

November 2015

Cross-Border Investigations Update

2 / Recent Developments

4 / Protecting the Privilege in Internal Investigations

A U.S. Court of Appeals shields investigation documents from disclosure.

6 / SEC Settles Investigation of Allegedly Improper Payments to Chinese Officials

The SEC settles with Mead Johnson Nutrition regarding allegations that its Chinese subsidiary made improper payments to government officials.

8 / Anti-Corruption Laws Introduced in Thailand, South Korea, India and China

Four Asian countries have adopted or are seeking to adopt increased criminal penalties for bribery of government officials.

9 / Cross-Border Tax Investigations Moving to Southeast Asia

U.S. regulators investigate transfers of U.S. taxpayer funds from Switzerland to other jurisdictions around the world, including in Asia.

10 / Trader First to Be Sentenced in UK Libor Trial

In August 2015, trader Tom Hayes was convicted after trial of manipulating Libor.

12 / US Court Rejects Accomplice Liability Theory in FCPA Case Against Nonresident Foreign National

A district court has ruled that a nonresident foreign national is not subject to criminal liability under the FCPA if he is not an agent of a domestic concern and did not commit the alleged acts while in the U.S.

14 / UK's New Rules to Encourage, Protect Whistleblowers

The United Kingdom has imposed new rules relating to whistleblowing on U.K.-authorized firms.

16 / Endnotes

17 / Contacts

Since the publication of our May 2015 issue, the following **significant cross-border prosecutions and settlements** have been announced.



May 2015
BHP Billiton

The company paid \$25 million to the U.S. Securities and Exchange Commission (SEC) to settle charges that it violated the accounting provisions of the U.S. Foreign Corrupt Practices Act (FCPA) by improperly sponsoring foreign government officials as guests at the 2008 Summer Olympics in Beijing.

FIFA Investigation

In May 2015, the U.S. Department of Justice (DOJ) unsealed a 47-count indictment charging 14 defendants with, among other offenses, racketeering, wire fraud and money laundering conspiracies. The indictment alleges that since 1991, the defendants and their co-conspirators violated the Racketeer Influenced and Corrupt Organizations Act by conspiring to enrich themselves through the receipt of approximately US\$150 million in bribes and kickbacks related to the distribution of media and marketing rights associated with various soccer matches and tournaments, including Fédération Internationale de Football Association (FIFA) World Cup qualifiers. The indictment also charged violations of the money laundering, wire fraud and U.S. Travel Act statutes. The defendants include nine officials acting in a fiduciary capacity within FIFA and affiliated associations; four sports, media and marketing executives; and one businessman accused of helping to transfer or conceal illicit payments.

June 2015
Joseph Sigelman

Joseph Sigelman, the former co-CEO of PetroTiger, pleaded guilty to one criminal count of conspiracy to violate the FCPA during the third week of his FCPA trial. Sigelman was sentenced on June 16 to probation and no jail time. After the conviction, the DOJ announced that it would not prosecute PetroTiger based on its “voluntary disclosure, cooperation, and remediation, among other factors.”

August 2015
Bank of New York Mellon

The SEC announced that Bank of New York Mellon (BNY Mellon) agreed to pay \$14.8 million to settle charges that it violated the FCPA by providing internships to three family members of foreign government officials affiliated with an unnamed Middle Eastern sovereign wealth fund. [See page 13 for more.](#)



September 2015

Hitachi Ltd.

Hitachi Ltd. paid \$19 million to resolve SEC charges that it violated the accounting provisions of the FCPA by inaccurately recording improper payments to South Africa's ruling political party in connection with contracts to build two multibillion dollar power plants.

U.S. v. Fokker Services

The U.S. Court of Appeals for the District of Columbia Circuit heard oral arguments in *U.S. v. Fokker Services* concerning district court Judge Richard J. Leon's rejection in February 2015 of a deferred prosecution agreement (DPA) between Fokker Services BV, a Dutch aerospace firm, and the DOJ. Fokker is accused of unlawfully exporting U.S. origin goods and services to Iran and other countries. Both the DOJ and Fokker appealed Judge Leon's decision to the D.C. Circuit.

John Ashe

U.S. Attorney for the Southern District of New York Preet Bharara announced charges against John Ashe, the former president of the United Nations (U.N.) General Assembly; the deputy U.N. ambassador for the Dominican Republic; two employees of a nonprofit organization based in New York; and a Macau real estate mogul and his assistant. The charges are in connection with an alleged multiyear scheme to pay more than \$1.3 million in bribes to Ashe in exchange for official actions in his capacity as U.N. General Assembly president in support of Chinese business interests.

October 2015

Court of Justice Ruling

The Court of Justice of the European Union declared the U.S.-EU Safe Harbor framework concerning the transfer of personal data from the European Union to the United States "invalid." (See Oct. 7, 2015, [Skadden client alert](#).) On October 26, 2015, the EU stated that it had reached a tentative agreement with the U.S. on a new trans-Atlantic transfer pact.

Crédit Agricole

Crédit Agricole CIB, and its parent, Crédit Agricole SA, settled with the U.S. Attorney's Office for the District of Columbia, New York County District Attorney's Office, New York Department of Financial Services, Board of Governors of the Federal Reserve System and the Office of Foreign Assets Control in connection with an investigation into the bank's compliance with U.S. economic sanctions laws between 2003 and 2008. As part of the settlement, Crédit Agricole will pay a combined penalty of \$787 million, enter into DPAs with the criminal authorities and undertake various remedial enhancements.

Bristol-Myers Squibb

Bristol-Myers Squibb (BMS) agreed to pay US\$14 million to the SEC to settle charges that it violated the FCPA and reaped more than US\$11 million in profits. The SEC alleged that BMS' joint venture in China made cash payments and provided other benefits to health care providers at state-owned or controlled hospitals in exchange for increased prescription sales. The SEC highlighted the company's failure to institute an effective system of internal controls to promptly respond to compliance gaps at its Chinese joint venture. In addition to penalties and disgorgement, BMS also agreed to report to the SEC for a two-year period on the status of its remediation and implementation of FCPA and anti-corruption compliance measures.

Protecting the Privilege in Internal Investigations



Any company engaged in or contemplating an internal investigation should take note of the U.S. Court of Appeals for the District of Columbia Circuit's recent decision in *In re Kellogg Brown & Root* (KBR), concerning the applicability of the attorney-client and work-product privileges to such investigations. As the court explained in *In re KBR*, "[s]o long as obtaining or providing legal advice was one of the significant purposes of the internal investigation, the attorney[client] privilege applies, even if there were also other purposes for the investigation and even if the investigation was mandated by regulation rather than simply an exercise of company discretion."¹ This protection extends to interview notes, summaries, memoranda and other materials generated during counsel-directed internal investigations.²

In so holding, the Court of Appeals twice vacated the district court's determinations that materials generated during an internal investigation were discoverable in civil litigation. In *In re Kellogg Brown & Root, Inc.*, defense contractor Harry Barko brought suit under the False Claims Act alleging that KBR inflated costs and took kickbacks from government subcontractors during the Iraq War.³ KBR, under the supervision of its law department, investigated these allegations pursuant to its code of business conduct. Barko maintained that documents associated with the internal investigation were nonprivileged business records subject to discovery.⁴

The district court sided with Barko, finding the materials nonprivileged and discoverable because the internal investigation was "undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice" and because KBR failed to show that "the communication would not have been made 'but for' the fact that legal advice was sought."⁵ In June 2014, a unanimous panel of the D.C. Circuit vacated that decision by a writ of *mandamus*, subject to the district court's further consideration of other arguments why the privilege might not apply.⁶

In subsequent proceedings, the district court again ordered disclosure of the materials, reasoning that even if the attorney-client privilege and work product protections attached, they were impliedly waived when KBR's 30(b)(6) designee reviewed the documents prior to his deposition and when KBR referred to them in certain sections of its summary judgment briefing.⁷

In August 2015, a separate unanimous panel of the D.C. Circuit took the extraordinary step of issuing a second writ of *mandamus* vacating the district court's order, thus shielding the investigation documents from disclosure. First, the panel held that KBR did not waive the privilege when its designee reviewed the documents in preparation for his 30(b)(6) deposition because under Federal Rule of Evidence 612, a piece of writing is discoverable

The Court of Appeals twice vacated the district court's determinations that materials generated during an internal investigation were discoverable in civil litigation.

only if a witness uses it to refresh memory before testifying and the judge decides that justice requires disclosure.⁸ Here, Barko noticed the deposition precisely to examine whether the investigation was privileged. The witness had no choice but to review the investigation documents — not to refresh memory, but to adequately prepare for the topics noticed. The appellate court held that allowing waiver in such a case would enable an adversary to obtain privileged documents merely by noticing a deposition on the topic of the privileged nature of the investigation, an “absurd” result that “would ring alarm bells in corporate general counsel offices throughout the country.”⁹

Second, the appellate panel held that KBR did not waive the privilege by placing the documents at issue. While KBR discussed its investigative mechanism in its summary judgment briefing, it did not actually disclose the contents of the work product or the conclusions of the investigation. Because KBR did not base a claim or defense on its attorneys’ advice, the materials remained subject to the privilege.¹⁰

While the Court of Appeals ultimately intervened to safeguard the privilege applicable to internal investigations, the district court’s rulings remind companies that the privilege is not invulnerable and provide an opportunity to reflect on the steps counsel may take so as to ensure, to the extent possible, that internal investigations and related materials retain their privileged nature. Such steps include:

- Counsel should carefully draft the engagement letter setting forth the scope of the investigation, identifying the individuals or entities within the scope of the privilege and explicitly stating that the investigation is being conducted by counsel in order to provide legal advice to the client.

- Materials generated during the investigation should reflect on their face that they are privileged and confidential and that they are attorney work product.¹¹ Interview memoranda should explicitly state that the interview was conducted as part of an investigation for the purpose of providing legal advice to the client, and that appropriate Upjohn warnings were given and acknowledged.
- Deposition counsel should clearly state on the record that testimony regarding the internal investigation is subject to the company’s claims of attorney-client privilege and work-product protection and should direct witnesses not to answer questions about the privileged contents of internal investigations. Deposition counsel also should consider conducting a cross-examination of its own client to establish the facts necessary to claim privilege with respect to the investigation, as did counsel for KBR.
- Court submissions referencing deposition testimony concerning the investigation should clearly state that they are not disclosing the contents of the work product or the conclusions of the investigation, and that they are not basing a claim or defense on the advice of counsel or the contents of privileged materials.

With these safeguards, and pursuant to the Court of Appeals’ decision in this case, companies can take some comfort that they may prevail against an aggressive adversary seeking discovery of privileged documents associated with an internal investigation.



SEC Settles Investigation of Allegedly Improper Payments to Chinese Officials

The SEC alleged that the subsidiary provided distributors with a discount termed a distributor allowance ... used to fund the improper payments and other incentives allegedly provided to the HCPs.

On July 28, 2015, it was announced that Mead Johnson Nutrition Co. (Mead Johnson) reached a settlement with the SEC, without admitting or denying the SEC's allegations that its Chinese subsidiary, Mead Johnson Nutrition (China) Co. Ltd. (Mead Johnson China) made improper payments to government officials in violation of the FCPA.¹² Mead Johnson agreed to pay US\$12,030,000.

The SEC's allegations centered around Mead Johnson China's conduct between 2008 and 2013, when the subsidiary allegedly utilized its distributor network to effectuate payments totaling over US\$2,070,000 to health care professionals (HCPs) in state-owned hospitals in China so that the HCPs would "recommend Mead Johnson's nutrition products to, and provide information about, expectant and new mothers."¹³ The SEC alleged that the subsidiary provided distributors with a discount termed a distributor allowance, which, among other things, was used to fund the improper payments and other incentives allegedly provided to the HCPs. The SEC also alleged books and records violations related to the recording of the distributor allowance in the company's books and records.

Importantly, Mead Johnson had received an allegation regarding potential FCPA violations and conducted an internal investigation in 2011 but failed to identify the alleged use of the distributor allowance to make improper payments to HCPs. The company did not report the potential FCPA violations to U.S. regulators. By 2013, it had discontinued distributor allowance funding and all practices related to compensating HCPs.

In its public release regarding the settlement with Mead Johnson, the SEC highlighted (i) the failure of Mead Johnson to identify these improper payments during the 2011 internal investigation, (ii) the failure of Mead Johnson to self-report the 2011 allegation, and (iii) the failure of Mead Johnson to promptly disclose the existence of the 2011 allegation during the SEC's subsequent inquiry into this matter. The SEC also noted that Mead Johnson's presence in China during the relevant period grew at a rapid pace, expanding from 28 cities to 241 cities within five years, and the SEC indicated that the company's internal controls were not adequate to prevent the alleged improper payments.

The SEC, however, credited Mead Johnson’s “extensive and thorough cooperation” during the SEC investigation, including undertaking a second internal investigation.¹⁴ The SEC also highlighted the “significant remedial measures” implemented by Mead Johnson following a subsequent 2013 internal investigation, including termination of senior Mead Johnson China staff, revisions to its compliance program and added resources to its compliance division (including establishing a unit in China to monitor the China operations on an ongoing basis).¹⁵

This settlement highlights the importance of robust internal controls both as a means of identifying and dealing with potential compliance issues and as a factor in U.S. authorities’ handling of related enforcement matters. As is made clear by the settlement and SEC release, U.S. regulators expect companies to take allegations of FCPA violations seriously, conduct thorough internal investigations into potential misconduct and ensure that their internal controls and compliance architecture are commensurate with the size and growth of their business. Robust controls and a defensible internal investigation are particularly important where a company may decide, in consultation with counsel, not to voluntarily report allegations or findings to U.S. regulators. These considerations are especially important in market environments such as China, where compliance-related allegations and issues may be common and where companies’ rapid growth could strain compliance resources and controls.

Anti-Corruption Laws Introduced in Thailand, South Korea, India and China



Asian countries have stepped up efforts to punish both bribe givers and bribe recipients. Thailand, South Korea, India and China have all adopted or are seeking to adopt increased criminal penalties for bribery of government officials. These new or pending regulations provide a strong reminder to companies doing business in the region that they must be conscientious of the frameworks imposed by local regulations, in addition to the perhaps more familiar requirements of the FCPA.¹⁶

Thailand, in particular, has focused attention on bribery by foreigners. Amendments to Thailand's Anti-Corruption Act took effect on July 9, 2015, and expanded the scope and applicability of the anti-corruption law.¹⁷ Among other things, foreigners (specifically, foreign officials working for foreign government agencies and international organizations) can receive the death penalty for taking bribes. Previously this penalty, which has yet to be imposed under the anti-corruption law, was applicable only to Thai nationals. The amendment also limits the applicability of a 20-year statute of limitations, no longer applying for individuals who have fled the country.

South Korea also has increased criminal penalties against corrupt public officials, in addition to reducing the burden of proof for corruption prosecutions. The Anti-Corruption Law (Act No. 13278), approved by the legislature in March 2015 and effective beginning in October 2016, introduces criminal penalties for public officials who accept over \$900 in cash or gifts. The law also removes the previous requirement that prosecutors establish a direct link between an action (or a failure to act) and an allegedly corrupt gift. Conviction under the new law can result in fines up to five times the amount of the bribe and a jail sentence of up to three years.

Similarly, India and China have indicated that they may adopt provisions that allow harsher penalties for corruption, particularly with respect to bribe givers. In India, the Prevention of Corruption (Amendment) Bill, 2013, amending the Prevention of Corruption Act, 1988, is currently pending approval.¹⁸ The bill reportedly focuses on bribe givers, establishing liability for companies and their officers and penalties, including prison sentences of up to seven years.¹⁹ The Lokpal Bill, which focuses on establishing an anti-corruption watchdog to investigate allegations of corruption,²⁰ also is pending parliamentary review in India. Likewise, Chinese legislators also have proposed changes to local criminal law to target bribe givers, including increased monetary penalties.²¹ The amendment also expands the scope of criminal bribery to include government officials who both directly and indirectly accept bribes.

Thailand, South Korea, India and China have all adopted or are seeking to adopt increased criminal penalties for bribery of government officials.

Cross-Border Tax Investigations Moving to Southeast Asia



As has been well publicized, and detailed in a June 26, 2014, [Skadden client alert](#), for several years U.S. regulators have been investigating and in some cases prosecuting Swiss banks alleged to have assisted U.S. taxpayers in evading U.S. taxes. Now, as U.S. regulators move to conclude their enforcement activities in Switzerland, they have indicated that they will “follow the money” to investigate transfers of U.S. taxpayer funds from Switzerland to other jurisdictions around the world, including in Asia. For example, in July 2015, *The Wall Street Journal* reported that the Internal Revenue Service (IRS) had launched a probe into a Singaporean asset management firm alleged to have accepted transfers from undeclared Swiss accounts closed by U.S. taxpayers. This investigation marks the start of the next phase of IRS and DOJ tax investigations.²²

Banks in the region will need to evaluate their potential exposure for tax violations relating to U.S. customers, and to consider ways to investigate and address any identified risks.

Regulators in southeast Asia and elsewhere already have started to sign agreements to share information with foreign tax authorities, including U.S. tax regulators. For example, Singapore recently signed a multilateral Organisation for Economic Co-operation and Development (OECD) agreement whereby it will start automatically sharing information with foreign tax authorities beginning in 2018. It appears likely that U.S. regulators may replicate the approach pursued with the Swiss government in other jurisdictions, essentially allowing banks suspected of tax offenses related to U.S. customers to obtain a nonprosecution agreement or nontarget letter if they pay a fine and disclose information about certain account holders.

In light of this new, focused enforcement risk, banks in the region will need to evaluate their potential exposure for tax violations relating to U.S. customers, and to consider ways to investigate and address any identified risks. Armed with a wealth of detailed information gleaned from cooperating banks and taxpayers under the auspices of the Swiss investigations, U.S. regulators already have begun to turn their attention to Asia.

Trader First to Be Sentenced in UK Libor Trial



The SFO took an aggressive approach to the Hayes case, which may be attributable in part to the increased political scrutiny of the agency in the U.K., particularly in connection with the Libor cases.

On August 3, 2015, Tom Hayes, a former UBS and Citigroup trader, was sentenced to 14 years' imprisonment by a court in the United Kingdom. Hayes was the first trader convicted of manipulation of the London Interbank Offered Rate (Libor) in proceedings brought by the Serious Fraud Office (SFO), and at his sentencing Lord Justice Cooke noted that "a message [must be] sent to the world of banking." The SFO took an aggressive approach to the Hayes case, which may be attributable in part to the increased political scrutiny of the agency in the U.K., particularly in connection with the Libor cases.

Furthermore, the SFO has described Hayes as the "ringmaster" in a conspiracy involving 10 banks and financial institutions. A trial of Hayes' co-conspirators commenced in early October 2015 in the U.K. and a third, unrelated, U.S. dollar Libor trial is set for January 2016. The SFO has also indicated that it is developing cases against other individuals, to be announced in the coming months.²³

As discussed further below, the Hayes case exemplifies extensive cooperation among multiple regulators in different jurisdictions, resulting in corporate and individual enforcement proceedings and settlements worldwide. Hayes' significant sentence also highlights the severe consequences of an individual defendant's failure to cooperate when facing allegations of serious economic crime in the United Kingdom.

Cross-Border Enforcement Cooperation

Between June 2012 and May 2015, the U.K.'s Financial Conduct Authority (FCA) and its U.S. counterparts, the DOJ, the Commodity Futures Trading Commission (CFTC) and the SEC, have levied nearly \$6 billion in fines against global banks for their role in Libor manipulation, in closely coordinated investigations and settlements.

Cross-border cooperation with respect to individual prosecutions, while robust, has not been quite so well coordinated. For example, when the DOJ sought to question Hayes in the U.K., the SFO rejected its request. The SFO arrested Hayes — a U.K. national based in the U.K.

— on fraud charges; the DOJ subsequently filed an extradition request. Because the SFO had already charged Hayes, he could not be extradited.²⁵

In early 2014, the SFO also charged a former Barclays trader who was cooperating with the DOJ, as well as three U.S.-based British Barclays traders.²⁴ In early 2015, the DOJ requested that Interpol issue a red notice to arrest a former ICAP broker, Darrell Read, a British national, in connection with alleged Libor manipulation, even though he was charged with rigging the yen Libor in the United Kingdom. His U.K. trial commenced in early October 2015.

Against this backdrop, the SFO now seems less likely to decline to prosecute individuals in multijurisdictional cases. Previously, the SFO declined to prosecute the “NatWest Three”²⁶ (in relation to the Enron case) and Jeffrey Tesler²⁷ (as part of the Nigeria Bonny Island FCPA investigation) — British nationals who were the subjects of open DOJ investigations and ultimately were extradited to the United States. Subsequent to the August 2014 conviction of four SFO targets — former Innospec CEO Paul Jennings and three other former Innospec managers — whom the U.S. authorities also were seeking to prosecute, the SFO appears to have become more resolute in asserting jurisdiction.²⁸ Today’s SFO is more likely to pursue its own prosecutions of offenses committed in and from the U.S. and particularly where the defendants are British. The prosecution of Hayes and the lengthy sentence he received is likely to reinforce the SFO’s commitment to this approach.

Cooperating in UK Criminal Proceedings

Hayes’ significant prison sentence may be due in part to the court’s perception that he made efforts to manipulate the prosecution and the U.K. judicial system. He initially cooperated with the SFO in over 80 hours of voluntary interviews in which he admitted his conduct and acknowledged it was dishonest. However, Hayes subsequently refused to plead guilty, and in his trial testimony, he stated that he had cooperated with the SFO and made admissions only to avoid similar charges by the DOJ.

When imposing a custodial sentence in the U.K., the judge must impose a sentence that is commensurate with the seriousness of the offense.²⁹ The new sentencing guidelines for Fraud, Bribery and Money Laundering Offences, in effect since October 2014, have transformed sentencing in the U.K. for economic crimes.³⁰ The principle-based guidelines (an approach akin to that of the U.S. federal sentencing guidelines) provide greater certainty in the sentencing of individuals and companies. The new sentencing regime requires consideration of factors such as the harm caused by the offense and the extent of the defendant’s culpability.³¹

Moreover, an early guilty plea should result in an approximately 30 percent discount on the overall sentence.³² Cooperation with the prosecuting authorities can bring a further discount of between 30 to 50 percent, depending on the value and quality of the cooperation.³³ Where a defendant is sentenced to a term of imprisonment under four years, the defendant likely will serve half of the sentence or less, whereas for a prison term over four years, the defendant will likely serve two-thirds of the sentence imposed.

By contesting the SFO’s case, after initially collaborating and agreeing to plead guilty, Hayes lost all credit for his admissions and cooperation. Hayes’ prosecution (and lengthy sentence) and those cases that are expected to follow reflect the SFO’s willingness to prosecute U.K.-based defendants for U.K. conduct, its aggressive approach to sentencing and the risks to those defendants who fail to cooperate fully with the SFO’s investigations.



US Court Rejects Accomplice Liability Theory in FCPA Case Against Nonresident Foreign National

The court ... ruled that the government must prove that Hoskins was acting as an agent of a U.S. company to convict him of conspiracy to violate the FCPA.

On August 13, 2015, the U.S. District Court for the District of Connecticut held that a nonresident foreign national is not subject to criminal liability under the FCPA if he is not an agent of a domestic concern and did not commit the alleged acts while physically present in the United States.³⁴ The court rejected the DOJ's claim that the defendant — Lawrence Hoskins, a British national and the former senior vice president in the United Kingdom division of Alstom Power, S.A., a French power and transportation company — could be convicted of violating the FCPA on the theory that he engaged in a conspiracy by acting “together with” a domestic concern to violate the FCPA, *i.e.*, that he acted as an accomplice to Alstom Power Inc.'s alleged violation.³⁵

Specifically, the DOJ alleged that Hoskins participated in a bribery scheme from 2002 to 2009 for Alstom Power, Inc., a company headquartered in Windsor, Connecticut, to secure a \$118 million project to build power stations for Indonesia's state-owned and state-controlled electricity company. The government alleged that Hoskins approved and authorized payments to consultants retained for the purpose of paying bribes to Indonesian government officials to secure a contract to build the power stations.

Three categories of individuals and entities are subject to jurisdiction under the FCPA statute: (i) a “domestic concern”³⁶ or a U.S. issuer of securities, or any officer, director, employee or agent thereof, who makes use of U.S. interstate commerce in furtherance of a corrupt payment, (ii) a U.S. citizen, resident or national who commits an act in furtherance of a corrupt payment, regardless of whether he or she makes use of U.S. interstate commerce, and (iii) any person who, while in United States territory, commits an act in furtherance of a corrupt payment.³⁷

The conspiracy charge against Hoskins, however, was consistent with the government's efforts to expand FCPA jurisdiction beyond the plain language of the statute. As explained in the FCPA Resource Guide, published jointly by the DOJ and the SEC in November 2012:

Individuals and companies, including foreign nationals and companies, may also be liable for conspiring to violate the FCPA — *i.e.*, for *agreeing* to commit an FCPA violation — even if they are not, or could not be, independently charged with a substantive FCPA violation. Under certain circumstances, it could also be held liable for the domestic concern's substantive FCPA violations under *Pinker-*

US Court Rejects Accomplice Liability Theory in FCPA Case Against Nonresident Foreign National

ton v. United States, which imposes liability on a defendant for reasonably foreseeable crimes committed by a co-conspirator in furtherance of a conspiracy that the defendant joined. A foreign company or individual may be held liable for aiding and abetting an FCPA violation or for conspiring to violate the FCPA, even if the foreign company or individual did not take any act in furtherance of the corrupt payment while in the territory of the United States.³⁸

The court in *Hoskins* rejected the government's expansive theory of FCPA jurisdiction and ruled that the government must prove that Hoskins was acting as an agent of a U.S. company to convict him of conspiracy to violate the FCPA.³⁹ The court held that Congress did not intend to impose accomplice liability under the FCPA on nonresident foreign nationals who are not subject to direct liability, *i.e.*, if they are not agents of a domestic concern and have not acted in the territory of the United States.⁴⁰

The court based its ruling on a review of the language and legislative history of the FCPA and application of the principle established by the U.S. Supreme Court in *Gebardi v. United States* that, where Congress has intentionally excluded a class of individuals from liability under a statute, the government cannot override congressional intent by charging those individuals with conspiring to violate the same statute that the individuals could not directly violate.⁴¹ The court did not dismiss the government's conspiracy count against Hoskins in its entirety, however, finding that the defendant could be found criminally liable for conspiracy to violate the FCPA if the government is able to prove at trial that Hoskins was acting as an agent of a domestic concern and thus subject to direct liability under the FCPA. The government's motion for reconsideration is pending.

The court's ruling, if upheld, may be a significant setback to the government's case against Hoskins given that it may be difficult to persuade the jury that Hoskins was acting as an agent of a domestic concern. Furthermore, the decision may cause the government to exercise caution in charging other nonresident foreign nationals under accomplice liability theories, even outside the Second Circuit.



'Sons and Daughters' Settlement

On August 18, 2015, the SEC announced that Bank of New York Mellon agreed to pay \$14.8 million to settle charges that it violated the FCPA by providing internships to three family members of foreign government officials affiliated with an unnamed Middle Eastern sovereign wealth fund.⁴² The SEC found that the bank provided the internships to maintain the fund's business, in violation of the FCPA's anti-bribery and recordkeeping provisions.⁴³

As set forth in the SEC's allegations — which BNY Mellon did not admit or deny — two foreign government officials asked for and received internships for their two sons and a nephew, in conversations indicating that the internships could result in beneficial business opportunities for BNY Mellon. Contrary to its standard practice, the bank hired the family members, who lacked the requisite academic and professional credentials for the internships, before meeting or interviewing them. While traditional BNY Mellon internships are two months, the family members received positions that lasted six months. Two of the interns, having already graduated from college, were paid above the normal intern salary scale.

Recent news media reports have indicated that as many as six other banks could be under investigation for similar conduct.

UK's New Rules to Encourage, Protect Whistleblowers



In June 2013, the Parliamentary Commission on Banking Standards issued a report finding that an absence of whistleblowing was contributing to a negative culture in banks and other financial institutions. In response to these findings, and in an effort to encourage and protect whistleblowers, the U.K.'s FCA and Prudential Regulation Authority (PRA) have imposed additional requirements relating to whistleblowing on U.K.-authorized firms, to take effect in 2016.

The FCA and the PRA have issued policy statements confirming that the new rules will apply to:

- U.K. entities that receive deposits (such as banks, building societies and credit unions) with assets of £250 million or greater;
- PRA-designated (*i.e.*, significant) investment firms; and
- insurance and reinsurance firms within the scope of Solvency II, the Society of Lloyd's and Lloyd's managing agents.

Other firms are directed to treat the new rules as guidance, although the application of the rules is likely to be expanded to other types of institutions.

The rules require firms to impose formal internal whistleblowing procedures; they do not require employees to report misconduct. Firms are required to:

- inform U.K.-based employees about the FCA and PRA whistleblowing services, and in particular to inform employees that they are entitled to approach the FCA and PRA at any stage of the whistleblowing process;
- develop procedures enabling whistleblowing claims to be handled anonymously, though firms may discuss with whistleblowers the benefits of disclosing their identity;
- develop procedures to ensure that claims are assessed and escalated as appropriate;
- ensure that all new settlement agreements explain the legal rights of employees, and make clear that employees are entitled to make protected and confidential disclosures;
- take reasonable steps to prevent retaliation against whistleblowers, and to report to the FCA any cases in which employees claim retaliation and prevail in an employment tribunal;

The U.K.'s Financial Conduct Authority and Prudential Regulation Authority have imposed additional requirements relating to whistleblowing on U.K.-authorized firms.

-
- provide appropriate training for U.K.-based employees and their managers, as well as those handling whistleblowing processes;
 - appoint a “whistleblowers’ champion” (discussed further below); and
 - report to the firm’s board on an annual basis concerning whistleblowing.

The appointment of a “whistleblowers’ champion,” responsible for a firm’s whistleblowing function and its general oversight, is a particularly significant requirement. The rules direct that the role be “entirely non-executive in nature” and be assigned to a nonexecutive director subject to the Senior Managers Regime or Senior Insurance Managers Regime. The champion is responsible for the whistleblowing function and must ensure that appropriate action is taken to respond to employees’ whistleblowing concerns. The champion is responsible for the preparation of the annual report to the board regarding whistleblowing activities, must have sufficient access to resources (including training) and possess a sufficient level of authority/independence in the firm to allow them to carry out these responsibilities.

Most of the new rules go into effect on September 7, 2016; the whistleblowers’ champion role must be established by March 7, 2016. Affected firms should take the opportunity to consider now how they will comply with these new rules and select a whistleblowers’ champion.

- ¹ See *In re Kellogg Brown & Root*, 756 F.3d 754, 758-59 (D.C. Cir. 2014) (*In re KBR I*).
- ² See *In re Gen. Motors LLC Ignition Switch Litig.*, 80 F. Supp. 3d 521, 529-30 (S.D.N.Y. 2015) (“[T]he privilege of nondisclosure is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice” (quoting *In re County of Erie*, 473 F.3d 413, 421 (2d Cir. 2007)) (alteration in original) (citation omitted)).
- ³ 796 F.3d 137 (D.C. Cir. 2015) (*In re KBR II*).
- ⁴ *Id.* (quoting *United States ex rel. Barko v. Halliburton*, 37 F. Supp. 3d 1, 5 (D.D.C. 2014)).
- ⁵ *Id.*
- ⁶ See *In re KBR I*, 756 F.3d at 764.
- ⁷ *In re KBR II*, 796 F.3d at 146.
- ⁸ *Id.* at 143.
- ⁹ *Id.* at 151.
- ¹⁰ *Id.* at 148.
- ¹¹ See *United States v. Gangi*, 1 F. Supp. 2d 256, 265-66 (S.D.N.Y. 1998) (finding that failure to label documents as confidential, privileged or work product weighed in favor of waiver because reasonable precautions to protect the privilege had not been taken).
- ¹² Order instituting cease-and-desist proceedings, Exchange Act Release No. 75,532, Administrative Proceeding File No. 3-16704 (July 28, 2015); SEC press release, “SEC Charges Mead Johnson Nutrition With FCPA Violations” (July 28, 2015).
- ¹³ *Id.*
- ¹⁴ *Id.*
- ¹⁵ *Id.*
- ¹⁶ The information provided here on legal developments in the Asia-Pacific region are given for background and informational purposes only and should not be regarded as advice on local law in these jurisdictions.
- ¹⁷ “Thailand: Anti-Corruption Law Penalties Extended to Foreigners,” Library of Congress (Aug. 7, 2015); see also “New Anti-Corruption Law in Thailand Extends Death Penalty to Foreigners,” *The Guardian* (July 15, 2015).
- ¹⁸ Sanjam Arora, “India Plugs the Corruption Gaps: Cabinet Amendments to the Poca Amendment Bill, 2013,” *Global Compliance News* (June 6, 2015).
- ¹⁹ “The Prevention of Corruption (Amendment Bill), 2013,” PRS Legislative Research (accessed Sept. 8, 2015, 3:05 p.m.).
- ²⁰ “Lokpal Bill: Parliament Panel Gets Yet Another Extension,” *The Indian Express* (Aug. 9, 2015).
- ²¹ Ninth Amendment to the Criminal Law of the People’s Republic of China.
- ²² Laura Saunders, “IRS Probes Singapore Asset Manager,” *Wall St. J.* (July 19, 2015).
- ²³ David Green CB QC, speech at The 33rd Cambridge Economic Crime Symposium (Sept. 7, 2015).
- ²⁴ Chad Bray, “Charges in Libor Case for 3 From Barclays,” *N.Y. Times* (April 28, 2014); Matthew Goldstein and Ben Protess, “U.S. and Britain Join Forces in Bank Misbehavior Cases,” *N.Y. Times* (Feb. 24, 2014).
- ²⁵ David Enrich and Evan Perez, “U.S. and U.K. in Tussle Over Trader,” *Wall St. J.* (Mar. 14, 2013).
- ²⁶ *United States of America v. David Bermingham, Giles Darby and Gary Mulgrew; Bermingham & Ors, R (on the application of) v. The Director of the Serious Fraud Office* [2006] EWHC 200 (Admin).
- ²⁷ *United States v. Tesler, et al.*, No. 09-CR-098 (S.D. Tex. Filed Feb. 17, 2009).
- ²⁸ *R v. Turner, Kerrison, Papachristos and Jennings*, unreported Southwark Crown Court (Aug. 4, 2014).
- ²⁹ Criminal Justice Act 2003, Section 148.
- ³⁰ Sentencing Guidelines Council, “Fraud, Bribery and Money Laundering Offences Definitive Guideline” (2014).
- ³¹ *Id.* at 6.
- ³² Sentencing Guidelines Council, “Reduction in Sentence for a Guilty Plea, Definitive Guideline” (2007), at Annex 1, paragraph 3(c).
- ³³ *R v. Blackburn (Derek Stephen)* [2007] EWCA Crim 2290; *R v. Dougall (Robert)* [2010] EWCA Crim 1048.
- ³⁴ See *United States v. Hoskins*, No. 3:12CR238 (JBA), 2015 WL 4774918 (D. Conn. Aug. 13, 2015).
- ³⁵ *Id.* at *2, 8-9.
- ³⁶ A “domestic concern” is defined as “(a) any individual who is a citizen, national, or resident of the United States; and (b) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a state of the United States or a territory, possession, or commonwealth of the United States.” 15 U.S.C. § 78dd–2(h)(1) (West 2009).
- ³⁷ 15 U.S.C. §§ 78dd-1, 2, 3 (West 2009).
- ³⁸ U.S. Dept. of Justice & SEC, “A Resource Guide to the U.S. Foreign Corrupt Practices Act,” at 34 (2011).
- ³⁹ 2015 WL 4774918, at *5.
- ⁴⁰ *Id.* at *9.
- ⁴¹ See *id.* at *4 (citing *United States v. Castle*, 925 F.2d 831, 833 (5th Cir. 1991) (*per curiam*)) (explaining the principle from *Gebardi v. United States*, 287 U.S. 112 (1932)). The *Hoskins* court further stated that the *Gebardi* principle also applies to aiding and abetting liability. 2015 WL 4774918, at *4 (citing *U.S. v. Amen*, 831 F.2d 373, 381 (2d Cir. 1987)).
- ⁴² SEC press release, “SEC Charges BNY Mellon With FCPA Violations” (Aug. 18, 2015).
- ⁴³ *Id.*

Beijing

Jon L. Christianson

86.10.6535.5588
jon.christianson@skadden.com

Brussels

Simon Baxter

32.2.639.0310
simon.baxter@skadden.com

Frederic Depoortere

32.2.639.0334
frederic.depoortere@skadden.com

Ingrid Vandendorre

32.2.639.0336
ingrid.vandendorre@skadden.com

James S. Venit

32.2.639.4501
james.venit@skadden.com

Chicago

Patrick Fitzgerald

312.407.0508
patrick.fitzgerald@skadden.com

Eric J. Gorman

312.407.0792
eric.gorman@skadden.com

Michael Y. Scudder

312.407.0877
michael.scudder@skadden.com

Charles F. Smith

312.407.0516
charles.smith@skadden.com

Frankfurt

Anke C. Sessler

49.69.74220.165
anke.sessler@skadden.com

Hong Kong

Bradley A. Klein*

852.3740.4882
bradley.klein@skadden.com

Rory A. McAlpine

852.3740.4743
rory.mcalpine@skadden.com

London

Patrick Brandt

44.20.7519.7155
patrick.brandt@skadden.com

Ryan D. Junck*

44.20.7519.7006
ryan.junck@skadden.com

David Kavanagh

44.20.7519.7288
david.kavanagh@skadden.com

Bruce Macaulay

44.20.7519.7274
bruce.macaulay@skadden.com

Karyl Nairn QC

44.20.7519.7191
karyl.nairn@skadden.com

Matthew Cowie

44.20.7519.7139
matthew.cowie@skadden.com

Los Angeles

Richard Marmaro

213.687.5480
richard.marmaro@skadden.com

Matthew E. Sloan

213.687.5276
matthew.sloan@skadden.com

New York

Clifford H. Aronson

212.735.2644
clifford.aronson@skadden.com

John K. Carroll

212.735.2280
john.carroll@skadden.com

Warren Feldman

212.735.2420
warren.feldman@skadden.com

Steven R. Glaser

212.735.2465
steven.glaser@skadden.com

Christopher J. Gunther

212.735.3483
christopher.gunther@skadden.com

Keith Krakaur*

212.735.2809
keith.krakaur@skadden.com

David Meister

212.735.2100
david.meister@skadden.com

Stephen C. Robinson

212.735.2800
stephen.robinson@skadden.com

Lawrence Spiegel

212.735.4155
lawrence.spiegel@skadden.com

Jocelyn Strauber*

212.735.2995
jocelyn.strauber@skadden.com

David M. Zornow

212.735.2890
david.zornow@skadden.com

Munich

Bernd R. Mayer
49.89.244495120
bernd.mayer@skadden.com

Palo Alto

Jack P. DiCanio
650.470.4660
jack.dicanio@skadden.com

Paris

Gregoire Bertrou
33.1.55.27.11.33
gregoire.bertrou@skadden.com

Francois Michaud
33.1.55.27.11.43
francois.michaud@skadden.com

São Paulo

Julie Bédard
212.735.3236
julie.bedard@skadden.com

Singapore

Rajeev P. Duggal
65.6434.2980
rajeev.duggal@skadden.com

Washington, D.C.

Jamie L. Boucher
202.371.7369
jamie.boucher@skadden.com

Brian D. Christiansen
202.371.7852
brian.christiansen@skadden.com

Gary DiBianco*
202.371.7858
gary.dibianco@skadden.com

Mitchell S. Ettinger
202.371.7444
mitchell.ettinger@skadden.com

Margaret E. Krawiec
202.371.7303
margaret.krawiec@skadden.com

Andrew M. Lawrence
202.371.7097
andrew.lawrence@skadden.com

David B. Leland
202.371.7713
david.leland@skadden.com

Colleen P. Mahoney
202.371.7900
colleen.mahoney@skadden.com

Erich T. Schwartz
202.371.7660
erich.schwartz@skadden.com

Steven C. Sunshine
202.371.7860
steve.sunshine@skadden.com

William J. Sweet, Jr.
202.371.7030
william.sweet@skadden.com

Charles F. Walker
202.371.7862
charles.walker@skadden.com

*Editors

Associates **Lianna Chan**, **Angela Kim**, **Eli S. Rubin**, **Sean P. Shecter**, **Daniel B. Weinstein** and **Caroline Wojtylak**, and trainee associate **Eve Wright** contributed to this publication.

This communication is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This communication is considered advertising under applicable state laws.

Skadden, Arps, Slate, Meagher & Flom LLP / Four Times Square / New York, NY 10036 / 212.735.3000