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Today’s multinational corporations are well aware that regulatory and law enforcement investigations are often global in scope. U.S. authorities, for example, currently are conducting high-profile cross-border investigations concerning corrupt practices or bribery, market manipulation, tax fraud, price-fixing and sanctions violations, among other areas. The United States Department of Justice’s (DOJ) global investigative focus has resulted, among other things, in increased scrutiny of compliance programs of multinational corporations. Marshall Miller, principal deputy attorney general for the Criminal Division of the DOJ, has said that the DOJ’s recent prosecutions of multinational corporations reflect failures “in global enforcement of compliance programs” and “of any ‘culture of compliance’ to extend beyond U.S. borders,” and the rise of a culture favoring profits over compliance.

International cooperation, though not a new phenomenon in global investigations, is on the rise. Authorities worldwide are cooperating with U.S. authorities in a wide range of investigations, providing access to information and evidence, in addition to initiating their own parallel investigations. Miller recently commented, “We have forged deepening relationships with non-U.S. governments,” and Attorney General Eric Holder has stated that companies should expect even greater collaboration in the future, because in order to “pursue even more criminal cases against bad-actor institutions in the future — no matter their size,” the U.S. “must harmonize our domestic regulatory scheme with its global counterparts.” Miller and Leslie Caldwell, assistant attorney general and chief of the DOJ’s Criminal Division, recently have warned that as a result of the DOJ’s deepening international relationships and increasing sophistication in analyzing non-U.S. law, the DOJ will more rigorously evaluate claims that international data privacy laws preclude the production of materials requested by the DOJ and may consider such claims “obstructionist” if deemed unsupported by relevant law.

Non-U.S. authorities also are increasingly initiating their own cross-border investigations, with the U.S. (and others) following thereafter. Authorities in China, for instance, have launched independent corruption and price-fixing investigations that have led to follow-on investigations in the U.S., the U.K. and elsewhere.

CROSS-BORDER ENFORCEMENT TRENDS

Government authorities worldwide continue to aggressively pursue alleged violations of laws and regulations. Over the past 18 months, criminal and regulatory actions have been commenced against businesses and financial institutions in multiple jurisdictions and across areas including market abuse, sanctions violations, corrupt practices, tax evasion and antitrust, resulting in the imposition of unprecedented monetary penalties and, on occasion, guilty pleas of major financial institutions.

EVENTS & PUBLICATIONS

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Read “[Getting the Deal Through: Government Investigations](#)” by contributing editors David M. Zornow, Skadden’s global head of Litigation/Controversy, and counsel Jocelyn Strauber.

SKADDEN'S CROSS-BORDER INVESTIGATIONS CAPABILITIES

Skadden advises and defends corporations, financial institutions and individuals at all stages of regulatory and law enforcement investigations. Our attorneys also regularly assist corporate clients in establishing, implementing and enhancing state-of-the-art compliance programs. We combine an on-the-ground presence in key financial centers; experience representing parties in every corner of the world, including the Americas, Europe and Asia Pacific; and a network of dedicated local counsel in locations where the firm does not have a physical office to meet our clients' needs, no matter where they may arise. Our capabilities span the full range of regulatory and white collar subject matter areas.

Market Abuse

In the wake of the financial crisis in 2008-2009, law enforcement authorities and regulators in multiple jurisdictions continue to investigate and punish wrongdoing associated with the manipulation of aspects of the global financial system.

In 2012, media reports revealed that traders at major international banks may have manipulated the London Interbank Offered Rate (LIBOR), which serves as the primary benchmark for short-term interest rates globally and as a reference rate for many interest rate contracts, mortgages, credit cards, student loans and other consumer lending products. Regulators and law enforcement authorities in Europe, the U.S., Australia, Canada, Hong Kong, Japan and Singapore have coordinated their investigations into this alleged misconduct.

This demonstration of cross-border cooperation has resulted in two subsidiaries of non-U.S. financial institutions pleading guilty to wire fraud, authorities across the globe levying nearly \$6.5 billion in fines, and law enforcement authorities in both Europe and the U.S. bringing criminal charges against individuals from multiple countries. To date, the DOJ has criminally charged nine individuals, and the U.K. Serious Fraud Office (SFO) has brought charges against 12 others and indicated that additional individuals will be charged in the near future. Recent charges brought by the DOJ have been confined to using wire or bank fraud in an effort to manipulate LIBOR, but past criminal charges against one Scottish bank and one trader also included price-fixing under the Sherman Act. In the summer of 2014, two former traders (a citizen of the United Kingdom and a Japanese national) of a Netherlands-based Bank pled guilty to wire and bank fraud conspiracy charges in the U.S. for their involvement in manipulating LIBOR submissions to benefit trading positions. Earlier this month, a senior banker at a U.K. bank became the first person to plead guilty in the U.K. to charges arising out of the LIBOR investigation. The banker — who has not been identified — pled guilty to conspiracy-to-defraud charges.

Government authorities worldwide also are reportedly investigating potential manipulation of the multitrillion-dollar foreign exchange market. Press reports dating back to June 2013 have asserted that foreign exchange traders at major international banks manipulated the global currency exchange markets and, in particular, the WM/Reuters benchmark currency exchange rates, which are used to value trillions of dollars of investments around the globe. WM/Reuters publishes benchmark currency exchange rates each hour, based on actual transactions. Reports have stated that traders were manipulating those rates via their trading activity during the 60-second windows in which the benchmarks are set, and were sharing order information with traders at other banks so as to align their trading strategies during these windows.

The U.K. Financial Conduct Authority (FCA), which is widely considered to be the first agency to investigate potential manipulation in the foreign exchange markets, has publicly acknowledged the fact of its ongoing investigation. The DOJ, Commodity Futures Trading Commission, Securities and Exchange Commission (SEC), European Commission, and other regulatory and law enforcement entities around the world have reportedly opened their own investigations as well. No charges have been brought to date, though press reports have stated that penalty negotiations have begun between the FCA and a number of multinational financial institutions.

Economic Sanctions

U.S. authorities continue to aggressively pursue individuals and institutions that violate U.S. sanctions regulations. In July 2014, BNP Paribas SA (BNPP) became the first non-U.S. financial institution to plead guilty to such violations, in connection with processing transactions through the U.S. financial system on behalf of sanctioned Sudanese, Iranian and Cuban entities, by concealing references to those entities' involvement in financial and trade transactions.¹ In connection with the guilty plea, BNPP agreed to pay \$9 billion in financial

¹ DOJ Press release of June 30, 2014 (at <http://www.justice.gov/opa/pr/2014/June/14-ag-686.html>).

penalties, \$963 million of which was assessed by the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC), to settle its investigation into BNPP's practices. As a result of BNPP's payment, OFAC has assessed a total of approximately \$1.2 billion in penalties to date in 2014. By comparison, OFAC assessed approximately \$137 million during 2013, and even excluding the BNPP settlement, OFAC's assessed penalties in 2014 already have exceeded those assessed in 2013.

In response to rising tensions between Ukraine and Russia and the annexation of Crimea by Russia, the U.S. Department of the Treasury imposed in July 2014 a broad-based package of sanctions on entities in the financial services, energy, and arms or related materiel sectors of Russia, pursuant to a series of executive orders. In September, additional sanctions were imposed on an expanded group of Russian entities. As with all U.S. sanctions, the restrictions apply to any entity owned 50 percent or more by a sanctioned person or entity; based on new guidance from OFAC, this rule now also applies to any entity owned 50 percent or more by sanctioned persons or entities in the aggregate.

On July 16, 2014, OFAC created a new Sectoral Sanctions Identification List (SSIL) pursuant to Executive Order 13662 and designated four Russian entities — two financial institutions and two energy firms. Pursuant to OFAC's first and second SSIL directives, U.S. persons are essentially prohibited from transacting in, providing financing for or otherwise dealing in new medium- and long-term debt or equity issued by these four entities, but the property of these entities was not blocked and U.S. persons were permitted to conduct other transactions with them. In July, OFAC also added to its List of Specially Designated Nationals and Blocked Persons, among others, (i) eight Russian arms suppliers and one state-owned defense technology firm, (ii) an entity that has asserted governmental authority over certain parts of Ukraine without the authorization of the Ukrainian government, as well as a leader of that entity, (iii) a key shipping facility in the Crimean peninsula and (iv) four Russian government officials. As a result of these sanctions, any assets of the designated entities or individuals within the U.S. were subject to freeze orders, and transactions between these entities/ individuals and U.S. persons or by those entities within the U.S. were prohibited.

On September 12, 2014, OFAC intensified the sanctions against Russia. First, OFAC updated the first SSIL directive (Directive 1), effectively cutting off an expanded list of Russian financial institutions from all U.S.-dollar financing except for very short-term financing (*i.e.*, less than 30 days). OFAC also modified the second SSIL directive (Directive 2), by adding two energy companies to the list of designated entities but maintaining the same restrictions on obtaining new medium- and long-term financing from U.S. persons. OFAC also issued two new directives: Directive 3, which essentially cuts off from U.S.-dollar financing (except for very short-term financing), and Directive 4, which prohibits U.S. persons from providing goods, services (except financial services) and technology in support of the exploration or production of deep-water, Arctic-offshore or shale projects that have the potential to produce oil in Russia or in the maritime area claimed by Russia.

In response, Russia has adopted so-called "Protective Economic Sanctions." Currently, the sanctions are limited to a ban on the import to Russia of (i) food products from the U.S., the EU, Canada, Australia and Norway² and (ii) products of consumer goods manufacturing³ if such products are designated for use by the Russian state, except for products imported from Belarus and Kazakhstan. Although the ban specified in item (ii) does not specifically relate to the U.S., the EU or other states that introduced or supported the economic sanctions against Russia, it is considered related to such sanctions, given its timing.

²Order No. 560 of the Russian President, "On the application of certain special economic measures to protect security of the Russian Federation," Aug. 6, 2014; Resolution No. 778 of the Russian Government, "On the measures implementing Order 560 of the Russian President dated 6 August 2014," Aug. 7, 2014, as amended by Resolution No. 830 of the Russian Government, "On amending Resolution No. 778 of the Russian Government dated 7 August 2014," Aug. 20, 2014.

³Resolution No. 791 of the Russian Government, "On the introduction of a ban on the import of the products of consumer goods manufacturing designated to be used for the federal needs of the state," Aug. 11, 2014.

Cross-Border Tax Enforcement

U.S. authorities also continue to investigate and prosecute non-U.S. banks and financial advisors suspected of aiding U.S. taxpayers in evading their tax obligations by opening and maintaining undeclared accounts overseas.⁴

In May, Credit Suisse AG pled guilty to conspiracy to aid and assist U.S. taxpayers in filing false income tax returns and other documents with the Internal Revenue Service (IRS). Credit Suisse AG also agreed to pay \$2.6 billion in fines in connection with the plea. The prosecution of Credit Suisse arose out of a long-running investigation resulting in indictments of eight of its executives since 2011, two of whom have pled guilty. The Credit Suisse guilty plea followed the January 2013 guilty plea of Wegelin Bank, the oldest private bank in Switzerland and first non-U.S. bank to plead to felony tax charges, for helping U.S. account holders hide assets from the IRS in undeclared accounts.

In addition to its own enforcement efforts, the DOJ joined the Swiss federal government in August 2013 in announcing a voluntary disclosure program open to Swiss banks not already under investigation by the DOJ. Approximately 80-100 Swiss banks reportedly are still participating in the program. The program provides Swiss banks that have reason to believe they may have committed a tax- or monetary-related offense under U.S. law with an opportunity to obtain a non-prosecution agreement in exchange for: (i) paying a substantial fine based on the value of undeclared accounts maintained or opened after August 2008, and (ii) disclosing a significant amount of information about its historical activities and relationships with undeclared U.S. account holders. Banks participating in the program have provided the DOJ with account information, including information that will help in drafting requests to Swiss authorities for information related to undisclosed accounts, pursuant to a 1996 treaty between the U.S. and Switzerland.

The DOJ and IRS have repeatedly emphasized that their enforcement efforts extend beyond Switzerland and that they plan to follow the trail of undeclared money around the world, including to known private banking centers in Hong Kong, Singapore and the Middle East. And the U.S. is not alone in its aggressive pursuit of banks and financial advisors suspected of aiding taxpayers in evading their tax obligations. Earlier this month, press reports indicated that UBS AG may be facing a fine of as much as \$6.2 billion in connection with a French probe regarding whether it helped French nationals evade taxes in France.

Anti-Corruption

Multijurisdictional enforcement and international cooperation are on the rise in corruption investigations as well. U.S. authorities are actively enforcing the U.S. Foreign Corrupt Practices Act (FCPA); according to public reports, there are over 100 pending corruption investigations. In just the first six months of 2014, the DOJ and SEC collected more than \$582 million in settlements with four major corporations — Alcoa Inc., Smith & Wesson Holding Corp., Hewlett-Packard Co. and Marubeni Corp. — based on allegations of misconduct in multiple countries, including Bahrain, Indonesia, Mexico, Pakistan, Poland and Russia. Regulators in these countries provided the DOJ with significant support by supplying information and investigative assistance.⁵

Substantial anti-corruption efforts are by no means limited to the U.S.; nations worldwide are initiating their own anti-corruption investigations and prosecutions. China's recent anti-corruption campaign has received a great deal of media attention and has impacted numerous industries and companies doing business in China (see Page 6, "Asia Pacific: A

⁴ See also "Latest Swiss Cross-Border Tax Investigation Reflects Wider US Enforcement Agenda" (June 26, 2014), available at https://www.skadden.com/sites/default/files/publications/Latest_Swiss_Cross-Border_Tax_Investigation_Reflects.pdf.

⁵ Bloomberg BNA, "U.S. Foreign Corrupt Practices Act Enforcement and Anti-Corruption Trends: A 2014 Mid-Year Review," September 2014, at http://www.skadden.com/newsletters/BloombergBNA_WorldSecuritiesLawReport.pdf.

U.S. authorities continue to aggressively pursue non-U.S. banks and financial advisors suspected of aiding U.S. taxpayers in evading their tax obligations.

New Enforcement Environment in China”). In January 2014, Brazil’s new anti-corruption law, the Clean Company Act, took effect. Brazilian law does not provide for criminal liability for corporations, but the Clean Company Act allows the imposition of civil money penalties against Brazilian entities found liable for bid-rigging and fraud in public procurement or bribery of domestic and foreign public officials. In addition to Brazilian companies, the Clean Company Act applies to foreign companies with a presence in Brazil.

Antitrust

In the antitrust arena, authorities around the world continue to vigorously investigate international price-fixing. In the U.S., the Antitrust Division of the DOJ has targeted global industries from auto parts to thin-film-transistor liquid-crystal-display (TFT-LCD) panels, as well as activities relating to rate-setting, as discussed above. The auto-parts investigation — the largest in the Antitrust Division’s history — has involved significant fines against industry participants and convictions of numerous individuals. To date, 28 companies and 26 executives have pled guilty to price-fixing and bid-rigging in the auto parts industry, resulting in \$2.4 billion in criminal fines. The TFT-LCD investigation recently concluded when the Court of Appeals for the Ninth Circuit affirmed a \$500 million fine against Taiwanese AU Optronics Corporation.

It is worth noting that non-U.S. as well as domestic commercial conduct falls within the reach of the U.S. antitrust laws when the non-U.S. conduct constitutes activity “involving ... import commerce” into the U.S., or when the non-U.S. conduct has a “direct, substantial, and reasonably foreseeable effect” on U.S. commerce, pursuant to the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. § 6a. Currently, the U.S. Courts of Appeal are split on the question whether “direct” requires an immediate or merely proximate effect. Furthermore, there is potential for debate about the outer bounds of the “involving ... import commerce” clause, after a Court of Appeals upheld a criminal conviction of a corporation when 99 percent of the goods in question were sold abroad.⁶

In addition to increased antitrust enforcement efforts by U.S. authorities, China’s National Development and Reform Commission (NDRC) also has recently expanded its focus on international cartels and efforts to coordinate with international enforcers. Reports indicate that the U.S. antitrust division, NDRC, Japanese Fair Trade Commission, European Commission, Korean Fair Trade Commission and Taiwan Fair Trade Commission launched a coordinated investigation into cartelization of the capacitor market. This investigation appears to be the first instance of coordination between the U.S. antitrust division and NDRC on an active cartel case.

The capacitor investigation is one of several examples of the NDRC’s recent focus on international, rather than domestic, companies. Several U.S., German and Japanese auto-parts manufacturers also have faced fines from the NDRC. In September 2014, Audi and Chrysler were fined, collectively, ¥275 million (\$45 million) for spare-part pricing offenses (comprised of a \$40 million fine against Audi and a \$5 million fine against Chrysler). The prior month, 12 Japanese auto-part makers were fined a collective ¥1.24 billion (\$201 million) for their participation in a 10-year cartel. The fines against Audi and Chrysler and the launch of several pricing investigations against other foreign multinationals (including actions against General Motors and Daimler, which also have been reported to be under investigation for alleged violations of the Anti-Monopoly Law) have spurred concern that the NDRC may be using the Anti-Monopoly Law to target foreign companies for unilateral pricing activity acceptable in other jurisdictions. Both the U.S. and European Chambers of Commerce have been outspoken, and critics have warned that the NDRC’s continued high-profile investigations will impact the willingness of foreign multinationals to be present in China; foreign investment in China reportedly dropped to a four-year low in August 2014.

⁶ *United States v. Hsiung*, 758 F.3d 1074 (9th Cir. 2014).

ASIA PACIFIC: A NEW ENFORCEMENT ENVIRONMENT IN CHINA

Over the past year, the nature of regulatory enforcement activity in China appears to have shifted. Historically, Chinese enforcement actions appear to have been directed principally at domestic organizations and individuals; actions against prominent multinationals or non-China nationals were rare, and even controversial. That is no longer the case. In connection with China's well-publicized anti-corruption campaign and the increasingly expansive application of its Anti-Monopoly Law (see Page 5, "Cross-Border Enforcement Trends, Antitrust"), multinational corporations and non-Chinese nationals have found themselves targets of Chinese investigations and enforcement actions.

These investigations have involved multiple government agencies, including the State Administration for Industry and Commerce (SAIC), the Ministry of Public Security (MPS) and the National Development and Reform Commission (NDRC). Chinese authorities have emphasized that they are not targeting multinationals, yet investigations of businesses based overseas appear to be increasing in number, reflecting — at a minimum — a heightened interest in the conduct of foreign entities operating in China.

GSK in Focus: The Bribery and Anti-Corruption Sweep

GlaxoSmithKline (GSK), a multinational pharmaceutical company headquartered in the U.K., was the target of one of China's most prominent recent bribery investigations. GSK's Chinese subsidiary was found guilty in the Changsha Intermediate People's Court in Hunan Province on September 19 of bribing nongovernment personnel to obtain improper commercial gain and fined almost \$500 million. GSK's former top executive in China, Mark Reilly, was convicted of bribery charges, received a suspended three-year prison sentence and will be expelled from China; four other senior GSK executives received suspended sentences as well.

In January 2013, an anonymous whistleblower contacted the GSK board and the U.K. Serious Fraud Office, alleging that GSK sales representatives used discretionary cash budgets to bribe doctors to prescribe GSK pharmaceuticals and offered other improper incentives to doctors, including paid leisure travel. In July 2013, the Chinese police detained large numbers of China-based GSK personnel, on the basis of allegations that, since 2007, GSK had paid up to ¥3 billion (\$500 million) in bribes to doctors and government officials, including payments via hundreds of travel agencies and consultancies. In May 2014, Chinese authorities charged three GSK executives, including Reilly.

Chinese authorities also prosecuted Peter Humphrey and Yu Yingzeng, a husband-and-wife team of investigators hired by GSK to examine the whistleblower allegations, on charges that they illegally purchased personal data in connection with their investigation. Humphrey and Yingzeng were sentenced to two and a half years and two years in prison, respectively.

GSK has stated that it cooperated fully with Chinese authorities and took steps to comprehensively remedy the issues identified in the investigation. The company reportedly made fundamental changes to the incentive program for its salesforce — decoupling sales targets from sales personnel compensation — and significantly reduced and changed the interactions between its salesforce and healthcare professionals. GSK reportedly also expanded the processes for review and monitoring of invoicing and payments. GSK has apologized to the Chinese government and its people and stated that GSK remains fully committed to its business in China and to expanding access to medicines and vaccines.

While the investigation of GSK is perhaps the clearest example of the increased regulatory scrutiny of multinationals, Chinese authorities reportedly have initiated investigations or made inquiries of other multinationals doing business in China, including AstraZeneca, Roche, Bayer, Eli Lilly, Novartis and Sanofi. These investigations demonstrate a shifting enforcement environment for multinationals in China and illustrate how inquiries in China can prompt investigations in other jurisdictions. GSK, for example, is reportedly now facing additional corruption probes in the U.S., the U.K., Iraq, Jordan, Lebanon, Poland and Syria.

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Beyond GSK: What Can Multinationals Expect?

The recent wave of enforcement activity in China has contributed to a perception among some that multinationals have been singled out for investigation to benefit domestic competitors — a claim that the Chinese government has denied. Experts have attributed (in part) the drop in foreign direct investment in China this past August to nervousness on the part of multinationals about the risks of enforcement actions in China. In any event, there is no indication that China's interest in anti-corruption investigations is on the wane. For those multinationals operating in China — a solid growth market with a growing consumer base for many industries — GSK and other recent investigations underscore the importance of an integrated global compliance infrastructure and a sensitivity to the different enforcement environments across various jurisdictions. Rigorous and regular evaluation and refinement of corporate compliance programs, enhanced monitoring of operations and careful attention to the regulatory and enforcement landscape will assist multinationals in limiting their risks worldwide. Such vigilance seems particularly necessary for those companies operating in the vital Chinese market.

TAKING STOCK OF THE UK BRIBERY ACT 2010

This summer marked the third anniversary of the implementation of the U.K. Bribery Act 2010 (the Act). The Act criminalized, for the first time, a corporation's failure to prevent bribery in the U.K. or abroad by an "associated person," which it broadly defines as a person who performs services for or on behalf of the corporation. An "adequate" compliance program to prevent bribery is a defense under the Act — and therefore the Act provides a strong incentive for corporations to implement such a program.

The Act's expansive definition of an "associated person" and the law's broad geographical reach raised concerns of excessively aggressive enforcement. Thus far, those concerns have proved unwarranted. To date, no corporations have been prosecuted under the Act. However, the Serious Fraud Office's latest pronouncements, active investigations and recent prosecutions pursuant to the U.K.'s pre-existing anti-bribery laws all strongly suggest that the SFO will soon employ the Act to target corporations whose employees engage in corrupt conduct at home and abroad.

Recent SFO Cases and Future Pipeline

In September of this year, the SFO director stated that the agency currently has "37 defendants await[ing] trial in 12 cases" and over 60 cases in the pipeline.⁷ Public reports indicate that the SFO is presently pursuing bribery and fraud investigations involving numerous U.K. and multinational companies, including Rolls Royce, Barclays and GSK, to name a few.

The SFO also brought several major prosecutions under the prior U.K. anti-bribery legislation, including cases against Balfour Beatty, Innospec Limited, DePuy Limited, Macmillan Publishers and BAE Systems plc. These actions showcased the SFO's success in enforcing anti-corruption laws. Most recently, in June and July of this year, the SFO also successfully prosecuted CEOs and other executives of two major companies. In June, the SFO secured the convictions of Innospec Limited's two former CEOs, business director and sales director for their role in corrupt payments to public officials and agents of the Indonesian and Iraqi governments.⁸ The convicted Innospec executives received significant jail time, and the convictions were upheld by the Court of Appeal in September (though one jail sentence was reduced by one year). In July, Bruce Hall, an Australian national and former CEO of the Bahraini company Aluminium

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⁷ David Green, Speech at the Cambridge Symposium on Economic Crime, Jesus College, Sept. 2, 2014, [available at http://www.sfo.gov.uk/about-us/our-views/director%27s-speeches/speeches-2014/cambridge-symposium-2014.aspx](http://www.sfo.gov.uk/about-us/our-views/director%27s-speeches/speeches-2014/cambridge-symposium-2014.aspx).

⁸ *R v. Turner, Kerrison, Papachristos and Jennings*, unreported Southwark Crown Court, Aug. 4, 2014.

Bahrain B.S.C. (Alba) was sentenced to 16 months in prison for bribing an agent of Alcoa to secure contracts for the supply of goods and services to Alba.⁹

The Innospec convictions are significant as they mark the end of the SFO's six-year investigation of Innospec Limited — an investigation that involved significant cross-border cooperation and that may shed some light on the SFO's likely approach to a future Bribery Act prosecution. The investigation of Innospec Inc. and its U.K. subsidiary, Innospec Limited, began in 2006 and involved the SEC, DOJ and OFAC, as well as the SFO. Innospec Inc. cooperated with the investigation and ultimately pled guilty in the U.S. to violations of the Foreign Corrupt Practices Act and Cuban sanctions regulations, and Innospec Limited pled guilty to corruption-related offenses under the U.K.'s prior anti-corruption laws.¹⁰ In this first "global settlement" between a cooperating company and the SFO, OFAC, DOJ and SEC, Innospec Inc. paid more than \$40 million in fines to the SFO and U.S. authorities.

Strategy and Approach of the SFO

1. SFO expects corporate cooperation

The SFO now appears to expect significant cooperation with both U.K. and other governmental authorities — as Innospec Limited provided — from corporations that are under investigation.¹¹ In a recent speech, the joint head of Bribery and Corruption at the SFO reiterated the office's expectation of true and thorough cooperation, not just "the impression of cooperation."¹² Similarly, the SFO general counsel outlined the office's expectations of a company's cooperation when the company seeks a deferred prosecution agreement (DPA) and stated that the SFO expects corporations to promptly self-report and then to collect data and otherwise investigate wrongdoing using a methodology agreed to by the SFO.¹³ Innospec conducted an internal investigation that was vetted with regulators, engaged in remediation efforts, agreed to a monitor and pledged full cooperation in the investigation of its executives. This type of extensive cooperation may well become the model for future targets of bribery investigations and prosecutions in the U.K.

2. Cross-border cooperation

The Innospec investigation involved significant cooperation between the SFO and U.S. government authorities, and such cooperation has continued to this day. The SFO frequently works with non-U.K. regulators in bribery investigations — for example, the SFO collaborated with U.S. authorities to investigate BAE Systems plc. and Johnson & Johnson/DePuy, leading to further global settlements for corruption-related offenses. Most recently, the SFO has worked with Chinese authorities (the first notable instance of U.K.-China cooperation) in the GSK investigation.¹⁴ International cooperation in current investigations of manipulation of the LIBOR rate and the foreign exchange market demonstrates that multijurisdictional and multi-agency cases likely will be the standard for years to come.

⁹ *R v. Hall*, unreported Southwark Crown Court, July 22, 2014.

¹⁰ *R v Innospec Limited* [2010] EW Misc 7 (EWCC).

¹¹ SFO press release, Innospec Limited for prosecuted for corruption by the SFO, March 18, 2010, available at <http://www.sfo.gov.uk/press-room/press-release-archive/press-releases-2010/innospec-limited-prosecuted-for-corruption-by-the-sfo.aspx>.

¹² Ben Morgan, "Deferred Prosecution Agreements: What Do We Know So Far?," July 1, 2014, speech at the U.K. Aerospace and Defence Industry seminar, available at <http://www.sfo.gov.uk/about-us/our-views/other-speeches/speeches-2014/ben-morgan-speech-to-uk-aerospace-and-defence-industry-seminar.aspx>.

¹³ See <http://www.sfo.gov.uk/about-us/our-views/other-speeches/speeches-2014/corporate-criminal-liability-and-deferred-prosecution-agreements-.aspx>.

¹⁴ *Reuters*, "UK Fraud Office Liaising With China on GSK Bribery Case," July 23, 2014, available at <http://www.reuters.com/article/2014/07/23/us-britain-fraud-sfo-gsk-idUSKBN0FS1U320140723>.

3. U.K. crime to be prosecuted in the U.K.

The Innospec investigation also demonstrates that the SFO now intends to prosecute violations of U.K. law in the U.K. Previously, the SFO occasionally declined to prosecute non-U.K. nationals, and even U.K. nationals, where, for example, another regulator expressed interest in doing so. However, in the Innospec investigation the SFO prosecuted a U.S./U.K. national, and in the LIBOR investigation the SFO asserted jurisdiction over the prosecution of U.K. banker Tom Haynes, who also was a target of the DOJ's LIBOR investigations.

4. Sectoral sweeps and proactive investigations

The SFO may continue to focus on companies, like Innospec, that operate in areas potentially vulnerable to corruption offenses. In a recent policy statement, SFO Director Green stated that he will use intelligence-led policing powers to target sectors most vulnerable to economic crime, such as public contracts and construction, and oil and gas.¹⁵ Additionally, the SFO has announced that it intends to conduct industry-wide probes and proactive sectoral sweeps, a statement that indicates a move from a reactive to a more proactive approach to corruption investigations.¹⁶

Improvements to U.K. Sentencing Procedures and Framework

Recent changes to the U.K.'s sentencing procedures also will facilitate an increased volume of corporate corruption prosecutions.

First, newly available Deferred Prosecution Agreements provide a means to resolve investigations of corporations without a trial, guilty plea or declination of prosecution, and also can incentivize a corporation to cooperate. DPAs are offered at the discretion of the SFO, when deemed in the public interest and where there is sufficient evidence that an offense has been committed. The U.K. judiciary also plays a role — a court must determine whether a DPA is in the interests of justice and “fair, reasonable and proportionate.”¹⁷ If, at the end of the deferral period, the organization has fulfilled its obligations under the DPA, which may include remediation and the appointment of a monitor, the charges will be dropped; if not, the SFO can proceed with the prosecution.

Second, the U.K. has clarified sentencing guidance in corporate corruption cases. It previously was very difficult to predict the sentence that would be imposed in a corporate corruption case in the U.K. In an effort to provide uniformity and predictability in this area, the Sentencing Council has proposed sentencing guidelines for fraud, bribery and money-laundering offenses. These guidelines will provide a solid framework against which DPAs can be negotiated and a reliable means to compare the likely sentence in the U.S. and in the U.K. for similar conduct.¹⁸ The new sentencing framework has yet to be applied in practice but is likely to result in the imposition of higher fines for U.K. corporations that violate the U.K. Bribery Act, particularly with respect to corporations lacking adequate compliance policies.

This is therefore a key moment for corporations based or operating in the U.K. to refine and strengthen their anti-corruption policies and programs. The SFO has sent clear signals that it will aggressively prosecute corporate wrongdoing pursuant to the U.K. Bribery Act in the future.

Recent changes to the U.K.'s sentencing procedures ... will facilitate an increased volume of corporate corruption prosecutions.

¹⁵ *Financial Times*, “SFO Changes Approach With Aggressive Scrutiny of Key Sectors,” Oct. 24, 2013, available at <http://www.ft.com/cms/s/1%1b12dbc-3cc9-11e3-86ef-00144feab7de.html?siteedition=intl#axzz3BcKhARbp>.

¹⁶ David Green, Speech at the Cambridge Symposium on Economic Crime, Jesus College, Sept. 2, 2014, available at <http://www.sfo.gov.uk/about-us/our-views/director%27s-speeches/speeches-2014/cambridge-symposium-2014.aspx>.

¹⁷ Schedule 17 of the Crime and Courts Act 2013, Section 7.

¹⁸ Sentencing Council, “Fraud, Bribery and Money Laundering Offences Guideline Consultation,” June 2013, at http://sentencingcouncil.judiciary.gov.uk/docs/Fraud_Consultation_-_web.pdf.

CITY OF PONTIAC V. UBS AG: CURBING LIABILITY FOR FOREIGN SECURITIES TRANSACTIONS

In May, the Second Circuit Court of Appeals resolved two questions concerning the limits of extraterritorial application of Section 10(b) of the Securities Exchange Act of 1934, arising out of the Supreme Court's 2010 decision in *Morrison v. National Australia Bank Ltd.*¹⁹ The Second Circuit decision, *City of Pontiac v. UBS AG*²⁰ — one of first impression in the Circuit — confirmed that when securities transactions occur on a non-U.S. exchange, *Morrison* bars Section 10(b) claims even if (i) the issuer cross-listed the securities on a U.S. exchange and (ii) the buy order for those securities was placed in the U.S. The court thus closed the door on plaintiffs' efforts to apply Section 10(b) to securities transactions in shares of a non-U.S. issuer occurring on a non-U.S. exchange after *Morrison*, and made clear that *Morrison* limited Section 10(b)'s application to securities transactions that occur on U.S. exchanges.

In *Morrison*, the Supreme Court held, in the context of non-U.S. plaintiffs suing domestic and non-U.S. defendants for misconduct in connection with securities traded on non-U.S. exchanges, that Section 10(b) did not apply extraterritorially. The Court concluded that Section 10(b) thus provided a private cause of action only with respect to (i) transactions in securities listed on domestic exchanges and (ii) domestic transactions in other securities. In *City of Pontiac*, plaintiffs — non-U.S. and U.S. institutional investors — brought a putative class action against UBS (a non-U.S. issuer) pursuant to Section 10(b), alleging false statements by UBS in connection with the sale of UBS securities on a non-U.S. exchange. UBS had cross-listed the same securities on the New York Stock Exchange, and one plaintiff, a U.S. entity, placed the order to buy the securities in the U.S.; the order later was executed on a non-U.S. exchange.

The plaintiffs first claimed that because UBS securities were listed on both U.S. and non-U.S. exchanges, *Morrison* did not bar their claims because *Morrison* held only that Section 10(b) was inapplicable to claims arising out of securities *not* listed on a domestic exchange (the so-called "listing theory"). The U.S.-entity plaintiff further claimed that because the "buy order" was placed in the U.S., the second prong of *Morrison* was satisfied — that is, the "buy order" was a domestic transaction (*i.e.*, a purchase of securities in the U.S.).

The Second Circuit rejected the plaintiffs' "listing theory" as "irreconcilable with *Morrison* read as a whole." The court read *Morrison* to hold that the Exchange Act's focus was on the location of the securities transaction itself, not the location of an exchange where the security may be dually listed. The court emphasized that *Morrison* explicitly rejected the notion that the public interest of the U.S. extends to transactions conducted on non-U.S. exchanges and markets. Therefore, the court held that, because the transactions at issue occurred on a non-U.S. exchange and involved a non-U.S. purchaser of non-U.S.-issued shares, Section 10(b) did not apply.

The Second Circuit also rejected the claim that the placement of a "buy order" to purchase non-U.S.-issued shares on a non-U.S. exchange qualified as a purchase of a security in the U.S. under *Morrison*. Here the court relied on its decision in 2012 in *Absolute Activist Value Master Fund Ltd. v. Ficeto*,²¹ which held that, under *Morrison*, securities transactions are domestic "when parties incur irrevocable liability to carry out the transaction within the U.S. or when title is passed within the United States." The Second Circuit held that "the mere placement of a buy order in the U.S." did not demonstrate "that a purchaser incurred irrevocable liability in the U.S., such that the U.S. securities laws govern the purchase of those

¹⁹561 U.S. 247 (2010).

²⁰752 F.3d 173 (2d Cir. 2014).

²¹677 F.3d 60 (2d Cir. 2012).

securities.” In rejecting plaintiff’s claim, the court went on to reaffirm its position in *Absolute Activist* that “a purchaser’s citizenship or residency does not affect where a transaction occurs.”

The Second Circuit’s *City of Pontiac* decision clarifies the extraterritorial boundaries of the Exchange Act and strongly suggests that non-U.S. issuers are not subject to suit under the Exchange Act in connection with securities transactions that occur on non-U.S. exchanges, even when U.S. purchasers place orders to buy those securities in the U.S. However, the Second Circuit simply held that a buy order placed in the U.S., on its own, was insufficient to establish a domestic transaction — it did not elaborate on what additional facts might be sufficient. *Absolute Activist* previously noted that irrevocable liability in the U.S. may be evaluated by considering facts concerning the formation of contracts, the placement of purchase orders, the passing of title or the exchange of money. The *City of Pontiac* decision thus does not completely foreclose the possibility that additional facts might transform a purchase of non-U.S.-issued securities on a non-U.S. exchange into a domestic securities transaction to which Section 10(b) applies.

The question of whether a transaction is “domestic” — and the fact that *Morrison* and *City of Pontiac* do not clearly resolve that question — has implications in the foreign sovereign immunity context as well. In *Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC*, purchasers of securities sued a sovereign wealth fund operated by the Republic of Kazakhstan (the majority shareholder of a Kazakh bank), alleging false and misleading statements under Section 10(b) of the Exchange Act. The District Court for the Southern District of New York initially denied the fund’s motion to dismiss under the Foreign Sovereign Immunity Act.²² However, more recently, and in the wake of the *City of Pontiac* decision, the court granted the fund’s request for a certificate of appealability, noting “the somewhat unsettled and evolving nature of the law with respect to *Morrison*, which includes [the *City of Pontiac*] decision of the Second Circuit from only days ago that arguably affects this case.”²³ The court recognized that the question of whether a transaction is domestic for purposes of the application of *Morrison* to Section 10(b) could have implications for foreign sovereign immunity issues as well. Although the Second Circuit declined to immediately hear the appeal, the application of the *City of Pontiac* decision to the foreign sovereign immunity question may ultimately come before the Second Circuit.

²² 2014 WL 917055 (S.D.N.Y. March 10, 2014).

²³ 2014 WL 1881075 (S.D.N.Y. May 9, 2014).

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