



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

BakerHostetler

Table of Contents

Introduction	2
Cross-Border Enforcement	3
“Spoofing”	4
Benchmark Rate Manipulation	6
Forex	11
Accounting Fraud	14
Trade Sanctions/Export Controls	16
Law Enforcement Tools	19
U.S. Attempts to Seize Data Overseas	20
Whistleblowers	21
Use of Deferred Prosecution Agreements	24
U.S. and International Legislative, Regulatory, and Enforcement Priorities	27
Increased Focus on Individual Accountability for Corporate Wrongdoing	28
Substantive Areas of Emphasis	31
Practical Considerations in Conducting Cross-Border Investigations: Attorney-Client Privilege and Work Product Doctrine	38
Key Takeaways	41

Edited by

Jonathan B. New, Patrick T. Campbell and David M. McMillan. Contributing writers are Emily R. Fedeles, Shawn P. Hough, Marco Molina, Frank M. Oliva, Panida A. Pollawit, Victoria Stork and Elias Trahanas.

Introduction

As the first year of a new administration, 2017 was a year of transition in terms of both leadership and priorities of U.S. law enforcement agencies. Despite these changes, however, pre-existing trends in cross-border investigations, regulations, and enforcement have continued unabated. Senior U.S. Department of Justice (DOJ) and Securities and Exchange Commission (SEC) officials in the Trump administration have publicly confirmed the agencies' commitments to coordinating with foreign authorities and signaled that the extent of coordination will continue to increase in the coming years. As Steven R. Peikin, Co-director of the SEC's Division of Enforcement, observed in a speech in November 2017, "The level of cooperation and coordination among regulators and law enforcement worldwide is on a sharply upward trajectory." Indeed, to further cement transatlantic relationships, the DOJ Fraud Section has detailed a senior prosecutor to the Serious Fraud Office (SFO) and the Financial Conduct Authority (FCA) in the U.K.

BakerHostetler's 2017 *Year-End Cross-Border Government Investigations and Regulatory Enforcement Review* provides highlights and analysis of important transnational legislative, judicial, regulatory, and enforcement activities during the second half of 2017. As cross-border cooperation grows, this report attempts to keep companies and individuals informed of relevant trends and developments in the U.S., Europe, and beyond that may impact their global activities. Part II of this report highlights key developments in the area of cross-border regulatory enforcement, with a particular focus on efforts by U.S. regulators to target allegedly manipulative tactics involving the securities industry that, despite occurring overseas, they claim substantially affect U.S. interests. Part II also summarizes the U.S.'s efforts in bringing accounting fraud and trade sanction actions against foreign companies and individuals with only tangential connections between the conduct alleged and the U.S. Part III analyzes the continued use by U.S. and foreign law enforcement of various tools involved in cross-border criminal investigations and prosecutions, including developments in the widely discussed *Microsoft-Ireland* case, whistleblower programs, and deferred prosecution agreements. Part IV discusses what the authors view as the key cross-border legislative, regulatory, and enforcement priorities in 2017 and beyond. Part V concludes with an update on one of those more challenging practical issues facing companies caught up in a cross-border investigation: maintaining the attorney-client privilege and, work product doctrine.

We encourage you to read this report in conjunction with BakerHostetler's other year-end reviews: the [2017 FCPA Year-End Update](#) and [2017 Year-End Securities Litigation and Enforcement Highlights](#). Please feel free to contact any member of the BakerHostetler White Collar, Investigations, and Securities Enforcement and Litigation team listed at the end of this report with any questions.



Cross-Border Enforcement

Cross-Border Enforcement “Spoofing”

The second half of 2017 saw U.S. regulators continue to focus on spoofing activities allegedly engaged in by institutions and/or traders who are located overseas, on the basis that their actions impacted the U.S. The U.S. Commodity Futures Trading Commission (CFTC), which has brought and resolved numerous spoofing cases over the past several years, announced in its “Annual Enforcement Results for Fiscal Year 2017” that it continues to have “robust cooperation with foreign regulators and law enforcement officials to combat the international components of many of its investigations” and will continue bringing spoofing-related enforcement actions against foreign actors.¹ The second half of 2017 also saw the first federal circuit-level decision on the scope of the Commodity Exchange Act (CEA) anti-spoofing laws.

This latter development was perhaps the most significant spoofing-related event that occurred in 2017. In 2010, as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Congress amended the CEA and criminalized spoofing.² The anti-spoofing provision of the CEA enacted by Dodd-Frank proscribes “any trading, practice, or conduct that ... is of the character of, or is commonly known to the trade as, ‘spoofing’ (bidding or offering with the intent to cancel the bid or offer before execution).”³ On August 7, 2017, in *United States v. Coscia*, the Seventh Circuit Court of Appeals upheld the constitutionality of the CEA’s anti-spoofing provision.⁴

The court rejected Coscia’s argument that the CEA’s anti-spoofing statute gives inadequate notice of the proscribed conduct, reasoning that “because the statute clearly defines ‘spoofing’ in the parenthetical [of the statute], Mr. Coscia had adequate notice of the prohibited conduct.”⁵ For this reason – that the statute itself defines “spoofing” – the court also rejected Coscia’s argument that the absence of guidance external to the statute (*e.g.*, legislative history) leaves a person of ordinary intelligence to speculate about the definition Congress intended for the term “spoofing.”⁶ Coscia also argued that even if the statute provided 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 that the statute does not provide any parameters to distinguish lawful from unlawful high-frequency trading.⁷ The court rejected this argument as well, finding that “because Mr. Coscia’s behavior clearly falls within the confines of the conduct prohibited by the statute, he cannot challenge any allegedly arbitrary enforcement that could hypothetically be suffered by a theoretical legitimate trader.”⁸ The court continued that the anti-spoofing statute, by containing a definition of “spoofing,” imposes clear restrictions on when a prosecutor can charge an individual with spoofing.⁹

1 Press Release, U.S. Commodity Futures Trading Comm’n, “CFTC Enforcement Activity Includes Significant Anti-Manipulation and Spoofing Enforcement Actions, Integration of Market Surveillance Unit, Additional Protection of Whistleblowers, and Enhanced Enforcement,” Rel. No. pr7650-17 (Nov. 22, 2017), <http://www.cftc.gov/PressRoom/PressReleases/pr7650-17>.

2 7 U.S.C.A. § 6c(a)(5).

3 *Id.*

4 *United States v. Coscia*, 866 F.3d 782, 785-77 (7th Cir. 2017).

5 *Id.* at 792.

6 *Id.*

7 *Id.* at 793.

8 *Id.* at 794.

9 *Id.* at 794-795. In upholding Coscia’s spoofing conviction, the court also rejected Coscia’s argument that the record evidence did not support his spoofing conviction.

Cross-Border Enforcement

On February 2, 2018, Coscia petitioned the Supreme Court for a writ of certiorari, in hopes of getting another opportunity to argue that the federal anti-spoofing laws are unconstitutional.¹⁰ The Supreme Court will decide later this term whether it will grant certiorari in Coscia's case.

Meanwhile, the CFTC has been actively enforcing the CEA's anti-spoofing provisions in the second half of 2017. On November 22, 2017, the CFTC released its enforcement results for fiscal year (FY) 2017,¹¹ which confirms what we previously reported about the CFTC's increasingly aggressive approach to bringing enforcement actions on allegations of spoofing-related activity.¹² According to the release, in FY 2017, the CFTC brought 12 enforcement actions targeting spoofing-related activity, which account for nearly one-fourth of all the enforcement actions that the CFTC brought in this period. The CFTC release also notes that in FY 2017 the regulator pursued significant and complex litigation charging spoofing-related activity, and it predicts that the CFTC's enforcement activity will increase in the coming fiscal year partly due to a revamped cooperation policy that incentivizes corporate actors to self-report by promising reduced monetary penalties.¹³ This carrot-and-stick policy is similar to the policy the DOJ recently announced with respect to its enforcement of the U.S. Foreign Corrupt Practices Act (FCPA) (discussed below).¹⁴

The CFTC has implemented its revamped cooperation policy against foreign-based institutions on allegations of spoofing-related activity that took place overseas. On August 7, 2017, in the CFTC's first action under its new cooperation approach, the regulator issued an order that filed and settled spoofing-related charges against the Bank of Tokyo-Mitsubishi UFJ, Ltd. (BTMU) and found that from July 2009 through December 2014, a BTMU trader based in Tokyo placed multiple orders for futures contracts on the Chicago Mercantile Exchange and the Chicago Board of Trade with an intent to cancel the orders before their execution.¹⁵ According to the CFTC, BTMU promptly reported the trading activity and cooperated with the CFTC's investigation into the matter. BTMU also remediated by, among other things, overhauling its systems and controls, implementing a variety of enhancements to detect and prevent similar misconduct, revising its policies, updating its training, and implementing electronic systems to identify spoofing. The CFTC's Director of Enforcement, James McDonald, said that BTMU's self-reporting, cooperation, and remediation were key to the CFTC's decision to allow BTMU to pay only a \$600,000 civil monetary penalty in order to settle this matter.¹⁶

The CFTC also put this new carrot-and-stick policy into play in its enforcement action against Arab Global Commodities DMCC (AGC), a Dubai-based trading firm. On October 10, 2017, the CFTC issued an order filing and settling charges against AGC for allegedly spoofing copper futures

¹⁰ *Coscia v. United States*, No. 17A527 (2018).

¹¹ Press Release, U.S. Commodity Futures Trading Comm'n, "CFTC Enforcement Activity Includes Significant Anti-Manipulation and Spoofing Enforcement Actions, Integration of Market Surveillance Unit, Additional Protection of Whistleblowers, and Enhanced Enforcement," Rel. No. pr7650-17 (Nov. 22, 2017), <http://www.cftc.gov/PressRoom/PressReleases/pr7650-17>.

¹² BakerHostetler, 2016 Mid-Year Cross-Border Government Investigations and Regulatory Enforcement Review; BakerHostetler, 2016 Year-End Cross-Border Government Investigations and Regulatory Enforcement Review; and BakerHostetler, 2017 Mid-Year Cross-Border Government Investigations and Regulatory Enforcement Review.

¹³ *Id.*

¹⁴ United States Attorneys' Manual, "FCPA Corporate Enforcement Policy," Section 9-47.120, <https://www.justice.gov/criminal-fraud/file/838416/download>.

¹⁵ Press Release, U.S. Commodity Futures Trading Comm'n, "CFTC Finds That The Bank of Tokyo-Mitsubishi UFJ, Ltd. Engaged in Spoofing of Treasury Futures and Eurodollar Futures," Rel. No. pr7598-17 (Aug. 7, 2017), <http://www.cftc.gov/PressRoom/PressReleases/pr7598-17>.

¹⁶ *Id.*

Cross-Border Enforcement

contracts on the Commodity Exchange, Inc.¹⁷ The CFTC order finds that an AGC trader based in Dubai placed large orders of close to 100 contracts on one side of the book and a smaller order of close to 10 contracts on the opposite side of the book. The trader then cancelled the large order once his smaller order was filled. Once AGC discovered this practice, it terminated the trader and reported the misconduct to the CFTC. The CFTC order recognized that AGC self-reported, cooperated, and remediated, and required AGC to pay a \$300,000 civil monetary penalty and to cease and desist from violating the federal anti-spoofing laws.¹⁸

As we explained in our previous reports,¹⁹ government agencies like the CFTC often encounter issues uncovering and proving spoofing-related activity because of the sheer volume of high-frequency trades on any given trading day and the difficulties in determining the trader's intent. By rewarding companies that self-report, cooperate, and remediate, the CFTC is attempting to benefit from these companies' internal investigations and more quickly detect spoofing-related activity. Indeed, McDonald said that rewarding companies that self-report with lower-than-usual settlement amounts will be "an important part of [the CFTC's] enforcement program going forward."²⁰

Benchmark Rate Manipulation

LIBOR

As cross-border criminal and civil enforcement becomes more prevalent, law enforcement authorities in different jurisdictions are increasingly investigating the same individuals for the same alleged unlawful conduct, and sharing information. However, if regulators do not treat the information they receive from foreign regulators in accordance with the laws of the charging jurisdiction, this information sharing can give rise to opportunities for defendants to challenge the regulators' evidence against them. In this vein, U.S. prosecutors have encountered significant Fifth Amendment issues in their LIBOR (London Interbank Offered Rate) prosecutions: the DOJ's direct or indirect use of testimony of a defendant that was compelled by the U.K. FCA.

This issue was at the center of *U.S. v. Allen*.²¹ On July 19, 2017, the Second Circuit Court of Appeals reached a much-anticipated decision in *Allen*, a criminal case involving alleged LIBOR manipulation that could curtail law enforcement's ability to convict defendants after they have made potentially self-incriminating statements before foreign regulators. The court held that the Fifth Amendment to the U.S. Constitution – which protects criminal defendants' right against self-incrimination – requires that "inculpatory statements obtained overseas by foreign officials must have been made voluntarily" in order for the statements to be admissible in U.S. courts.²² Incriminating statements made under coercion by a foreign power, such as the threat of incarceration, are considered tainted statements that are inadmissible.

17 Press Release, U.S. Commodity Futures Trading Comm'n, "CFTC Finds That Proprietary Trading Firm Arab Global Commodities DMCC Engaged in Spoofing of Copper Futures Contracts," Rel. No. pr7627-17 (Oct. 10, 2017), <http://www.cftc.gov/PressRoom/PressReleases/pr7627-17>.

18 *Id.*

19 BakerHostetler, 2016 Mid-Year Cross-Border Government Investigations and Regulatory Enforcement Review; BakerHostetler, 2016 Year-End Cross-Border Government Investigations and Regulatory Enforcement Review; and BakerHostetler, 2017 Mid-Year Cross-Border Government Investigations and Regulatory Enforcement Review.

20 Press Release, U.S. Commodity Futures Trading Comm'n, "CFTC Finds That The Bank of Tokyo-Mitsubishi UFJ, Ltd. Engaged in Spoofing of Treasury Futures and Eurodollar Futures," No. pr7598-17 (Aug. 7, 2017), <http://www.cftc.gov/PressRoom/PressReleases/pr7598-17>.

21 *United States v. Allen*, 864 F.3d 63, 80 (2d. Cir. 2017).

22 *Id.*

Cross-Border Enforcement

The defendants, Anthony Allen and Anthony Conti, were former cash traders in the London office of the Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A. (Rabobank).²³ Rabobank was one of 16 banks that submitted its estimated rate at which it projected it could borrow from other banks over a period of time, ranging from a day to a year, in U.S. dollars and Japanese yen.²⁴ The British Bankers' Association, now replaced by the Intercontinental Exchange Benchmark Administration Limited,²⁵ would then use these daily submissions to calculate the LIBOR fixed rate for that day.²⁶ Between 1998 and 2009, the defendants were Rabobank's designated LIBOR submitters for the dollar.²⁷ Allen was also responsible for supervising another cash trader, Paul Robson, who was the primary LIBOR submitter for the yen.²⁸ U.S. prosecutors in the Southern District of New York charged the defendants with multiple counts related to LIBOR manipulation on the theory that they made LIBOR submissions based on the requests of derivative traders at Rabobank instead of on good-faith projections of the borrowing rates.²⁹

Prior to the defendants' indictment in the U.S., the defendants and Robson were interviewed by the FCA as part of its investigation into the same alleged LIBOR manipulation scheme.³⁰ Under U.K. law, the defendants were required to participate in these interviews or potentially face criminal sanctions.³¹ The FCA initiated an enforcement action against Robson and, in the course of disclosure in that proceeding, provided him with copies of the defendants' interview transcripts as part of the FCA's discovery obligations.³² Robson read, annotated, and took notes on the defendants' interviews before he was interviewed by the DOJ, and he subsequently agreed to be a cooperating witness for the DOJ.³³

At trial, the government entered evidence of requests made by derivative traders to influence the LIBOR submissions in favor of their trades.³⁴ The defendants did not deny that these requests were made or that their alleged conduct, if proven, was illegal, but they argued instead that they were not influenced by these requests.³⁵ The government's main witness was Robson, who testified at trial that he had personally witnessed the defendants discussing how to improperly influence LIBOR and that Allen had directed him and other LIBOR submitters "to account for trading positions when setting LIBOR."³⁶ According to the Second Circuit, Robson's testimony was central to the defendants' indictment and ultimate convictions.³⁷

23 *Id.* at 67.

24 *Id.* at 71.

25 *Id.* at 70, n. 12.

26 *Id.* at 72.

27 *Id.*

28 *Id.* Allen sometimes submitted LIBOR for the yen when Robson was not around.

29 *Id.* at 73.

30 *Id.* at 76.

31 *Id.* at 67-68.

32 *Id.* at 77.

33 *Id.*

34 *Id.* at 73-74.

35 *Id.* at 74.

36 *Id.* at 73-76, 97.

37 *Id.* at 97-98.

Cross-Border Enforcement

The defendants argued at trial, and then again on appeal, that Robson's statements to an FBI agent and testimony at trial were tainted by his exposure to the compelled, self-incriminating statements that they made in those FCA interviews.³⁸ They requested their indictment be dismissed because the FBI agent who testified at the grand jury provided material information that came exclusively from Robson: that Allen directed Robson to manipulate LIBOR, and that Conti considered the benefits to himself and other traders when submitting LIBOR.³⁹ Alternatively, the defendants sought to suppress Robson's testimony at trial.⁴⁰ The district court rejected the defendants' arguments, and the defendants were ultimately convicted.⁴¹

The Fifth Amendment right against self-incrimination is violated when compelled testimony and "evidence derived directly and indirectly therefrom" are used at trial.⁴² The Second Circuit held that this remains true even if the defendants were compelled by a foreign official.⁴³ In order for the prosecution to use the evidence contained in the compelled testimony, Supreme Court precedent in *United States v. Kastigar* requires that the government overcome a heavy burden of proving by a preponderance of the evidence that "all of the evidence it proposes to use was derived from legitimate *independent* sources."⁴⁴ Furthermore, where the government wishes to present evidence through a potentially tainted witness, the government must also prove that the witness's exposure to the defendant's compelled testimony "did not shape, alter, or affect the information that he provided and that the [g]overnment used."⁴⁵ The Second Circuit suggested that the "most effective way" for the government to show that Robson was not tainted was to compare his statements before and after he read the defendants' FCA interviews.⁴⁶ The Second Circuit also looked for Robson to state at the *Kastigar* hearing that he could "segregate the effects of his exposure" to the compelled statements.⁴⁷

After reviewing Robson's testimony at the hearing, the court concluded that the government did not meet its burden, because certain details in the FCA interviews were also in Robson's statements only *after* he had read them. The court also held that Robson's "self-serving denials" that his testimony was not tainted was insufficient to meet the government's burden.⁴⁸ The court remarked that the government never asked Robson whether his memory was refreshed by the FCA interviews or to swear under oath that his memory had not been refreshed.⁴⁹

After determining that there was a Fifth Amendment violation, the Second Circuit reviewed whether the lower court's error in permitting Robson to testify was an error that was harmless beyond

38 *Id.* at 80.

39 *Id.* at 79, 100 (citing *United States v. Allen*, 160 F.Supp. 684, 697 (S.D.N.Y. 2016)).

40 *Id.* at 79.

41 *Id.* at 79, 100. *See also United States v. Allen*, 160 F.Supp. 3d 684.

42 *Id.* at 81 (quoting *In re Terrorist Bombings*, 552 F.3d 177, 199 (2d Cir. 2008)).

43 *Id.* at 82.

44 *Id.* at 91 (quoting *United States v. Kastigar*, 406 U.S. 441, 461-62 (1972) (emphasis added)).

45 *Id.* at 93.

46 *Id.*

47 *Id.* at 96.

48 *Id.* at 94.

49 *Id.*

Cross-Border Enforcement

a reasonable doubt.⁵⁰ Since Robson was the sole source of some of the evidence needed for the government to prove its case, the Second Circuit deemed the error not harmless beyond a reasonable doubt, reversed the defendants' convictions, and dismissed their indictment.⁵¹

In its petition for rehearing *en banc*,⁵² the DOJ argued that self-incriminating statements obtained overseas should be admissible because otherwise, foreign governments hostile to U.S. prosecutions might be encouraged to publicly reveal coerced statements in order to taint proceedings in the U.S. The DOJ also claimed that it "has already elected to forgo worthy cross-border investigations that, absent the panel's decision, it would have vigorously pursued."⁵³ The DOJ identified 36 countries, including Switzerland, Singapore, and Brazil, which use coercive measures to compel statements, and noted that cross-border investigations in those countries could be impeded as a result of the *Allen* opinion.⁵⁴ The Second Circuit was not persuaded by the DOJ's arguments and declined to reconsider its opinion, without dissent.⁵⁵

The Second Circuit's opinion has inspired other defendants to challenge the introduction of statements into their U.S. proceedings that were compelled by foreign authorities. In the Southern District of New York criminal action *United States v. Connolly*,⁵⁶ one of the defendants, Gavin Black, also accused of LIBOR manipulation, moved for a *Kastigar* hearing and challenged his indictment on the basis that the DOJ used prior testimony that he was compelled to give in a proceeding before the FCA to secure it. On October 19, 2017, the district court granted Black's motion and held that the indictment against Black must be dismissed if the DOJ's presentation to the grand jury was directly or indirectly derived from Black's compelled testimony to the FCA, and if the DOJ's use of the compelled testimony was not harmless beyond a reasonable doubt.⁵⁷ The court stated that the government ran the risk of having to subject itself to a *Kastigar* hearing by indicting someone who provided compelled testimony to the FCA. At the outset, the court ruled that it was of no moment whether Black's compelled testimony consisted of only exculpatory information. The court reasoned that the government could argue that even exculpatory testimony is incriminating by attempting to contradict such testimony with other evidence.

The court noted that the government bears "the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources."⁵⁸ The court held that the government's unsworn statement that no witness or member of the prosecution team was exposed to Black's compelled testimony is insufficient. Government prosecutors and agents must testify under oath that the witnesses who testified at the grand jury proceeding did not have access to Black's compelled testimony, and that Black's testimony was not used to prepare any of those witnesses before their testimony. The special agent who testified at the grand jury to a summary of various witness interviews must also eliminate the possibility that the grand jury was informed of Black's compelled statements through his testimony. The government's cooperators

50 *Id.* at 97.

51 *Id.* at 98-100.

52 *U.S. v. Allen*, No. 16-939 (2d. Cir. Oct. 2, 2017) [Dkt. No. 136].

53 *Id.* at 14.

54 *Id.*

55 *U.S. v. Allen*, No. 16-939 (2d. Cir. Nov. 9, 2017) [Dkt. No. 139].

56 No. 1:16-CR-00370-CM-2 (S.D.N.Y. Oct. 19, 2017).

57 *Id.* at ECF No. 145.

58 *Id.*

Cross-Border Enforcement

must affirm under oath they did not have access to Black's compelled testimony before providing statements to the government. The government also has to produce a FCA attorney who attended both Black's compelled testimony and a proffer session by one of the government's cooperating witnesses for testimony under oath. The FCA attorney will have to identify a source other than Black's compelled testimony for the content of the questions he asked the cooperator at the proffer session. Black's *Kastigar* hearing is scheduled for April 24, 2018.

The Second Circuit in *Allen* and the district court in *Connolly* adopted the view that the Fifth Amendment bars the use of tainted statements not only at trial but also in court proceedings more generally.⁵⁹ However, this view is not without controversy. The Supreme Court recently granted certiorari in *City of Hays, Kansas v. Vogt* to decide a circuit split between the Third, Fourth, Sixth, and Eighth circuits, which hold that the Fifth Amendment bars the use of tainted statements only during trial, and the Second, Seventh, Ninth, and Tenth circuits, which bar the use of tainted statements during pretrial proceedings as well.⁶⁰ In granting certiorari, the Supreme Court will be reviewing the question of whether the government can use a compelled inculpatory statement in a probable cause hearing, a decision which could have ramifications on the evidence the U.S. is permitted to put forth during the pretrial phases in its cross-border prosecutions.⁶¹

Despite these developments, the U.S. LIBOR cases continue. In August 2017, U.S. prosecutors charged two Société Générale SA executives with LIBOR manipulation on allegations that they submitted false rate information in an attempt to make it appear the bank was able to borrow at lower interest rates.⁶² The charges involve French nationals Danielle Sindzingre, co-head of Société Générale SA's fixed income, credit, and currencies, and Muriel Bescond, global head of short-term derivatives.⁶³ Prosecutors charged both of them with transmitting false market reports concerning commodities and conspiracy. According to the charges, between May 2010 and October 2011, Sindzingre and Bescond knowingly instructed their subordinates at the bank's Paris treasury desk to submit false LIBOR rates in an attempt to make it appear the bank could borrow money at lower interest rates than it actually could.⁶⁴ The goal, according to prosecutors, was to avoid the reputational harm Société Générale SA would suffer if its true borrowing costs were made public.⁶⁵ Prosecutors claim that the false information submitted by Sindzingre and Bescond altered the final U.S. dollar LIBOR calculation for the day and caused over \$170 million in harm to global financial markets.⁶⁶ As of right now, Sindzingre and Bescond are believed to be outside the United States.⁶⁷

59 *Allen*, 864 F.3d at 80; *Connolly*, ECF No. 145.

60 Jody Godoy, DOJ Says Allen Ruling Already Chilling Int'l Enforcement, Law360 (Oct. 4, 2017), <https://www.law360.com/articles/971147/doj-says-allen-ruling-already-chilling-int-l-enforcement>.

61 *Vogt v. City of Hays, Kansas*, 844 F.3d 1235 (10th Cir. 2017), cert. granted, 138 S.Ct. 55 (Sept. 28, 2017) (No. 16-1495); see Jody Gody, Justices to Review Compelled Statements' Pretrial Use, Law360 (Sept. 28, 2017), <https://www.law360.com/articles/968992/justices-to-review-compelled-statements-pretrial-use>.

62 Press Release, U.S. Dep't of Justice, "Two International Bank Managers Charged In Interest Rate Manipulation Scheme" (Aug. 24, 2017), <https://www.justice.gov/usao-edny/pr/two-international-bank-managers-charged-interest-rate-manipulation-scheme>; see also Stewart Bishop, SocGen Execs Hit With Libor Rigging Charges, Law360 (Aug. 24, 2017), <https://www.law360.com/whitecollar/articles/957604/>.

63 *Id.*

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.*

Cross-Border Enforcement

The second half of 2017 saw developments in U.K. LIBOR enforcement efforts as well, specifically in connection with the U.K.'s proceedings against convicted LIBOR manipulator Tom Hayes. At the beginning of November 2017, a U.K. tribunal lifted a ban implemented by the FCA that was keeping former UBS trader Hayes from working in the financial services industry pending the appeal of his criminal conviction for manipulating the yen version of the LIBOR.⁶⁸ The U.K.'s Upper Tribunal ruled that the FCA's lifetime ban could not go into effect while Hayes' appeal is pending.⁶⁹ The ruling is notable because it is the first time a U.K. court granted an application for a stay in FCA prohibition proceedings where the individual affected by the prohibition has been sentenced for a criminal offense.⁷⁰

It appears that the Upper Tribunal was influenced by the possibility that Hayes' appeal may succeed. Before his trial, Hayes approached the SFO about making a deal that would prevent a parallel proceeding against him in the U.S.⁷¹ He pulled out of the proposed deal, however, and was later prosecuted by the SFO.⁷² As a result, Hayes was convicted and received a 14-year sentence, while the brokers he was accused of conspiring with were acquitted.⁷³ Although the U.K. Court of Appeal reduced Hayes' sentence to 11 years, it upheld his conviction in 2015.⁷⁴

In January of this year, however, the U.K. Criminal Case Review Commission agreed to consider Hayes' petition for a new appeal based on alleged flaws in the expert evidence the SFO used in the case.⁷⁵ Given the petition, the Upper Tribunal judge determined that the FCA's ban should be put on hold, citing the fact that the filing was a substantive application and would likely be considered seriously.⁷⁶ The judge also noted that there was little risk Hayes would reenter the financial services industry in the interim, because he is still serving out his prison sentence.⁷⁷

Forex

Similar to the LIBOR enforcement actions, alleged manipulation of the foreign exchange (forex) markets has also been at the center of cross-border enforcement actions. On September 29, 2017, the U.S. Federal Reserve Board of Governors (Federal Reserve) announced that it fined HSBC over \$175 million for failing to properly oversee its forex trading business.⁷⁸ The Federal Reserve issued a consent order to cease and desist, which assesses the fine and requires HSBC to implement a revised compliance risk management program and review its internal controls.⁷⁹ According to the Federal Reserve, HSBC was fined because there were deficiencies in HSBC's oversight and internal controls over forex traders who buy and sell U.S. dollars and foreign currencies for the

68 Melissa Lipman, Ex-UBS Trader Hayes Wins Reprieve on FCA Ban Amid Appeal, Law360 (Nov. 8, 2017), <https://www.law360.com/articles/983252/ex-ubs-trader-hayes-wins-reprieve-on-fca-ban-amid-appeal>.

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.*

76 *Id.*

77 *Id.*

78 Press Release, Fed. Reserve Bd., "Federal Reserve Board fines HSBC Holdings plc and HSBC North America Holdings Inc. \$175 million for unsafe and unsound practices in FX trading" (Sept. 29, 2017), <https://www.federalreserve.gov/newsevents/pressreleases/enforcement20170929a.htm>; see also Matthew Periman, Fed Fines HSBC \$175 Million Over Forex Practices, Law360 (Sept. 29, 2017), <https://www.law360.com/securities/articles/969662/>.

79 *Id.*

Cross-Border Enforcement

firm's own accounts and for customers.⁸⁰ HSBC failed to detect and address traders who were misusing confidential customer information and using electronic chat rooms to communicate with competitors about their trading positions.⁸¹

In October 2017, former HSBC trader Stuart Scott announced that he will appeal a London Judge's ruling that requires him to face charges in New York over his role in an alleged a front-running scheme designed to defraud an HSBC client.⁸² Those charges stem from accusations that Scott, along with HSBC executive Mark Johnson, defrauded HSBC client Cairn Energy PLC by using non-public information to trade ahead of a \$3.5 billion foreign currency exchange it had planned.⁸³ According to U.S. prosecutors, Scott's and Johnson's actions netted approximately \$8 million in ill-gotten profits for the bank.⁸⁴ On October 23, 2017, Johnson was convicted of nine criminal counts related to these allegations in the Southern District of New York.⁸⁵

On November 13, 2017, the New York State Department of Financial Services (NYS DFS) announced a settlement with Credit Suisse AG related to allegations that the bank failed to implement effective controls over its forex business through a foreign bank branch in New York.⁸⁶ Pursuant to the settlement, Credit Suisse has agreed to pay a \$135 million fine, improve its internal controls and compliance program, and retain an outside consultant.⁸⁷ According to the settlement order, the NYS DFS found that Credit Suisse's forex traders used electronic chat rooms to share confidential information.⁸⁸ The traders allegedly used codenames such as "Satan" and "Tanktop" to refer to some of the bank's customers.⁸⁹ The sharing of confidential information allegedly led to coordinated trading, exchange rate manipulation, and wider bid-ask spreads for Credit Suisse forex customers. It allegedly may have also led to the front-running of customer orders.⁹⁰

Aside from the enforcement actions, in May 2017, the central bank Foreign Exchange Working Group and the private sector Market Participants Group released a voluntary global code of conduct which establishes best practices for wholesale foreign exchange markets.⁹¹ The voluntary code, which was designed to prevent misconduct in the forex markets, contains a provision that allows market makers to back out of a trade at the last minute (a period known as the "last look window"), enabling traders to advertise a price but reject the trade even if the client wishes to trade at that price.⁹² In September 2017, the Bank of England signaled that it may be necessary

80 *Id.*

81 *Id.*

82 Pete Brush, Ex-HSBC Trader Rips Ruling Forcing Him to Stand Trial in US, Law360 (Sept. 29, 2017), <https://www.law360.com/securities/articles/969662/>.

83 *Id.*

84 *Id.*

85 Press Release, U.S. Dep't of Justice, "Former Global Head Of HSBC's Foreign Exchange Cash-Trading Found Guilty Of Orchestrating Multimillion-Dollar Front-Running Scheme" (Oct. 23, 2017), <https://www.justice.gov/usao-edny/pr/former-global-head-hsbc-s-foreign-exchange-cash-trading-found-guilty-orchestrating>.

86 Press Release, NYS Dep't of Fin. Serv's, "DFS Fines Credit Suisse AG \$135 Million For Unlawful, Unsafe and Unsound Conduct In Its Foreign Exchange Trading Business" (Nov. 13, 2017), <http://www.dfs.ny.gov/about/press/pr1711131.htm>.

87 Jon Hill, NY Hits Credit Suisse with \$135M Fine Over Forex Business, Law360 (Nov 13, 2017), <https://www.law360.com/whitecollar/articles/984649/>.

88 *Id.*

89 *Id.*

90 *Id.*

91 Tom Zanki, Global Regulators Set FX Market Conduct Code After Scandals, Law360 (May 25, 2017), <https://www.law360.com/articles/927737>.

92 William Shaw, Global Forex Rules May Need Tweaking, BOE Official Says, Law360 (Sept. 12, 2017), <https://www.law360.com/articles/962877/global-forex-rules-may-need-tweaking-boe-official-says>.

Cross-Border Enforcement

to change the voluntary code due to concern that this provision has the potential for misuse.⁹³ While the code provides guidance designed to minimize the risk of such misconduct, there is now debate as to whether the risk can be reduced further by substantive amendment.⁹⁴

Other Alleged Benchmark Rate Manipulation

In addition to LIBOR and forex, regulators have also been targeting alleged manipulations of other benchmark rates, with mixed success. In November 2017, the European Commission (EC) suffered a setback in its enforcement efforts surrounding manipulation of Japanese yen interest rate derivatives, when a European Union (EU) court annulled parts of the EC's decision to fine a U.K. broker-dealer, ICAP PLC (ICAP), nearly €15 million (\$19 million).⁹⁵ ICAP PLC was accused of being involved with cartels linked to the manipulation.⁹⁶ While the General Court of the EU found that the EC was within its right to determine ICAP's participation in the manipulation restricted competition, the court noted that the EC used evidence that was insufficient to prove a number of the allegations.⁹⁷ In addition, the General Court challenged the methodology used by the EC to calculate the penalty owed by IPAC.⁹⁸ The EC has two months to decide whether to bring an appeal to the Court of Justice against the General Court's decision.⁹⁹

Similarly, on November 14, 2017, the CFTC announced a settlement with Statoil ASA, a Norwegian energy company, regarding charges that it tried to manipulate the Argus Far East Index in order to boost the value of financial positions held by the company.¹⁰⁰ The Argus Far East Index is a benchmark index for propane gas prices.¹⁰¹ According to the CFTC's order, Statoil used targeted purchases of propane in October and November 2011 in the Far East to create the illusion that propane was in high demand.¹⁰² This artificially lifted the price of propane and pushed the Argus Far East Index higher, which benefited Statoil financially.¹⁰³ According to the CFTC, Statoil engaged in this behavior because it was trying to offset substantial losses experienced by the company's gas liquids unit throughout the first half of 2011.¹⁰⁴ Pursuant to the CFTC's order, Statoil is required to pay a monetary penalty and refrain from further violations of federal law related to the manipulation of financial indexes.¹⁰⁵

93 *Id.*

94 *Id.*

95 2017 E.C.R. 795, ¶ 299; Paige Long, EU Court Rebukes Watchdog Over €15M ICAP Libor Rig Fine, Law360 (Nov. 10, 2017), https://www.law360.com/securities/articles/983217/eu-court-rebukes-watchdog-over-15m-icap-libor-rig-fine?nl_pk=40be814d-d483-4682-834e-5ca3db600dde&utm_source=newsletter&utm_medium=email&utm_campaign=securities.

96 2017 E.C.R. 795, ¶ 17.

97 *Id.* ¶ 294

98 *Id.* ¶¶ 256-69

99 Paige Long, EU Court Rebukes Watchdog Over €15M ICAP Libor Rig Fine, Law360 (Nov. 10, 2017), https://www.law360.com/securities/articles/983217/eu-court-rebukes-watchdog-over-15m-icap-libor-rig-fine?nl_pk=40be814d-d483-4682-834e-5ca3db600dde&utm_source=newsletter&utm_medium=email&utm_campaign=securities.

100 Press Release, U.S. Commodity Futures Trading Comm'n, "CFTC Finds Statoil ASA Attempted to Manipulate the Argus Far East Index, a Propane Benchmark, to Benefit Statoil's NYMEX-cleared Swaps Position," Rel. No. 7643-17 (Nov. 14, 2017), <http://www.cftc.gov/PressRoom/PressReleases/pr7643-17>.

101 *Id.*; see also Dunstan Prial, CFTC Fines Norwegian Energy Co. \$4M for Index Rigging, Law360 (Nov. 14, 2017), https://www.law360.com/securities/articles/984986/cftc-fines-norwegian-energy-co-4m-for-index-rigging?nl_pk=40be814d-d483-4682-834e-5ca3db600dde&utm_source=newsletter&utm_medium=email&utm_campaign=securities.

102 Order, In the Matter of Statoil, U.S. Commodity Futures Trading Comm'n, CFTC Docket. No. 18-04 (Nov. 14, 2017), <http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfstatoilorder111417.pdf>.

103 *Id.*

104 *Id.*

105 *Id.*

Cross-Border Enforcement Accounting Fraud

DOJ Defeats Ex-Autonomy CFO's Jurisdictional Challenge in HP Accounting Fraud Case

As discussed in our *2016 Year-End Cross-Border Report*, the DOJ has continued to focus alleged accounting fraud – whether against entities or individuals located in the U.S. or overseas – for conduct that it perceives as affecting U.S. interests. In November 2016, a federal grand jury indicted U.K. citizen Sushovan Hussain, CFO of Autonomy Corporation plc (Autonomy), on felony wire fraud charges stemming from the Hewlett-Packard Co. (HP) takeover of Autonomy that ended in HP writing off \$8.8 billion.¹⁰⁶ The indictment 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.¹⁰⁷ The DOJ filed a superseding indictment in May 2017, adding a 16th count of securities fraud.¹⁰⁸

The DOJ notched an important victory in October 2017, when District Judge Charles R. Breyer denied a motion to dismiss the charges filed by Hussain.¹⁰⁹ Hussain had argued that the case had no business in a U.S. court because the relevant events took place outside the U.S. and that the DOJ therefore exceeded its jurisdictional reach in filing the charges.¹¹⁰ The DOJ countered that the case is properly before a U.S. court because Hussain visited the U.S. 20 times in connection with his alleged scheme to defraud, and because Autonomy derives substantial revenue from business in the U.S. As of 2010, about 68 percent of Autonomy's reported revenues came from the U.S. and other countries in the Americas.¹¹¹ The district court, siding with the DOJ, held that the majority of the counts required only domestic application of the wire fraud statutes because they were based on alleged use of wires in the U.S.¹¹² Following the Supreme Court's decision in *Morrison v. National Australian Bank Ltd.*, which outlined a two-pronged test for determining whether a particular statute's application would require impermissible extraterritorial enforcement,¹¹³ the court held that so long as the government identifies a domestic wire transmission, the statute is not improperly extraterritorial in its application.¹¹⁴ This decision in the DOJ's prosecution against Hussain is important because it potentially expands the DOJ's ability to target alleged accounting fraud that takes place overseas, given that the mere allegation of a wire transmission in the U.S. was sufficient to withstand a challenge based on extraterritoriality.

106 Press Release, U.S. Dep't of Justice, "Former Autonomy CFO Charged with Wire Fraud" (Nov. 14, 2016), <https://www.justice.gov/opa/pr/former-autonomy-cfo-charged-wire-fraud>; David Goldman, HP Takes \$8.8 Billion Writedown on Autonomy (Nov. 20, 2012), <http://money.cnn.com/2012/11/20/technology/enterprise/hp-earnings/>.

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

108 Indictment, *United States v. Hussain*, 3:16-cr-00462 (N.D. Cal. May 4, 2017) (ECF 52).

109 Order, *United States v. Hussain*, 3:16-cr-00462 (N.D. Cal. Oct. 27, 2017) (ECF 129), <https://www.almcms.com/contrib/content/uploads/documents/403/3997/BreyerHussainRuling.pdf>.

110 *Id.* at *5; Bayles Cara, Ex-Autonomy CFO Bids To Ditch Fraud Charges Over HP, Law360 (Oct. 6, 2017), https://www.law360.com/securities/articles/972431/ex-autonomy-cfo-bids-to-ditch-fraud-charges-over-hp-deal?nl_pk=40be814d-d483-4682-834e-5ca3db600dde&utm_source=newsletter&utm_medium=email&utm_campaign=securities.

111 Order, Hussain, 3:16-cr-00462 at *9; Bayles Cara, Ex-Autonomy CFO Bids To Ditch Fraud Charges Over HP, Law360 (Oct. 6, 2017), https://www.law360.com/securities/articles/972431/ex-autonomy-cfo-bids-to-ditch-fraud-charges-over-hp-deal?nl_pk=40be814d-d483-4682-834e-5ca3db600dde&utm_source=newsletter&utm_medium=email&utm_campaign=securities.

112 Order, *Hussain*, 3:16-cr-00462 at *9.

113 *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 249 (2010) (determining that section 10(b) of the Exchange Act applies only to "transactions in securities listed on domestic exchanges, and domestic transactions in other [*i.e.*, non-U.S.-listed] securities").

114 Order, *Hussain*, 3:16-cr-00462 at *9.

Cross-Border Enforcement**Mining Conglomerate Rio Tinto Faces Civil Charges in the U.S. and U.K. Over Mozambique Coal Mining Project**

On the civil side, the SEC has continued its targeting of overseas actors for alleged accounting improprieties that it claims could affect U.S. stakeholders. In October 2017, the SEC filed securities and accounting fraud claims against London- and Australia-based mining giant Rio Tinto Plc (Rio Tinto), an affiliate, and top corporate executives over an alleged scheme to inflate the value of a Mozambique coal business acquired for \$3.7 billion and sold a few years later for \$50 million.¹¹⁵ The SEC's complaint, filed in the U.S. District Court for the Southern District of New York, alleges that Rio Tinto shares are traded on the New York Stock Exchange and that the company made use of interstate commerce in the U.S., bringing it within U.S. jurisdiction.¹¹⁶ The charges stem from the company's alleged failure to follow accounting standards and company policies to accurately value and record its assets, causing it to mislead investors about the true value of its coal assets, which had rapidly declined due to numerous project setbacks.¹¹⁷ The SEC seeks permanent injunctions, disgorgement of unlawful profits, and civil penalties, and also bars against the company's top executives from serving as public company officers or directors.

The SEC's filing comes on the same day the U.K.'s FCA announced that it had levied a £27 million fine against Rio Tinto for breaches of parallel disclosure and accounting rules stemming from the mining valuation matter.¹¹⁸

SEC Sues Mexican Housing Company and Former Officials Over Alleged Scheme to Misrepresent Company's Financial Condition

Also in October 2017, the SEC brought financial fraud charges against four former officers of Mexican home construction firm Desarrolladora Homex SAB de CV (Homex), stemming from their participation in an alleged scheme to overinflate by 317 percent the number of homes sold during a three-year period, resulting in the company overstating its revenue by 355 percent (approximately \$3.3 billion).¹¹⁹ The SEC claims that the defendants, who are all Mexican nationals, manually entered revenue and expense figures in spreadsheets maintained outside the firm's accounting system that fraudulently misrepresented the company's financial condition, such as by recording revenue for homes that were never built.¹²⁰ The SEC asserts jurisdiction over the defendants based on their use of means of interstate commerce in the U.S. and on the fact that the company's securities were traded on the New York Stock Exchange.¹²¹

115 Press Release, Secs. & Exch. Comm'n, "Rio Tinto, Former Top Executives Charged with Fraud," Rel. No. 2017-196 (Oct. 17, 2017), <https://www.sec.gov/news/press-release/2017-196>.

116 Compl., *Secs. & Exch. Comm'n v. Rio Tinto PLC, et al.*, 17-cv-7994 ¶ 18 (S.D.N.Y. Oct. 17, 2017) [ECF 1].

117 Press Release, Secs. & Exch. Comm'n, "Rio Tinto, Former Top Executives Charged with Fraud," Rel. No. 2017-96 (Oct. 17, 2017), <https://www.sec.gov/news/press-release/2017-196>.

118 Final Notice, Financial Conduct Authority (Oct. 17, 2017), <https://www.fca.org.uk/publication/final-notices/rio-tinto-plc-2017.pdf>.

119 Compl., *Secs. & Exch. Comm'n v. de Nicolas Gutiérrez, et al.*, 1:17-cv-2086, at *1 (S.D. Cal. Oct. 11, 2017) (ECF 1), <https://www.sec.gov/litigation/complaints/2017/comp23964.pdf>.

120 *Id.* at *2.

121 *Id.* at *3.

Cross-Border Enforcement

The charges piggyback on an agreement reached in March 2017, wherein Homex consented to the entry of a final judgment permanently enjoining it from violating the antifraud, reporting, and books and records provisions of the federal securities laws, and it also agreed to be prohibited from offering its securities on U.S. exchanges for at least five years.¹²² Notably, the SEC utilized satellite imagery to bolster its case, capturing images of Homex construction sites allegedly showing that homes had not been built despite Homex's representations to the contrary, signaling that the SEC may be getting more creative in its global enforcement efforts.¹²³

Trade Sanctions/Export Controls

In the second half of 2017, the U.S. Treasury's Office of Foreign Assets Control (OFAC) brought significant actions against companies and individuals for conduct originating outside U.S. borders – marking what could be the beginning of a new, and more aggressive, government enforcement strategy against trade sanction violations.

OFAC Sanctions Non-U.S. Financial Entity – CSE Global Limited and CSE TransTel Pte. Ltd.

OFAC began the second half of 2017 by penalizing a non-U.S., nonfinancial company for allegedly causing sanctions violations by initiating U.S. dollar payments involving a sanctioned country – an enforcement action that OFAC seldom, if ever, pursues.¹²⁴ Specifically, on July 27, 2017, OFAC reached an approximately \$12 million agreement with Singapore-based companies CSE Global Limited and CSE TransTel Pte. Ltd. (TransTel), settling potential civil liability for apparent violations of the International Emergency Economic Powers Act (IEEPA) and the Iranian Transactions and Sanctions Regulations (ITSR).¹²⁵ According to the settlement agreement, between August 25, 2010, and November 5, 2011, TransTel entered into contracts with multiple Iranian companies to deliver and install telecommunications equipment for several energy projects in and near Iran.¹²⁶ From 2012 to 2013, TransTel transferred over \$11 million via wire through the U.S. banking system relating to conduct carried out by third-party vendors in Iran. None of those transactions, however, bore any indication that they concerned Iran or an Iranian entity, but were in fact related to the provision or supply of goods or services to Iran.¹²⁷ Thus, because TransTel initiated U.S. dollar payments involving a sanctioned country, OFAC was able to gain jurisdiction over its conduct.

OFAC determined that TransTel's senior management had actual knowledge of the conduct and willfully and recklessly violated U.S. economic sanctions, conveying significant economic benefits to vendors in Iran in the process.¹²⁸ Although TransTel and CSE Global faced a maximum civil monetary penalty of approximately \$38 million under the IEEPA, OFAC settled on a \$12 million penalty due to several mitigating factors, such as TransTel's and CSE Global's cooperation with the investigation and other remedial actions the companies took to ensure compliance with

122 Press Release, Secs. & Exch. Comm'n, "SEC Charges Mexico-Based Homebuilder in \$3.3 Billion Accounting Fraud," Rel. No. 2017-60 (Mar. 3, 2017), <https://www.sec.gov/news/pressrelease/2017-60.html>.

123 *Id.*

124 Office of Foreign Assets Control, Enforcement Information for July 27, 2017, https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20170727_transtel.pdf.

125 Press Release, U.S. Dep't of the Treasury, "Settlement Agreement between the U.S. Department of the Treasury's Office of Foreign Assets Control and CSE Global Limited and CSE TransTel Pte. Ltd." (July 27, 2017), <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20170727.aspx>.

126 U.S. Dep't of the Treasury, Settlement Agreement [between CSE Global and TransTel and OFAC], at *2 (July 27, 2017), https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/transtel_settlement.pdf.

127 *Id.*

128 *Id.*

Cross-Border Enforcement

the settlement.¹²⁹ This action is significant because OFAC rarely, if ever, penalizes a non-U.S., nonfinancial company for “causing” sanctions violations by initiating U.S. dollar payments involving a sanctioned country, and therefore it could mark the beginning of a new chapter of expanded OFAC enforcement against non-U.S., nonfinancial companies.

Conduct in OFAC Sanctioned Jurisdiction Lead to Criminal Charges – *United States v. Atilla*

It is well-known that violations of U.S. sanctions regulations will result in OFAC administering civil monetary penalties. However, OFAC is not the only U.S. government regulator monitoring cross-border transactions, as the DOJ also brings criminal charges for willful violations of U.S. sanctions, even if a substantial part of the conduct took place outside the U.S.

In the second half of 2017, the DOJ secured a criminal conviction of Turkish banker Mehmet Hakan Atilla stemming from violations of the IEEPA and the ITSR. Atilla faced six total criminal charges: four conspiracy counts, a bank fraud count, and a money-laundering count.¹³⁰ Atilla was convicted on five of the six counts, including bank fraud and conspiracy to violate U.S. sanctions law.¹³¹ Atilla was found not guilty of money laundering.¹³²

Atilla was indicted with a number of other co-conspirators, including Reza Zarrab, a Turkish and Iranian gold trader.¹³³ The defendants were accused of participating in a scheme to transfer funds on behalf of the Iranian government and Iranian businesses entities through a network of international companies located in Iran, Turkey, and elsewhere, effectively concealing the origins of the funds from banks in the U.S.¹³⁴

Zarrab pleaded guilty in October of 2017 to all seven counts against him, including conspiracy to violate the U.S. sanctions against Iran.¹³⁵ The remaining co-conspirators remain at large. According to prosecutors, one of the co-conspirators is former Turkish economy minister Zafer Caglayan.¹³⁶

129 Roberto Gonzalez, et al., OFAC's Settlement with CSE Global Breaks New Ground, Law360 (July 31, 2017), <https://www.law360.com/articles/949483/ofac-s-settlement-with-cse-global-breaks-new-ground>.

130 Pete Brush, Turkish Banker Convicted of Scheming to Aid Iran, Law360 (Jan. 3, 2018), <https://www.law360.com/articles/995480/turkish-banker-convicted-of-scheming-to-aid-iran>.

131 *Id.*

132 *Id.*

133 Press Release, U.S. Dep't of Justice, “Former Turkish Minister Of The Economy, Former General Manager Of Turkish Government-Owned Bank, And Two Other Individuals Charged With Conspiring To Evade U.S. Sanctions Against Iran And Other Offenses” (Sept. 6, 2017), <https://www.justice.gov/usao-sdny/pr/former-turkish-minister-economy-former-general-manager-turkish-government-owned-bank>; *see also* Turkish Banker Wants Out of Iran Sanctions Case or Own Trial, Law360 (Oct. 10, 2017), https://www.law360.com/whitecollar/articles/973067/turkish-banker-wants-out-of-iran-sanctions-case-or-own-trial?nl_pk=82503858-21e4-4460-8f7f-81f7947f2c5b&utm_source=newsletter&utm_medium=email&utm_campaign=whitecollar.

134 Press Release, U.S. Dep't of Justice, “Turkish National Arrested for Conspiring to Evade U.S. Sanctions Against Iran, Money Laundering and Bank Fraud” (Mar. 21, 2016), <https://www.justice.gov/opa/pr/turkish-national-arrested-conspiring-evade-us-sanctions-against-iran-money-laundering-and>.

135 Benjamin Weiser, Reza Zarrab, Turk at Center of Iran Sanctions Case, Is Helping Prosecution, New York Times (Nov. 28, 2017), <https://www.nytimes.com/2017/11/28/world/europe/reza-zarrab-turkey-iran.html>.

136 *Id.*

Cross-Border Enforcement

As part of his plea, Zarrab agreed to cooperate with U.S. officials and testify at Atilla's trial.¹³⁷ According to Zarrab's testimony, Zarrab was the mastermind behind the scheme designed to allow Iran to benefit from revenue generated through its oil and gas business by using fraudulent gold and food transactions through Halkbank, which is a majority state-owned bank in Turkey, and Atilla helped design some of the transactions.¹³⁸ Moreover, Zarrab testified that he "paid bribes to Turkish officials and that Turkish President Tayyip Erdogan, then prime minister, personally signed off on parts of the scheme."¹³⁹ Since Zarrab's testimony, President Erdogan has denounced the verdict.¹⁴⁰

Atilla argued that, at best, the alleged scheme warranted civil or administrative sanction rather than criminal prosecution. Atilla insisted that there is no criminal jurisdiction because the alleged criminal activities do not have a U.S. nexus. Nevertheless, the jury chose to convict.

Atilla's conviction demonstrates that foreign nationals can be prosecuted criminally by U.S. law enforcement for sanctions violations, regardless of the fact that their conduct was carried out beyond U.S. borders. This case bears watching; if the conviction withstands a likely appeal, it has the potential to change how aggressively foreign nationals are prosecuted in connection with OFAC-sanctioned activities.

137 *Id.*

138 Brendan Pierson, U.S. Judge Refuses to Overturn Turkish Banker's Conviction, Reuters (Feb. 7, 2018), <https://www.reuters.com/article/us-usa-turkey-zarrab/u-s-judge-refuses-to-overturn-turkish-bankers-conviction-idUSKBN1FR2MP>.

139 *Id.*

140 *Id.*



Law Enforcement Tools

Law Enforcement Tools

As the information needed to prosecute individuals and companies in their home jurisdictions is increasingly located abroad, law enforcement agencies are increasingly attempting to seize information in foreign jurisdictions. Different law enforcement agencies in different jurisdictions also are more frequently using similar tools to identify and prosecute alleged unlawful conduct. In this issue, we provide an update to the U.S. government's attempt in the so-called *Microsoft-Ireland* case to seize data stored overseas and discuss the expansion of whistleblower programs and use of deferred prosecution agreements (DPAs) in the U.S. and abroad.

U.S. Attempts to Seize Data Overseas

On October 16, 2017, the U.S. Supreme Court granted the DOJ's petition for certiorari¹⁴¹ in the so-called *Microsoft-Ireland* case, kicking off another – and likely the final – chapter in a yearslong battle over the enforceability of search warrants targeting data stored on foreign servers. The DOJ seeks reversal of a July 14, 2016, decision of the Second Circuit Court of Appeals, which held that warrants for user data that an internet provider stores outside U.S. borders are unenforceable because the federal statute authorizing data-centered search warrants – the Stored Communications Act (SCA)¹⁴² – only has territorial effect.¹⁴³ The decision confirmed that courts may not issue and enforce against U.S.-based service providers warrants for the seizure of customer email content that is stored exclusively on foreign servers.

The *Microsoft-Ireland* case, which has huge implications for cross-border law enforcement and data privacy rights, stemmed from a December 2013 decision by a federal magistrate judge in New York to issue a warrant under the SCA directing Microsoft to disclose all emails and other private information associated with a certain email account in Microsoft's possession, custody, or control. When Microsoft determined that the target account was hosted in Dublin, Ireland, and that the data content was stored there, it filed a motion to quash the warrant, arguing the information was beyond the U.S. government's reach.

The magistrate judge denied Microsoft's motion to quash the subpoena in April 2014, and U.S. District Court Judge Preska adopted the magistrate's ruling in August 2014. But Microsoft appealed to the Second Circuit Court of Appeals and won, convincing the court that the SCA does not authorize courts to compel internet service providers like Microsoft to produce emails or other private communications stored in a foreign nation.¹⁴⁴ The Supreme Court will now decide whether the Second Circuit's reversal should stand or the district and magistrate courts were correct in authorizing the cross-border search warrant. As of the release of this report, numerous amicus briefs have been filed, including one submitted on behalf of 35 states and the commonwealth of Puerto Rico that argues the Second Circuit's decision should be reversed.¹⁴⁵ If the decision stands, data located outside the U.S. should enjoy greater levels of protection against U.S. government investigation and enforcement activity.

¹⁴¹ *United States v. Microsoft Corp.*, 138 S. Ct. 356 (2017).

¹⁴² 18 U.S.C. §§ 2701–2712.

¹⁴³ *Matter of Warrant to Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corp.*, 829 F.3d 197 (2d Cir. 2016). The Second Circuit also denied the DOJ's petition for a rehearing en banc. See *Microsoft Corporation v. United States of America*, Petition for Rehearing and Rehearing En Banc filed, Docket No. 14-2985 (Oct. 13, 2016), https://www.justsecurity.org/wp-content/uploads/2016/10/Microsoft_14-2985-United-States-Appellee-Petition.pdf.

¹⁴⁴ *Microsoft Corp.*, 829 F.3d 197.

¹⁴⁵ *Microsoft Corp.*, 138 S. Ct. 356.

Law Enforcement Tools

Whistleblowers

SEC Whistleblower Program Annual Statistics

The SEC whistleblower program, instituted in 2010 under Dodd-Frank, had one of its busiest years in 2017, with awards totaling nearly \$50 million to 12 individuals.¹⁴⁶ The SEC issued three of the 10 highest awards in the program's history in 2017, continuing to show the impact of the program and proving that the incentives for whistleblowers to report to the SEC are strong.¹⁴⁷ In total, the SEC Office of the Whistleblower received over 4,440 tips in 2017, up from 4,218 in 2016, reflecting the upward trajectory in whistleblower tips since the program's inception.¹⁴⁸ The SEC reported that enforcement actions based on tips starting in 2012 have led to over \$975 million in financial sanctions, including more than \$671 million in disgorgement.¹⁴⁹ This year also saw the SEC announcing the third-highest award since the first award was issued under the program in 2012. This award – of more than \$20 million – was given to a whistleblower who alerted the SEC “with a valuable tip that led to a near total recovery of investor funds.”¹⁵⁰

Foreign Whistleblowers Under the SEC Whistleblower Program

Although most of the whistleblower tips in 2017 came from individuals in the United States, the Office of the Whistleblower received tips from individuals in 72 other countries, with the highest numbers coming from the U.K. (84), Canada (73), and Australia (48).¹⁵¹ Foreign nationals are also eligible for whistleblower awards. On December 5, 2017, the SEC announced an award of more than \$4.1 million to a foreign national working outside the United States.¹⁵² This former company insider “alerted the agency to a widespread, multi-year securities law violation and continued to provide important information and assistance throughout the SEC’s investigation.”¹⁵³ Jane Norberg, chief of the Office of the Whistleblower, said that this award highlighted the “[t]he breadth of the SEC’s whistleblower program.” Awards such as these should serve as a reminder to firms that anti-corruption internal controls and compliance programs are crucial and must take on a worldwide, rather than purely domestic, focus.

U.S. Supreme Court Decision on Dodd-Frank Anti-Retaliation Provisions

As discussed in our *2017 Mid-Year Cross-Border Report*, the Supreme Court granted certiorari in *Somers v. Digital Realty Trust Inc.*, in order to resolve a circuit split on the question of whether an individual must report alleged misconduct to the SEC in order to bring a claim against his or her former employer under the anti-retaliation provisions of Dodd-Frank.¹⁵⁴ The plaintiff in *Somers* sued his former employer, alleging that he had been fired for making internal complaints, even though he did not provide any information to the SEC. The Ninth Circuit allowed the claim to proceed and held that Dodd-Frank’s “anti-retaliation provision unambiguously and expressly protects from retaliation all

146 U.S. Secs. & Exch. Comm’n, Whistleblower Program: 2017 Annual Report to Congress 10 (2017) (hereinafter *2017 Annual Whistleblower Report*).

147 *Id.*

148 *Id.* at 23.

149 *Id.* at 1.

150 Order Determining Award Claim, Exchange Act Rel. No. 79294, File No. 2017-1 (Nov. 14, 2016); Press Release, U.S. Secs. & Exch. Comm’n, “SEC Issues \$20 Million Whistleblower Award,” Rel. No. 2016-237 (Nov. 14, 2016), <https://www.sec.gov/news/pressrelease/2016-237.html>.

151 *2017 Annual Whistleblower Report* at 26.

152 Press Release, U.S. Sec. & Exch. Comm’n, “Former Company Insider Earns More Than \$4.1 Million for Whistleblower Tip,” Rel. No. 2017-222 (Dec. 5, 2017), <https://www.sec.gov/news/press-release/2017-222>.

153 *Id.*

154 *Somers v. Digital Realty Trust Inc.*, 137 S. Ct. 2300 (Jun. 26, 2017).

Law Enforcement Tools

those who report to the SEC *and* who report internally.”¹⁵⁵ The Ninth Circuit’s decision disagreed with Fifth Circuit precedent in *Asadi v. G.E. Energy (USA) LLC*, which held that an individual must report to the SEC in order to qualify for whistleblower protections under Dodd-Frank.¹⁵⁶

The Supreme Court heard argument on November 28, 2017, and issued its opinion on February 21, 2018. Resolving the circuit split in favor of the Fifth Circuit, the court, in an opinion delivered by Justice Ginsburg, held that in order for an individual to sue under Dodd-Frank’s whistleblower protections, the individual must first report the information to the SEC.¹⁵⁷ The court found three main reasons to reverse the Ninth Circuit’s decision and hold that the Fifth Circuit’s more restrictive interpretation of Dodd-Frank’s statutory language was correct.

First, the court held that Dodd-Frank’s “explicit definition” of a whistleblower as “any individual who provides . . . information relating to a violation of the securities laws to the Commission” applies throughout the law and is not modified by the anti-retaliation provisions.¹⁵⁸

Second, the court looked to another of Dodd-Frank’s whistleblower protection provisions, relating to the Consumer Financial Protection Bureau (CFPB).¹⁵⁹ Unlike the SEC provision, the CFPB whistleblower protection provision “imposes no requirement that information be conveyed to a government agency.”¹⁶⁰ Using a longstanding principal of statutory interpretation, the court found that Congress would not include this language in the CFPB provision and omit it in the SEC provision without intending “a difference in meaning.”¹⁶¹

Third, the court reviewed the “core objective” of Dodd-Frank’s whistleblower program and held that this core objective is to “motivate people who know of securities law violations to *tell the SEC*.”¹⁶² The Court then explained that the “award program and anti-retaliation provision . . . work synchronously to motivate individuals with knowledge of illegal activity to ‘tell the SEC’” because Congress recognized that “[f]inancial inducements alone . . . may be insufficient to encourage certain employees, fearful of employer retaliation, to come forward with evidence of wrongdoing.”¹⁶³

This decision now changes the incentives for whistleblowers: they are encouraged to report misconduct *directly* to the SEC as opposed to reporting internally, as whistleblowers who report to the SEC will be able to take advantage of heightened whistleblower protections. Firms should take note and update compliance programs to reflect this new interpretation of Dodd-Frank’s anti-retaliation incentives.

155 *Somers v. Digital Realty Trust, Inc.*, No. 15-17352 (9th Cir. Mar. 8, 2017) (emphasis added), <http://cdn.ca9.uscourts.gov/datastore/opinions/2017/03/08/15-17352.pdf>.

156 *Asadi v. G.E. Energy (USA) LLC*, 720 F.3d 620 (5th Cir. 2013).

157 *Somers v. Digital Realty Trust, Inc.*, No. 16-1266, 2018 WL 987345, at *4 (Feb. 21, 2018).

158 *Id.* at *5, *8–9.

159 *Id.* at *9.

160 *Id.*

161 *Id.*

162 *Id.*

163 *Id.*

Law Enforcement Tools

Whistleblower Programs in Other Jurisdictions

The continued success of the SEC's Whistleblower Program has continued to inspire other countries to increase the scope and scale of their own whistleblower programs. Of note in the second half of 2017, the Australian Senate introduced a bill on December 7, 2017, that, if enacted, would change the regulatory regime in Australia by requiring all public companies to have an internal whistleblower policy and would increase protections of the identity of whistleblowers.¹⁶⁴ But similar to the existing whistleblower scheme in the U.K., the new law would not create a monetary award for whistleblowers.

In the U.K., employees continue to be protected from retaliation by the Public Interest Disclosure Act of 1998 and by both the Prudential Regulation Authority (PRA) and the FCA. A 2013 amendment to the Public Interest Disclosure Act¹⁶⁵ further protected employees by clarifying the standard by which they qualify for protection from retaliation from their employer: whether, in the reasonable opinion of the employee, the disclosure is in "the public interest."¹⁶⁶ This standard, however, had not been truly tested until a July 10, 2017, decision from the Court of Appeal, *Chesterton Global Ltd v. Nurmohamed*.¹⁶⁷ In *Nurmohamed*, the claimant, Mohamed Nurmohamed, was fired from his employer, Chesterton, after he claimed that Chesterton manipulated its internal financial figures to reduce the commission payments owed to Nurmohamed and about 100 other Chesterton employees. The question at issue was whether this disclosure, which affected Nurmohamed's *own* commissions and the commissions of about 100 employees, was in "the public interest." The Court of Appeal endorsed a test – the first to explain factors for the public interest standard – which asks:

1. How many people were originally affected by the disclosure?
2. What is the "nature of the interest affected" – is the wrongdoing "very important" or simply "trivial"?
3. Was the wrongdoing deliberate or inadvertent?
4. Who was the wrongdoer? Is the wrongdoer large or prominent?¹⁶⁸

This decision implicates all firms with branches or offices in the U.K. by confirming that there is now both a subjective test (whether the employee thought the disclosure was in the public interest) and objective test (as outlined by the court). Firms should implement strong whistleblower policies and document any internal disclosures in order to buttress any argument that objective factors weigh in favor of additional employee protection.

Also this year, Italy has approved new whistleblowing legislation – the first in the country to offer robust protections for employees. The law, which passed on November 15, 2017, and amends the existing Regulation on Corporate Administrative Liability,¹⁶⁹ establishes a framework for employee reporting of misconduct, requires employers to implement certain whistleblower protections, and imposes sanctions on employers for retaliation, among other things. The law establishes two

164 Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017, <http://bit.ly/2CKbq6w>.

165 Public Interest Disclosure (Amendment) Bill 2013-14, <https://services.parliament.uk/bills/2013-14/publicinterestdisclosureamendment.html>.

166 *Id.*

167 *Chesterton Global Ltd (t/a Chestertons) & Anor v. Nurmohamed & Anor* [2017] EWCA Civ 979, <http://bit.ly/2qwAKrB>.

168 *Id.*

169 DataGuidance, Italy: Approved draft whistleblowing law creates "protected and confidential environment" (Nov. 23, 2017), <https://www.dataguidance.com/italy-draft-whistleblowing-law-passed-parliament/>.

Law Enforcement Tools

systems, one for public employers and one for private employers.¹⁷⁰ Once the law officially enters into force, Italian firms, including Italian branches of foreign companies, will have to identify specific channels to facilitate reporting by employees of potential misconduct within the workplace and guarantee confidentiality to the whistleblowers.¹⁷¹

Use of Deferred Prosecution Agreements

DPAs (and non-prosecution agreements, or NPAs) are agreements between the government and defendants to suspend (or dismiss) further prosecution in exchange for the defendant's promise to satisfy certain conditions. Examples of these conditions include paying penalties and restitution, agreeing to modify practices within the company, and agreeing to be monitored for compliance with the imposed conditions. DPAs are often attractive alternatives to trial for defendants when the risk of a guilty verdict is high.

DPAs have been common law enforcement tools in the U.S. for the past 15-plus years. However, DPA regimes are seeing growing acceptance by countries across the globe. The U.K. now has a DPA regime, though with a narrower focus and a more active role from the courts than the U.S. regime, where the court's role is limited.¹⁷² The second half of 2017 saw the first DPA under France's recently adopted DPA regime. In late July 2016, France adopted a practice similar to DPAs, known as the Convention judiciaire d'intérêt public (CJIP). As a reaction to international criticism that France had taken a hands-off approach to anti-corruption enforcement, the French Parliament adopted Sapin II, legislation that, in addition to creating the option of CJIPS, established an agency focused on anti-corruption, imposed harsh fines for noncompliance with stricter due diligence and reporting requirements, and provided more whistleblower protections.¹⁷³ Some key distinctions between CJIPs and U.S. DPAs are that CJIPs are available only for companies, not individuals,¹⁷⁴ and only for certain corruption-related offenses.¹⁷⁵ Judges in France also wield power similar to that of their U.K. counterparts, playing a large role in approving CJIPs, including the amount that the defendants are fined.¹⁷⁶

On November 14, 2017, HSBC entered into the first CJIP with the French Ministère de la Justice, France's DOJ equivalent.¹⁷⁷ In exchange for the CJIP, HSBC agreed to pay €300 million in damages, penalties, and disgorgement of profits.¹⁷⁸ In the CJIP's statement of facts, HSBC admitted its role in money laundering, tax evasion, and soliciting prospective clients to conceal its

170 *Id.*

171 *Id.*

172 *United States v. HSBC Bank U.S.A., N.A.*, 863 F.3d 125, 129 (2d Cir. 2017) ("Absent unusual circumstances not present here, a district court's role vis-à-vis a DPA is limited to arraigning the defendant, granting a speedy trial waiver if the DPA does not represent an improper attempt to circumvent the speedy trial clock, and adjudicating motions or disputes as they arise.").

173 George A. Stamboulidis, et al., *New French Anti-Corruption Law: Companies Doing Business in France Must Beware*, BakerHostetler (Nov. 22, 2016), <https://www.bakerlaw.com/alerts/new-french-anti-corruption-law-companies-doing-business-in-france-must-beware>; Keith Krakaur, et al., *Inside France's 1st Deferred Prosecution Agreement*, Law360 (Jan. 4, 2018), <https://www.law360.com/articles/996822/inside-france-s-1st-deferred-prosecution-agreement>.

174 Loi 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique [Law 2016-1691 of Dec. 9, 2016 on Transparency, the Fight Against Corruption & the Modernization of Economic Life], http://www.ds-avocats.com/mailling/EN_La%20mise%20en%20place%20effective%20au%20sein%20des%20entreprises%20de%20programmes%20de%20conformite%20anticorruption.pdf.

175 Keith Krakaur, et al., *Inside France's 1st Deferred Prosecution Agreement*, Law360 (Jan. 4, 2018), <https://www.law360.com/articles/996822/inside-france-s-1st-deferred-prosecution-agreement>.

176 *Id.*

177 Press Release, Ministère de la Justice (Nov. 14, 2017), https://mobile.twitter.com/pr_finance/status/930446326101368832/photo/1.

178 *The Nat'l Fin. Prosecutor of the Paris First Instance Court v. HSBC Private Bank (Suisse) SA, "PBRs"*, CH-660.0.074.001-4 ¶¶ 26, 49. https://www.economie.gouv.fr/files/files/directions_services/afa/CJIP_English_version.pdf.

Law Enforcement Tools

assets through these methods.¹⁷⁹ Under French law, HSBC was legally required to acknowledge facts in its case because it had allowed the case to go forward to the point where an investigating magistrate became involved.¹⁸⁰

With the U.K. and now France adopting DPAs in their practices and serious contemplation of the same by other countries such as Canada,¹⁸¹ potential defendants of parallel prosecutions worry that domestic and foreign regulators will not coordinate their efforts. Stephen Cutler, the vice chairman of J.P. Morgan Chase & Co., and former SEC Director of Enforcement, commented late last year that U.S. prosecutors, when offering a U.S. DPA, may not take into account any sanctions that may have been imposed by foreign authorities.¹⁸² Since U.S. courts have limited influence over the details of a DPA, Cutler expressed concern that U.S. prosecutors will not consider sanctions from other countries in fashioning the terms of the DPA.¹⁸³ However, these defendants are not without recourse, because they could still use the penalties imposed by other countries while negotiating their DPAs in the U.S., and walk away if they find the bargain unsatisfactory.

For example, the largest penalty imposed in a FCPA case to date – against Swedish telecommunications firm Telia Company AB (Telia) – was, according to the DOJ’s press release, a coordinated resolution between the DOJ, the SEC, and Dutch law enforcement.¹⁸⁴ In September 2017, Telia, in a DPA with the DOJ and separate resolution with the SEC, agreed to pay over \$965 million in criminal penalties, forfeiture, and disgorgement to settle allegations that the company bribed Uzbek government officials in violation of the FCPA and other anti-bribery provisions.¹⁸⁵ The DPA stated that Telia would pay a total criminal penalty of \$548.6 million.¹⁸⁶ The SEC stated in its enforcement order that Telia would disgorge \$457 million (subject to a \$40 million deduction for forfeiture paid in connection with the DOJ resolution).¹⁸⁷ However, the DOJ and SEC agreed to offset a portion of the fine and disgorgement amounts based on Telia’s payments to foreign authorities concerning the bribery allegations.¹⁸⁸ In a separate, but related, settlement with the Public Prosecution Service of the Netherlands (OM), Telia agreed to pay a criminal penalty of \$274,000,000, and the DOJ agreed to credit the fine Telia had to pay to the U.S. by that amount.¹⁸⁹ The SEC agreed to offset the disgorgement amount by up to \$208.5 million against any

179 *Id.* ¶¶ 26-27, 33.

180 Keith Krakaur, et al., Inside France’s 1st Deferred Prosecution Agreement, Law360 (Jan. 4, 2018), <https://www.law360.com/articles/996822/inside-france-s-1st-deferred-prosecution-agreement>.

181 The Canadian government announced its plans to introduce legislation to bring a DPA scheme “to be implemented through judicial remediation orders as an additional tool for holding corporate offenders to account.” Jaclyn Jaeger, Canada to introduce deferred prosecution agreements, Compliance Week (Mar. 6, 2018), <https://www.complianceweek.com/news/news-article/canada-to-introduce-deferred-prosecution-agreements#.WqFdU2zfOUI>.

182 Evan Weinberger, DOJ Wants More Enforcement Coordination, Deputy AG Says, Law360 (Nov. 8, 2017), <https://www.law360.com/articles/982149/doj-wants-more-enforcement-coordination-deputy-ag-says>.

183 *Id.*

184 Press Release, U.S. Dep’t of Justice, “Global Telecommunications Company And Its Subsidiary To Pay More Than \$965 Million In Penalties In Massive Bribery Scheme Involving Uzbek Official” (Sept. 21, 2017), <https://www.justice.gov/usao-sdny/pr/global-telecommunications-company-and-its-subsidiary-pay-more-965-million-penalties>.

185 *Id.*

186 *Id.*

187 *Id.*

188 *Id.*

189 *Id.*

Law Enforcement Tools

disgorgement obtained by the Swedish Prosecution Authority or the OM.¹⁹⁰ Thus, while Telia's total resolution still amounts to over \$965 million, it will ultimately comprise fines and disgorgement paid to the U.S., the Netherlands, and Sweden.¹⁹¹ In the DOJ's press release announcing the resolution, former Acting Assistant Attorney General Kenneth Blanco stated that the settlement "demonstrates the Department's cooperative posture with its foreign counterparts to stamp out international corruption and to reach fair, appropriate and coordinated resolutions."¹⁹²

Companies should expect to see an increase in DPAs in the U.K. and France and eventually other countries as DPA regimes become more widely adopted across the globe. With the increase in countries utilizing DPAs, and the more frequent global enforcement of the same conduct by different law enforcement authorities, we also expect to see an increase in coordinated resolutions such as the one in the Telia case. Companies should heed the lessons in the Telia resolution and attempt to negotiate credits and offsets into their agreements with all law enforcement agencies involved in cross-border matters.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*



U.S. and International Legislative, Regulatory, and Enforcement Priorities

**U.S. and International
Legislative, Regulatory,
and Enforcement Priorities**

Increased Focus on Individual Accountability for Corporate Wrongdoing

Over the past several years, law enforcement authorities in several jurisdictions have expressed their desire to focus more on individual liability for corporate misconduct.

In the U.S., Deputy Attorney General Rod J. Rosenstein is currently focused on a new initiative to streamline all DOJ policies, particularly with respect to holding individuals accountable for corporate misconduct. In an October 6, 2017 speech on corporate enforcement policy, Rosenstein emphasized the importance of “clear policies” that “promote consistency across the [d]epartment’s many offices and tens of thousands of decision-making employees.”¹⁹³ He highlighted three forthcoming mandates regarding the DOJ’s stance on corporate misconduct: “(1) the department will continue to investigate and prosecute individual wrongdoers for corporate misconduct; (2) the federal government will ‘not use criminal authority to unfairly extract civil payments’; and (3) the department’s policy will be made more ‘clear and more concise.’”¹⁹⁴

The SEC has also emphasized individual accountability in its enforcement actions. SEC Chairman Jay Clayton stated during his confirmation hearing in March 2017 that “individual accountability has a greater deterrent effect across the system than corporate accountability.”¹⁹⁵ The SEC’s 2017 Annual Report buttressed Clayton’s statement by including a “focus on individual accountability” as one of the five core principles that will guide SEC enforcement decision-making in 2018.¹⁹⁶

In a recent development that will likely lead to more actions against individuals for alleged money laundering and public corruption, on November 29, 2017, Rosenstein announced a revised FCPA corporate enforcement policy that is intended to further incentivize voluntary disclosures of corporate wrongdoing.¹⁹⁷ The revised policy follows the FCPA pilot program that began in 2016 but, unlike the pilot program, the revised policy is written into the U.S. Attorney’s Manual at section 9-47.120.

Like under the pilot program, the revised FCPA corporate enforcement policy requires companies to voluntarily and reasonably promptly self-disclose misconduct, fully cooperate, and timely and appropriately remediate in order to be eligible for a declination or reduced sanctions. Notably, full cooperation means, among other things, disclosing all facts gathered in an investigation with attribution of facts to specific sources (without violating the attorney-client privilege). However, the pilot program and revised corporate enforcement policy depart in a significant manner: there is more certainty that compliance with the enforcement policy will result in the DOJ declining to bring charges. The pilot program *permitted* prosecutors to consider a declination if the company timely and appropriately self-disclosed, cooperated, and remediated, or reduced sanctions if these criteria were met but aggravating circumstances, such as involvement of executive management, significant company profit, and company recidivism, existed. On the other hand, the revised corporate enforcement policy provides a *presumption* that the government should decline to prosecute companies which meet these standards in cases where aggravating circumstances

193 Rod J. Rosenstein, NYU Program on Corporate Compliance & Enforcement Keynote Address On Corporate Enforcement Policy (Oct. 6, 2017), https://wp.nyu.edu/compliance_enforcement/2017/10/06/nyu-program-on-corporate-compliance-enforcement-keynote-address-october-6-2017/.

194 *Id.*

195 Nomination of Jay Clayton: Hearing Before the S. Comm. On Banking, Housing and Urban Affairs, 115th Cong. 99 (2017) (Responses to Written Questions of Sen. Reed from Jay Clayton), <http://bit.ly/2DxnvwV>.

196 Press Release, U.S. Sec. & Exch. Comm’n, “SEC Enforcement Division Issues Report on Priorities and FY 2017 Results” (Nov. 15, 2017), <https://www.sec.gov/news/press-release/2017-210>; U.S. Sec. & Exch. Comm’n, Fiscal Year 2017 Agency Financial Report (2017), <http://bit.ly/2DFvOGa>.

197 United States Attorneys’ Manual, FCPA Corporate Enforcement Policy, Section 9-47.120 (2017), <http://bit.ly/2nDljuT>.

U.S. and International Legislative, Regulatory, and Enforcement Priorities

do not exist, and accord reduced sanctions under certain circumstances.¹⁹⁸ The revised FCPA corporate enforcement policy, as well as the CFTC's new policy to encourage and reward voluntary cooperation discussed above, likely will lead to companies making earlier and more robust self-disclosures that could place more information in the hands of regulators that they in turn can use to scrutinize individuals.

However, there is pending legislation in the U.S. that might make it harder for prosecutors to obtain convictions against individuals for corporate misconduct. On October 2, 2017, the Mens Rea Reform Act of 2017 was introduced into Congress by Senator Orrin Hatch (R-Utah).¹⁹⁹ This proposal would create a default rule for federal prosecutions whereby juries, in order to convict a defendant, must find criminal intent for all federal offenses even where such intent is not an explicit element of the crime. This proposal, if enacted, would require federal prosecutors to prove the defendant's state of mind for a wide array of crimes.²⁰⁰ A number of criminal-defense organizations support these changes because the default intent standard would serve as a "moral anchor of our criminal law ... that people shouldn't be punished unless they know they're doing something wrong."²⁰¹ Critics, however, note that a default intent standard would make it harder for federal prosecutors to bring charges for regulatory offenses, which currently lack an intent standard.²⁰² The proposed bill currently is still in Congress and has not been voted on by either the Senate or the House.²⁰³

We have seen a similar focus on individual accountability in the U.K. In fact, prosecuting individuals in the U.K. may have just become easier thanks to the U.K. Supreme Court's recent ruling in the criminal case *Ivey v. Genting Casinos*.²⁰⁴ The Supreme Court ruled that Ivey cheated a casino out of £7.7 million using an illegal technique called "edge sorting." This case is pivotal because in this ruling, the court removed a portion of a legal test that has been used for 35 years in U.K. criminal dishonesty cases. The case against Ivey "remov[ed] the standard that the accused be aware that their actions would be viewed as dishonest, in a move which lawyers say delivers a standardized approach across both criminal and civil law and lowers the burden for prosecutors or claimants seeking to punish corruption."²⁰⁵

Prior to *Ivey*, U.K. courts followed the standard under *R v. Ghosh*, which set forth a subjective and objective test for determining dishonesty under which juries must "first decide whether, according to the ordinary standards of reasonable and honest people, what was done was dishonest, and if so, whether the defendant realized what he was doing was by those standards."²⁰⁶ However, the court in *Ivey* discarded the second, subjective, prong of the *Ghosh*

198 Jody Godoy, 5 Takeaways From The 'New' FCPA Corporate Charging Policy, Law360 (Nov. 29, 2017), <https://www.law360.com/articles/989478/5-takeaways-from-the-new-fcpa-corporate-charging-policy>.

199 "S. 1902 – 115th Congress: Mens Rea Reform Act of 2017," GovTrack (Dec. 20, 2017), <https://www.govtrack.us/congress/bills/115/s1902>.

200 Matt Ford, Could a Controversial Bill Sink Criminal-Justice Reform in Congress?, The Atlantic (Oct. 26, 2017).

201 *Id.*

202 *Id.*

203 S. 1902: Mens Rea Reform Act of 2017, govtrak.us.

204 [2017] UKSC 67.

205 Mark Taylor, Landmark Dishonesty Ruling Tips Scales Towards Prosecutors, Law360 (Nov. 7, 2017), <https://www.law360.com/articles/982160/landmark-dishonesty-ruling-tips-scales-toward-prosecutors>.

206 *R v. Ghosh* [1982] EWCA Crim 2.

U.S. and International Legislative, Regulatory, and Enforcement Priorities

test that the defendant must be aware that their actions were dishonest,²⁰⁷ removing a vital defense for individuals accused of wrongdoing.

The prosecution made multiple arguments as to the problem with the initial *Ghosh* standard of dishonesty, arguing that “the effect [of the *Ghosh* standard] was that the more warped the defendant’s standards of honesty are, the less likely it is that they will be convicted,” and that the test “was based on the mistaken premise that criminal responsibility for dishonesty must depend on the actual state of mind of the defendant.”²⁰⁸ The standard now, for both criminal and civil cases, does not require the defendant to appreciate that what he or she has done is dishonest, and looks instead at objective standards of ordinary dishonest people.²⁰⁹ This ruling could have far-reaching implications in U.K. criminal jurisprudence and could ultimately lead to increased prosecution of individuals, including of defendants whose activities are allegedly “dishonest,” beginning with the currently ongoing trial against Tesco PLC executives as well as other high-profile white-collar crime cases in the U.K.

The U.K. Senior Managers and Certification Regime (SMCR) may also lead to more actions against individuals in the U.K. Following the 2008 financial crisis, U.K. authorities created the SMCR. Recently, the FCA and the U.K. Prudential Regulation Authority launched proposals to significantly widen the SMCR. These new rules will drastically increase the number of regulated firms, increasing it from approximately 935 to over 60,000, essentially expanding it to everybody who works in financial services.²¹⁰

Under this regime, anybody responsible for a “senior management function” as defined by the FCA must be approved before commencing in the role.²¹¹ Senior managers will be required to have a statement of responsibilities and a duty of responsibility. The FCA has also proposed prescribed responsibilities, new responsibilities that would be allocated to senior managers. In addition, the certification regime will exist for persons who are not senior managers but whose jobs can cause harm to the firm or its customers. These persons need not be approved by the FCA, but firms need to check and confirm they are suitable for the job responsibilities at least once per year.²¹²

The certification regime puts additional requirements to verify and certify non-senior managers in the firms on a regular basis. This will increase the importance of quickly identifying problematic issues. The penalties that accompany these new requirements include prosecution and the potential for criminal liability.²¹³

207 *Ivey* [2017] UKSC 67; *see also* Mark Taylor, Landmark Dishonesty Ruling Tips Scales Towards Prosecutors, *Law360* (Nov. 7, 2017), <https://www.law360.com/articles/982160/landmark-dishonesty-ruling-tips-scales-toward-prosecutors>.

208 *Ivey* [2017] UKSC 67.

209 McDowell Purcell, Dishonesty in the UK, *Lexology* (Nov. 14, 2017).

210 Financial Conduct Authority, Senior Managers and Certification Regime: banking (Feb. 14, 2018), <https://www.fca.org.uk/firms/senior-managers-certification-regime/banking>; Bank of England, Policy Statement Strengthening Individual Accountability in Insurance: Optimisations to the SIMR (February 2018), <https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/policy-statement/2018/february/ps118.pdf?la=en&hash=6424AC319AD37506CFCC8D481394A6181F3C1302>; Mark Taylor, 4 Key Points About The Expanded Senior Managers Regime, *Law360* (Aug. 8, 2017).

211 Senior Managers and Certification Regime 2018 Extension: FCA Consults, *Lexology* (Sept. 15, 2017).

212 *Id.*

213 Mark Taylor, 4 Key Points About the Expanded Senior Managers Regime, *Law360* (Aug. 8, 2017).

**U.S. and International
Legislative, Regulatory,
and Enforcement Priorities**

Substantive Areas of Emphasis

Complex Market Manipulation

As described above, U.S. authorities continue to bring actions against companies and individuals on allegations of complex market manipulation, notably in the areas of alleged LIBOR and forex manipulation. Despite the obstacles to cross-border enforcement raised in *U.S. v. Allen*, these actions will likely continue. There are indications that U.K. authorities may continue bringing actions on allegations of complex market manipulation as well. On November 14, 2017, Julia Hoggett, the FCA's Director of Market Oversight, said at the Recent Developments in the Market Abuse Regime conference that the FCA will "not shy away from pursuing those hugely important but inevitably complex market abuse cases where they arise."²¹⁴

Corruption

As discussed in more detail in *BakerHostetler's 2017 FCPA Year-End Update*, U.S. and foreign regulators continue to emphasize anti-corruption enforcement. Daniel S. Kahn, the Chief of the DOJ's Foreign Corrupt Practices Unit, called 2017, which was the FCPA's 40th anniversary, a "historic year" – 39 actions were resolved by the DOJ and SEC against entities and individuals.²¹⁵ Resolutions in 2017 included the highest penalty recovered to date: the \$965 million Telia resolution described above.²¹⁶ Sandra Moser, the Principal Deputy Chief of the DOJ's Criminal Fraud Section, stated in July 2017 at a Forum on Anti-Corruption in High Risk Markets that the department is "taking additional steps to enhance our enforcement of the Foreign Corrupt Practices Act (FCPA) against both corporate and individual actors, and to promote transparency in doing so."²¹⁷

Likewise, even though the second half of 2017 did not see any U.K. enforcement actions of the U.K. Bribery Act, there are indications that anti-corruption enforcement will remain a priority in the U.K. On September 4, 2017, at the Cambridge Symposium on Economic Crime, David Green, the outgoing SFO Director, stated, "Whilst priorities will be for others to decide, I have no doubt that the investigation and prosecution of commercial bribery, corporate fraud and misconduct should and will remain a priority for U.K. law enforcement."²¹⁸

Finally, several high profile corruption resolutions in 2017 involved cross-border collaboration between the U.S. and several other countries and coordinated resolutions.²¹⁹ We anticipate that this cross-border collaboration in the area of anti-corruption will continue in 2018. At a November 9, 2017, speech at New York University School of Law on the past, present, and future of the SEC's enforcement of the FCPA, Steven R. Peikin, Co-director of the SEC's Enforcement Division, stated, "I fully expect the trend of the Enforcement Division, working closely with foreign law enforcement and regulators in anti-bribery actions, to continue its upward trajectory in the coming years."²²⁰

214 Julia Hoggett, Speech Effective Compliance with the Market Abuse Regulation – a State of Mind (Nov. 14, 2017), <https://www.fca.org.uk/news/speeches/effective-compliance-market-abuse-regulation-a-state-of-mind>.

215 Keynote Interview, Anti-Bribery: How the Risks are Changing, Presented by Dow Jones (Nov. 15, 2017).

216 Press Release, Dep't of Justice, Telia Company AB and Its Uzbek Subsidiary Enter Into a Global Foreign Bribery Resolution of More Than \$965 Million for Corrupt Payments in Uzbekistan (Sept. 21, 2017), <https://www.justice.gov/opa/pr/telia-company-ab-and-its-uzbek-subsidiary-enter-global-foreign-bribery-resolution-more-965>.

217 Melissa Jampol et al., DOJ Previews Changes to Corporate Misconduct Policy, Law360 (Oct. 13, 2017), <https://www.law360.com/articles/973927/doj-previews-changes-to-corporate-misconduct-policy>.

218 Serious Fraud Office, Cambridge Symposium 2017 (Sep. 4, 2017), <https://www.sfo.gov.uk/2017/09/04/cambridge-symposium-2017/>.

219 BakerHostetler, 2017 FCPA Year-End Update (2018), <https://www.bakerlaw.com/webfiles/Litigation/2018/Alerts/03-08-18-FCPA-2017-Year-end-Update.pdf>.

220 Steven R. Peikin, Co-Director, Division of Enforcement, U.S. Securities and Exchange Commission, Reflections on the Past, Present, and Future of the SEC's Enforcement of the Foreign Corrupt Practices Act (Nov. 9, 2017), <https://www.sec.gov/news/speech/speech-peikin-2017-11-09>.

U.S. and International Legislative, Regulatory, and Enforcement Priorities

Anti-Money Laundering

Since the disclosure of the Panama Papers in April 2016, regulators in the U.S. and around the world have increasingly focused on anti-money laundering (AML) legislation, regulation, and enforcement. This section focuses on developments in AML laws and regulations that indicate that this area will remain a priority in the U.S., the U.K., and other parts of the world.

The Paradise Papers

Released on November 5, 2017, by the International Consortium of Investigative Journalists (ICIJ), the “Paradise Papers” consist of approximately 13.4 million leaked documents that allegedly reveal that heads of state, politicians, and large corporations were investing in offshore trusts to avoid taxes.²²¹ Two reporters at a German newspaper, Süddeutsche Zeitung, were the first to receive these leaked documents and shared them with the ICIJ, which disseminated the information to over 380 journalists for review.²²² The Süddeutsche Zeitung is the same group that reported on the Panama Papers only 18 months earlier.²²³

The Paradise Papers allegedly revealed previously unpublicized connections between and amongst individuals and corporations, raising questions about the motivations behind the billions of dollars invested offshore and their need for secrecy. Examples according to the Paradise Papers include Yuri Milner, a prominent investor in Facebook, Twitter, and Cadre (a real estate technology company owned by Jared Kushner), whose funding traced back to the Kremlin; Bank of Utah’s use of its citizenship status to register private planes for wealthy foreigners; and Apple’s establishment of subsidiaries in Ireland and the Bailiwick of Jersey, places that have lower corporate tax rates than the U.S.²²⁴ The Paradise Papers have also implicated the queen of England as a beneficiary of these offshore tax havens.²²⁵

As detailed in our *2016 Mid-Year Cross-Border Report*, the Panama Papers prompted multiple financial regulatory agencies in the U.S. to create rules aimed at curbing tax avoidance practices. The European Union, including the U.K., also created a task force to adopt stricter AML rules in response to the Panama Papers.²²⁶ This time around, however, although approximately one-third of the clients of Appleby’s, a Bermuda law firm that specializes in providing tax advice for offshore arrangements and from where the leaked documents originated, linked to the Paradise Papers came from the U.S.,²²⁷ public outcry was muted, with some Democratic leaders calling for the Republican tax plan to slow down in light of the Paradise Papers,²²⁸ but ultimately with no further action taken.

221 Mark Taylor, EU Promises Rapid Response After Paradise Papers Leaks, Law360 (Nov. 7, 2017), <https://www.law360.com/articles/982699/eu-promises-rapid-response-after-paradise-papers-leaks>.

222 Michael Forsythe, Paradise Papers Shine Light on Where the Elite Keep Their Money, New York Times (Nov. 5, 2017), <https://www.nytimes.com/2017/11/05/world/paradise-papers.html>.

223 *Id.*

224 *Id.*; Jesse Druckern and Simon Bowers, After a Tax Crackdown, Apple Found a New Shelter for Its Profits, New York Times (Nov. 6, 2017), <https://www.nytimes.com/2017/11/06/world/apple-taxes-jersey.html>.

225 Mark Taylor, UK Promises Tough Paradise Papers Response in Budget, Law360 (Nov. 22, 2017), <https://www.law360.com/articles/987879/uk-promises-tough-paradise-papers-response-in-budget>.

226 *Id.* at 13.

227 Paradise Papers: Who are Appleby, the Lawyers at the Centre of the Leak?, BBC News (Nov. 5, 2017), <http://www.bbc.com/news/business-41878881>.

228 Lynnley Browning, After “Paradise Papers,” Democrats Call on GOP to Slow Down Tax Bill, Bloomberg (Nov. 5, 2017), <https://www.bloomberg.com/news/articles/2017-11-05/offshore-tax-haven-reports-stir-call-to-slow-pace-of-house-bill>.

U.S. and International Legislative, Regulatory, and Enforcement Priorities

Over in the U.K. and European Union, AML campaign groups criticized their governments' initiatives as ineffective for failing to prevent the ongoing practices purportedly revealed in the Paradise Papers.²²⁹ Facing mounting pressure, the U.K.'s Treasury allocated £155 million to tackle avoidance and evasion activities and promised aggressive action against tax evaders and the banks and law firms that enable them.²³⁰ Such measures include tighter rules in the design of certain offshore structures and targeting online auction and sale websites to monitor compliance with tax rules.²³¹ In 2018, the U.K. Treasury will also be looking to curb the practice by traders and professionals of dispersing income amongst unrelated entities to avoid taxes.²³²

It is too early to tell whether any enforcement proceedings will result from the Paradise Papers themselves. Appleby denies that its or its clients' actions were unlawful.²³³ As of the end of December 2017, the only lawsuit filed has been initiated by Appleby for breach of confidence against Guardian News and the BBC.²³⁴ However, those doing business in Europe who are interested in taking advantage of offshore tax incentives are forewarned of the likelihood of increasing enforcement actions and criminal prosecutions in the near future.

Anti-Money Laundering Developments in the U.S.

On November 21, 2017, the U.S. Financial Industry Regulatory Authority (FINRA) provided guidance to firms regarding AML program requirements under FINRA's AML Compliance Program, FINRA Rule 3310. Specifically, FINRA provided guidance in connection with the U.S. Financial Crimes Enforcement Network's (FinCEN) adoption of a final rule on Customer Due Diligence Requirements for Financial Institutions (CDD Rule), which goes into effect on May 11, 2018.²³⁵

FINRA Rule 3310 requires broker-dealers to establish AML programs that implement policies and procedures that can be reasonably expected to detect and cause the reporting of suspicious transactions.²³⁶ As part of that rule, broker-dealers must comply with the FinCEN CDD Rule that mandates that institutions adopt risk-based procedures for conducting ongoing customer due diligence, centering on (1) customer identification and verification, which is already a requirement for AML programs; (2) beneficial ownership identification and verification; (3) understanding the nature and purpose of customer relationships; and (4) ongoing monitoring for reporting suspicious transactions and, on a risk basis, maintaining and updating customer information.²³⁷ In particular, the CDD Rule requires firms to create customer risk profiles in order to understand the nature and purpose of their customer relationships, allowing them to detect suspicious activity through the

229 *Id.*

230 Mark Taylor, UK Promises Tough Paradise Papers Response in Budget, Law360 (Nov. 22, 2017), https://www.law360.com/whitecollar/articles/987879/uk-promises-tough-paradise-papers-response-in-budget?nl_pk=82503858-21e4-4460-8f7f-81f7947f2c5b&utm_source=newsletter&utm_medium=email&utm_campaign=whitecollar.

231 *Id.*

232 *Id.*

233 Michael Forsythe, Paradise Papers Shine Light on Where the Elite Keep Their Money, New York Times (Nov. 5, 2017), <https://www.nytimes.com/2017/11/05/world/paradise-papers.html?smprod=nytcore-iphone&smid=nytcore-iphone-share>.

234 Paradise Papers Legal Action Against BBC & Guardian Condemned, The Guardian (Dec. 19, 2017), <https://www.theguardian.com/uk-news/2017/dec/19/paradise-papers-legal-action-against-bbc-and-guardian-condemned>.

235 FINRA Regulatory Notice 17-40, FinCEN's Customer Due Diligence Requirements for Financial Institutions and FINRA Rule 3310 (Nov. 21, 2017), http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-17-40.pdf.

236 FINRA Rule 3310 (Nov. 21, 2017), http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-17-40.pdf.

237 *Id.*

U.S. and International Legislative, Regulatory, and Enforcement Priorities

development of a customer risk profile.²³⁸ It also requires implementation of procedures designed to verify the identity of beneficial owners of legal entities associated with customers.²³⁹ The rule further highlights an ongoing monitoring obligation to identify and report suspicious activity, which applies to both existing and new accounts, and will require firms to maintain and update customer information on a continuous basis.²⁴⁰

In another development, first annual compliance certifications under the NYS DFS new Banking Division Transaction Monitoring and Filtering Program Requirements and Certifications (Part 504) are due on April 15, 2018.²⁴¹ The new NYS DFS AML rules require financial institutions that are regulated by the New York banking regulator to, among other things, maintain a transaction-monitoring program that is reasonably designed to monitor transactions after their execution for potential Bank Secrecy Act (BSA)/AML violations and suspicious activity reporting, including reviewing and periodically updating the program to take into account and reflect changes to applicable BSA/AML laws, regulations, and regulatory warnings.²⁴² Regulated financial institutions must also maintain watch list filtering programs that are reasonably designed to identify and stop transactions that are prohibited by federal economic and trade sanctions.²⁴³

However, perhaps the most notable part of the NYS DFS new AML rules, and one that goes beyond the new FinCEN CDD Rules described above, is the Sarbanes-Oxley like requirement that the regulated financial institution certify compliance with the rules, either by “Board Resolution” or “Senior Officer(s) Compliance Finding,” on an annual basis.²⁴⁴ These annual certifications must include statements that the board of directors or senior officials have reviewed documents, reports, certifications, and opinions of officers and other relevant parties in order to certify required compliance with the regulation.²⁴⁵ Additionally, the institutions must maintain such data for five years.²⁴⁶ According to the NYS DFS, the requirements in the AML certifications are intended to close compliance gaps and overcome improper governance and oversight.²⁴⁷

Congress is also considering legislation that would amend the BSA by creating new AML reporting requirements. Aimed at companies that are more likely to be shell companies, the proposed, bipartisan Corporate Transparency Act would require companies with less than 20 employees and less than \$5 million in annual gross receipts or sales that are formed in the U.S. to file information about their beneficial ownerships with either the state in which the entity is formed or the federal government.²⁴⁸ At a minimum, such companies will have to disclose: (1) a list of beneficial owners, and (2) for each beneficial owner, the name and current address and a non-expired U.S. passport

238 *Id.* at 4.

239 *Id.* at 5.

240 *Id.* at 4.

241 N.Y. Comp. Codes R. & Regs tit. 3, §§504.1 *et seq.* (2018).

242 *Id.* at § 504.3(a).

243 *Id.* at § 504.3(b).

244 *Id.* at §§ 504.4, 504.6.

245 *Id.* at § 504.7, Attachment A.

246 *Id.* at § 504.4.

247 Press Release, NYS Dep’t of Fin. Serv’s, “DFS Issues Final Anti-Terrorism Transaction Monitoring and Filtering Program Regulation” (Jun. 30, 2016), <http://www.dfs.ny.gov/about/press/pr1606301.htm>.

248 Corporate Transparency Act of 2017, H.R. 4450, 114th Cong. pmb. (2017), <https://maloney.house.gov/sites/maloney.house.gov/files/Corporate%20Transparency%20Act%202017.pdf>. As of the writing of this report, the proposed legislation is with the House Committee on Financial Services. There is a companion bill, the True Incorporation Transparency for Law Enforcement Act, that is currently with the Senate Committee on the Judiciary.

U.S. and International Legislative, Regulatory, and Enforcement Priorities

number or state-issued driver's license number. Under the act, a person would be considered a beneficial owner if he or she, directly or indirectly, either (1) exercises substantial control over, or (2) has a substantial interest in or receives substantial economic benefits from, the assets of a corporation or a limited liability company. Noncompliance with the act would result in civil penalties of up to \$10,000 and criminal penalties of up to three years in prison for knowing violations.²⁴⁹

Anti-Money Laundering Developments in the U.K.

In the second half of 2017, U.K. lawmakers took significant action in connection with their AML efforts. On September 30, 2017, the Criminal Finances Act 2017 (the Criminal Finances Act) came into effect, which will impact both U.K. companies and international companies with a U.K. presence. This act signifies a major development in the U.K.'s approaches to investigating and prosecuting financial crime, and represents another U.K. statute, in the vein of the U.K. Bribery Act, that places the burden on corporations to show that they had reasonable measures in place to prevent any misconduct that is associated with them. The Criminal Finances Act has three major components: (1) two new, separate criminal offenses for failure to prevent evasion of U.K. domestic and foreign taxes, both of which are punishable by unlimited fines; (2) new powers allowing the U.K. High Court to issue "unexplained wealth orders" (UWOs), which are orders requiring individuals reasonably suspected to be involved or connected to someone who is involved with a serious crime to explain how a particular property was obtained; and (3) reform of the U.K. suspicious activity reporting (SAR) regime.

Similar to the "failure to prevent bribery" provision of the U.K. Bribery Act, the new criminal offences set forth in the Criminal Finances Act effectively impose strict liability on a company whose employees have been found to have facilitated tax evasion. Again similar to the U.K. Bribery Act, companies have a sole statutory defense: that (i) the entity in question had "such prevention procedures as it was reasonable in all the circumstances to expect;" or (ii) it was "not reasonable in all the circumstances to expect" these prevention procedures to be in place.²⁵⁰ Moreover, the Criminal Finances Act new criminal offenses have extraterritorial reach. For failure to prevent evasion of U.K. taxes, any company located anywhere in the world can be liable, regardless of whether the company has a presence in the U.K.²⁵¹ For failure to prevent foreign tax evasion, the statute's extraterritorial reach is narrower, but still expansive as it includes companies that are incorporated in the U.K., companies that carry on business or part of a business in the U.K., and companies whose associated persons facilitated the evasion of taxes from within the U.K.²⁵²

The Criminal Finances Act also creates a process for U.K. law enforcement to obtain UWOs. A UWO is a court order requiring an individual or company, when suspected of being involved in or associated with serious criminality, to explain the origin of any assets disproportionate to income.²⁵³ The purpose of the UWO is to target individuals making large purchases where the individual does not appear to be wealthy enough to make the purchase.²⁵⁴

249 *Id.*

250 Criminal Finances Act 2017, c. 22, Part 3. § 45(2).

251 *Id.* at § 45.

252 *Id.* at § 46.

253 *Id.* at §§ 362A-362T; see also Neil Gerrard et al., Get Ready for the UK's New Unexplained Wealth Order, Law360 (July 17, 2017), <https://www.law360.com/articles/944546/get-ready-for-the-uk-s-new-unexplained-wealth-order>.

254 Transparency International, Unexplained Wealth Orders: How to Catch the Corrupt and Corrupt Money in the UK (Apr. 28, 2017), https://www.transparency.org/news/feature/unexplained_wealth_orders_how_to_catch_the_corrupt_and_corrupt_money_in_the.

U.S. and International Legislative, Regulatory, and Enforcement Priorities

The emergence of UWOs brings about new issues in U.K. criminal law. UWOs place the burden of proof on the individual or entity to explain how the questioned property was obtained. UWOs also allow the government to confiscate property without a conviction.²⁵⁵ While there is still a lack of clarity on how these UWOs will operate in practice, there will likely be challenges to these orders in the U.K. courts.

Finally, the Criminal Finances Act includes a reform of the U.K. SAR regime. This new regime brings about the largest amount of change since the Proceeds of Crime Act 2002 (POCA).²⁵⁶ Under POCA, when a regulated entity receives or submits a SAR to the National Crime Agency (NCA), the UK's national law enforcement agency, the NCA has seven days to investigate and consent to the suspicious transaction.²⁵⁷ If it does not, the regulated entity is required to stop all activity on the questionable transaction for 31 days, known as the moratorium period.²⁵⁸ The SAR reforms will bring about two new powers for law enforcement agencies. First, law enforcement authorities may move the court to extend the moratorium period for up to 186 days to allow further time for investigation upon a showing that (i) an investigation is occurring in relation to a relevant disclosure; (ii) the investigation is being expeditiously and diligently conducted; (iii) additional time is needed to conduct the investigation; and (iv) it is reasonable under all circumstances to extend said moratorium.²⁵⁹

Additionally, authorities will have more power to obtain further information from the reporter of the SAR or another person carrying on a business in a regulated sector. An authorized officer may apply for an order to a magistrate for additional information to be disclosed to an office of the NCA. A court may allow for a "further information order" where (i) the requested information relates to a matter arising from a SAR; (ii) the information would assist in the investigation where an individual is engaged in money laundering or to aid in the determination of whether such an investigation should commence; and (iii) it is reasonable under all circumstances to require such information be provided.²⁶⁰

There are many questions with respect to how to respond to a further information order. Whether an individual would be required only to respond with personal information, or would have to investigate for such information, is one such question.²⁶¹ However, such orders do not extend to attorney-client privileged information, and, generally, such information cannot be used as evidence against the person providing such information in criminal proceedings.²⁶²

255 Criminal Finances Act 2017, c. 22, Part 1, §§ 362A-362T.

256 Neil Gerrard et al., Get Ready for the UK's New Unexplained Wealth Order, Law360 (July 17, 2017), <https://www.law360.com/articles/944546/get-ready-for-the-uk-s-new-unexplained-wealth-order>.

257 Proceeds of Crime Act (2002) § 335, <http://www.legislation.gov.uk/ukpga/2002/29/contents>.

258 *Id.*

259 Criminal Finances Act § 10; *see also* Neil Gerrard et al., The UK's New Suspicious Activity Reporting Regime: Part 2, Law360 (June 23, 2017), <https://www.law360.com/articles/937560/the-uk-s-new-suspicious-activity-reporting-regime-part-2>.

260 *Id.*

261 Neil Gerrard et al., The UK's New Suspicious Activity Reporting Regime: Part 2, Law360 (June 23, 2017), <https://www.law360.com/articles/937560/the-uk-s-new-suspicious-activity-reporting-regime-part-2>.

262 *Id.*

U.S. and International Legislative, Regulatory, and Enforcement Priorities

In addition to the Criminal Finances Act, British lawmakers plan to pass the Sanctions and Anti-Money Laundering Bill,²⁶³ which would give the U.K. government the authority to implement, impose, and lift sanctions in the future. The bill is designed to allow the U.K. to comply with United Nations and other international obligations regarding the prevention of money laundering and terrorist financing following Brexit.²⁶⁴ Finally, in December 2017, the U.K. government announced that it will be launching a new unit within the NCA designed to combat fraud and money laundering, called the National Economic Crime Center.²⁶⁵ The new unit will have the authority to coordinate the U.K.'s national response to economic crime.²⁶⁶ U.K. officials stated that new legislation will be passed allowing the new unit to directly order the SFO to investigate economic crime.²⁶⁷ Accordingly, the British government took many aggressive steps throughout 2017 to address money laundering and other forms of economic fraud.²⁶⁸

Anti-Money Laundering Developments in Europe

On December 19, 2017, after nine rounds of negotiations, the European Council agreed on an updated version of its anti-money laundering directive.²⁶⁹ The directive targets “letterbox companies” – companies that are established in tax-friendly countries but carry out their commercial business elsewhere – by allowing any individual to have access to the beneficial owners of EU companies.²⁷⁰ It also grants investigative journalists and non-governmental organizations access to beneficial owners of trusts.²⁷¹ Among other things, the directive will allow for the imposition of sanctions on businesses, protection for whistleblowers, and the ability to call out EU member states that are not compliant with anti-money laundering rules.²⁷²

263 Mark Taylor, UK Draws Up New Sanctions, Anti-Money Laundering Bill, Law360 (Oct. 19, 2017), <https://www.law360.com/articles/976174/uk-draws-up-new-sanctions-anti-money-laundering-bill>.

264 *Id.*

265 Paige Long, UK Gov't to Create New National Economic Crime Center, Law360 (Dec. 11, 2017), <https://www.law360.com/articles/993256/uk-gov-t-to-create-new-national-economic-crime-center>.

266 *Id.*

267 *Id.*

268 *Id.*

269 Najjyya Budaly, EU Shines a Light on Owners of Firms Dealing in Dirty Money, Law360 (Dec. 19, 2017), <https://www.law360.com/articles/996305?scroll=1>.

270 *Id.*

271 *Id.*

272 *Id.*



Practical Considerations in Conducting
Cross-Border Investigations: Attorney-Client Privilege
and Work Product Doctrine

Practical Considerations in Conducting Cross-Border Investigations: Attorney-Client Privilege and Work Product Doctrine

The increase in cross-border enforcement continues to raise a host of practical issues that companies and their counsel must navigate to successfully defend the company in all investigating jurisdictions. In particular, companies should be mindful of the different laws concerning the attorney-client privilege and work product doctrine that apply in different jurisdictions.

In July 2018, the U.K. Court of Appeal will hear the appeal in *Serious Fraud Office v. Eurasian Natural Resources Corp. Ltd. (ENRC)*.²⁷³ As discussed in our *2017 Mid-Year Cross-Border Report*, in May 2017, the U.K. High Court of Justice, Queen's Bench Division, limited the scope of the U.K. legal advice and litigation privileges (the U.K. counterparts to the U.S. attorney-client privilege and work product doctrine, respectively) in the context of an internal investigation. Among other things, the court held that interview notes drafted by ENRC's outside counsel in connection with an internal investigation into allegations of fraud and corruption that was conducted in response to, first, an email from an apparent whistleblower, and then, by indications that the SFO was investigating the alleged misconduct, were not covered under the U.K. legal advice or litigation privileges. The *ENRC* decision highlighted the significant differences in the privilege laws applicable to internal investigations in the U.S. and the U.K.

First, the court held that the interview notes were not protected by the legal advice privilege because ENRC did not provide support that the individuals its counsel interviewed were authorized to obtain legal advice on behalf of the company, a standard that is similar to the "control group" test that was rejected by the U.S. Supreme Court in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). The court also rejected application of the litigation privilege to the interview notes, holding, among other things, that the communications between ENRC's counsel and the individuals interviewed were not in reasonable contemplation of litigation because the SFO only was conducting a criminal investigation at that point. Even if that were not the case, the court reasoned, ENRC did not show that the communications were made with the sole or dominant purpose of defending against litigation, as the primary purpose of ENRC's internal investigation was to assess the veracity of a whistleblower's claims and to prepare for potential SFO investigations. These standards also are markedly different from U.S. law on the work product doctrine.²⁷⁴

At the end of 2017, a U.K. court, in *Bilta (UK) Ltd v. Royal Bank of Scotland Plc* [2017] EWHC 3535 (*Bilta*), once again ruled on whether documents generated during the course of an internal investigation in response to a government investigation were covered under the litigation privilege. Unlike in *ENRC*, the court in *Bilta* held that the facts and circumstances presented rendered the documents created as part of the internal investigation covered by the litigation privilege.²⁷⁵

²⁷³ *Serious Fraud Office v. Eurasian Natural Res. Corp.* [2017] EWHC 1017, 11 (QB).

²⁷⁴ Patrick T. Campbell and Darley Maw, *Serious Fraud Office v. Eurasian Natural Resources Corp. Ltd. and Beyond: Attorney-Client Privilege and Work Product Doctrine in Cross-Border Investigations*, Bloomberg Law (Sept. 12, 2017), <https://www.bna.com/serious-fraud-office-n57982088104/>. For example, under U.S. law, generally, application of the U.S. work product doctrine does not require that the sole or dominant purpose for the creation of the documents is to defend against litigation. Rather, in most federal circuits, the party claiming protection under the work product doctrine need only show that, "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998) (citation omitted); see also, e.g., *In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.)*, 357 F.3d 900, 907 (9th Cir. 2004).) Under the "because of" test, 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. E.g., *In re Gen. Motors LLC Ignition Switch Litig.*, 80 F.Supp.3d 521, 532 (S.D.N.Y. 2015).

²⁷⁵ *Bilta (UK) Ltd v. Royal Bank of Scotland Plc* [2017] EWHC 3535 [¶ 70], <http://www.bailii.org/ew/cases/EWHC/Ch/2017/3535.html>.

**Practical Considerations in
Conducting Cross-Border
Investigations: Attorney-
Client Privilege and Work
Product Doctrine**

The dispute in *Bilta* arose out of missing trader intra-community (MTIC) fraud that allegedly affected the U.K. market for the European Union Allowances (EUAs), also known as “carbon credits.”²⁷⁶ The companies that allegedly participated in the fraud failed to satisfy their value-added tax (VAT) obligations in connection with the trades to the U.K. tax authority, Her Majesty’s Revenue and Customs (HMRC); instead, they paid their VAT receipts to third parties before going into liquidation.²⁷⁷ The claimants in *Bilta* insisted that when Royal Bank of Scotland (RBS) carried out the trades, it shut its eyes to what was an obvious fraud.²⁷⁸

On March 29, 2012, HMRC issued a letter to RBS stating that there might be grounds to deny RBS’s VAT reclaim in relation to the 2009 EUA trading.²⁷⁹ Subsequently, fearing an HMRC assessment, RBS retained counsel to conduct an internal investigation into the alleged fraud.²⁸⁰ Counsel for RBS was tasked with creating a report for HMRC advocating that RBS’s conduct did not warrant an HMRC assessment.²⁸¹

The claimants in *Bilta* sought the internal investigation documents, arguing that they were not covered by the litigation privilege.²⁸² The claimants conceded that the documents were created at a time when litigation was in contemplation, and that that litigation was adversarial.²⁸³ However, heavily relying on *ENRC*, the claimants argued that RBS did not create the documents for the sole or dominant purpose of conducting that litigation.²⁸⁴ Rather, the claimants argued that RBS’s internal investigation was intended to ensure that RBS satisfied its general duties and obligations as a taxpayer and to convince HMRC not to carry out the threatened assessment.

The court disagreed with the claimants’ argument and distinguished the case from *ENRC*. The court held that the March 29, 2012, HMRC letter amounted to a “watershed moment,” prompting an investigation that may have had the “subsidiary purpose” of fending off an HMRC assessment, but that in reality, at that point litigation was “almost inevitable.”²⁸⁵ HMRC had already indicated that it had sufficient evidence to order an assessment; therefore, the “commercial reality” was that the documents created as part of RBS’s investigation were prepared for “the sole or at least the dominant purpose of the expected litigation,” and thus were covered by the litigation privilege.²⁸⁶

While *ENRC* is still good law, the *Bilta* court declined to draw a general legal principle from the decision. Instead, *Bilta* shows that U.K. courts will look to the “commercial reality” of the facts and circumstances under which the documents were generated. This provides some comfort in light of the potentially wide-reaching implications of the *ENRC* decision.

²⁷⁶ *Id.* at ¶ 4.

²⁷⁷ *Id.*

²⁷⁸ *Id.* at ¶ 5.

²⁷⁹ *Id.* at ¶ 22.

²⁸⁰ *Id.* ¶ 23.

²⁸¹ *Id.* at ¶¶ 33-36.

²⁸² *Id.* at ¶ 55.

²⁸³ *Id.* at ¶¶ 50-54.

²⁸⁴ *Id.* at ¶ 55.

²⁸⁵ *Id.* at ¶ 60, 66.

²⁸⁶ *Id.* at ¶ 65, 70.



Key Takeaways

Key Takeaways

The cross-border legislative, regulatory, and enforcement landscape is constantly evolving and is now particularly unpredictable with a new administration in place. As this report highlights, the U.S. frequently cross-collaborates with other countries on investigative and enforcement efforts, while continuing to make use of all available means to carry out its activities even where the targeted conduct takes place abroad. U.S. regulators and law enforcement remain focused on combating allegedly manipulative securities trading practices and purported benchmark manipulation, working in parallel with their U.K. counterparts, and also levying significant fines for trade sanctions violations that occur substantially overseas. In addition, law enforcement authorities from different jurisdictions are increasingly coordinating enforcement actions based on the same conduct, and reaching coordinated resolutions. This cross-border landscape does not come without significant prosecution risk. Defendants who provided compelled testimony to an overseas regulator before being criminally charged by the U.S. are bringing *Kastigar* motions to challenge their indictments and/or convictions at trial on the basis that they were tainted, directly or indirectly, by the defendants' compelled testimony.

With the increase in cross-border enforcement, comes the increase in governments attempting to seize data outside of their own jurisdictions to support their enforcement actions. The raging battle over U.S. law enforcement's ability to seize data overseas continues with the United States Supreme Court set to review the *Microsoft-Ireland* decision. Foreign jurisdictions are also continuing to model each other's enforcement regimes, with countries beginning or enhancing whistleblower and DPA programs that are already established enforcement tools in the U.S. law enforcement and regulatory priorities in different jurisdictions are also increasingly becoming intertwined, as authorities on both sides of the pond continue to aggressively focus on holding individuals accountable for corporate wrongdoing, corruption, and money-laundering. Finally, companies and individuals must be aware of and address the practical challenges of defending against cross-border investigations and enforcement actions, such as having to deal with the different privilege laws across jurisdictions.

Companies and individuals should bear these issues in mind and use this report as a resource when confronted with cross-border enforcement or regulatory issues. Stay tuned for BakerHostetler's *2018 Mid-Year Cross-Border Government Investigations and Regulatory Enforcement Review* for more updates.

For more information about cross-border government investigations and regulatory enforcement, or if you have questions about how these matters may impact your business, please contact the following BakerHostetler attorneys or visit our website, bakerlaw.com.

John J. Carney

jcarney@bakerlaw.com

+1.212.589.4255

Steven M. Dettelbach

sdettelbach@bakerlaw.com

Cleveland
+1.216.861.7177

Washington, D.C.
+1.202.861.1621

George A. Stamboulidis

gstamboulidis@bakerlaw.com

+1.212.589.4211

Jonathan B. New

jnew@bakerlaw.com

+1.212.589.4650

Patrick T. Campbell

pcampbell@bakerlaw.com

+1.212.589.4643

bakerlaw.com

Recognized as one of the top firms for client service, BakerHostetler is a leading national law firm that helps clients around the world address their most complex and critical business and regulatory issues. With five core national practice groups – Business, Employment, Intellectual Property, Litigation and Tax – the firm has more than 940 lawyers located in 14 offices coast to coast. For more information, visit bakerlaw.com.

Baker & Hostetler LLP publications inform our clients and friends of the firm about recent legal developments. This publication is for informational purposes only and does not constitute an opinion of Baker & Hostetler LLP. Do not rely on this publication without seeking legal counsel.

© 2018 BakerHostetler®

BakerHostetler