settled by the Greek Ministry of Justice or possibly other branches of the Greek government.<sup>156</sup> Finally, in perhaps the most notable action, a federal indictment released in July 2018 (discussed above) alleged that Russian intelligence agents used bitcoin to launder over \$95,000 in connection with their attempts to influence the 2016 U.S. Presidential election.<sup>157</sup>

In 2018, the SEC also initiated several ICO-related actions that did not involve fraud. In one cross-border example, in September 2018, the SEC and CFTC charged 1pool Ltd. (aka 1Broker) and its CEO with offenses related to its alleged solicitation of U.S. investors to purchase swaps and commodity transactions, allowance of investors to open trading accounts by providing only a username and email address and requirement that customers fund their accounts using bitcoin. According to the complaint, 1Broker's actions violated federal securities laws requiring broker-dealer registration and customer identity verification.<sup>158</sup>

### Foreign Enforcement Actions

Foreign law enforcement agencies have been actively pursuing cryptocurrency related actions, sometimes independently and sometimes in concert with their international counterparts.

In Iceland, authorities opened an investigation into the theft of approximately 600 advanced computers, valued at approximately \$2 million, from data centers used to mine bitcoin and other

152 Press Release, U.S. Sec. and Exch. Comm'n, "British Citizen Extradited From Morocco For Defrauding Investors Of More Than \$36 Million" (Apr. 13, 2018), <https://www.justice.gov/usao-sdny/pr/british-citizen-extradited-morocco-defrauding-investors-more-36-million>.

153 Press Release, U.S. Dep't of Just., "Payza and Two Canadian Brothers Accused of Operating an Unlicensed Money Service Business and Money Laundering" (Mar. 20, 2018), <https://www.justice.gov/usao-dc/pr/payza-and-two-canadian-brothers-accused-operating-unlicensed-money-service-business-and>; <https://www.coindesk.com/us-crypto-payza-money-laundering-lawsuit/>.

154 Press Release, U.S. Dep't of Just., "Russian National And Bitcoin Exchange Charged In 21-Count Indictment For Operating Alleged International Money Laundering Scheme And Allegedly Laundering Funds From Hack Of Mt. Gox" (Jul. 26, 2017), <https://www.justice.gov/usao-ndca/pr/russian-national-and-bitcoin-exchange-charged-21-count-indictment-operating-alleged>.

155 David Hundeyin, *Alleged Bitcoin Launderer Begins Hunger Strike to Protest Western Extradition*, CNN (Nov. 26, 2018), <https://www.cnn.com/alleged-bitcoin-launderer-begins-hunger-strike-to-protest-western-extradition>; Helen Partz, *Greek Court Rules to Extradite Alexander Vinnik, Accused of Laundering \$4 Bln in Bitcoin*, Cointelegraph (Jul. 14, 2018), <https://cointelegraph.com/news/greek-court-rules-to-extradite-alexander-vinnik-accused-of-laundering-4-bln-in-bitcoin>.

156 Marie Hullet, *Greek Supreme Court Rules in Support of Extraditing Alleged Bitcoin Launderer Vinnik to France*, Cointelegraph (Dec. 19, 2018), <https://cointelegraph.com/news/greek-supreme-court-rules-in-support-of-extraditing-alleged-bitcoin-launderer-vinnik-to-france>.

157 Indictment, *United States v. Netyksha*, No. 1:18-cr-00215 (D.D.C. Jul. 13, 2018).

158 Press Release, U.S. Sec. and Exch. Comm'n, "SEC Charges Bitcoin-Funded Securities Dealer and CEO" (Sept. 27, 2018), <https://www.sec.gov/news/press-release/2018-218>.

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cryptocurrencies.<sup>159</sup> News sources reported that Chinese authorities located and seized the stolen computers after identifying them based on unusually high electricity consumption.<sup>160</sup>

In Japan, financial regulators shut down two cryptocurrency exchanges for alleged compliance deficiencies<sup>161</sup> and ordered six licensed cryptocurrency exchanges to enhance their internal-auditing and user-protection systems in an effort to stem money laundering.<sup>162</sup> In a separate incident, Tokyo police arrested eight men suspected of raising \$68.4 million in cash and cryptocurrency through a U.S.-based pyramid scheme.<sup>163</sup> In China, prosecutors charged four suspects in connection with an alleged \$2 billion cryptocurrency pyramid scheme<sup>164</sup> and seized \$1.5 million of cryptocurrencies in an action against an illegal gambling scheme.<sup>165</sup> In South Korea, the government confiscated \$1.4 million of bitcoin seized in an alleged child pornography action.<sup>166</sup>

In September 2018, the Australian Securities & Investments Commission (ASIC) announced plans to increase scrutiny of ICOs due to persistent problems associated with the offerings, including the use of “misleading or deceptive” statements in sales and marketing materials and offerors not holding Australian financial services licenses. The ASIC reported in the announcement that it had stopped five ICOs since April 2018.<sup>167</sup> In October 2018, the ASIC shut down a Brisbane-based ICO project that intended to raise up to \$50 million to create a cryptocurrency trading platform.<sup>168</sup>

In Germany, prosecutors seized and sold \$14 million in bitcoin in connection with two Bavarian cybercrime agency investigations, notably waiting to order the sale until bitcoin rebounded from a low of about \$6,000 to about \$10,000.<sup>169</sup> Spanish tax authorities have requested information from over 60 companies in the country related to crimes involving cryptocurrencies.<sup>170</sup> In France, authorities recently arrested a French intelligence agent who was selling state secrets in exchange for bitcoin.<sup>171</sup>

159 Egill Bjarnason, *Bitcoin Heist: 600 Powerful Computers Stolen in Iceland*, U.S. News (Mar. 2, 2018), <https://www.usnews.com/news/business/articles/2018-03-02/big-bitcoin-heist-2-held-over-stolen-computers-in-iceland>.

160 Nikhilesh De, *Iceland's Missing Bitcoin Miners May Be In China*, coindesk (May 7, 2018), <https://www.coindesk.com/icelands-missing-bitcoin-miners-may-china/>.

161 Stan Higgins, *Report: Two Japanese Crypto Exchanges to Shut Down*, coindesk (Mar. 28, 2018), <https://www.coindesk.com/report-2-japanese-crypto-exchanges-shut/>.

162 Wolfie Zhao, *Japan's Financial Watchdog Orders AML Shake-Up at 6 Crypto Exchanges*, coindesk (Jun. 22, 2018), <https://www.coindesk.com/japans-financial-watchdog-orders-aml-shake-up-at-6-crypto-exchanges/>.

163 Ana Berman, *Japan: Tokyo Police Arrest 8 Men Allegedly Involved in \$68 Million Crypto Pyramid Scheme*, coindesk (Nov. 14, 2018), <https://cointelegraph.com/news/japan-tokyo-police-arrest-8-men-allegedly-involved-in-68-million-crypto-pyramid-scheme>.

164 Wolfie Zhao, *China Prosecutes 98 Over Alleged \$2 Billion OnceCoin Pyramid Scheme*, coindesk (May 23, 2018), <https://www.coindesk.com/china-prosecutes-98-over-alleged-2-billion-onecoin-pyramid-scheme/>.

165 Muyao Shen, *Police Seize \$1.5 Million in Crypto During FIFA Gambling Crackdown*, coindesk (Jul. 13, 2018), <https://www.coindesk.com/police-seize-1-5-million-in-crypto-during-fifa-gambling-crackdown/>.

166 Wolfie Zhao, *Korea Seizes Bitcoin Worth \$1.4 Million Following Supreme Court Ruling*, coindesk (May 30, 2018), <https://www.coindesk.com/korea-seizes-bitcoin-worth-1-4-million-following-supreme-court-ruling/>.

167 Swati Pandey, *Australian regulator cracks down on misleading digital coin offerings*, Reuters, <https://mobile.reuters.com/article/amp/idUSKCN1M008F>.

168 Wolfie Zhao, *Australian Securities Watchdog Halts ICO Seeking to Raise \$50 Million*, coindesk (Oct. 22, 2018), <https://www.coindesk.com/australia-securities-watchdog-halts-ico-seeking-to-raise-50-million>.

169 Wolfie Zhao, *German Authorities Sold \$14 Million in Seized Cryptos Over Price Fears*, coindesk (May 29, 2018), <https://www.coindesk.com/german-authorities-sold-14-million-in-seized-cryptos-over-price-fears/>.

170 David Floyd, *Spain's Tax Authorities Seek Crypto User Names and Bank Accounts*, coindesk (Apr. 6, 2018), <https://www.coindesk.com/spains-tax-authorities-seek-crypto-user-names-bank-accounts/>.

171 Nikhilesh De, *France Accuses Intelligence Agent of Selling State Secrets for Bitcoin*, coindesk (Oct. 2, 2018), <https://www.coindesk.com/french-officials-allege-intelligence-agent-sold-state-secrets-for-bitcoin>.

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In the U.K., authorities seized approximately \$667,000 of bitcoin as part of the arrest of a computer hacker who stole valuable data from companies around the world and sold the data on the dark web in exchange for bitcoin.<sup>172</sup> In South Africa, authorities opened an investigation into an alleged fraud scheme involving a company that offered investments in bitcoin and is alleged to have defrauded investors of \$80 million, and another investigation involved kidnappers demanding ransom to be paid in bitcoin.<sup>173</sup> Finally, in India, a former politician was arrested for suspected involvement in a scheme to frame another man for the purpose of extorting \$1.3 million in bitcoin.<sup>174</sup>

### U.S. and International Regulations Involving Cryptocurrency

According to a report from U.S.-based firm CipherTrace, in the first nine months of 2018, approximately \$927 million in cryptocurrencies was stolen from cryptocurrency exchanges by hackers, representing a 250 percent increase from 2017.<sup>175</sup> The increase in cryptocurrency cyber-thefts, along with an inconsistent international regulatory environment, appears to be driving continued money laundering risks related to cryptocurrencies. The dramatic price increase and subsequent volatility of bitcoin also may be contributing to increased money laundering risk, as individuals who illegally acquired bitcoin seek to “cash out.”<sup>176</sup> According to Europol, of the estimated £100 billion in illicit proceeds present in Europe, approximately 3 to 4 percent, or £5.5 billion, have been laundered using cryptocurrencies.<sup>177</sup> Findings from a Wall Street Journal investigation published in September 2018 identified almost \$90 million laundered through 46 cryptocurrency exchanges since 2016. By following the assets from those who had reported hacks, blackmail schemes and other stolen cryptocurrencies, the investigators were able to pinpoint where the cryptocurrencies became untraceable after entering an exchange.<sup>178</sup> Data published from the first full year under Japan’s cryptocurrency exchange reporting regulations has shown a substantial increase in reports of suspected money laundering events – more than tenfold the amount reported between April and December 2017.<sup>179</sup>

On August 9, 2018, Kenneth A. Blanco, the Director of the U.S. Financial Crimes Enforcement Network (FinCEN), delivered a clear, stern message to crypto exchanges on their AML obligations, stating that compliance programs must be implemented long before they receive notice of an examination.<sup>180</sup> In October 2018, FinCEN issued an advisory to U.S. financial institutions regarding

172 London police seize bitcoin worth \$667,000 from hacker, AP News (May 25, 2018), <https://apnews.com/5fd14db1cb8b467dbf42698f3154abee>.

173 Lester Coleman, *South African Authorities Investigate \$80 Million Crypto Investment Scam*, CCN (May 28, 2018), <https://www-ccn-com.cdn.ampproject.org/c/s/www.ccn.com/south-african-authorities-investigate-8-million-crypto-investment-scam/amp/>.

174 Ashmita Dutta, *In Bitcoin extortion case of \$1.3 million, ex-Indian MLA detained*, BCFocus (Sept. 10, 2018), <https://bcfocus.com/news/in-bitcoin-extortion-case-of-1-3-million-ex-indian-mla-detained/22711/>.

175 Gertrude Chavez-Dreyfuss, *Cryptocurrency theft hits nearly \$1 billion in first nine months: reports*, Reuters (Oct. 10, 2018), <https://uk.reuters.com/article/uk-crypto-currency-crime/cryptocurrency-theft-hits-nearly-1-billion-in-first-nine-months-report-idUKKCN1MK1JD>.

176 David Gilbert, *Criminals are racing to cash out their bitcoin*, Vice News (Mar. 19, 2018), [https://news.vice.com/en\\_us/article/7xdzqa/criminals-are-racing-to-cash-out-their-bitcoin-heres-how-theyre-doing-it](https://news.vice.com/en_us/article/7xdzqa/criminals-are-racing-to-cash-out-their-bitcoin-heres-how-theyre-doing-it).

177 Shiroma Silva, *Criminals hide 'billions' in crypto-cash – Europol*, BBC News (Feb. 12, 2018), <https://www.bbc.co.uk/news/technology-43025787>; Kieran Cocoran, *Criminals in Europe are laundering \$5.5 billion of illegal cash through cryptocurrency, according to Europol*, Business Insider (Feb. 12, 2018), <http://www.businessinsider.com/europol-criminals-using-cryptocurrency-to-launder-55-billion-2018-2>.

178 Justin Scheck & Shane Shifflett, *How Dirty Money Disappears Into the Black Hole of Cryptocurrency*, Wall. St. J. (Sept. 28, 2018), <https://www.wsj.com/articles/how-dirty-money-disappears-into-the-black-hole-of-cryptocurrency-1538149743?tesla=y&mod=e2li>.

179 *Cases of money laundering linked to cryptocurrency in Japan up tenfold in 2018*, The Japan Times (Feb. 28, 2019), <https://www.japantimes.co.jp/news/2019/02/28/national/crime-legal/cases-money-laundering-linked-cryptocurrency-japan-tenfold-2018/#.XHnF7FBKiUn>.

180 Kenneth A. Blanco, Director, Fin. Crimes Enf’t Network, Prepared Remarks at the 2018 Chicago-Kent Block (Legal) Tech Conference (Aug. 9, 2018), <https://www.fincen.gov/news/speeches/prepared-remarks-fincen-director-kenneth-blanco-delivered-2018-chicago-kent-block>.



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Iran's efforts to evade sanctions that included a section on virtual currency, stating that Iran has engaged in millions of dollars of bitcoin-denominated transactions since 2013.<sup>181</sup> In November 2018, the U.S. Office of Foreign Assets Control (OFAC) for the first time in history included bitcoin addresses among the identifying information for individuals newly added to the Specially Designated Nationals List.<sup>182</sup> In addition, new guidance from OFAC states that if cryptocurrency “identifiers or wallets” are identified as being associated with a specially designated national, steps should be taken to block cryptocurrency transactions and report the matter to OFAC.<sup>183</sup>

There are indications that money laundering via cryptocurrencies may be an even larger risk outside the U.S. – particularly in Europe, where cryptocurrency exchange services are not subject to a comprehensive AML regime. A 2018 report by a leading provider of cryptocurrency investigations software stated that cryptocurrency “conversion services based in Europe received the greatest share of illicit bitcoins out of identifiable regions, more than five times as much as North American services.” The report also noted that “a large percentage of conversion services that receive illicit bitcoins appear to conceal their country of operations, making it a challenge to identify the legal jurisdictions responsible for their AML enforcement.”<sup>184</sup>

European regulators appear to have taken heed, with the EU recently publishing the Fifth Anti-Money Laundering Directive (5AMLD), which brings cryptocurrency exchange platforms and wallet providers fully within the EU AML rules, including know-your-customer requirements and reporting obligations for suspicious transactions. 5AMLD entered into force on July 9, 2018, and all EU-member states must implement its provisions in their national law by January 10, 2020.<sup>185</sup> Australia also updated its AML guidance related to cryptocurrencies in early 2018,<sup>186</sup> and Canada has proposed new AML regulations on cryptocurrencies.<sup>187</sup>

Finally, in October 2018, the intergovernmental Financial Action Task Force (FATF) announced an update to its 2015 guidance that set out requirements for combating money laundering and terrorist financing in the virtual currency space. According to the FATF, the updates are designed to clarify that virtual assets and their service providers “are subject to AML/CFT regulations, for example conducting customer due diligence including ongoing monitoring, record-keeping, and reporting of suspicious transactions.”<sup>188</sup>

181 Fin. Crimes Enf't Network, FIN-2018-A006, Advisory on the Iranian Regime's Illicit and Malign Activities and Attempts to Exploit the Financial System (2018), <https://www.fincen.gov/sites/default/files/advisory/2018-10-11/Iran%20Advisory%20FINAL%200508.pdf>.

182 Nikhilesh De, *US Regulators Tie Two Bitcoin Addresses To Iranian Ransomware Plot*, coindesk (Nov. 28, 2018), <https://www.coindesk.com/us-regulators-tie-two-bitcoin-addresses-to-iranian-ransomware-plot>.

183 U.S. Dep't of Treasury, Questions on Virtual Currency, [https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq\\_compliance.aspx#vc\\_faqs](https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_compliance.aspx#vc_faqs).

184 Tom Robinson, D.Phil & Yana Fanusie, *Bitcoin Laundering: An Analysis of Illicit Flows into Digital Currency Services* (2018), <https://info.elliptic.co/whitepaper-fdd-bitcoin-laundering>.

185 Gina Conheady, *INSIGHT: EU Regulation of Cryptocurrency Exchanges: 5AMLD Ups the Ante*, Bloomberg Law (Jun. 27, 2018), <https://www.bna.com/insight-eu-regulation-n73014476945/>.

186 Daniel Palmer, *New AML Rules for Australia's Bitcoin Exchanges Kick In Today*, coindesk (Apr. 3, 2018), <https://www.coindesk.com/new-aml-rules-australias-bitcoin-exchanges-kick-today>.

187 Maxwell William, *Canada Releases Official Draft of New Crypto Regulations Focused on KYC/AML*, Cointelegraph (Jun. 10, 2018), <https://cointelegraph.com/news/canada-releases-official-draft-of-new-crypto-regulations-focused-on-kyc-aml>.

188 Fin. Action Task Force, Regulation of Virtual Assets (2018), <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/regulation-virtual-assets.html>.



Incentivizing Voluntary Disclosure

## INCENTIVIZING VOLUNTARY DISCLOSURE

2018 saw an increased focus by U.S. law enforcement on encouraging voluntary self-disclosure in exchange for declinations or significantly reduced sanctions, both domestically and in cross-border actions.

In a major development, on March 1, 2018, John P. Cronan, then-Principal Assistant Attorney General, and Benjamin Singer, then-Chief of the DOJ Fraud Section's Securities and Financial Fraud Unit, announced that the DOJ will use the FCPA Corporate Enforcement Policy (the FCPA Policy) as nonbinding guidance in other types of corporate criminal matters.<sup>189</sup> As we previously reported, the DOJ's FCPA Policy, which was issued in November 2017, created a declination presumption for companies who voluntarily disclosed potential FCPA violations, fully-cooperated with the DOJ and remediate, absent certain aggravating circumstances.<sup>190</sup> For a company that fully cooperates but circumstances exist that make declination of prosecution inappropriate, the DOJ will request a 50 percent reduction off the low end of the sentencing guidelines (except in the case of a criminal recidivist). In accordance with this policy, U.S. authorities issued at least 19 declinations in FCPA investigations in 2018.<sup>191</sup>

The DOJ began its voluntary disclosure policy in non-FCPA cases with its investigation into alleged manipulative foreign currency options trading at Barclays. In January 2018, Barclays former New York-based forex trading head, Robert Bogucki, was charged with engaging in a scheme to deflate the value of the U.S. dollar to the British Pound to gain extra profit when Barclays carried out a purchase of currency options from its client.<sup>192</sup> On February 28, 2018, Barclays entered into an agreement with the DOJ, which required the bank to pay \$12.9 million in restitution and disgorge the profits it obtained in the alleged scheme. According to the DOJ, it resolved the investigation without bringing charges against Barclays because it self-disclosed the conduct, performed a "thorough and comprehensive" internal investigation, created a compliance program aimed at preventing currency manipulation through "front-running" and fully cooperated.<sup>193</sup>

The DOJ stated that its deal with Barclays would be used as a road map for other similar situations in which companies cooperate.<sup>194</sup> The DOJ also compared its resolution of the Barclays investigation with its investigation into similar conduct at HSBC. On January 18, 2018, the DOJ filed a criminal information alleging that HSBC engaged in a scheme to defraud two bank clients through a multi-million dollar currency manipulation scheme (Stuart Scott and Mark Johnson were charged in connection with this investigation, see section on Benchmark Rate Manipulation, above.)<sup>195</sup> HSBC entered into a deferred prosecution agreement and agreed to pay a \$63.1 million criminal penalty and \$38.4 million in disgorgement and restitution. The DOJ stated that, while

189 Jody Godoy, *DOJ Expands Leniency Beyond FCPA, Lets Barclays Off*, Law360 (Mar. 1, 2018) <https://www.law360.com/articles/1017798/doj-expands-leniency-beyond-fcpa-lets-barclay>.

190 Rod Rosenstein, Deputy Attorney General, U.S. Dep't of Just., 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017), <https://www.justice.gov/opa/speech/deputy-attorney-general-rostenstein-delivers-remarks-34th-international-conference-foreign>; see also BakerHostetler, *DOJ Announces Revised FCPA Corporate Enforcement Policy* (Dec. 4, 2017), <https://www.bakerlaw.com/alerts/doj-announces-revised-fcpa-corporate-enforcement-policy>.

191 Richard L. Cassin, *2018 FCPA Enforcement Index*, The FCPA Blog (Jan. 2, 2019), <http://www.fcpablog.com/blog/2019/1/2/2018-fcpa-enforcement-index.html>.

192 Press Release, U.S. Dep't of Just., "Former Head of Barclays New York Foreign Exchange Operation Indicted for Orchestrating Multimillion-Dollar Front-Running Scheme" (Jan. 16, 2018), <https://www.justice.gov/opa/pr/former-head-barclays-new-york-foreign-exchange-operation-indicted-orchestrating-multimillion>; see also Godoy, *supra* note 189.

193 Benjamin D. Singer, U.S. Dep't of Just. Criminal Fraud Division Chief of the Securities and Financial Fraud Unit, Declination Letter (Feb. 28, 2018), <https://www.justice.gov/criminal-fraud/file/1039791/download>; see also Godoy, *supra* note 189.

194 *Id.*

195 Press Release, U.S. Dep't of Just., "HSBC Holdings Plc Agrees to Pay More Than \$100 Million to Resolve Fraud Charges" (Jan. 18, 2018), <https://www.justice.gov/opa/pr/hsbc-holdings-plc-agrees-pay-more-100-million-resolve-fraud-charges>.

**INCENTIVIZING  
VOLUNTARY DISCLOSURE**

HSBC had taken remedial actions, the bank did not sufficiently cooperate with the DOJ until after being notified of the DOJ's concerns.

Notably, in November 2018, the DOJ introduced revisions to the policy that then-Deputy Attorney General Sally Yates promulgated in September 2015, commonly known as the Yates Memo. Deputy Attorney General Rod Rosenstein announced that to receive cooperation credit, companies are no longer required to identify every individual involved in wrongdoing. Instead, companies must identify individuals who were "substantially involved in or responsible for the criminal conduct."<sup>196</sup> Companies and their counsel will have to wait to see how this new policy plays out and the impact it has on the DOJ's use and extension of the FCPA Policy.

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196 Rod Rosenstein, Deputy Attorney General, U.S. Dep't of Just., Prepared Remarks for the 35th Int'l Conference on the Foreign Corrupt Practices Act (Nov. 29, 2018), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0>; see also BakerHostetler, *Revised DOJ Corporate Cooperation Policy Paints a Target on Individuals* (Dec. 7, 2018), <https://www.bakerlaw.com/alerts/revised-doj-corporate-cooperation-policy-paints-a-target-on-individuals>.



DOJ Policy Against “Piling On”

**DOJ POLICY AGAINST  
“PILING ON”**

On May 9, 2018, a non-binding policy was added to the Justice Manual (formerly known as the U.S. Attorney’s Manual) that discourages unnecessary “piling on” of enforcement actions and penalties to corporate wrongdoers.<sup>197</sup> According to the DOJ, the policy promotes coordination between U.S. and foreign law enforcement agencies in an effort to limit duplicative penalties on corporate entities for the same conduct.

Among other things, under the policy, DOJ prosecutors and attorneys should coordinate with other federal, state, local and foreign authorities who may be seeking to resolve a case based on the same misconduct, which may include crediting and apportioning fines, penalties and forfeitures and other means of avoiding disproportionate punishment. Despite the general policy against “piling on,” the policy also sets forth evaluating factors to determine whether the imposition of multiple penalties would nevertheless serve the interests of justice, such as (i) the egregiousness of a company’s misconduct, (ii) statutory mandates regarding penalties, fines or forfeitures, (iii) the risk of unwarranted delay in achieving a final resolution, and (iv) the adequacy and timeliness of a company’s disclosures and its cooperation with the DOJ.<sup>198</sup>

The Petrobras and SocGen FCPA resolutions discussed in the sections on Anti-Corruption and Money Laundering, above, and Use of DPAs and NPAs Abroad, below, respectively, are examples of the DOJ applying its anti-piling on policy. It remains to be seen how the DOJ will apply this policy in 2019.

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197 Memorandum from Rod Rosenstein, Deputy Att’y Gen. U.S. Dep’t of Just., to Heads of Dep’t Components U.S. Att’y’s, “Policy on Coordination of Corporate Resolution Penalties” (May 9, 2018), <https://www.justice.gov/opa/speech/file/1061186/download>.

198 New Section in USAM Title 1. 1-12.100 – Coordination of Corporate Resolution Penalties in Parallel and/or Joint Investigations and Proceedings Arising from the Same Misconduct.



## Whistleblower Programs In the U.S. and Abroad

## WHISTLEBLOWER PROGRAMS IN THE U.S. AND ABROAD

Whistleblower programs in the U.S. saw a large increase in both the number of tips received and award amounts distributed in 2018. There were also key developments outside of the U.S., particularly in the EU.

### U.S. Whistleblower Programs

The SEC Whistleblower Program had a banner year: according to the SEC's 2018 Annual Whistleblower Report (2018 Whistleblower Report), the agency paid out more awards in its 2018 fiscal year (approximately \$170 million) than in all other years of the program combined. The SEC also reported that during its 2018 fiscal year, it received more than 5,200 whistleblower tips (the highest number of tips in a fiscal year and a 76 percent increase since the SEC Whistleblower Program began in 2012).<sup>199</sup> Of the total number of whistleblower tips received by the SEC in fiscal year 2018, approximately 650, or 12 percent, are reported as originating outside of the U.S. (from 72 foreign countries).<sup>200</sup> Canada (89 tips), the U.K. (85 tips), Australia (45 tips) and China (40 tips) topped the list of non-U.S. whistleblower tips. Notably, in late September 2018, the SEC announced an approximately \$4 million award to an "overseas whistleblower whose tip led it to open an investigation and whose extensive assistance helped it bring a successful enforcement action."<sup>201</sup> Jane Norberg, Chief of the SEC's Office of the Whistleblower, noted: "Whistleblowers, whether they are located in the U.S. or abroad, provide a valuable service to investors and help us stop wrongdoing."

In 2018, the CFTC issued its first whistleblower award on a tip originating from outside the U.S. – \$70,000 to an individual living in a foreign country who "significantly contributed to an ongoing CFTC investigation and led the CFTC to a successful settlement."<sup>202</sup> Enforcement Division Director McDonald stated: "This award is significant because it signals to whistleblowers around the world that anyone with information about potential violations of the Commodity Exchange Act can participate in the CFTC's Whistleblower Program."

### Whistleblower Programs Abroad

The U.S. whistleblower programs continue to have an impact on the law enforcement policies of other countries. On April 23, 2018, the European Commission (EC) proposed a new whistleblower protection law that seeks to increase protection of whistleblowers and create some level of consistency in standards across the EU.<sup>203</sup> The current state of whistleblowing laws among different countries in the EU is extremely fragmented and inconsistent. Only 10 EU member states currently offer full protection to whistleblowers, and some countries offer no protection at all.<sup>204</sup>

199 U.S. Sec. & Exch. Comm'n, "2018 Annual Report to Congress: Whistleblower Program" (Nov. 15, 2018), <https://www.sec.gov/files/sec-2018-annual-report-whistleblower-program.pdf>.

200 The percentage of tips originating outside of the U.S. was consistent with fiscal year 2017. U.S. Sec. & Exch. Comm'n, "2017 Annual Report to Congress: Whistleblower Program" at 33 (Nov. 15, 2017), <https://www.sec.gov/files/sec-2017-annual-report-whistleblower-program.pdf>.

201 Press Release, U.S. Sec. & Exch. Comm'n, "SEC Awards Almost \$4 Million to Overseas Whistleblower" (Sept. 24, 2018), <https://www.sec.gov/news/press-release/2018-209>.

202 Press Release, U.S. Commodity Futures Trading Comm'n, "CFTC Announces First Whistleblower Award to a Foreign Whistleblower" (July 16, 2018), <https://www.cftc.gov/PressRoom/PressReleases/7755-18>.

203 Press Release, European Commission, "Whistleblower Protection: Commission Sets New, EU-wide Rules" (Apr. 23, 2018), [http://europa.eu/rapid/press-release\\_IP-18-3441\\_en.htm](http://europa.eu/rapid/press-release_IP-18-3441_en.htm).

204 Foo Yun Chee & Francisco Guarascio, *EU moves to protect whistleblowers*, Reuters (Apr. 23, 2018), <https://www.reuters.com/article/us-eu-whistleblower-rules/eu-moves-to-protect-whistleblowers-idUSKBN1HU1DG>.



## WHISTLEBLOWER PROGRAMS IN THE U.S. AND ABROAD

The proposed legislation aims to establish consistency among the EU member states by:

- Establishing clear and safe reporting channels, including a three-tier reporting system consisting of internal reporting channels, reporting to competent authorities and public/media reporting. There will also be feedback obligations for authorities and companies, who will have to respond to and follow-up on a report within three months.
- Creating protection against retaliation for the whistleblower.

Companies with more than fifty employees with an annual turnover of over €10 million will have to establish internal whistleblowing procedures. Local governments which oversee more than 10,000 residents will also be subject to the proposal. All employers that qualify will also have to protect the confidentiality of the whistleblower.<sup>205</sup> The proposal additionally gives whistleblowers the right to legal aid and possible financial support.<sup>206</sup> However, unlike U.S. whistleblower programs, the proposed law does not include provisions for monetary awards for whistleblowers.

On November 20, 2018, the European Parliament's Legal Affairs Committee voted in favor of the proposal.<sup>207</sup> The EU Parliament, European Council and EC are in the process of holding negotiations on the legislation before it is revised, approved and implemented by EU member states, a process that usually takes between 18-24 months from start to finish. As of March 5, 2019, the European Council and Parliament are in agreement that whistleblowers should be required to report before they make their claims public, but the two sides have yet to agree on a pre-public reporting process.<sup>208</sup> The EU Parliament favors providing whistleblowers a choice of reporting to either their employer or a regulator before going public; the European Council prefers a three-stage process that would require whistleblowers to first report to their employers and then to a regulator before going public in order to receive whistleblower protections. Negotiations are ongoing.<sup>209</sup>

Pakistan may also see new whistleblower legislation in the near future. On November 29, 2018, Pakistan's newly elected Prime Minister, Imran Khan, said in a speech that his government will introduce a new whistleblower law.<sup>210</sup> Prime Minister Khan stated that the new legislation will allow for the payment of rewards to whistleblowers who assist authorities in identifying individuals involved in corruption who deposit money in Pakistani and foreign banks. In addition to monetary rewards, a draft of the bill, titled the Whistleblower Protection and Vigilance Commission Bill 2018, includes anti-retaliation protections.<sup>211</sup>

205 Nikolaj Nielsen, *European Commission Proposes Whistleblower Protection Law*, EU Observer (Apr. 23, 2018), <https://euobserver.com/justice/141671>.

206 Jennifer Rankin, *EU moves to bring in whistleblower protection law*, The Guardian (Apr. 16, 2018), <https://www.theguardian.com/world/2018/apr/16/eu-moves-to-bring-in-whistleblower-protection-law-yax-avoidance-emissions-scandals>.

207 Catherine Lafferty, *EU Lawmakers Agree On Draft Whistleblower Protection Rules*, Law360 (Nov. 21, 2018), <https://www.law360.com/articles/1104174/print?section=financial-services-uk>.

208 William Shaw, *EU Gov'ts, Lawmakers Divided On Whistleblower Protection*, Law 360 (March 5, 2019), <https://www.law360.com/financial-services-uk/articles/1135239/eu-gov-ts-lawmakers-divided-on-whistleblower-protection>.

209 *Id.*

210 *Pakistan PM promises whistleblower law to combat corruption*, AP News (Nov. 29, 2018), <https://www.apnews.com/9ae73c474cab4771938ebe107882245c>.

211 Ahmad Ahmadani, *PTI govt set to introduce new anti-graft laws*, PakistanToday (Dec. 14, 2018), <https://www.pakistantoday.com.pk/2018/12/14/pti-govt-set-to-introduce-new-anti-graft-laws/>.



## Use of Non- and Deferred Prosecution Agreements in the U.S. and Abroad

## USE OF NON- AND DEFERRED PROSECUTION AGREEMENTS IN THE U.S. AND ABROAD

### Use of DPAs and NPAs in the U.S.

The DOJ continues to heavily utilize Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs) as tools in criminal investigations, including in significant cross-border actions. DPAs and NPAs continue to be utilized in large-scale FCPA enforcement resolutions (for example, see the Petrobras resolution described in the section on anti-corruption and money laundering, above). 2018 also saw use of DPAs in international tax cases. For example, in August 2018, Basler Kantonalbank (BKB), a bank headquartered in Basel, Switzerland, entered into a DPA with federal prosecutors in the Southern District of Florida that required it to pay \$60.4 million in penalties.<sup>212</sup> BKB admitted that, between 2002 and 2012, it conspired with its employees, external asset managers and clients to commit tax fraud and evasion. The agreement requires BKB to cooperate fully with the IRS and other U.S. authorities and has deferred prosecution against the bank for an initial period of three years to allow it to demonstrate good conduct.

The DOJ also revised the DPA framework for assessing when a DPA will require a corporate monitor, potentially limiting the need for and scope of monitorships.<sup>213</sup> On October 11, 2018, Assistant Attorney General Brian A. Benczkowski issued a memorandum titled *Selection of Monitors in Criminal Division Matters* (Benczkowski Memo) outlining standards, policies and procedures regarding the selection of monitors for Criminal Division DPAs.<sup>214</sup> Intended to supplement the Morford Memo, “[t]he goal of the new guidance is to further refine the factors that go into determination of whether a monitor is needed, as well as clarify and refine the monitor selection process.”<sup>215</sup> The Benczkowski Memo states that “[w]here a corporation’s compliance program and controls are demonstrated to be effective and appropriately resourced at the time of resolution, a monitor will likely not be necessary.”

### Use of DPAs and NPAs Abroad

Reflecting the perceived success and utility of the DOJ’s practice, other countries continue to develop their own variants of DPAs and NPAs.

#### France

In 2018, three French companies entered into conventions judiciaires d’intérêt public (CJIPs) under France’s relatively new DPA regime. Two of the cases involved alleged corruption of a public official of EDF (a state-owned French electric utility company), who was charging commissions in exchange for the award or maintenance of certain contracts. In the first case, the CEO of SET Environnement allegedly paid illegitimate commissions to the public official in exchange for obtaining and maintaining public contracts. Under the CJIP executed on February 14, 2018, the company agreed to pay €800,000 in restitution and penalties.<sup>216</sup> In the second case, employees

212 Press Release, U.S. Dep’t of Just., “Justice Department Announces Deferred Prosecution Agreement With Basler Kantonalbank” (Aug. 28, 2018), <https://www.justice.gov/opa/pr/justice-department-announces-deferred-prosecution-agreement-basler-kantonalbank>.

213 BakerHostetler, *DOJ’s New Guidance on Monitorships: Reaffirming the Importance of Compliance and Preventing Misconduct* (Oct. 31, 2018), <https://www.bakerlaw.com/alerts/dojs-new-guidance-on-monitorships-reaffirming-the-importance-of-compliance-and-preventing-misconduct>.

214 Brian A. Benczkowski, Assistant Attorney General, U.S. Dep’t of Just., Memorandum, “Selection of Monitors in Criminal Division Matters” (Oct. 11, 2018), <https://www.justice.gov/opa/speech/file/1100531/download>.

215 Brian A. Benczkowski, Assistant Attorney General, U.S. Dep’t of Just., Prepared Remarks at NYU School of Law Program on Corporate Compliance and Enforcement Conference on Achieving Effective Compliance (Oct. 12, 2018), <https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-nyu-school-law-program>.

216 Emmanuel Jarry, *Premières conventions judiciaires dans des affaires de corruption*, Reuters (Mar. 7, 2018), <https://fr.reuters.com/article/topNews/idFRKCN1GJ2RX-0FRTP>.

## USE OF NON- AND DEFERRED PROSECUTION AGREEMENTS IN THE U.S. AND ABROAD

of Kaeffer Wanner allegedly made cash payments of hundreds of thousands of euros to the public official, leading to estimated benefits of €3.3 million. Kaeffer Wanner agreed to the terms of the CJIP on February 15, 2018, which required the company to pay a €2.7 million penalty.<sup>217</sup>

The French authorities identified aggravating factors in negotiating these CJIPs, including the nature and duration of the conduct. However, the authorities also identified mitigating factors, including the departure and termination of involved employees, the company's cooperation with the government investigation, changes in shareholding, changes in management as a result of disciplinary measures and voluntary departures and the strengthening of corporate compliance programs.<sup>218</sup>

The CJIPs also outline the implementation of an anticorruption compliance program under the control of the new French Anti-Corruption Agency (AFA). The AFA is responsible for verifying whether companies are implementing detection and prevention of corruption measures under the Sapin II law.<sup>219</sup> SET Environnement must implement a new anticorruption compliance program in accordance with French law as well as submit to AFA monitoring for two years.<sup>220</sup> As Kaeffer Wanner had already established an anticorruption compliance program, it will submit to eighteen months of monitoring by the AFA.<sup>221</sup>

Finally, unlike the first French CJIP involving HSBC Bank, these two CJIPs were negotiated at the district level court, not by the Financial Prosecution Office (PNF). Additionally, these CJIPs are the first time a posteriori audit and AFA monitoring were required.

In the third French DPA of 2018, the PNF and French bank SocGen entered into a CJIP to resolve claims that SocGen paid bribes in order to obtain investments in Libyan state-owned financial institutions.<sup>222</sup> Under the agreement, SocGen agreed to pay €250,150,755 in penalties and a two-year compliance monitorship. The CJIP was approved by the President of the Tribunal de grande instance de Paris on June 4, 2018.<sup>223</sup> Notably, SocGen also resolved a parallel investigation conducted by the U.S. DOJ. In conjunction with that resolution, a SocGen subsidiary pled guilty in the Eastern District of New York to conspiracy to violate the FCPA and agreed to a DPA and \$585 million fine.<sup>224</sup> As part of its new policy against "piling on" discussed above, the DOJ credited SocGen for the amount it paid to the PNF. This was the first coordinated resolution between U.S. and French authorities in a foreign bribery case.

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217 *Id.*

218 "Loi Sapin II," Law No. 2016-1691 on transparency, the fight against corruption and the modernization of life (Dec. 10, 2016), [https://www.economie.gouv.fr/files/files/directions\\_services/afa/Questionnaire\\_et\\_pieces\\_a\\_fournir.pdf](https://www.economie.gouv.fr/files/files/directions_services/afa/Questionnaire_et_pieces_a_fournir.pdf).

219 *Id.*

220 Seeger Kirry, NYU Program on Corporate Compliance and Enforcement, First French DPAs for Corruption Offences (March 14, 2018), [https://wp.nyu.edu/compliance\\_enforcement/2018/03/14/first-french-dpas-for-corruption-offences/#\\_ftn1](https://wp.nyu.edu/compliance_enforcement/2018/03/14/first-french-dpas-for-corruption-offences/#_ftn1); Michael Griffiths, *Just Anti-Corruption, French compliance monitorships a "work in progress,"* Global Investigations Review (Jul. 9, 2018), <https://globalinvestigationsreview.com/article/1171535/french-compliance-monitorships-a-work-in-progress>.

221 *Id.*

222 Convention judiciaire d'intérêt public conclue entre le procureur de la République financier et la société Société Générale SA (signed Oct. 18–30, 2017).

223 *Id.*

224 Press Release, U.S. Dep't of Just., "Société Générale S.A. Agrees to Pay \$860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate" (June 4, 2008), <https://www.justice.gov/opa/pr/soci-t-g-n-rale-sa-agrees-pay-860-million-criminal-penalties-bribing-gaddafi-era-libyan>.

## USE OF NON- AND DEFERRED PROSECUTION AGREEMENTS IN THE U.S. AND ABROAD

### Ireland

In 2018, the Law Reform Commission (LRC) of Ireland issued a report recommending that Ireland adopt a DPA regime.<sup>225</sup> After examining and comparing key features of the U.S. and U.K. DPA models, the LRC's report concluded that a model based on the U.K. approach should be introduced.<sup>226</sup> Consequently, the proposed framework would differ from the U.S. DPA regime in a number of respects. First, the LRC recommends that the DPA framework be instituted by statute and be operated by the Office of the Director of Public Prosecutions (DPP).<sup>227</sup> While the decision to seek a DPA would be at the discretion of the DPP, judicial approval would be required to initiate and finalize a DPA or modify an existing DPA.<sup>228</sup> The LRC also recommends that the use of DPAs be limited to corporations and partnerships and used only in actions involving certain economic crimes.<sup>229</sup>

### Singapore

On March 19, 2018, Singapore passed legislation including DPAs in the Criminal Procedure Code and Evidence Act.<sup>230</sup> In implementing DPAs, Singapore is taking on related framework from both the U.S., such as the ability of prosecutors to choose not to pursue charges if the company agrees to certain terms, and from the U.K., such as the requirement that the DPA be approved by a court. The Ministry of Law in Singapore has stated that DPAs will only apply to companies (not individuals) facing prosecution for offenses of corruption, money laundering or receipt of stolen property.<sup>231</sup> It will also require the Singapore High Court to determine that the DPA is in the interests of justice, with fair, reasonable and proportionate terms. The court's approval, the terms of the agreement and the underlying facts and conduct will all be matters of public record. The terms of the agreement may include financial penalties, disgorgement of profits, compensation to victims, requirements to implement or adjust enhanced internal controls or other compliance measures and appointment of a monitor.<sup>232</sup> The framework expects corporations to self-report wrongdoing and demonstrate a commitment to remediation in order to be considered for a Singaporean DPA.

### Canada

On September 19, 2018, the Canadian Criminal Code was amended to establish a regime for DPAs, known as the Remediation Agreement Regime (RAR).<sup>233</sup> Remediation Agreements (RAs) under the RAR will be voluntary agreements between a prosecutor and the accused organization.<sup>234</sup> All RAs will need to be presented to a judge for review and approval. The

225 Law Reform Commission of Ireland, Report, Regulatory Powers and Corporate Offences (2018), [https://www.lawreform.ie/\\_fileupload/Completed%20Projects/LRC%20119-2018%20Regulatory%20Powers%20and%20Corporate%20Offences%20Volume%201.pdf](https://www.lawreform.ie/_fileupload/Completed%20Projects/LRC%20119-2018%20Regulatory%20Powers%20and%20Corporate%20Offences%20Volume%201.pdf).

226 *Id.* at 264-65.

227 *Id.* at 266.

228 *Id.*

229 *Id.* at 267-68.

230 Criminal Justice Reform Act 2018, No. 19 of 2018, Part VIIA (April 17, 2018), <https://sso.agc.gov.sg/Acts-Supp/19-2018/Published/20180417?DocDate=20180417>.

231 *Id.* at 149F(3).

232 *Id.* at 149E(3)(f)(i).

233 Parliament of Canada, House Government Bill C-74, <http://www.parl.ca/DocumentViewer/en/42-1/bill/C-74/first-reading>.

234 Canada Dep't of Just., "Remediation Agreements and Orders to Address Corporate Crime" (Sept. 11, 2018), <https://www.canada.ca/en/department-justice/news/2018/03/remediation-agreements-to-address-corporate-crime.html>

**USE OF NON- AND DEFERRED PROSECUTION AGREEMENTS IN THE U.S. AND ABROAD**

judge must be satisfied that the agreement is in the public interest and has terms that are fair, reasonable and proportionate. Under the new legislation, to enter into an RA, the corporation must have: (i) accepted responsibility for, and stopped, its alleged wrongdoing; (ii) agreed to pay a financial penalty; (iii) disgorged any benefit gained from wrongdoing; (iv) enhanced its compliance measures; and (v) made restitution to any victims (including those outside of Canada).

**United Kingdom**

There were no DPAs entered into in 2018 by the U.K. SFO. However, on November 30, 2018, the SFO announced that Standard Bank PLC fully complied with the terms of its DPA.<sup>235</sup> Standard Bank entered into the DPA in November 2015 due to allegations that it corruptly paid \$6 to an entity controlled by Tanzanian government officials.<sup>236</sup> This is the first successfully completed U.K. DPA.

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235 Joanne Faulkner, *SFO Wraps Up First Deferred Prosecution Agreement*, Law360 (Nov. 30, 2018), <https://www.law360.com/articles/1106556/sfo-wraps-up-first-deferred-prosecution-agreement>.

236 *Id.*



## The General Data Protection Regulation

## THE GDPR

The General Data Protection Regulation (GDPR) took effect on May 25, 2018, replacing the EU Data Protection Directive (Directive).<sup>237</sup> The Directive mandated standards for companies that handle EU personal data to better safeguard its processing and movement. The GDPR contains data transfer restrictions that are near-equivalent to the Directive, but includes other requirements that are more demanding than their counterparts under the Directive. The GDPR automatically applies in all EU countries and the European Economic Area, which includes all EU countries and Iceland, Norway and Liechtenstein (all together, Member States) (but excludes Switzerland). The reach of the GDPR is broad. It applies to companies within the EU, regardless of whether the data processing takes place in the EU or not, and companies outside of the EU that (i) sell or market goods or services in the EU, or (ii) monitor the behavior of data subjects that take place within the EU.<sup>238</sup>

The goal of the GDPR is to protect people concerning the “processing” and movement of their personal data. For example, Article 13 of the GDPR sets forth an extensive list of the information that should be provided to individuals regarding the “processing” of personal information obtained from them, including the purpose of processing and the legal basis for processing, such as (i) any legitimate interests pursued by the employer, (ii) the recipients or categories of recipients of the personal data, (iii) details on safeguards used for cross-border data transfers, and (iv) the existence of the employees’ access, restriction and deletion rights. This notice must be concise, intelligible and easily accessible, using clear and plain language, and needs to be provided at the latest before the personal data is disclosed to another recipient. Article 14 of the GDPR provides similar requirements applicable when the personal data being processed was not obtained from the data subject. Under the GDPR, the definition of “processing” is very broad; it is essentially any touch of personal data, including the collection, storage, use, revision, disclosure, archiving and destruction of data.<sup>239</sup>

The GDPR, including its rights to access the personal data that the employer processes<sup>240</sup> and to request the deletion of personal data, can create challenges for companies defending against cross-border government investigations. Use of protected data for investigative purposes is lawful only when permitted by a particular GDPR provision. One GDPR provision permits use if the data subject has given consent for a specific purpose.<sup>241</sup> However, the company must demonstrate that the data subject has consented to the processing of his or her personal data. Employee consent must be “freely given” and specific.<sup>242</sup> General employee consent or a general statement that records belong to the company and that employees have no privacy expectations will not meet this standard.<sup>243</sup>

Under the GDPR, data processing also is permitted when it is necessary for “legitimate interests” of the employer or third party that override the employee’s interests or fundamental rights and freedoms protecting personal data. For this provision to apply, the company must balance the

237 The U.K.’s Data Protection Act 2018 also came into force on May 25, 2018, implementing the GDPR into law in the U.K. Data Protection Act 2018, <http://www.legislation.gov.uk/ukpga/2018/12/contents/enacted>.

238 Regulation (EU) 2016/679 (General Data Protection Regulation), Art. 3.

239 *Id.* at Art. 4.

240 The Swiss Federal Supreme Court has ruled that an employee has the right to receive a copy of documents bearing the employee’s name that the bank has disclosed to the U.S. DOJ in a tax-related cross-border investigation.

241 General Data Protection Regulation, Art. 6.

242 *Id.* at Art. 7.

243 *Id.*



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importance of use of the data with the employee's interest in his or her personal data not being reviewed, disclosed or transferred.<sup>244</sup> For example, when conducting this balancing exercise in connection with an internal investigation in response to regulatory action, the following must be taken into account: (i) proportionality and necessity (e.g., availability of less intrusive measures, including anonymization or pseudonymization); (ii) relevance of personal data for the investigation; (iii) consequences for company if data is not disclosed to the regulator (e.g., sanctions, disqualification from receiving cooperation credit); and (iv) consequences for the employee if data is disclosed (e.g., being made subject to civil or criminal proceedings).<sup>245</sup>

Moreover, any notice to employees that their personal data has been collected may of course put an investigation at risk or complicate an employer trying to defend itself in regulatory investigations. However, Article 14(5)(b) of the GDPR provides a derogation to the notice requirements when the personal data being processed is not obtained from the data subject (which is a common scenario found in investigations), if the notice is "likely to render impossible or seriously impair the achievement of the objectives of that processing."<sup>246</sup>

Another complication for defending against cross-border government investigations is the GDPR's restriction on transfers of personal data outside the EU. Data restrictions apply unless: (i) employees provide consent; (ii) the receiving country(ies) has(have) been deemed to have "adequate protection"; or (iii) other transfer mechanisms are in place.<sup>247</sup> Because consent can be withdrawn by employees, it is unlikely to be a practicable basis for the transfer of employee data in cross-border investigations.<sup>248</sup> However, Article 49(1) of the GDPR provides two derogations to such restriction, when the transfer is necessary: (i) for important reasons of public interest; or (ii) for the establishment, exercise or defense of legal claims.<sup>249</sup>

Another consideration for companies conducting internal investigations that are subject to the GDPR is whether a Data Protection Impact Assessment (DPIA) is necessary. The GDPR requires companies to conduct DPIAs where data processing "is likely to result in a high risk" for the rights of individuals, having regard to the "nature, scope, context and purposes of the processing."<sup>250</sup> The Article 29 Working Party's October 2017 Guidelines on DPIAs provides insight into the GDPR's DPIA requirements, seeking to clarify how DPIAs will function and when they are necessary.<sup>251</sup> These Guidelines provide nine criteria to be considered when evaluating whether a DPIA is necessary, including whether the processing of data concerns "vulnerable data subjects."<sup>252</sup> Notably, employees are considered "vulnerable data subjects" under the GDPR because they are seen as not being able to easily oppose their employer processing their data.<sup>253</sup> To the extent that

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244 *Id.* at Art. 6.

245 *Id.*

246 WP 29, Guidelines on Transparency under Regulation 2016/679, at para. 58.

247 General Data Protection Regulation, Arts. 45-49.

248 *Id.* at Art. 49.

249 Case law under the current Swiss Federal Data Protection Act states that the transfer of employee data to the U.S. DOJ in a tax-related cross-border investigation was not "overriding public interest," so it is unclear how this might play out in the GDPR.

250 General Data Protection Regulation, Art. 35.

251 WP 29, Guidelines on Data Protection Impact Assessment (DPIA) and determining whether processing is "likely to result in a high risk" for purposes of Regulation 2016/679, as last Revised and Adopted on 4 October 2017, [https://iapp.org/media/pdf/resource\\_center/WP29-GDPR-DPIA-guidance\\_final.pdf](https://iapp.org/media/pdf/resource_center/WP29-GDPR-DPIA-guidance_final.pdf).

252 *Id.* at 9-12.

253 *Id.*

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processing that occurs during internal investigations meets two of these criteria (or one, depending on the circumstance), a DPIA may be required.<sup>254</sup>

Supervisory authorities of 26 EU Member States<sup>255</sup> submitted draft lists to the European Data Protection Board (EDPB) (the successor to the Article 29 Working Party) identifying data processing activities likely to result in a high risk and therefore requiring DPIAs. The EDPB subsequently issued opinions on each of these lists in a sort of global assessment in line with creating consistency across the EU.<sup>256</sup> Organizations conducting internal investigations in a particular Member State should consult the most recent version of that Member State's DPIA list as well as the EDPB's opinion for further guidance.

Sanctions for violating the GDPR are significant. According to Article 83 of the GDPR, fines are administered by individual Member State's Data Protection Authorities, who examine ten criteria to determine the amount of a fine, including: (i) nature of infringement and intent; (ii) mitigation; (iii) history of the organization; and (iv) cooperation.<sup>257</sup> For certain enumerated violations, infringers can be subject to fines of up to 10 million euros or 2 percent of worldwide annual revenue of the prior financial year, whichever is higher.<sup>258</sup> In severe cases, infringers can be subject to fines of up to 20 million Euros or 4 percent of the worldwide annual revenue of the prior financial year, whichever is higher.<sup>259</sup> In addition, pursuant to Article 84 of the GDPR, Member States are required to establish penalties for violations of the GDPR that are not subject to fines under Article 83.

Within approximately one month of the GDPR's implementation date, Data Protection Authorities in nearly all the Member States had received complaints from EU individuals,<sup>260</sup> and several enforcement actions have occurred. For example, in July 2018, the Italian Data Protection Authority served an enforcement notice on two companies in relation to location monitoring systems used in company vehicles.<sup>261</sup> In particular, the Italian Data Protection Authority required the companies to take further steps to ensure compliance with the GDPR.<sup>262</sup> In September 2018, the Austrian Data Protection Authority issued a fine of 4,800 Euros under the GDPR to a company who reportedly installed a CCTV camera that recorded a significant portion of public pavement beyond its business premises.<sup>263</sup>

The GDPR still is in its early days and 2019 should shed further light on how the law will be enforced.

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254 *Id.*

255 Austria, Belgium, Bulgaria, Czech Republic, Germany, Estonia, Greece, Finland, France, Hungary, Ireland, Italy, Lithuania, Latvia, Malta, Netherlands, Poland, Portugal, Romania, Sweden, Slovakia, United Kingdom, Denmark, Croatia, Luxembourg and Slovenia.

256 European Data Protection Board, Opinions, [https://edpb.europa.eu/our-work-tools/consistency-findings/opinions\\_en](https://edpb.europa.eu/our-work-tools/consistency-findings/opinions_en); Consistency Findings, [https://edpb.europa.eu/our-work-tools/consistency-findings\\_en](https://edpb.europa.eu/our-work-tools/consistency-findings_en).

257 General Data Protection Regulation, Art. 83.

258 *Id.*

259 *Id.*

260 John Choudhari, *Cataloging GDPR complaints since May 25*, IAPP (June 25, 2018), <https://iapp.org/news/a/cataloguing-gdpr-complaints-since-may-25/>.

261 Ezra Steinhardt, *European Regulators are Intensifying GDPR Enforcement*, Covington (Nov. 14, 2018), <https://www.insideprivacy.com/eu-data-protection/european-regulators-are-intensifying-gdpr-enforcement/>.

262 *Id.*

263 *Austria announces first GDPR fine*, IAPP (Oct. 15, 2018), <https://iapp.org/news/a/austria-announces-first-gdpr-fine/>.



## International Privilege Developments

## INTERNATIONAL PRIVILEGE DEVELOPMENTS

As prosecutors continue to aggressively pursue cross-border enforcement actions, it is imperative that companies and their counsel have a clear understanding of the different laws concerning the attorney client privilege and work product doctrine that apply in different jurisdictions.

### U.K. Privilege Developments

In 2018, U.K. courts issued several decisions regarding attorney-client privilege standards. From the perspective of cross-border internal investigations, the most important of these was the Court of Appeal decision in *Serious Fraud Office v. Eurasian Natural Resources Corp. Ltd.* (“ENRC”).

On September 5, 2018, the U.K. Court of Appeal overturned the U.K. High Court’s May 2017 decision in *ENRC* that interview notes drafted by the company’s outside counsel and documents prepared by the company’s forensic accounting firm, in connection with an internal investigation into allegations of fraud and corruption that was conducted in response to whistleblower allegations and then indications that the SFO was investigating the alleged misconduct, were not covered under the U.K. litigation privilege, the analog to the U.S. attorney work product doctrine.<sup>264</sup> The High Court found that, because ENRC did not present evidence beyond unverified allegations of misconduct, it failed to establish that it was aware of a real likelihood, rather than a mere possibility, of litigation with the SFO.<sup>265</sup> The High Court also found that, even if ENRC reasonably contemplated criminal proceedings, the documents generated during the internal investigation were created to avoid litigation, not for the “dominant purpose” of defending against litigation.<sup>266</sup> Finally, the High Court held that the interview notes drafted by ENRC’s outside counsel were not protected by legal advice privilege, the analog to the U.S. attorney-client privilege. The High Court, relying on the U.K. Supreme Court decision in *Three Rivers District Council v. Bank of England* (No 6) [2004] U.K. QB 48, concluded that, because ENRC did not provide evidence that the interviewees were authorized to seek legal advice on behalf of the company, counsel’s interview notes were not privileged.<sup>267</sup>

The Court of Appeal held that the interview notes and forensic accounting documents were protected from disclosure under the litigation privilege. First, it decided that contemporaneous documents showed that ENRC was in reasonable contemplation of litigation when it initiated its investigation in April 2011. The court focused on several facts in reaching its determination, including ENRC’s immediate engagement of outside counsel to conduct an internal investigation after it received the whistleblower’s report and communications and actions by ENRC’s former general counsel and its head of compliance that showed concern about an impending SFO investigation.<sup>268</sup>

The Court of Appeal concluded that “the whole sub-text of the relationship between ENRC and the SFO was the possibility, if the not the likelihood, of prosecution if the self-reporting process did not result in civil settlement.”<sup>269</sup> It rejected the view that ENRC had to establish specific facts that would

264 See Patrick Campbell & Darley Maw, *INSIGHT: Avoid Surprises—Take Note of Different Privilege Laws in Cross-Border Investigations*, Bloomberg Law (Nov. 29, 2018), <https://www.bna.com/insight-avoid-surprisestake-n57982094238/>.

265 *SFO v. ENRC* [2018] EWCA Civ.2006 at 64, 90.

266 *Id.* at 49.

267 *Id.* at 177-79.

268 *Id.* at 92.

269 *Id.* at 93.

## INTERNATIONAL PRIVILEGE DEVELOPMENTS

give rise to a criminal prosecution for litigation privilege to apply. Rather, the court found that, while not every concern expressed by the SFO could be regarded as adversarial litigation, “when the SFO specifically makes clear to the company the prospect of its criminal prosecution ... and legal advisers are engaged to deal with that situation, as in the present case, there is a clear ground for contending that criminal prosecution is in reasonable contemplation.”<sup>270</sup>

The court further held that the documents generated by ENRC’s counsel and forensic accounting firm were created for the dominant purpose of defending against anticipated criminal proceedings. It reasoned that the mere fact lawyers could anticipate that a document they created would eventually be disclosed to opposing counsel does not divest litigation privilege.<sup>271</sup> However, the Court of Appeal did not overturn the High Court’s holding that interview notes drafted by ENRC’s outside counsel were not protected by the U.K. legal advice privilege.<sup>272</sup>

The *ENRC* decision, while welcomed by the legal and business community, should not be taken to mean that privilege in the context of internal investigations in the U.K. works like it does in the U.S. In most federal circuits, the work product doctrine applies to documents and communications prepared or obtained “because of the prospect of litigation” – there is no requirement that a document be produced to assist in the conduct of litigation, much less primarily or exclusively to assist in litigation.<sup>273</sup> *ENRC* did not change the contours of the U.K. litigation privilege, which applies only to documents and communications made for the “sole or dominant purpose” of conducting litigation.<sup>274</sup> In practice, this test can be applied strictly. For example, in November 2018, the U.K. High Court used the “dominant purpose” test in holding that correspondence with experts was not subject to litigation privilege as it was prepared for two purposes, only one of which was for contemplated litigation, and the claimant had not established that the litigation purpose was dominant.<sup>275</sup>

In addition, there could still be additional litigation over whether documents created and used for the purposes of settling investigations or enforcement actions are covered by the U.K. litigation privilege. While not in the government enforcement context, in late 2018, the U.K. Court of Appeal held in *WH Holding Ltd v E20 Stadium LLP* [2018] EWCA Civ 2652 that emails between a company’s board members, which had been prepared to discuss a commercial proposal in connection with a litigation settlement, were not covered by litigation privilege.

Finally, it is important to note that the U.K. legal advice privilege still only applies to communications between company attorneys and employees who are authorized to seek legal advice.<sup>276</sup> This is in significant contrast to U.S. privilege law, which holds that the attorney-client privilege applies to communications between company counsel and employees as long as a significant purpose of the internal investigation is to obtain or provide legal advice, the communications regard matters within the scope of the employee’s duties and the employee is sufficiently aware that he is being

270 *Id.* at 96.

271 *Id.* at 102.

272 *Id.* at 129.

273 *E.g., United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998); *In re Gen. Motors LLC Ignition Switch Litig.*, 80 F. Supp.3d 521, 532 (S.D.N.Y. 2015).

274 *SFO v. ENRC* [2018] EWCA Civ.2006 at 64.

275 *Sotheby’s v Mark Weiss Ltd* [2018] EWHC 3179 (Comm).

276 *SFO v. ENRC* [2018] EWCA Civ.2006 at 177-79.

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questioned so the company could obtain legal advice.<sup>277</sup> However, change might be on the horizon. The Court of Appeal in *ENRC* stated that, while it was bound to follow the U.K. Supreme Court decision in *Three Rivers*, the legal advice privilege standard stemming from *Three Rivers* is inconsistent with international common law and inappropriate when applied to multinational companies with cross-border operations.<sup>278</sup>

### Privilege Developments in Switzerland

On March 2, 2018, the Swiss Federal Council announced the beginning of a consultation phase regarding a revision to certain sections of the Swiss Civil Procedure Code (CPC), including extension of the attorney-client privilege to in-house counsel in civil proceedings.<sup>279</sup> Currently, Swiss attorney-client privilege does not extend to in-house counsel, but only to outside counsel. Under the amendment, in-house privilege would apply only: (i) to specific attorney-client related activities; and (ii) if the legal department is supervised by a person licensed to practice law. The amendment would permit in-house counsel to refuse both to testify and to produce documents. One of the main goals of the revision is to strengthen collective redress mechanisms, which are akin to class actions in the U.S., and to help alleviate the disadvantages experienced by Swiss entities as opposed to those abroad with more protective privilege laws.<sup>280</sup>

The Swiss Federal Council has proposed a draft bill. Cantons, civil society institutions, practitioners and others were invited to submit comments on the draft bill by June 11, 2018.<sup>281</sup> Currently, parliamentary debates are taking place surrounding the bill and comments, and subsequently, the parliament will vote on whether or not the bill will take effect. If this bill passes, it remains to be seen whether the Swiss attorney-client privilege will be extended to in-house counsel in other contexts in the future.

<sup>277</sup> *Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981); *In re Kellogg Brown & Root Inc.*, 756 F.3d 754, 758-59 (D.D.C. 2014).

<sup>278</sup> *SFO v. ENRC* [2018] EWCA Civ.2006 at 128-30.

<sup>279</sup> Article 398 CO; New Art. 160a.

<sup>280</sup> Philipp Groz, Urs Hoffmann-Nowotny & Stefan Leimgruber, *Partial Revision of the Swiss Civil Procedure Code*, mondaq (Apr. 25, 2018), <http://www.mondaq.com/x/695522/Civil+Law/Partial+Revision+Of+The+Swiss+Civil+Procedure+Code>.

<sup>281</sup> *Id.*



Looking Ahead to 2019

### LOOKING AHEAD TO 2019

Although the cross-border regulatory and enforcement landscape is constantly evolving, the developments reported above provide some indication of trends that can be expected to continue into 2019. In particular, the current priorities of U.S. law enforcement are coming into sharper focus after two years of development under the new administration.

For example, one important trend that bears watching in 2019, is the increased focus of U.S. law enforcement on white collar prosecutions of individuals, and a concomitant de-emphasis on the imposition of large corporate penalties, in both domestic and cross-border actions. At the November 2018 conference where he announced the DOJ's softening of the Yates Memo, Deputy Attorney General Rosenstein stated: "Thanks to a series of initiatives and policy enhancements, we are making white collar enforcement more effective and more efficient."<sup>282</sup> In 2018, these policies and initiatives included the DOJ's extension of its FCPA Corporate Enforcement Policy to all corporate criminal violations, not just the FCPA; its policy of working with law enforcement in overlapping jurisdictions, both foreign and domestic, to avoid "piling on" fines and penalties against corporations; and new guidelines that may decrease the frequency of imposing corporate monitorships in non- and deferred prosecution resolutions. Meanwhile, in the same November 2018 speech, Deputy Attorney General Rosenstein emphasized that "pursuing individuals responsible for wrongdoing will be a top priority in every corporate investigation by the DOJ." He touted the fact that in 2018, the DOJ had announced FCPA charges against more than 30 individual defendants, and convictions of 19 individuals in FCPA prosecutions. All indications point to this trend continuing in 2019.

U.S. law enforcement's encouragement and rewarding of corporate cooperation, however, has also led to new challenges and a reexamination of the rights of individual defendants caught up in such investigations. For example, defendants such as Gavin Black are now challenging, on Fifth Amendment grounds, the government's use of statements obtained by cooperating companies in the course of an internal investigation. Such challenges may force U.S. law enforcement to take greater care in its interactions with cooperating corporations, much as the Second Circuit's decision in *United States v. Allen* continues to create a hazard for the U.S. in cross-border investigations that are increasingly coordinated with law enforcement agencies from other nations. More courts can be expected to consider similar challenges in 2019.

In a trend that is likely to continue, 2018 also saw several challenges to U.S. law enforcement's expansive jurisdictional view and cross-border investigatory methods. More foreign nationals are challenging the statutes under which they are prosecuted on extraterritoriality grounds. This challenge was successful in the *Hoskins* case, in which the Second Circuit significantly curtailed the DOJ's ability to bring FCPA actions against foreign nationals on extraterritoriality grounds. Foreign jurisdictions also may be taking heed of U.S. law enforcement overreach, as a U.K. court refused to extradite a U.K. citizen to the U.S. to face currency manipulation charges, in part, because most of the conduct occurred in the U.K. and the defendant had no significant connection with the U.S.

More generally, a trend to watch in 2019 will be whether U.S. law enforcement continues to target white collar criminal enforcement with the same level of intensity it has shown since the financial crisis. Although the DOJ announced that white collar prosecutions increased in 2018 over the prior

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<sup>282</sup> Rosenstein, *supra* note 196.



LOOKING AHEAD TO 2019

year,<sup>283</sup> a closer look at DOJ statistics reveals that the number of white collar criminal prosecutions was at its second-lowest level since 1995.<sup>284</sup> The New York Times has reported a substantial drop in corporate penalties in the first 20 months of the Trump administration as compared with the previous 20 months of the Obama administration, including a 62 percent drop in penalties and disgorgement imposed by the SEC, and a 72 percent decrease in corporate penalties from the DOJ's criminal prosecutions.<sup>285</sup> U.S. government reports and statements by administration officials indicate a shift in enforcement priorities to illegal immigration, drugs offenses and violent crime. The administration has also touted its efforts in combating health care fraud and the opioid crisis.

However, these numbers might not tell the whole story, at least in the context of cross-border investigations. As described in detail above, U.S. law enforcement remained focused in 2018 on prosecuting individuals and entities allegedly engaged in transnational cybercrime, theft of trade secrets, violations of economic sanctions and money laundering, and perhaps even stepped up its efforts in these areas. Regulators continue to vigorously prosecute cases involving international rate manipulation, illegal spoofing and complex securities fraud. U.S. law enforcement also filed a number of significant charges of insider trading against foreign nationals. These particular types of cross-border white collar crimes are likely to remain a focus of the U.S. and other countries in 2019.

The spotlight that U.S. law enforcement has placed on transnational offenses such as cybercrime, theft of trade secrets and violations of economic sanctions has led some to suggest that U.S. law enforcement has been targeting certain foreign nationals and companies to further U.S. foreign policy goals. As described above, individuals and companies from China, Russia, Iran and Venezuela were frequent U.S. law enforcement targets in high profile cases brought in 2018. To what extent these claims will lead to legal challenges by such defendants, remains to be seen. Ultimately, the legitimacy of these complaints will be tested by the merits of the actions that the U.S. has chosen to pursue. However, the claims of political bias will undoubtedly grow louder with every similar investigation and prosecution that the U.S. pursues in 2019.

Finally, companies and their counsel should pay attention to developments in 2019 that impact how they should conduct internal investigations. For example, the manner in which the GDPR is enforced will be an important factor for structuring effective cross-border internal investigations. Similarly, companies and their counsel should bear in mind the continuing clarifications and limitations on legal privilege in various European countries, especially whether and how U.K. privilege law evolves after the Court of Appeal decision in *SFO v. ENRC*.

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283 *Id.*

284 *Rod Rosenstein leaves lighter burden on companies at DOJ*, The Financial Times (Jan. 21, 2019).

285 Danielle Ivory, Ben Protess & Robert Geveloff, *4 Takeaways From the Trump-Era Plunge in Corporate Penalties*, N.Y. Times (Nov. 5, 2018), <https://www.nytimes.com/2018/11/05/us/trump-corporate-penalties-sec-justice.html>.

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