Skadden

July 2017

Cross-Border Investigations Update

Since the publication of our December 2016 issue, the following significant cross-border prosecutions, settlements and developments have occurred.

Anti-Corruption

Teva Pharmaceutical Industries Pays $519 Million to Settle FCPA Probe

Israeli pharmaceutical firm Teva Pharmaceutical Industries Ltd. agreed as part of a deferred prosecution agreement to pay a $283 million penalty to the U.S. Department of Justice (DOJ) in the largest criminal fine imposed against a pharmaceutical company for violations of the Foreign Corrupt Practices Act (FCPA). It also agreed to disgorge $236 million in profits, including interest, to the U.S. Securities and Exchange Commission (SEC), to resolve charges relating to bribery of government officials in Mexico, Russia and Ukraine. Teva admitted to making payments to doctors and government officials in order to increase sales of its drugs and protect its business interests from competition. The DOJ also imposed a compliance monitor for a term of three years. Importantly, the DOJ took issue with the effectiveness of Teva's compliance program, noting that it was insufficient to meet the risks posed by Teva's business and inadequate to prevent or detect corrupt payments to foreign officials. The DOJ further claimed that the company's managers responsible for compliance were unable or unwilling to enforce the anti-corruption policies. Teva received a 20 percent discount off the low end of the U.S. sentencing guidelines fine range because of its substantial cooperation and remediation. The DOJ stated that the company did not receive a further discount because it did not timely and voluntarily self-disclose the conduct; rather, it cooperated with the DOJ's investigation only after the SEC served Teva with a subpoena. The DOJ also claimed that the company did not produce documents on a timely basis and made overly broad assertions of the attorney-client privilege, circumstances that limited the cooperation credit it received.[1]

General Cable Pays $75.5 Million to Resolve Africa and Asia Bribery Investigation

Fiber-optic and cable producer General Cable Corp. agreed to pay $75.5 million to the DOJ and SEC to resolve FCPA and accounting violations. General Cable voluntarily disclosed payments between 2002 and 2013 totaling approximately $13 million to third-party agents and distributors in Angola, Bangladesh, China, Indonesia and Thailand, some of which were used to pay bribes resulting in profits exceeding $50 million. General Cable agreed to pay approximately $82 million in total: $61.5 million to the SEC comprised of $55 million in disgorgement and a $6.5 million penalty for accounting-related fraud, and $20.5 million to the DOJ as part of a three-year nonprosecution agreement. According to the DOJ, the $20.5 million penalty reflected a 50 percent reduction from the low end of the U.S. sentencing guidelines fine range due to General Cable's voluntary disclosure of the misconduct and full cooperation with the government, as well as its remediation efforts.[2]

Major Chilean Chemical Company Pays $30.5 Million to Settle FCPA Investigation

Sociedad Química y Minera de Chile S.A. (SQM), a large Chilean chemical and mining company, agreed to a $30.5 million settlement with the DOJ and SEC in connection with bribery offenses. SQM made payments between 2008 and 2015 of approximately $15 million to foundations controlled by, or to vendors associated with, Chilean politicians, including officials with influence over the government's mining activities. The payments to vendors were made despite evidence that the vendors provided no actual goods or services. SQM agreed to pay $15 million to the SEC and $15.5 million to the DOJ as part of a deferred prosecution agreement. According to the DOJ, the $15.5 million penalty reflected a 25 percent reduction from the low end of the applicable U.S. sentencing guidelines fine range due to SQM's full cooperation and substantial and ongoing remediation. The DOJ also imposed an independent compliance monitor for a term of two years, with a third year of self-reporting.[3]

[1] *See* DOJ press release "Teva Pharmaceutical Industries Ltd. Agrees to Pay More Than $283 Million to Resolve Foreign Corrupt Practices Act Charges" (Dec. 22, 2016).

[2] *See* SEC press release "Wire and Cable Manufacturer Settles FCPA and Accounting Charges" (Dec. 29, 2016); DOJ press release "General Cable Corporation Agrees to Pay $20 Million Penalty for Foreign Bribery Schemes in Asia and Africa" (Dec. 29, 2016).

[3] *See* DOJ press release "Chilean Chemicals and Mining Company Agrees to Pay More Than $15 Million to Resolve Foreign Corrupt Practices Act Charges" (Jan. 13, 2017).

Anti-Corruption (cont'd)

Former Guinean Minister of Mines Convicted of Bribery Offenses

Mahmoud Thiam, the former minister of Mines and Geology, was found guilty after a jury trial of transacting in criminally derived property and money laundering. A high-ranking minister in Guinea, Thiam laundered bribery payments totaling $8.5 million from China Sonangol International Ltd. and China International Fund, SA, in exchange for assistance in securing mining rights in the West African nation. Some of the bribe payments Thiam received were used to fund a lavish lifestyle in the U.S., including a multimillion dollar residence in Dutchess County, New York, and private school tuition for Thiam's children. Sentencing is scheduled for August 2017.[4]

US Naval Officers Indicted for Trading Classified US Navy Information in International Fraud and Bribery Scheme

Retired U.S. Navy Rear Adm. Bruce Loveless and eight other high-ranking Navy officers were charged in U.S. District Court for the Southern District of California with accepting the services of prostitutes, luxury travel and dinners in exchange for providing classified U.S. Navy information to a defense contractor. The information was provided to Leonard Francis, the former CEO of Glenn Defense Marine Asia, and is alleged to have been provided in order to help Francis and Glenn Defense secure lucrative contracts and sabotage the bids of competing defense contractors. The bribery scheme allegedly cost the Navy and U.S. taxpayers tens of millions of dollars.[5]

European Development Bank Official Convicted in UK on Corruption Charges

Andrey Ryjenko, a European Bank for Reconstruction and Development (EBRD) official tasked with vetting applications for funding from the EBRD, was convicted of violating the Prevention of Corruption Act 1906. As alleged, he accepted corrupt payments from a consultancy in exchange for the EBRD providing loans to the consultancy's clients. Ryjenko received $3.5 million from the consultancy, Chestnut Consulting Group, whose clients included oil and gas companies in former Soviet states. Chestnut made these payments into bank accounts held in the name of Ryjenko's sister. During Ryjenko's trial, Chestnut's owner, Dmitrij Harder, testified via video link from the U.S. for the prosecution. Harder pleaded guilty in a Philadelphia federal court on April 20, 2016, to violating the FCPA by bribing Ryjenko. On June 20, 2017, a top U.K. court sentenced Ryjenko to six years' imprisonment.[6]

New Jersey Pastor and Technology Expert Convicted in Bitcoin Bank Bribery Scheme

Trevon Gross, a New Jersey pastor, and Yuri Lebedev, a Florida technology expert, were convicted of bribing an officer of a financial institution and obstructing a government investigation in connection with a scheme to use a credit union to process unlawful bitcoin-to-dollar exchanges. In 2014, Lebedev bribed Gross, the former chairman and CEO of a New Jersey-based credit union serving primarily low-income customers, for permission to use the credit union to process bitcoin transactions, which were believed to draw less scrutiny from regulators and outside banks. Gross and Lebedev deceived financial institutions by deliberately misidentifying and miscoding customers' credit and debit card transactions, in violation of bank and credit card company rules and regulations, and caused more than $10 million in bitcoin-related transactions to be processed illegally through financial institutions.[7]

[4] *See* DOJ press release "Former Guinean Minister of Mines Convicted of Receiving and Laundering $8.5 Million in Bribes From China International Fund and China Sonangol" (May 4, 2017).

[5] *See* DOJ press release "U.S. Navy Admiral and Eight Other Officers Indicted for Trading Classified Information in Massive International Fraud and Bribery Scheme" (Mar. 14, 2017).

[6] *See* Global Investigations Review, "EBRD Official in Harder FCPA Case Found Guilty in London" (June 8, 2017); Global Investigations Review, "Dmitrij Harder Pleads Guilty to Bribing EBRD Official" (Apr. 20, 2016).

[7] *See* DOJ press release "Former Chairman and CEO of Credit Union and Operator of Unlawful Bitcoin Exchange Found Guilty in Manhattan Federal Court of Bribery and Fraud Scheme" (Mar. 17, 2017).

Anti-Money Laundering and Sanctions

Intesa Sanpaolo Fined $235 Million for Anti-Money Laundering and Sanctions Violations

Italy's largest retail bank, Intesa Sanpaolo SpA, was fined $235 million by the New York State Department of Financial Services (DFS) for several anti-money laundering and sanctions violations dating back to 2002. The violations included compliance failures due to deficiencies in the bank's transaction monitoring system. In addition, an investigation by DFS found that the bank deliberately concealed information from bank examiners. DFS concluded that Intesa processed more than 2,700 transactions, amounting to more than $11 billion, on behalf of Iranian clients and other entities possibly subject to U.S. sanctions using nontransparent methods, thereby subverting controls designed to detect illegal transactions. DFS also required Intesa to extend the engagement of its independent consultant and revise its audit, due diligence and compliance programs.[8]

Western Union Forfeits $586 Million in Anti-Money Laundering and Consumer Fraud Settlement

Global money services giant Western Union Financial Services, Inc. entered into a deferred prosecution agreement with the U.S. Federal Trade Commission (FTC), the DOJ and four U.S. Attorneys' offices for aiding and abetting wire fraud and failing to maintain effective anti-money laundering controls. Between 2004 and 2012, third parties orchestrated international consumer fraud schemes whereby they contacted victims in the U.S. and falsely posed as family members in need or offered fictitious lottery winnings, then directed the victims to send money through Western Union to help their relative or claim their prize. Western Union agents allegedly were complicit in this scheme by processing hundreds of thousands of transactions, often in return for a cut of the fraud proceeds. Despite consumer complaints and repeated compliance reviews identifying suspicious or illegal behavior by its agents, Western Union almost never reported the suspicious activity to law enforcement. The company also implemented certain procedures that it allegedly knew were not effective in limiting transactions with characteristics indicative of illegal gambling from the United States to other countries. Under the agreement, Western Union agreed to forfeit $586 million to compensate victims, enhance its compliance policies and procedures regarding anti-money laundering and consumer fraud, and impose an independent compliance auditor for a term of three years.[9] The company was also assessed a $184 million civil money penalty from the Financial Crimes Enforcement Network (FinCEN) related to the same underlying conduct.

Deutsche Bank Fined by UK Regulator in Largest Ever Anti-Money Laundering Penalty

Deutsche Bank AG was fined £163 million ($202 million) by the U.K.'s Financial Conduct Authority (FCA) for failing to implement adequate anti-money laundering controls, know-your-customer procedures and automated systems for detecting suspicious trades. It was the FCA's largest anti-money laundering fine. Between 2012 and 2015, customers used Deutsche Bank's Moscow affiliate to execute thousands of "mirror trades" that allowed them to move an estimated $10 billion of unknown origin from Russia to offshore bank accounts to disguise the source of the funds. By agreeing to settle with the FCA within 28 days of receiving the Stage 1 letter, Deutsche Bank qualified for a 30 percent "early stage" discount to its fine. Deutsche Bank also reached a settlement with DFS, agreeing to pay a $425 million fine for its role in the scheme and have an independent monitor review its anti-money laundering compliance programs. The FCA and the DFS did not conclude that the trades were illegal; the FCA stated the trades were "highly suggestive of financial crime."[10]

[8] *See* New York State Department of Financial Services press release "DFS Fines Intesa Sanpaolo $235 Million for Repeated Violations of Anti-Money Laundering Laws" (Dec. 15, 2016).

[9] *See* DOJ press release "Western Union Admits Anti-Money Laundering and Consumer Fraud Violations, Forfeits $586 Million in Settlement With Justice Department and Federal Trade Commission" (Jan. 19, 2017).

[10] *See* FCA press release "FCA Fines Deutsche Bank £163 Million for Serious Anti-Money Laundering Controls Failings" (Jan. 31, 2017).

Emissions Fraud

Volkswagen Reaches $4.3 Billion Settlement With DOJ

German car manufacturer Volkswagen AG agreed to plead guilty to criminal charges of conspiracy to defraud the United States, wire fraud and violations of the Clean Air Act, and to pay $4.3 billion in combined criminal and civil penalties in relation to the widely reported, decade-long emissions fraud scandal. Six high-ranking executives also have been indicted. The DOJ agreed that while federal guidelines called for a fine ranging from $17 billion to $34 billion, a criminal penalty of $2.8 billion was appropriate, due in part to Volkswagen's disclosure of misconduct and agreement to be monitored for three years. Volkswagen has faced a string of regulatory investigations and consumer claims in relation to allegations that it deliberately installed devices on millions of its cars to produce misleading emissions test results. Despite internal warnings that emissions during normal driving were vastly different from those reported in lab tests, Volkswagen executives authorized the continued concealment of the "defeat devices." As part of the agreement, Volkswagen agreed to invest $2 billion in projects that support the increased use of zero-emissions vehicles as well as $2.7 billion to mitigate the effects of the emissions from cars equipped with the defeat devices. Volkswagen also faces a joint EU enforcement action led by the Netherlands Authority for Consumers and Markets. The EU enforcement action seeks compensation for European consumers affected by the scandal, similar to the agreement Volkswagen struck in June 2016 to compensate U.S. consumers. It remains unclear whether all 28 EU countries will join the enforcement action. Each EU member state is not required to take part, and to date, countries including Austria and Finland have opted out of meetings with other member states.[11]

Price Fixing

Bumble Bee Agrees to Plead Guilty in DOJ Tuna Price-Fixing Investigation

California-based Bumble Bee Foods LLC agreed to plead guilty to its involvement in a conspiracy to fix the prices of tuna fish from 2011 to 2013. Bumble Bee agreed to pay a $25 million fine, which may increase to a maximum fine of $81.5 million if Bumble Bee is sold and certain conditions are met. Bumble Bee also agreed to continue cooperating with the DOJ Antitrust Division's ongoing investigation into the packaged seafood industry.[12]

[11] *See* DOJ press release "Volkswagen AG Agrees to Plead Guilty and Pay $4.3 Billion in Criminal and Civil Penalties; Six Volkswagen Executives and Employees Are Indicted in Connection With Conspiracy to Cheat U.S. Emissions Tests" (Jan. 11, 2017).

[12] *See* DOJ press release "Bumble Bee Agrees to Plead Guilty to Price Fixing" (May 8, 2017).

Misstatement of Profits

British Supermarket Tesco Agrees to DPA With Serious Fraud Office

British supermarket chain Tesco Stores Limited agreed to a deferred prosecution agreement (DPA) with the U.K.'s Serious Fraud Office (SFO) to settle allegations relating to the misstatement of profits in its 2014 accounts.[13] In 2014, Tesco admitted to having overstated its profits by £326 million. Tesco recorded supplier contributions to its balance sheet that were conditional on meeting sales targets that Tesco was unlikely to meet. Under the DPA, Tesco agreed to pay a £129 million fine to the SFO and £85 million in compensation to shareholders who purchased shares between August 29, 2014, and September 19, 2014. Tesco also announced it had agreed with the Financial Conduct Authority's finding of "market abuse" in connection with a trading statement issued by the company on August 29, 2014, which overstated expected profits due to the accounting errors.

Extradition Request and Arrest

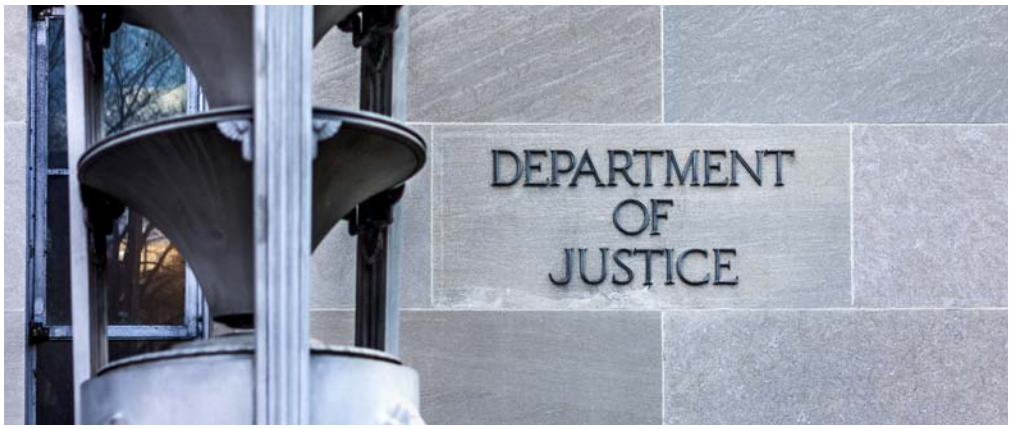
Former HSBC Trader Arrested by British Authorities Following DOJ Extradition Request

Stuart Scott, a former U.K.-based HSBC trader, was arrested on June 5, 2017, by British authorities following an extradition request from the DOJ.[14] Scott, former head of cash trading for Europe, the Middle East and Africa, was charged in the U.S. in July 2016 for his alleged involvement in a fraudulent scheme involving a $3.5 billion currency transaction. Scott and his co-conspirator, Mark Johnson (a fellow senior HSBC executive) are alleged to have rigged foreign exchange markets by misusing client information relating to the conversion of $3.5 billion into pound sterling by trading ahead of the transaction. This trading caused the price of sterling to rise, which led to HSBC's client incurring a loss, while Scott and Johnson allegedly profited by approximately $8 million. The first hearing on the U.S. authorities' extradition request is scheduled for July 31, 2017, in London.

[13] *See* The Telegraph, "Tesco Pays £129m to Settle Serious Fraud Office Probe Into Accounting Scandal" (Mar. 28, 2017); SFO press release "SFO Agrees Deferred Prosecution Agreement With Tesco" (Apr. 10, 2017).

[14] *See* Reuters, "Former HSBC Trader in Forex Probe Arrested by UK Police" (June 8, 2017).

Focus on FCPA Prosecutions Continues Under Attorney General Sessions



Six months into the Trump administration, it appears that the Department of Justice (DOJ) will continue its focus on Foreign Corrupt Practices Act (FCPA) prosecutions.[15] The statute was a department priority in the George W. Bush administration and pursued aggressively under the Obama administration. President Donald Trump's 2012 comments strongly criticizing the statute have been widely reported: At the time, he contended that official corruption should be prosecuted by the authorities in the country in which it occurred, and he asserted that the statute disadvantaged U.S. companies — presumably by prosecuting them for conduct that non-U.S. companies routinely engaged in.

While such statements could suggest that the DOJ may de-emphasize FCPA prosecutions in the new administration, it is unclear whether President Trump still holds these views five years later, particularly in light of the changing landscape. Since 2012, some countries, including China, Brazil and the U.K., have strengthened their anti-corruption laws and more aggressively prosecuted companies for corruption offenses. Non-U.S. authorities also increasingly initiate and lead such prosecutions against both U.S. and non-U.S. entities, arguably leveling the playing field. Furthermore, a number of the DOJ's recent prosecutions have targeted non-U.S. companies as well as U.S. companies, for conduct that primarily occurs overseas.

While it remains to be seen whether the DOJ will continue to impose the same hefty fines in new FCPA prosecutions that it has in recent years, the DOJ is nonetheless signaling that it will continue to invest significantly in its FCPA unit and not shift its priorities away from FCPA enforcement.

Attorney General Jeff Sessions expressed support for FCPA prosecutions in his recent remarks to the Ethics and Compliance Initiative Annual Conference on April 24, 2017, where he noted the DOJ "will continue to strongly enforce the FCPA and other anti-corruption laws. Companies should succeed because they provide superior products and services, not because they have paid off the right people." These remarks were reinforced by Trevor McFadden, the DOJ Criminal Division's acting principal deputy assistant attorney general, who noted that the DOJ will continue aggressive enforcement against companies and individuals who pay bribes overseas.[16]

Along similar lines, the DOJ announced on March 10, 2017, that it will temporarily extend the pilot program initiated in April 2016 that seeks to quantify benefits from voluntary self-disclosure of corruption-related conduct, full cooperation with the DOJ and remediation of any compliance deficiencies. Attorney General Sessions noted that these principles will continue to guide the DOJ's prosecutorial discretion.

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[15] Portions of this article were published in "Skadden's 2017 Insights," January 2017.

[16] Trevor N. McFadden, Acting Principal Deputy Assistant Attorney General, Criminal Division, Department of Justice, Speech at ACI's 19th Annual Conference on Foreign Corrupt Practices Act (Apr. 20, 2017).

Inconclusive UK Election Grants Reprieve for Serious Fraud Office

The failure of Prime Minister Theresa May's Conservative Party to win a majority in the U.K.'s general election on June 8, 2017, has seen a previous manifesto pledge from Prime Minister May to merge the Serious Fraud Office (SFO) with the National Crime Agency (NCA) shelved, at least temporarily. The Conservative manifesto advocated a controversial merger between the two entities on the basis that it would improve intelligence sharing and aid the investigation of serious fraud, money laundering and financial crime. However, the plans were not included in the new government's Queen's Speech, which set out the legislative program for Parliament for the next two years. It remains to be seen whether proposals to merge or otherwise reform the SFO will re-emerge during the tenure of the current Conservative minority government, though the SFO's conduct in opening a number of new investigations and announcing significant charging decisions — most recently against four senior Barclays executives in relation to emergency cash injections into Barclays by Qatari investors during the 2008 financial crisis — indicates that the ongoing debate over reform of the SFO is unlikely to have any significant practical impact in the short term.

US and Chinese Regulators Focus on Corporate Malfeasance

Chinese companies and multinationals with a presence in China are facing increased scrutiny from U.S. and Chinese regulators. Four aspects of the current regulatory environment are responsible for this increased scrutiny: (i) the Department of Justice (DOJ) and Securities and Exchange Commission's (SEC) embrace of the Foreign Corrupt Practices Act's (FCPA) "territorial theory of jurisdiction"; (ii) the U.S. government's continued enforcement of international sanctions and export controls; (iii) China's ongoing anti-corruption campaign; and (iv) increased cooperation between U.S. and Chinese authorities.

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Territorial Theory of Jurisdiction

Under the territorial theory of jurisdiction, even fleeting contacts with the U.S. — *e.g.*, a physical meeting on U.S. territory, wire transfers through U.S. bank accounts, and emails transmitted and stored on U.S. servers[17] — may be sufficient to provide the U.S. authorities with the requisite jurisdiction to charge the entity or persons involved, so long as those U.S. contacts can be said to be "in furtherance of" alleged bribery.

Last year, the DOJ entered into a settlement with the two Chinese subsidiaries of PTC Inc. (PTC China), the Massachusetts-based technology company, that illustrates the expansive scope of this theory of jurisdiction. The DOJ and SEC claimed that PTC China bribed Chinese government officials with trips to Los Angeles, Las Vegas and Hawaii, in return for contracts with state-owned entities worth more than $13 million. The DOJ and SEC asserted jurisdiction based solely on Chinese employees' travel to the U.S. in the company of Chinese government officials. That was sufficient to enable the DOJ to assert jurisdiction over PTC China, and to charge it in a U.S. court, even though the two PTC China entities in question were not listed in the U.S. and did not have a physical presence in the U.S. PTC China subsequently paid the DOJ and SEC approximately $28 million in penalties and disgorgement, far exceeding the $13 million in contracts associated with the improper payments.

[17] *See, e.g.*, Information ¶¶ 20(e), 22, *United States v. JGC Corp.*, No. 4:11-cr-00260, (S.D. Tex. Apr. 6, 2011), ECF No. 1 (wire transfers through correspondent bank accounts in the United States in furtherance of a bribery scheme may be sufficient to satisfy territorial jurisdiction), Information ¶¶ 2, 24, 26(c), 47, *United States v. Magyar Telekom, Plc.*, No. 1:11CR00597 (E.D. Va. Dec. 29, 2011), DCF No. 1 (territorial jurisdiction based solely on the transmission and storage of two emails on U.S. servers).

Sanctions and Export Controls

We also expect enhanced regulatory enforcement activity regarding Chinese companies and nationals in the area of economic sanctions and export controls.

This past March, the U.S. Government: (i) reached a $1.19 billion settlement with ZTE for unlawfully exporting telecommunications equipment to Iran and North Korea in violation of U.S. embargoes;[18] (ii) publicly warned the Chinese government during Secretary of State Rex Tillerson's visit to Beijing that the U.S. was preparing to impose heightened financial penalties on Chinese banks and companies doing business with North Korea;[19] (iii) imposed sanctions on 30 foreign entities and individuals pursuant to the Iran, North Korea, and Syria Nonproliferation Act, specifically naming the entities and individuals alleged to have transferred sensitive materials in aid of Iran's missile program — nine out of 11 of which were Chinese;[20] and (iv) imposed sanctions, pursuant to the United Nations Security Council Resolutions, in response to North Korea's development of weapons of mass destruction, on one entity and 11 individuals — five of whom are allegedly representatives of North Korean entities located in China.[21]

Whether or not these actions intentionally were closely timed, together they amplify the message that enforcement of U.S. sanctions and export control laws will be a top priority in the new administration.[22] Lest there be any doubt, the unusually blunt press statements issued by the authorities in the ZTE case — that "the world" is put "on notice [that] the games are over," that the U.S. government "will use every tool we have to punish" violators, who "will suffer the harshest of consequences" — forcefully underscore the point.

Chinese Media's Focus on Corporate Malfeasance

Scrutiny by the U.S. authorities is only part of the picture. Now in its sixth year, China's anti-corruption campaign shows no sign of waning. On a regular basis, the Chinese state media continue to feature the latest fallen "tigers," including senior officials of Chinese state-owned enterprises. In the past few years, the Chinese government regularly uses the media to expose alleged corporate malfeasance, including wrongdoing by foreign companies that purportedly were to blame for various quality-of-life issues.

For example, on December 24, 2016, reporters with the China Central Television, equipped with video and audio equipment, went "undercover" to several Chinese hospitals to expose kickbacks that sales representatives of pharmaceutical companies allegedly paid doctors in exchange for writing more prescriptions. The popular Chinese TV program "315 Gala" — aired each year on March 15 to coincide with World Consumers' Rights Day — "names and shames" companies for committing abuses that allegedly hurt Chinese consumers. Recent targets have included such well-known foreign brands as Apple, Hewlett-Packard, McDonald's, Muji, Nike, Starbucks and Volkswagen. Alleged offenses ran the gamut from false advertising to food safety violations. In addition to damage to their reputations, the targeted companies faced the prospect of follow-on enforcement action by the Chinese authorities.

Increased Law Enforcement Cooperation by US and Chinese Authorities

Further compounding the challenge for multinational companies is the new fact that law enforcement authorities in different jurisdictions, including those in the U.S. and China, are finding ways to bridge their differences and to advance cases of common interest. In the last two years, despite the absence of an extradition treaty, the U.S. has repatriated a number of high-profile Chinese fugitives who have been accused by the Chinese government of corruption. With less fanfare and out of public view, the U.S. authorities also have been able to obtain reciprocal assistance from the Chinese government on criminal matters. With increasing ease, prosecutors in the two countries are able to share information pursuant to the principle of reciprocity through various informal mechanisms.

[18] *See* Jamie Boucher *et al.*, "US Announces Record-Setting Penalties for Violations of Export Controls and Economic Sanctions" (Mar. 9, 2017).

[19] *See* CNN, "Tillerson to Warn China of Sanctions Over North Korea" (Mar. 16, 2017); Time, "Secretary of State Rex Tillerson Urges China-U.S. Cooperation on North Korea" (Mar. 18, 2017).

[20] *See* Department of State press release "Iran, North Korea, and Syria Nonproliferation Act Sanctions" (Mar. 24, 2017).

[21] *See* Department of the Treasury press release "Treasury Sanctions Agents Linked to North Korea's Weapons of Mass Destruction Proliferation and Financial Networks" (Mar. 31, 2017).

[22] *See* Department of Commerce press release "Secretary of Commerce Wilbur L. Ross, Jr. Announces $1.19 Billion Penalty for Chinese Company's Export Violations to Iran and North Korea" (Mar. 7, 2017).

Acting Assistant Attorney General Kenneth Blanco, in the same speech that announced the extension of DOJ's FCPA Pilot Program, explained why this trend will continue:

> [T]he department's efforts to combat the most sophisticated white collar criminals require our prosecutors and the agents with whom they work to go all over the world to seek the evidence and witnesses necessary to build their cases, and to collaborate with our foreign counterparts. ... [J]ust as we receive significant assistance from our foreign partners ... , so too do we provide significant assistance to them. ... [A] company operating in country X whose employees bribe a public official in violation of the FCPA, may be investigated and prosecuted by the United States, but also by several other countries with jurisdiction over the conduct that gave rise to the prosecution.[23]

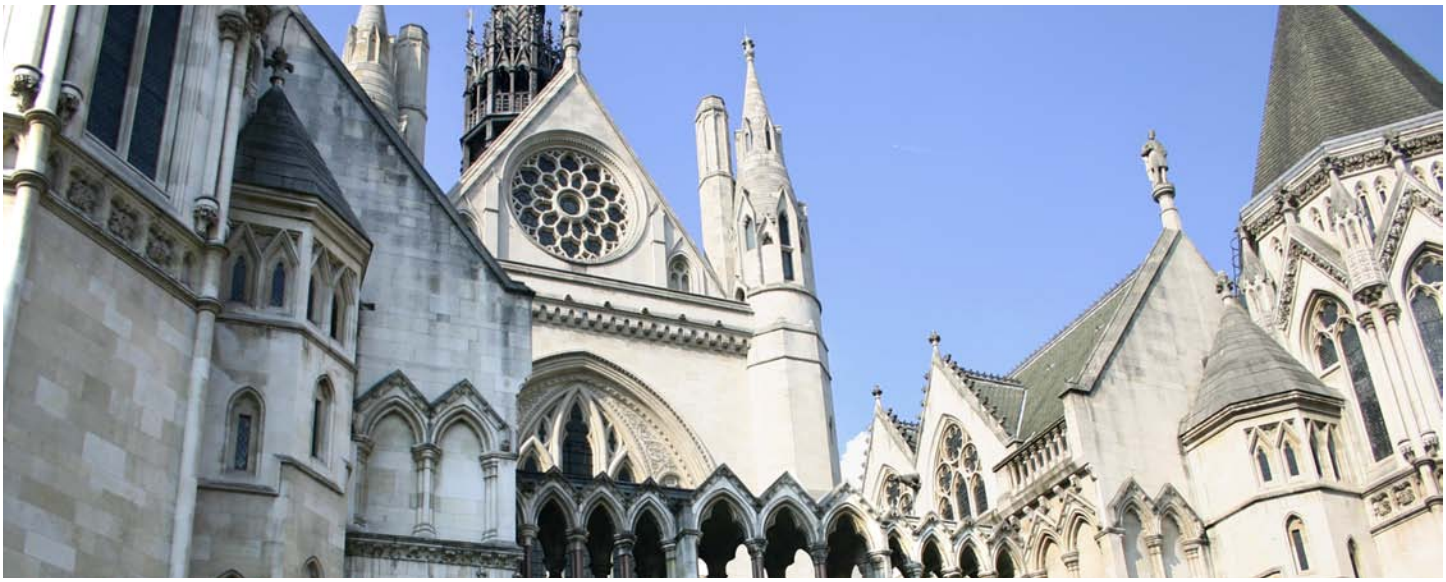
The DOJ's decision last year to return $1.5 million to Taiwan from the sale of two forfeited apartments that Taiwan's former President Chen Shui-Bian's family bought with corrupt proceeds sent a powerful message about the importance the U.S. authorities attach to building long-term cooperative relationships with their law enforcement partners.[24]

Conclusion

The confluence of factors described above makes it all the more imperative for multinational companies with operations in China to ensure that their local compliance programs are robust enough to prevent wrongdoing and detect misconduct early. In the event of violations, companies should be alert to the likelihood that the same conduct may attract scrutiny from both U.S. and Chinese regulators, and perhaps other authorities, and should develop their responses with this possibility in mind.

[23] Kenneth A. Blanco, Acting Assistant Attorney General, Criminal Division, Department of Justice, Speech at the American Bar Association National Institute on White Collar Crime (Mar. 10, 2017).

[24] *See* DOJ press release "United States Returns $1.5 Million in Forfeited Proceeds from Sale of Property Purchased with Alleged Bribes Paid to Family of Former President of Taiwan" (July 7, 2016).



Interview Notes: The English High Court's Approach to Privilege and the Lawyers' Working Papers Doctrine

Since December 2016, the English High Court has handed down two significant rulings that question the application of privilege in internal investigations. First, in *RBS Rights Issue Litigation*, the English High Court limited the availability of legal advice privilege and narrowed the application of the lawyers' working papers doctrine in respect of interview notes prepared for the purposes of an internal investigation.[25] The case arose in the context of a group litigation brought by thousands of claimants against the Royal Bank of Scotland (RBS) concerning the prospectus for a £12 billion fundraising in 2008 that allegedly was inaccurate. In the course of the proceedings, investors sought disclosure of interview notes taken by RBS' internal and external legal counsel during internal investigations conducted for the bank. RBS sought to block access to these notes on two grounds, first, claiming legal advice privilege and, second, on the basis of the lawyers' working papers doctrine.

The judgment, summarized below, raises important considerations for corporate clients seeking to obtain the benefit of legal advice privilege in England and Wales or seeking to rely on the lawyers' working papers doctrine with respect to lawyers' interview notes. The definition of the "client" for the purposes of legal advice privilege remains narrow and the privilege will only extend to communications between counsel and employees authorized to instruct and obtain legal advice on the corporation's behalf. The lawyers' working papers doctrine will only provide protection from disclosure of interview notes if the notes provide a clue as to the trend of legal advice being given to a client; verbatim transcripts or notes with mental impressions alone will not be protected. Further, the court did not accept RBS' argument that privilege should be determined in accordance with U.S. law on the basis that the interview notes were prepared by or on behalf of U.S. law firms in the context of internal investigations.

Second, in the subsequent case *Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation*, the judge followed the narrow interpretation of the "client" in the context of legal advice privilege of interview notes taken by lawyers for Eurasian Natural Resources Corporation (ENRC), among other things, prior to the commencement of crim-

[25] [2016] EWHC 3161 (Ch).

inal proceedings.[26] The judge also restrictively interpreted the requirements for litigation privilege, which is of particular concern for interviews conducted during the course of an internal investigation. An application for permission to appeal is currently being considered by the English Court of Appeal.

Legal Advice Privilege

Legal advice privilege attaches to confidential communications between a lawyer and a client where the communications have as their dominant purpose the giving or receiving of legal advice. RBS argued that the interview notes recorded communications between lawyers and persons authorized by RBS to give instructions to its lawyers.

The judge narrowly defined the "client" for the purposes of analyzing the application of legal advice privilege. The judge, relying on precedent, held that only those who are authorized to seek and receive legal advice on behalf of a corporate body classify as a "client" for purposes of the privilege. He concluded that the mere authority to provide factual information to lawyers is not sufficient to render the individual providing that factual information a client, and for that reason, RBS could not establish legal advice privilege with respect to the interview notes.

Some commentators have suggested that a "client" includes only those who are the "directing mind and will" of a corporate organization. Although the judge in this case did not make a determination on that issue, he stated that he was inclined to accept that view as correct.

This court followed the restrictive interpretation of the "client" in the subsequent case *Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation*, holding that legal advice privilege only attaches to "communications between the lawyer and those individuals who are authorised to obtain legal advice on that entity's behalf."[27] It was not sufficient that interviewees were authorized to communicate information and facts to the lawyers in order to enable them to provide legal advice. Employees falling within the definition of the "client" would be those tasked with obtaining the advice.

Lawyers' Working Papers

Lawyers' working papers are privileged under the doctrine of legal professional privilege on the ground that the papers may betray, or "give a clue" to, the nature of advice that has been given to the client.

The starting point for the judge in the present case was that if RBS was not entitled to claim legal advice privilege over the interview notes, the interviews themselves must not have been privileged communications. That is, verbatim transcripts of an unprivileged interview could not be privileged. It was therefore incumbent on RBS, if it wanted to obtain the benefit of the lawyers' working papers doctrine, to show that there was some attribute or addition to the interview notes that distinguished them from verbatim transcripts or revealed the nature of the legal advice given by RBS's lawyers. One clear way to establish that the notes would reveal legal advice would be if the notes recorded counsel's own thoughts or comments with a view to advising the client.

The judge held that RBS failed to meet this threshold. In rejecting RBS's claim, the judge stressed the importance of reflecting or giving a clue to the nature of legal advice, rather than merely reflecting a line of inquiry. The court found it insufficient to merely show that interview notes are not verbatim transcripts or that they contain mental impressions or physical annotations. Something more is required, such as legal analysis on the part of the interviewers, which gives an indication as to the nature of legal advice being given.[28]

Arguments Relating to US Law

RBS also argued that the issue of privilege should be determined in accordance with U.S. law on the basis that the interview notes were prepared by or on behalf of U.S. law firms in the context of internal investigations, some of which arose from subpoenas from the U.S. Securities and Exchange Commission, broadly relating to RBS's subprime exposures. However, based on the English choice of law rules, the judge held that privilege was to be determined in accordance with English law and that U.S. law was not applicable.

Discretion to Prevent Disclosure

The final argument raised by RBS was that the judge should exercise his discretion under the English High Court's Civil Procedure Rules to order that disclosure and inspection of the interview notes be prohibited. RBS argued that it had a right to withhold inspection under U.S. law and a reasonable expectation that the interview notes would remain privileged. The judge accepted that he had discretion but emphasized there is a general public policy that leans heavily in favor of disclosure, which can only be displaced where there are compelling grounds to do so, and such grounds were not present on the facts of this case.

[26] [2017] EWHC 1017 (QB). *See* Skadden client alert "English Court Questions the Application of Litigation Privilege in Criminal Investigations."

[27] [2017] EWHC 1017 (QB) ¶ 70.

[28] Justice Andrews agreed with this approach in *Director of the Serious Fraud Office v. ENRC*.

Litigation Privilege

Litigation privilege protects disclosure of confidential communications between a lawyer and a client, or between either of them and a third party, whose dominant purpose is giving or receiving information or advice in connection with litigation that is in reasonable prospect. The court considered this issue in *Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation*. The judge drew a distinction between criminal investigations and prosecutions, stating that "the reasonable contemplation of a criminal investigation does not necessarily equate to the reasonable contemplation of a prosecution," and that "the investigation and the inception of a prosecution cannot be characterised as part and parcel of one continuous amorphous process."[29]

Commentary

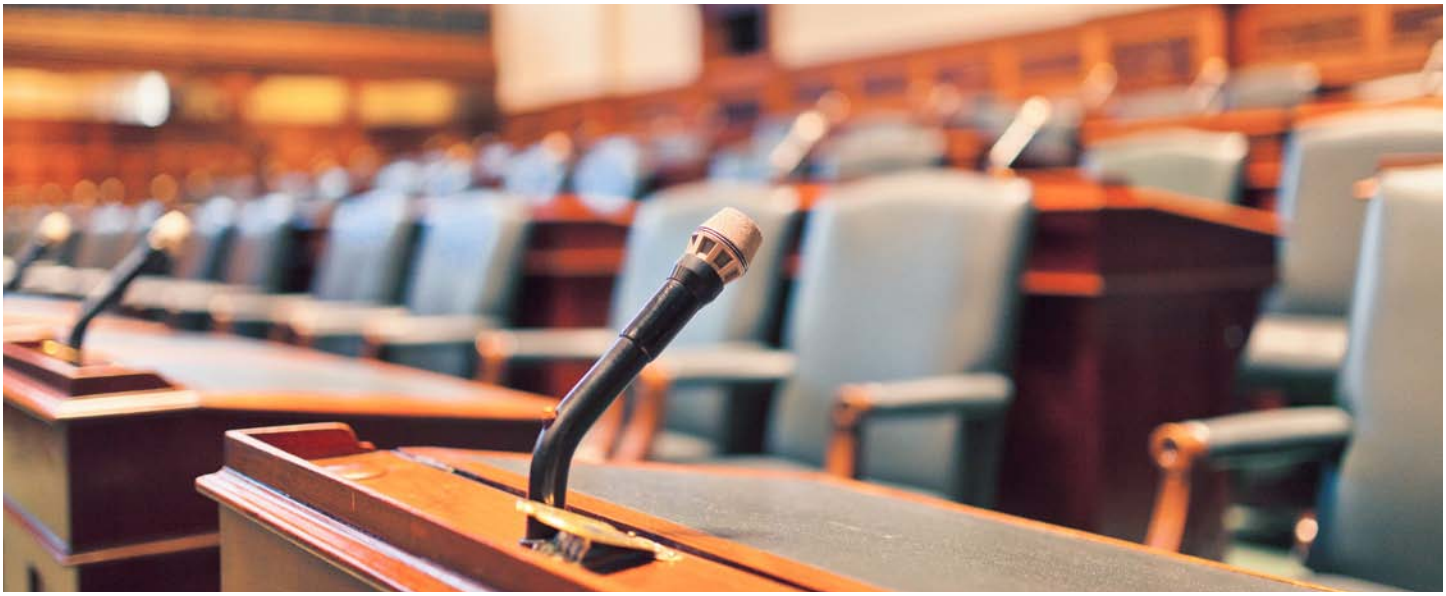
The *RBS Rights Issue Litigation* case is significant because of its very narrow interpretation of the "client" for purposes of the legal advice privilege, its application of the lawyers' working papers doctrine to interview memoranda, and the choice of law decision which resulted in the privilege being determined in accordance with English law rather than U.S. law.

The narrow interpretation of the "client" causes significant problems for corporate bodies wishing to obtain the benefit of legal advice privilege. This means that legal advice privilege will only extend to communications with employees authorized to instruct and obtain legal advice from lawyers. It will not cover communications with employees who only provide factual information to lawyers, even if those employees are authorized to instruct lawyers and even if the information is needed by the lawyers in order to advise the corporate client. Although the judge granted a right to appeal directly to the Supreme Court (subject to the Supreme Court granting permission to appeal), RBS amended its case and the disputed documents were no longer relevant to the issues to be determined, and therefore no appeal will take place.

The application of the lawyers' working papers doctrine is important in confirming that under English law, verbatim transcripts of unprivileged interviews will not be privileged. In order to obtain protection of interview notes, it will be necessary for interview notes to have some attribute that gives a clue as to the trend of legal advice being given to a client. The mere fact that interview notes are not a verbatim transcript, reflect a line of inquiry or include mental impressions will not be sufficient.

The restrictive application of the rules surrounding litigation privilege could dramatically impact the practice of internal investigations in the U.K., particularly those that are undertaken to address whistleblower allegations or compliance concerns prior to a formal enquiry by an external regulator.

[29] [2017] EWHC 1017 (QB) ¶ 154.



DOJ and SEC Bring Two Actions for Breach of FCPA Settlement Agreements

Following a record year of Foreign Corrupt Practices Act (FCPA) enforcement in 2016, the Department of Justice (DOJ) and the U.S. Securities and Exchange Commission (SEC) kicked off the new year by bringing enforcement actions against two companies concerning prior FCPA settlement agreements. While two cases do not necessarily make a trend, these actions shed light on the government's aggressive approach to corporations who the government believes violate the terms of their deferred prosecution agreements (DPAs) and settlement orders.

Biomet

In 2012, Zimmer Biomet Inc. entered into a DPA with the DOJ to resolve an investigation into FCPA violations in Brazil, China and Argentina, including (i) the use of a third-party distributor in Brazil and (ii) falsification of the company's financial records to conceal alleged bribe payments.[30] The 2012 DPA required Biomet to implement and maintain a corporate compliance program, engage an independent compliance monitor, and periodically self-report its remediation and compliance measures to the DOJ.[31] In a second DPA, finalized in January 2017, the DOJ set out that the company continued to allow the Brazilian distributor to sell, import and market Biomet's products, and took steps to conceal the distributor's involvement.[32] The second DPA also recites that in Mexico, the company failed to implement an adequate system of internal accounting controls at the company's Mexican subsidiary, despite being aware of red flags that bribes were being paid.[33]

[30] *See* Deferred Prosecution Agreement, *United States v. Zimmer Biomet Holdings, Inc.*, No. 1:12-cr-00080-RBW (D.D.C. Jan. 12, 2017); DOJ press release "Zimmer Biomet Holdings Inc. Agrees to Pay $17.4 Million to Resolve Foreign Corrupt Practices Act Charges" (Jan. 12, 2017).

[31] *See* Deferred Prosecution Agreement, *United States v. Zimmer Biomet Holdings, Inc.*, No. 1:12-cr-00080-RBW (D.D.C. Mar. 26, 2012).

[32] *See* Deferred Prosecution Agreement, *United States v. Zimmer Biomet Holdings, Inc.*, No. 1:12-cr-00080-RBW (D.D.C. Jan. 12, 2017).

[33] *See id.*; DOJ press release "Zimmer Biomet Holdings Inc. Agrees to Pay $17.4 Million to Resolve Foreign Corrupt Practices Act Charges" (Jan. 12, 2017).

The history of the matter is instructive. At the completion of the original three-year term of the compliance monitorship, the independent monitor found that, based on Biomet's conduct, it could not certify that Biomet's compliance program satisfied the requirements of the DPA. The DOJ extended the monitorship and the DPA for an additional year due to both the conduct in Brazil and Mexico and the fact that Biomet's compliance program did not meet the requirements of the DPA. At the end of the extended period, the compliance monitor could not certify that Biomet's compliance program met the DPA's requirements. As a result, on June 6, 2016, the DOJ filed a status report in the U.S. District Court for the District of Columbia that stated its finding that Biomet was in breach of the terms of its DPA.[34] The DOJ's declaration that Biomet had violated its DPA was the third reported instance in which a corporate defendant has been declared in breach of a DPA or NPA.[35]

While the DOJ credited Biomet's cooperation with the investigation and remedial action, it penalized the repeat conduct. On January 12, 2017, the company agreed to enter into a three-year DPA with the DOJ, pay a $17.4 million criminal penalty and install an independent compliance monitor for three years. The SEC filed a cease-and-desist order whereby the company agreed to pay a $6.5 million civil penalty and disgorge $6.5 million including prejudgment interest.[36]

In calculating Biomet's penalty under the U.S. sentencing guidelines, the government increased Biomet's culpability score for committing an offense less than five years after the 2012 DPA, and decreased it by the same amount in recognition of the company's full cooperation and acceptance of responsibility. It imposed a fine in the middle of the guidelines range.

Orthofix

Six days after the Biomet resolution, on January 18, 2017, Orthofix International N.V. resolved violations of the FCPA books and records and internal accounting controls provisions.[37] Orthofix agreed to pay an $8.25 million penalty to resolve the accounting violations and more than $6 million in disgorgement and penalties to settle the FCPA charges.[38] The SEC order also required Orthofix to engage an independent compliance consultant for one year to review and test its FCPA compliance program.[39] According to the order, Orthofix admitted that it violated the FCPA between 2011 and 2013 when its subsidiary in Brazil used third-party representatives and distributors to pay bribes to doctors at government-owned hospitals to induce them to use Orthofix's products.[40] These improper payments were recorded as legitimate expenses in the Brazilian subsidiary's books, which were subsequently consolidated into Orthofix's records, and generated illicit profits of approximately $2.9 million.[41]

In 2012, while the foregoing conduct was occurring, Orthofix entered into a DPA with the DOJ and a settlement with the SEC for unrelated FCPA violations.[42] The DPA and SEC settlements both included a requirement that Orthofix periodically self-report FCPA violations to the government. While still subject to these settlement agreements, in 2013, Orthofix discovered the misconduct in Brazil and disclosed it to the DOJ and SEC as part of its ongoing self-reporting obligations.[43] The SEC and DOJ followed up with new investigations, and DOJ twice extended the DPA term through July 2016. The DOJ ultimately decided not to bring criminal charges and allowed the DPA to expire in August 2016.[44]

The SEC order recognized Orthofix's self-reporting — even though it was obligated to do so under the 2012 order — and cooperation with the investigation as "significant" remedial steps.[45]

[34] *See* Status Report, *United States v. Zimmer Biomet Holdings, Inc.*, No. 1:12-cr-00080-RBW (D.D.C. June 6, 2016).

[35] In May 2015, Barclays PLC agreed to plead guilty to conspiring to manipulate the price of U.S. dollars and euros exchanged in the foreign currency exchange (FX) spot market. Barclays further agreed that its FX trading practices violated its June 2012 nonprosecution agreement resolving the DOJ's investigation of the manipulation of LIBOR and other benchmark interests rates. Barclays has agreed to pay an additional $60 million criminal penalty based on its violation of the nonprosecution agreement. *See* DOJ press release "Five Major Banks Agree to Parent-Level Guilty Pleas" (May 20, 2015). UBS AG agreed to plead guilty to manipulating LIBOR and other benchmark interest rates and pay a $203 million criminal penalty, after the DOJ declared that UBS' FX trading practices violated its December 2012 nonprosecution agreement resolving the LIBOR investigation. *See id.*

[36] *See* Deferred Prosecution Agreement, *United States v. Zimmer Biomet Holdings, Inc.*, No. 1:12-cr-00080-RBW (D.D.C. Jan. 12, 2017); *In the Matter of Biomet, Inc.*, SEC Exchange Act Release No. 79780 (Jan. 12, 2017).

[37] *In the Matter of Orthofix Int'l N.V.*, SEC Exchange Act Release No. 79828 (Jan. 18, 2017).

[38] *See id.* at 7.

[39] *See id.* at 8-9.

[40] *See id.* at 2.

[41] *See id.*

[42] Notice of Deferred Prosecution Agreement, *United States v. Orthofix Int'l N.V.*, No. 4:12-cr-00150 (E.D. Tex. July 10, 2012); Consent, *SEC v. Orthofix Int'l N.V.*, No. 4:12-cv-419 (E.D. Tex. Apr. 9, 2012).

[43] *See In the Matter of Orthofix Int'l N.V.*, SEC Exchange Act Release No. 79828 (Jan. 18, 2017).

[44] Orthofix press release "Orthofix Announces Resolution of SEC Investigations" (Jan. 18, 2017).

[45] *See In the Matter of Orthofix Int'l N.V.*, SEC Exchange Act Release No. 79828 (Jan. 18, 2017).

Conclusion

The increased use of NPAs and DPAs as settlement vehicles to resolve corporate FCPA investigations is part of a broader, long-term government strategy to motivate self-reporting and cooperation by "rewarding" companies that voluntarily self-disclose FCPA violations and cooperate with government investigations.[46] The *Biomet* and Orthofix cases suggest that the government is willing to aggressively pursue noncompliance and punish according to the terms of its settlement agreements.

[46] In April 2016, the DOJ's Fraud Section introduced the Foreign Corrupt Practices Act Enforcement Plan and Guidance, which included a one-year pilot program (Pilot Program) to encourage voluntary disclosure, extraordinary cooperation and demonstrated remediation in exchange for cooperation credit, a reduction in financial penalties under the U.S. sentencing guidelines, and more lenient charges or even a declination. DOJ, "The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance" (Pilot Program) (Apr. 5, 2016). In November 2015, Andrew Ceresny, director of the SEC's Enforcement Division, announced that "a company must self-report misconduct in order to be eligible for the Division to recommend a DPA or NPA to the Commission in an FCPA case," and stated that he was "hopeful that this condition on the decision to recommend a DPA or NPA will further incentivize firms to promptly report FCPA misconduct to the SEC." He noted that there are "significant benefits available to companies who self-report violations and cooperate fully with our investigations," including reduced charges and penalties, DPAs or NPAs, or even no charges when the violations are minimal. Andrew Ceresny, Director, SEC Division of Enforcement, ACI's 32nd FCPA Conference Keynote Address (Nov. 17, 2015).

Agencies Release Updated Antitrust Guidelines for IP Licensing and International Enforcement and Cooperation

On January 13, 2017, the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) (collectively, the Agencies) issued revised Antitrust Guidelines for the Licensing of Intellectual Property (IP Licensing Guidelines), as well as revised Antitrust Guidelines for International Enforcement and Cooperation.[47]

Updated Antitrust Guidelines for the Licensing of Intellectual Property

The revised IP Licensing Guidelines attempt to modernize the previous IP Licensing Guidelines, last updated in 1995. The Agencies updated the guidelines to address changes in statutes and case law, as well as relevant enforcement and policy work, including the 2010 Horizontal Merger Guidelines. The changes are modest, but, according to then-FTC Chairwoman Edith Ramirez, reflect a reaffirmation of the Agencies' "commitment to an economically grounded approach to antitrust analysis of IP licensing," and a recognition that IP licensing is generally procompetitive.[48] Renata Hesse, the then-acting assistant attorney general in charge of the DOJ's Antitrust Division, noted that the guidelines will continue to apply an "effects-based analysis" focusing on "evaluating harm to competition, not on harm to any individual competitor" and will continue to support "procompetitive intellectual property licensing that can promote innovation."[49] In recent remarks at the 32nd Annual Intellectual Property Law Conference sponsored by the American Bar Association, Acting Chairwoman of the FTC Maureen K. Ohlhausen commented that the "modest" updates provide the Agencies with "commendable flexibility" and "affirm that IP laws grant 'enforceable rights,' which have social value."[50]

The guidelines emphasize that for the purpose of antitrust analysis, they apply the same analysis to conduct involving intellectual property as to conduct involving other forms of property.

The revised guidelines continue to apply an effects-based analysis as to all IP areas and do not adjust that practice for any specific IP licensing activity. Indeed, the guidelines emphasize that for the purpose of antitrust analysis, they apply the same analysis to conduct involving intellectual property as to conduct involving other forms of property. The guidelines note that the Agencies do not presume that intellectual property creates market power in the antitrust context, and that the antitrust laws generally do not impose liability on a firm for a unilateral refusal to assist its competitors. The guidelines also note that there is no liability for excessive pricing without anticompetitive conduct; even if an intellectual property right confers market power, that market power alone does not violate the antitrust laws. Moreover, the guidelines

[47] This article was published as a Skadden client alert, titled "Agencies Release Updated Guidelines for IP Licensing and International Enforcement and Cooperation," on January 19, 2017.

[48] FTC press release "FTC and DOJ Issue Updated Antitrust Guidelines for the Licensing of Intellectual Property" (Jan. 13, 2017).

[49] *Id.*

[50] Maureen K. Ohlhausen, Acting Chairwoman, FTC, ABA's 32nd Annual Intellectual Property Law Conference (Apr. 6, 2017).

make clear that while some licensing activities among horizontal competitors[51] may be so plainly anticompetitive as to be challenged under the per se rule, the rule of reason governs purely vertical IP licensing restraints, including minimum resale price maintenance — a change to the prior guidelines in light of the Supreme Court's decision in *Leegin Creative Leather Products, Inc. v. PSKS*, 551 U.S. 877 (2007), which held that vertical minimum resale price maintenance agreements were not per se illegal under the Sherman Antitrust Act, but rather the rule of reason was the appropriate standard for evaluating vertical price constraints.

The Agencies also address the global nature of IP licensing and acknowledge that if a sufficient nexus to the United States exists, and considerations of international comity and foreign government involvement do not preclude investigation or enforcement, the guidelines will apply equally to all licensing arrangements.

Updated Antitrust Guidelines for International Enforcement and Cooperation

The updates to the Antitrust Guidelines for International Enforcement and Cooperation attempt to give businesses transacting overseas a roadmap of the Agencies' current practices and an analytical framework for determining whether to initiate and how to conduct investigations with an international dimension. Acting Assistant Attorney General Renata Hesse explained the impetus for the revised international guidelines, stating that "anticompetitive conduct that crosses borders can adversely affect our commerce with foreign nations. The Department's antitrust enforcement is focused on ending that conduct in order to protect consumers and businesses in the United States." [52] The revisions reflect developments in the Agencies' practices and in the law since the guidelines were last updated in 1995, particularly in light of increasing globalization and the tremendous expansion in trade between the United States and other countries in the last two decades.

The revised guidelines provide several important updates to the previous guidelines. Notably, the revised guidelines add a chapter on international cooperation. This chapter explains that the Agencies are committed to cooperating with foreign authorities on both policy and investigative matters. This cooperation may include initiating informal discussions and informing cooperating authorities of the different stages of investigations, engaging in detailed discussions of substantive issues, exchanging information, conducting interviews at which two or more agencies may be present, and coordinating remedy design and implementation. The new chapter also addresses the Agencies' use of investigative tools (such as civil investigative demands and subpoenas) outside of the United States, application of confidentiality safeguards under U.S. law to information received both domestically and abroad, the legal basis for cooperation with foreign authorities, types of information exchanged with foreign authorities and waivers of confidentiality, remedies and potential conflicts with remedies contemplated by the Agencies' foreign counterparts, and special considerations in criminal investigations.

This update to the guidelines also provides more clarity as to the application of U.S. antitrust law and agency practice to conduct involving foreign commerce, particularly with respect to the Foreign Trade Antitrust Improvements Act, foreign sovereign immunity, foreign sovereign compulsion, the act of state doctrine and petitioning of sovereigns. The guidelines include revised illustrative examples focused on commonly encountered issues in order to provide more effective guidance to businesses engaged in international activities.

* * *

The updates to the Antitrust Guidelines for the Licensing of Intellectual Property and the Antitrust Guidelines for International Enforcement and Cooperation were the last formal guidance published by the Agencies in the Obama administration. These updates should not prove controversial in the Trump administration, however, as the revisions are more a modernization of the 1995 guidelines to reflect developments in the law and advances in the way business is conducted, rather than a major overhaul of the guidelines. Indeed, since the inauguration, FTC Acting Chairwoman Ohlhausen has affirmed her support for the updates, noting that the revised IP Licensing Guidelines "will continue to protect strong IP rights in the United States"[53] and that the revised Guidelines for International Enforcement and Cooperation "contain important limits on the agencies' pursuit of extraterritorial remedies."[54] These views likely will be echoed by the DOJ if President Trump's nominee for assistant attorney general for the Antitrust Division, Makan Delrahim, is confirmed. Mr. Delrahim's previous stint at the DOJ from 2003-2005 included significant work in the areas of international cooperation and intellectual property policy. In that role, Mr. Delrahim repeatedly confirmed the position that antitrust enforcement policies both in the United States and abroad should be designed so as not to interfere with or discourage the legitimate exploitation of intellectual property rights.

[51] In the licensing context, horizontal competitors are actual or potential competitors in a relevant market in the absence of a license. On the other hand, vertical relationships exist where a licensing arrangement affects activities in a complementary relationship; for example, where a licensor is operating in research and development, and a licensee is operating as a manufacturer and buys the right to use the licensor's technology. Antitrust analysis of licensing arrangements examines whether the relationship among the parties is primarily horizontal, vertical or both.

[52] FTC press release "Federal Trade Commission and Department of Justice Announce Updated International Antitrust Guidelines" (Jan. 13, 2017).

[53] Ohlhausen, *supra* note 48, at 5.

[54] Maureen K. Ohlhausen, Commissioner, FTC, Antitrust Policy for a New Administration, Heritage Foundation Panel Discussion 3 (Jan. 24, 2017).

'Failure to Prevent' and Unexplained Wealth Orders: Forecasting Cross-Border Enforcement Practice

The new Criminal Finances Act 2017 (Act) introduces a series of new provisions that reflect the government's commitment to "clean up" the U.K. as a finance destination for foreign investors, as well as the recent momentum toward supporting domestic and cross-border enforcement actions by U.K. authorities by equipping them with effective investigatory tools and reducing the process-burdens that they face.

Among the most significant changes are the new corporate offense of failure to prevent the criminal facilitation of tax evasion (Failure to Prevent), which imposes criminal liability on businesses that fail to implement reasonable procedures to prevent their employees, agents and other persons providing services for or on behalf of the business from criminally facilitating tax evasion, and the introduction of unexplained wealth orders (UWOs), which require politically exposed persons and those suspected of committing serious crimes to explain the sources of their wealth.

The U.K. government no doubt intends for the use of UWOs and the enforcement of the Failure to Prevent offense to mirror the growth in successful prosecutions for international bribery and corruption.

Failure to Prevent the Criminal Facilitation of Tax Evasion

As we previously reported,[55] HMRC's draft guidance (updated in October 2016) makes clear that Failure to Prevent is founded on three basic components:

1. criminal tax evasion by a taxpayer (either an individual or a legal entity) under existing law;
2. criminal facilitation of tax evasion by the employees, agents and other persons providing services for or on behalf of a corporate body or partnership (Relevant Body), when acting in those respective capacities (Associated Person); and
3. failure by the Relevant Body to implement reasonable procedures to prevent its Associated Person from committing a tax evasion facilitation offense.

[55] *See* Skadden client alerts "The New UK Corporate Offence of 'Failure to Prevent the Facilitation of Tax Evasion': Implications for Fund Managers and Investors" and "'Failure to Prevent': The Implications for Global Financial Institutions."

Thus, a U.K. Relevant Body may be found guilty of an offense if an Associated Person committed a U.K. tax evasion facilitation offense, and it did not have reasonable prevention procedures in place to prevent the commission of that offense. It is striking that the Failure to Prevent offense has a broad extraterritorial scope. The Act criminalizes foreign Relevant Bodies for U.K. tax evasion facilitation offenses. It also criminalizes U.K. Relevant Bodies for foreign tax evasion facilitation offenses, provided that such conduct also amounted to an offense in the U.K. A Relevant Body that carries on at least part of its business in the U.K. may be found guilty if an Associated Person committed a foreign tax evasion facilitation offense, or where any conduct constituting at least part of the foreign tax evasion facilitation offense took place in the U.K.

The Act closely mirrors Section 7 of the Bribery Act 2010, which imposes corporate liability for failing to prevent bribery, but the Act noticeably does *not* require evidence of any benefit to the Relevant Body from the tax evasion facilitation offense. In light of its extraterritorial reach in prosecuting the new offenses, it is likely that the U.K.'s Serious Fraud Office (SFO) and other U.K. enforcement authorities will track the practice that the SFO has adopted with regard to Bribery Act offenses, in particular the recent collaborative approach taken with foreign authorities. Investigations into global financial institutions and other large, commercial Relevant Bodies will require a coordinated approach by the authorities, and in this regard HMRC has confirmed that DPAs will be available for Failure to Prevent.

The Act expressly states that it is immaterial whether the conduct of the Relevant Body, Associated Persons or persons committing the underlying tax evasion offense takes place in the U.K. or a foreign jurisdiction (except in the case of a foreign tax evasion facilitation offense where the Relevant Body is neither a U.K. entity nor carries out part of its business in the U.K.). Accordingly, any evidence-gathering of potential U.K. and foreign tax evasion and facilitation offenses may require close coordination between the enforcement authorities of different jurisdictions.

The Failure to Prevent offense is of particular importance for financial institutions, requiring the implementation of reasonable preventative procedures to protect against liability by the time that the new corporate offense comes into force on September 30, 2017. The shift in burden of proof to the Relevant Body reduces the evidential burden for the enforcement authorities, placing Relevant Bodies at a relative disadvantage to the SFO.

Unexplained Wealth Orders

As with the new Failure to Prevent offense, UWOs are intended to alleviate the burden on enforcement authorities. They will have a wide-ranging scope to gather evidence in other jurisdictions and to potentially support parallel enforcement actions.

The Act creates a new process for a number of U.K. regulators and enforcement agencies to apply to the High Court for a UWO, regardless of whether civil or criminal proceedings have been initiated against the respondent or whether the respondent is located in another jurisdiction.

There must be reasonable cause to believe that the respondent holds the property and that the value of the property is greater than £50,000. The respondent must also either be (i) a politically exposed person or (ii) someone for whom there are reasonable grounds for suspecting that he/she has been involved in serious crime. The court must also be satisfied that there are reasonable grounds for suspecting that the known sources of the respondent's lawfully obtained income would be insufficient for the purposes of enabling the respondent to obtain the property. The Act casts a wide net for the category of respondents to include anyone who is connected with a person who is or has been involved in serious crime, whether in the U.K. or another jurisdiction.

A UWO requires respondents to provide certain information about the specified property, including the nature and extent of the respondent's interest, how it was obtained, and any other information specified in the order. Aside from contempt of court proceedings, failing to respond to a UWO creates a rebuttable presumption that the property is recoverable in civil proceedings, which reduces the burden imposed on enforcement authorities under the current Proceeds of Crime Act 2002 (PoCA) civil recovery regime to prove that property derives from criminal conduct or constitutes the proceeds of crime.

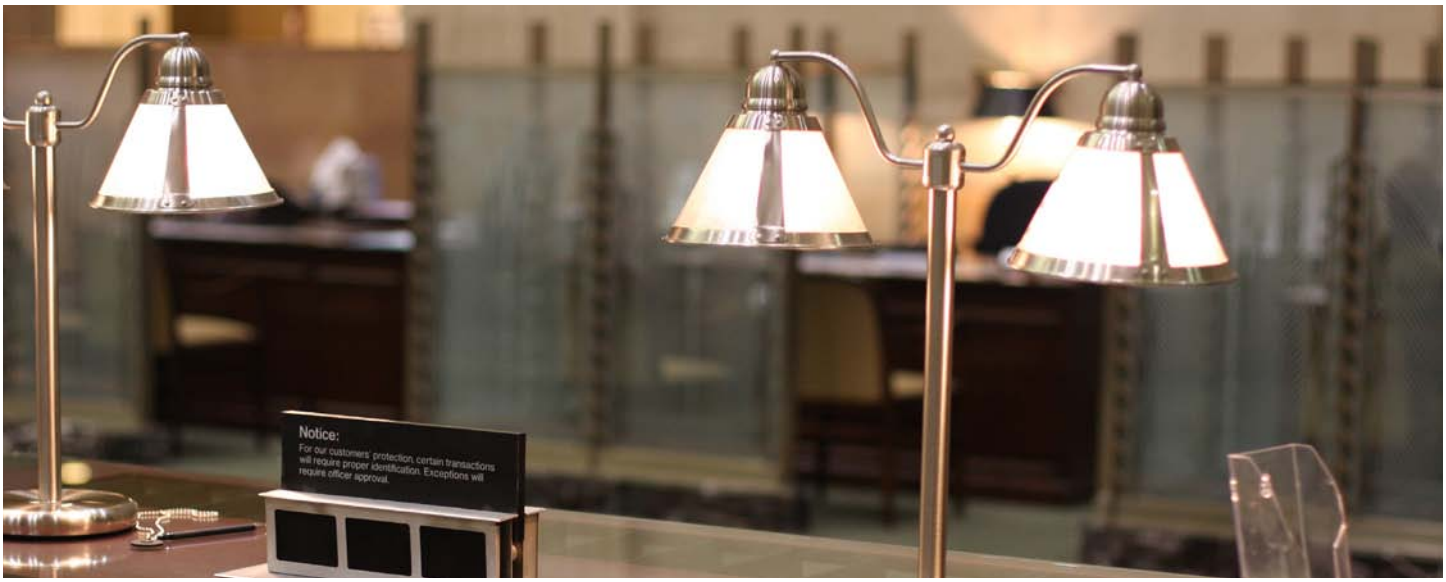
The Act also provides that a criminal offense is committed if a respondent intentionally or recklessly gives a false or misleading statement in response to a UWO, with a maximum penalty of two years' imprisonment.

A respondent's statements in response to the UWO cannot be used as evidence against the respondent in criminal proceedings, but the Act empowers the relevant enforcement authorities to take copies of any documents produced by the respondent in complying with the UWO and does not impose any restrictions on the information-sharing.

Based on the breadth of the potential respondents, enforcement agencies would be able to use UWOs as an evidence-gathering tool against associates and parties connected to the primary target of any enforcement action and potentially share this information with other U.K. and foreign enforcement authorities.

Conclusion

UWOs and the new Failure to Prevent offense follow the Bribery Act 2010 in attempting to facilitate enforcement actions against individuals and companies. By focusing on the individuals who act on behalf of companies, rather than by trying to attribute criminality through the "controlling mind" of the company, the U.K. government no doubt intends for the use of UWOs and the enforcement of the Failure to Prevent offense to mirror the growth in successful prosecutions for international bribery and corruption.



Shaw and the Bank Fraud Statute

On December 12, 2016, the U.S. Supreme Court unanimously held that the fraudulent wiring of funds out of a bank customer's account was sufficient under the federal bank fraud statute to sustain a conviction for defrauding a financial institution — even though the bank did not suffer any financial loss. The Court held that the bank had a property interest in the funds sufficient to trigger culpability under the first prong of the bank fraud statute, 18 U.S.C. § 1344(1), which prohibits knowingly executing or attempting to execute "a scheme or artifice to defraud a financial institution." The primary consequence of *Shaw* may be that it emboldens prosecutors to bring bank fraud charges in a wider variety of cases to take advantage of the bank fraud statute's 10-year statute of limitations and 30-year maximum prison sentence.

In *Shaw v. United States*, the Court held that a bank has a sufficient property interest in a customer account such that a fraudulent scheme to take funds from the account is sufficient to sustain a conviction for defrauding a financial institution under the first clause of the federal bank's fraud statute, although the financial loss was shared by the customer and another entity, rather than the bank.[56]

The Court found that a bank has certain property rights in funds that it holds for customers, such as the right to use the funds as a source of loans, from which the bank can profit.

The Bank Fraud Statute

The Court found that a bank has certain property rights in funds that it holds for customers, such as the right to use the funds as a source of loans, from which the bank can profit. Thus, the Court held that knowingly misleading a bank to obtain funds that the defendant knows are held at the bank is sufficient to sustain a bank fraud conviction under Section 1344(1), even where the bank was not the intended victim of the fraud and where the bank did not suffer any financial loss.

In rejecting Shaw's argument that he did not intend to defraud a financial institution, the Court found that for the purposes of the bank fraud statute, a scheme to obtain funds fraudulently from a bank depositor's account also constitutes a scheme to obtain property fraudulently from a financial institution, at least where the defendant knew that the bank held the deposits,

[56] *Shaw v. United States*, 137 S. Ct. 462 (2016).

the funds obtained came from the deposit account and the defendant misled the bank to obtain the funds. The Court explained that when a customer deposits funds, the bank typically becomes the owner of the funds and can, for example, use the funds as a source of funding for loans. The Court noted that even where the contract between the bank and the customer specifies that the customer retains ownership of the funds, the bank still is akin to a bailee and can assert the right to possess the funds against anyone except the bailor. Accordingly, the Court found that a scheme to take funds from a bank customer was also a scheme to deprive the bank of certain property rights.

Implications of *Shaw*

It is unclear how *Shaw* will impact the application of the bank fraud statute. While the Court has now made clear that financial institutions have a property interest in the funds deposited in accounts that they hold for customers, federal prosecutors already were able to charge bank fraud for fraudulent schemes to obtain assets held in the custody of a bank, using the "custody or control" provision of the second clause of the bank fraud statute.[57] However, to the extent that the ruling expands the use of the bank fraud statute even marginally, the expansion is significant, given the statute's 10-year limitations period and hefty 30-year maximum prison sentence.

[57] 18 U.S.C. § 1344(2) concerns a scheme or artifice "to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises."

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