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



November 2015

DOJ Hires Compliance Expert

The U.S. Department of Justice (DOJ) hired a dedicated compliance expert, Hui Chen, to assist its attorneys in evaluating companies' Foreign Corrupt Practices Act (FCPA) compliance programs. Assistant Attorney General Leslie Caldwell described Chen's main responsibilities as bringing an "expert eye" to prosecutors assessing the effectiveness of companies' compliance programs, including what remedial compliance measures should be required as part of a corporate resolution. Recently, Chen identified four broad areas of inquiry when evaluating an organization's compliance program: (1) thoroughness of the program's design, (2) how operational the program is, (3) whether personnel at all levels of the organization are communicating about compliance, and (4) how well-resourced the program is.

Forfeited Assets Returned

The DOJ's Kleptocracy Asset Recovery Initiative returned to the Republic of Korea approximately \$1.1 million in forfeited assets associated with former President Chun Doo Hwan's graft schemes. Chun was convicted by a Korean court in 1997 of accepting more than \$200 million in bribes from Korean businesses. In January 2014, FBI investigators in California seized \$726,951.45 held in an escrow account, which was traced to the sale of real estate property acquired by Chun's son and his girlfriend in 2005. In February 2015, Kleptocracy prosecutors sought to forfeit a secured investment worth approximately \$500,000 in a Pennsylvania company, which also was traced to Chun's corruption scheme. In March 2015, the department reached a settlement agreement of its civil forfeiture actions for a total of \$1,126,951.

December 2015

Framework to Facilitate US-China Collaboration

Financial Crimes Enforcement Network Director Jennifer Shasky Calvery and China Anti-Money Laundering Monitoring and Analysis Center Director-General Luo Yang signed a memorandum of understanding to create a framework to facilitate expanded U.S.-China collaboration, communication and cooperation between both nations' financial intelligence units. This arrangement provides a mechanism for sharing information concerning money laundering and the financing of terrorism in order to prevent the abuse of either country's financial systems.



January 2016

SFO Wins Court Approval on Handling of Privileged Material

In a landmark High Court win, the divisional court in *R (McKenzie) v. Director of the Serious Fraud Office* approved the U.K. Serious Fraud Office's (SFO) procedure for dealing with potentially privileged material. In June 2015, Colin McKenzie was arrested on suspicion of conspiracy to commit a Bribery Act offense. The SFO subsequently confiscated electronic devices that may have contained material subject to legal professional privilege. The SFO asked for a list of search terms to apply to the documents held on the confiscated items to help identify potential legally privileged material and isolate it for review by external independent counsel. McKenzie's solicitors challenged the lawfulness of the procedure, which they argued created a risk that the SFO might view privileged material. The judge confirmed that he "was satisfied that the system in place does not give rise to a real risk that privileged material might be read by investigators."

Libor Defendants Acquitted

Southwark Crown Court acquitted five former brokers of plotting with convicted former UBS and Citigroup trader Tom Hayes to manipulate the London Interbank Offered Rate (Libor). The men were found not guilty of conspiring to defraud investors. The verdicts represent a setback for the SFO, which has aggressively pursued these and similar prosecutions.

Smith & Ouzman Convicted

In December 2014, Smith & Ouzman Limited became the first corporation to be convicted of foreign bribery following an SFO trial. The English printing company was sentenced the following month and ordered to pay £2.2 million (£1.3 million fine, £881,158 settlement confiscation order and £25,000 costs). In February 2015, Smith & Ouzman's former chairman, Christopher Smith, and former sales and marketing manager, Nicholas Smith, were sentenced after being convicted of corruptly agreeing to make payments. Although the company's conduct occurred before the Sentencing Council's most recent Definitive Guideline on Fraud, Bribery and Money Laundering Offences was introduced in October 2014, the company and its former executives were sentenced thereunder. Smith & Ouzman is the first corporation to be sentenced for a bribery offense under the new guidelines. (See March 2, 2015, [client alert](#).)

Swiss Bank Program Resolution Reached

The DOJ announced that it reached its final nonprosecution agreement under Category 2 of the Swiss Bank Program. The program was introduced in August 2013 and provided a pathway to resolving enforcement actions against Swiss banks that may have assisted U.S. taxpayers in evading federal taxes. The program allowed certain banks to obtain nonprosecution agreements if they paid a fine and disclosed certain account data to the DOJ and U.S. Internal Revenue Service. The DOJ settled with over 80 banks in the program, raising the question whether and when they will pursue additional prosecutions using the information obtained. The recent leak from Panamanian law firm Mossack Fonseca, the so-called "Panama Papers," will only add to already heightened political pressure to vigorously pursue tax evasion investigations. The head of DOJ's Tax Division, Acting Assistant Attorney General Caroline Ciraolo, said that possible future jurisdictions for investigation include, but are not limited to, the British Virgin Islands, Cayman Islands, Channel Islands, Guernsey, Hong Kong, Israel, Liechtenstein, Luxembourg, Panama and Singapore.



April 2016

UK Proposes Anti-Money Laundering Reforms

The U.K. government unveiled plans to introduce sweeping reforms to its anti-money laundering regime. The proposals, subject to a six-week consultation period, would require those suspected of money laundering to declare the sources of their assets and also would see the introduction of a criminal offense of illicit enrichment. The offense would specifically target public officials who are unable to explain significant increases to their wealth. If enacted, the new regime will place the burden on individuals to explain where their money came from; those who are unable to provide a sufficient explanation for the source of their wealth will be prosecuted. Additionally, the proposals contemplate a new administrative power to label an entity “as being of money laundering concern,” which would require financial services firms to adopt special procedures when dealing with these entities.

Panama Papers Published

The first new reports based on the Panama Papers were published. The Panama Papers constitute 11.5 million files from the database of the world’s fourth largest offshore law firm, Mossack Fonseca. The records were obtained from an anonymous source by the German newspaper *Süddeutsche Zeitung*, which shared them with the International Consortium of Investigative Journalists (ICIJ). The ICIJ then shared them with a large network of international partners. On May 9, 2016, the ICIJ uploaded an additional database of documents to its website relating to more than 200,000 offshore accounts. The revelations have spurred criminal investigations around the world, brought pressure on senior politicians in numerous countries and led to the resignation of the prime minister of Iceland, Sigmundur David Gunnlaugsson. The leak is one of the largest ever, significantly larger than the U.S. diplomatic cables released by WikiLeaks in 2010 and the secret intelligence documents given to journalists by Edward Snowden in 2013.

Dubai Creates Financial Regulator

Sheikh Mohammed bin Rashid Al Maktoum, ruler of Dubai and vice president and prime minister of the United Arab Emirates, ratified a law to establish the Dubai Economic Security Center, a new government institution that will fight financial crime. The new center will oversee any company or institution licensed to engage in economic activity in the emirate, including those registered in free zones such as the Dubai International Financial Center, according to state news agency WAM. The center will also oversee charities operating in Dubai. Its aim is to maintain Dubai’s status as a global financial hub by working to combat corruption, fraud, crimes, bribery, embezzlement, destruction of public property, forgery, counterfeiting, money laundering, terrorism financing, illegal organizations and “any other crimes that may be committed by entities that are under its jurisdiction,” WAM said.



May 2016

Mixed Verdict in UK 'Tabernula Scandal' Trial

The final trial of what has been termed the "Tabernula scandal" concluded with a mixed verdict. Two defendants were found guilty of insider trading while three others were acquitted. The guilty defendants, former investment banker Martyn Dodgson and accountant Andrew Hind, were convicted by a 10-2 majority in a Southwark court. The FCA accused Dodgson of improperly sharing information from the investment banks where he worked with Hind, his close friend, as part of a conspiracy that began in November 2006 and ended in March 2010. The tips included inside information about the Paragon Group, Legal & General and BSkyB, the regulator said. Dodgson was sentenced to 4 ½ years in prison; Hind was sentenced to 3 ½ years. British authorities have described the Tabernula scandal as the largest crackdown on improper trading in Britain.

1MDB Scandal Leads to More Investigations

Singapore announced it withdrew the banking license of Swiss-based BSI Bank Ltd. and began criminal proceedings against the firm. The actions were the latest episode in the scandal surrounding Singapore's sovereign wealth fund, 1Malaysia Development Bhd. (1MDB). In 2015, Malaysian Prime Minister Najib Razak was accused of illegally transferring nearly \$700 million into private accounts; he later explained that the money was a gift from the Saudi royal family. In April 2016, a Malaysian parliamentary committee identified at least \$4.2 billion in irregular transactions by 1MDB. The scandal has led to investigations all across the globe: Hong Kong police have begun investigations regarding US\$250 million in Credit Suisse branch deposits allegedly linked to Najib and 1MDB; the SFO has begun investigations into money laundering reportedly involving the transfer of money from 1MDB funds in Malaysia to Switzerland and the Royal Bank of Scotland's branch in Zurich; and the Swiss attorney general's office has indicted several individuals linked to a fraudulent bond agreement involving money routed through Swiss banks.

Unaoil Investigated for Bribes

The DOJ, FBI, U.K. National Crime Agency and Australian Federal Police are reportedly investigating Monaco-based Unaoil's role in securing oil-related contracts through bribes on behalf of third parties. The investigation appears to stem, at least in part, from *The Huffington Post* and *Fairfax Media*'s publication of internal Unaoil documents allegedly evidencing corrupt practices.

Amendments Proposed to Chinese Commercial Bribery Law



On February 25, 2016, the Legislative Affairs Office of the State Council in China published for public comment draft amendments to the Anti-Unfair Competition Law (AUCL), which the Standing Committee of the National People's Congress must adopt before they can take effect.

The proposed changes modernize current law regarding commercial bribery that was adopted in 1993 and enhance the methods available to the Chinese government to prevent commercial bribery.¹ If approved, the provisions will strengthen the ability of the already powerful State Administration for Industry and Commerce (SAIC) to investigate alleged wrongdoing and bring enforcement action against business operators for, *inter alia*, acts of their employees, general books and records violations, and the provision of any economic benefit to any third party intended to influence a transaction. Foreign companies conducting business in China — to which this law also applies — would do well to reassess the robustness of their compliance programs. If and when these provisions become effective, the SAIC will have greater leeway to enter business premises and conduct investigations — activities that could expose companies to substantial local and possibly foreign enforcement action.

The proposed changes enhance the methods available to the Chinese government to prevent commercial bribery.

The draft amendments include:

- **Definition of “Commercial Bribery.”** The draft defines commercial bribery — which the existing AUCL does not — broadly: “Commercial bribery refers to a business operator providing or promising to provide economic benefits to the opposing party in a transaction, or to a third party able to influence the transaction, to entice it to seek a transaction-related opportunity or a competitive advantage for the business operator.”²
- **Vicarious Liability.** The draft provisions allow individual acts by employees to be imputed to a business operator, while the existing AUCL does not address vicarious liability.³
- **Books and Records.** The existing AUCL permits certain discounts and commissions between business operators, provided that they are accurately recorded for accounting purposes.⁴ The draft amendments prohibit the “transferring of economic benefits between business operators” unless they are “accurately reflected in contracts and accounting records.”⁵ The term “economic benefits,” while not defined, appears to be broader than the “discounts and commissions” exempted by the existing law.⁶

- **Benefits Obtained From Public Service.** The draft amendments prohibit benefits obtained by business operators “in the course of” or “relying upon” the provision of public service.⁷ This provision appears to prohibit organizations that provide public services, such as public utilities, public hospitals, public institutions and similar organizations, from receiving or providing benefits in connection with their work.
- **More Severe Penalties.** Under the existing AUCL, parties who engage in commercial bribery may be fined amounts ranging from RMB 10,000 to RMB 200,000 (approximately US\$1,500 to US\$30,000) and have their “illegal earnings” — an undefined term — confiscated.⁸ Under the draft amendments, fines may be imposed on the basis of attributable business revenue — ranging from 10 percent to 30 percent of the revenue attributable to the illegal conduct.⁹
- **Recklessness.** The draft amendments impose a recklessness standard, such that liability can attach when parties engage in or facilitate illegal conduct under the AUCL and where they know or should know that such conduct is illegal.¹⁰

- **Additional Administrative Enforcement Powers.** The draft amendments expand the powers of the enforcement agency SAIC, allowing the entity to enter the office premises of business operators to carry out investigations, among other things.¹¹

Increases in statutory capability often lead regulatory and criminal agencies to increase oversight. Whether SAIC will have the opportunity to utilize these draft amendments remains to be seen.

Skadden does not practice or advise on Chinese law. This article is for informational purposes only and does not constitute advice on or interpretation of Chinese law.



United States v. Allen: The Fifth Amendment in Cross-Border Investigations

The DOJ's first trial against individual traders arising out of the Libor scandal sets a significant precedent concerning the application of the U.S. Supreme Court's *Kastigar* decision.

On November 5, 2015, following a jury trial in the U.S. District Court for the Southern District of New York, two former Rabobank traders, Anthony Allen and Anthony Conti, were convicted of charges including wire fraud, bank fraud and conspiracy to commit wire fraud for their roles in the manipulation of the Libor. This was the DOJ's first trial against individual traders arising out of the Libor scandal, and it sets a significant precedent concerning the application of the U.S. Supreme Court's *Kastigar* decision to compelled statements obtained by foreign authorities from defendants subsequently prosecuted in U.S. courts.

Beginning in 2012, agencies from several countries began investigating the alleged unlawful manipulation of Libor, the primary benchmark for short-term interest rates around the world. In 2013, the FCA questioned Allen and Conti, two British nationals, in connection with the investigation. Under U.K. law, Allen and Conti faced criminal penalties if they refused to answer the FCA's questions.¹²

Later that same year, the FCA issued a warning notice to another former Rabobank trader, Paul Robson, indicating that it was considering taking further action against him.¹³ In response, Robson sought and received all evidence against him — including Allen and Conti's compelled testimony.

The DOJ subsequently indicted Robson in April 2014 in connection with its own Libor investigation.¹⁴ Robson pleaded guilty pursuant to a cooperation agreement and engaged in several proffer sessions with U.S. prosecutors. The DOJ indicted Allen and Conti based in part on information provided by Robson.¹⁵

Before trial, Allen and Conti filed a motion to dismiss the indictment on the ground that the Fifth Amendment to the U.S. Constitution barred the use, even indirectly, of their involuntary statements to the FCA.¹⁶ Relying on the Supreme Court's decision in *Kastigar v. United States*, Allen and Conti asserted that Robson's review of their compelled statements "tainted" the case against them.¹⁷ The Court in *Kastigar* held that if a defendant has been compelled to testify, the prosecution must establish that its evidence is derived from a legitimate source

independent of the compelled testimony and is therefore not “tainted” by the testimony. Allen and Conti argued that the prosecution could not meet such a burden, and they asked the court to dismiss the indictment or, alternatively, suppress Robson’s testimony and all evidence derived from his cooperation.

In response, the DOJ asserted that (1) the Fifth Amendment’s privilege against self-incrimination does not apply, as a matter of law, to statements compelled by foreign governments, and (2) in any event, the evidence against Allen and Conti was derived from legitimate and independent sources. Judge Jed S. Rakoff declined to rule on the motion before trial. Following Allen’s and Conti’s convictions, the court received additional briefing and held a two-day hearing on the motion.

Judge Rakoff subsequently denied the defendants’ motion in its entirety.¹⁸ Without addressing whether the Fifth Amendment privilege applied to statements made to foreign officials, the court held that the DOJ had established by a preponderance of the evidence that its evidence was derived from legitimate sources independent of the compelled testimony.¹⁹

In so holding, Judge Rakoff gave great weight to the affirmative steps taken by the DOJ to ensure its prosecutors were shielded from the compelled testimony. These included: (1) giving presentations to the FCA to explain the Fifth Amendment and *Kastigar* “in order to explain the importance of maintaining a ‘wall’ between the two countries’ investigations,”²⁰ (2) instructing the FCA and Robson not to share with U.S. prosecutors and investigators any information derived from the compelled testimony, and (3) utilizing a “day one/day two” approach, under which “the DOJ would seek to interview subjects first, before the FCA.”²¹ By ensuring that its prosecutors avoided any exposure to the defendants’ compelled testimony, the DOJ was able to establish to the court’s satisfaction that the FCA’s parallel investigation did not taint the evidence presented against Allen and Conti at trial.²²

Given the increasing assertiveness of foreign regulators, the DOJ may more often find itself prosecuting defendants who have provided compelled testimony to foreign authorities. The DOJ’s methodology in connection with the Allen and Conti trial and Judge Rakoff’s decision approving that methodology provide a road map for prosecutors to follow in future cases, to ensure that prosecutions are not derailed by testimony compelled by foreign governments that may not recognize an analogous Fifth Amendment right against self-incrimination.

Courts Evaluate Confidentiality of Monitors' Reports



The issue of maintaining the confidentiality of post-settlement documents arises when corporate criminal prosecutions are resolved through deferred prosecution or nonprosecution agreements.

Courts today are often called to address when, and under what circumstances, parties to a settlement agreement are able to maintain the confidentiality of documents created post-settlement, such as court-appointed monitors' reports. The issue arises frequently because corporate criminal prosecutions are commonly resolved through deferred prosecution agreements (DPAs) or nonprosecution agreements (NPAs), and such agreements often require the appointment of a monitor to ensure ongoing corporate compliance with the terms of the agreement.²³ Entities entering into such agreements with a U.S.-based government agency to resolve a cross-border investigation should be aware that they may not be able to maintain the confidentiality of all post-settlement compliance efforts and related interactions involving a corporate monitor. There are, however, certain steps a company can take to preserve the confidentiality of a monitor's report.

Recent Cases

In January 2016, former U.S. District Judge John Gleeson of the Eastern District of New York ordered that a monitor's report, submitted pursuant to a DPA entered into by HSBC and the DOJ, be filed publicly.²⁴ The report detailed the London-based bank's compliance with the DPA, including those terms requiring the bank to improve its anti-money laundering practices.²⁵ Though much of the report remains sealed pending appeal of Judge Gleeson's ruling, the report appears critical of the bank's efforts, and all the parties involved — the DOJ, HSBC and monitor — favored keeping the report confidential.

Judge Gleeson's ruling was based, first, on the public's historical right of access to materials requiring judicial review,²⁶ particularly when the documents pertain to an agreement reached with public institutions (such as the DOJ), in whose activities the public has an interest.²⁷ Second, Judge Gleeson relied on the fact that a settlement or plea agreement by the documents' own terms "implicate the Court in the[] resolution" of a case by conditioning the agreement upon compliance with a specific set of conditions, the occurrence of which the court is charged with evaluating.²⁸ The U.S. Court of Appeals for the 2nd Circuit had previously held that compliance reports that permit the public to evaluate judicial decision-making, including inaction in the face of a settlement agreement involving ongoing monitoring, constitute "judicial documents" subject to the public's First Amendment right to access.²⁹

The U.S. Court of Appeals for the District of Columbia Circuit recently took a position arguably in tension with Judge Gleeson's perspective. On April 5, 2016, the D.C. Circuit, in *United States v. Fokker Servs. B.V.*, limited the authority of district courts to review the terms of DPAs, overturning a district court opinion providing for robust oversight.³⁰ The D.C. Circuit treated DPAs as charging decisions, firmly within the purview of the executive branch, a position arguably inconsistent with Judge Gleeson's view that DPAs are "a substitute for a plea agreement or a trial — to both of which the public has historically had a First Amendment right of access."³¹

The D.C. Circuit's decision, however, does not directly contradict Judge Gleeson's opinion: Although district courts have limited authority to approve settlement agreements, documents filed to verify compliance with those agreements are "judicial documents" subject to the public's First Amendment right.³²

Moreover, even if the First Amendment right did not attach, courts would have to evaluate whether to permit sealed monitors' reports by determining "the weight of the presumption [of public access] and measur[ing] it against competing considerations."³³ While this balancing test might favor confidentiality, it would also provide district courts with discretion — and thus would result in some uncertainty with respect to whether monitors' reports remain sealed or are publicly disclosed.

Finally, in an ongoing matter in the U.S. District Court for the District of Columbia, a group of reporters have sought access under the Freedom of Information Act (FOIA) to a court-appointed monitor's reports in an FCPA action brought by the DOJ against Siemens AG. Siemens and the DOJ each recently moved for summary judgment to dismiss the attempt to secure the reports; the court has not yet issued a ruling. Because of several defenses specific to FOIA, a pro-Siemens verdict would not necessarily preclude future courts from ordering disclosure of monitors' reports on their own docket. But strong language from the court regarding the importance of keeping monitors' reports confidential might help shield future reports from disclosure.

What's at Stake

Litigants have argued that the disclosure of monitors' reports would negatively affect the monitored company in a number of ways, including: (1) complicate the monitorship (therefore making it less likely to accomplish the necessary reforms),³⁴ (2) publicly embarrass the corporation, (3) jeopardize attempts to

coordinate with foreign regulators, and (4) risk violations of foreign jurisdictions' data protection and privacy laws. Furthermore, as one company spokesman asserted, publishing "[m]onitor[s] reports ... would competitively harm the [monitored corporations] because competitors could affirmatively use the 'extensive, probing reviews of the companies' confidential business systems and policies, as well as selected samples of individual transactions.'" ³⁵ Moreover, publicizing the strengths and weaknesses of compliance efforts risks exposing the corporation's vulnerabilities.

Alternatives for Confidential Monitoring

From a corporation's perspective, the best way to shield monitors' reports from public disclosure may be through the pursuit of an NPA.³⁶ Although NPAs are substantially similar to DPAs, there is some support for the position that NPAs are not "presented to the court to invoke its powers or affect its decisions."³⁷ Accordingly, there is a basis for the government and corporation to contend that NPAs (and monitors' reports discussing them) are "not the business of the courts."³⁸ In seeking an NPA, companies negotiating with the government should emphasize the benefits that inure to the government and foreign regulators in preserving the confidentiality of monitors' reports.³⁹ Confidentiality may enable compliance with foreign data privacy concerns, but it might also be necessary to (1) facilitate cooperation with the monitor's investigation, (2) preserve the secrecy of ongoing foreign law enforcement investigations, and (3) satisfy the monitor's ability to report on compliance with goals imposed by overlapping foreign or civil settlements.

Where an NPA is not an option, corporations still have some options to preserve confidentiality. A resolution might employ a two-tier structure, where the bulk of the agreement is part of an NPA, but where an information is filed and a DPA is entered into as well. The company might also agree to toll the statute of limitations while it undertakes compliance efforts and other remedial measures. This allows the enforcement agency to gauge the sufficiency of any necessary remediation prior to any judicial filings. In either case, the settlement could provide that the monitor file any reports directly with the enforcement agency and outside of any ongoing criminal action. Corporations are advised to think creatively in the end stages of cross-border investigations while remaining aware of the likelihood that some or all of a DPA monitor's reports will be publicly disclosed.



France Approves First Corporate Plea Bargain in Swiss Bank Case

Reyl & Cie has agreed to pay a fine and plead guilty to laundering tax fraud proceeds.

On January 5, 2016, the Paris Court of Justice approved France's first corporate plea bargain between the financial prosecutor ("parquet national financier" or PNF) and Swiss bank Reyl & Cie S.A. The bank agreed to pay a €2.8 million fine and plead guilty to laundering tax fraud proceeds.

Reyl had been under criminal investigation by an investigating judge since 2013, following a scandal involving the French budget minister who, at the time, was holding undeclared accounts in Switzerland in violation of French tax laws.

As required by law, the plea deal was reviewed and approved by a judge in a public hearing, although the settlement papers were not made public.

Reyl's plea agreement employs a procedure called "comparution sur reconnaissance préalable de culpabilité" (CRPC), roughly translated as "court appearance upon pretrial guilty plea." CRPC settlements were initially introduced in 2004 to address minor and noncomplex offenses committed most often by individuals, although the law allowed corporations to also enter such plea deals.

In 2011, CRPCs were expanded to all criminal offenses, including complex cases that require the investigating judge to conduct a full factual investigation before sending the case to court.⁴⁰ Since then, investigating judges have been authorized to offer plea deals to defendants via the prosecutor in order to avoid lengthy trials, in particular when the facts of the case clearly satisfy the elements of the criminal offense.⁴¹ All defendants taking CRPC deals from the judiciary must (1) recognize the elements of the criminal offense, (2) plead guilty and (3) agree to the penalty proposed by the prosecutor.

In 2013, the French legislature created the PNF, a new financial prosecution office that focuses on economic and financial crimes, such as tax fraud, money laundering, market abuse and corruption. The PNF has been operational since 2014. In 2015, the Paris Court of Justice recommended that CRPCs be used in the type of complex cases that the PNF typically manages. Reyl was the first corporate matter managed by the PNF to result in a CRPC settlement.

How CRPCs Differ From US Procedures

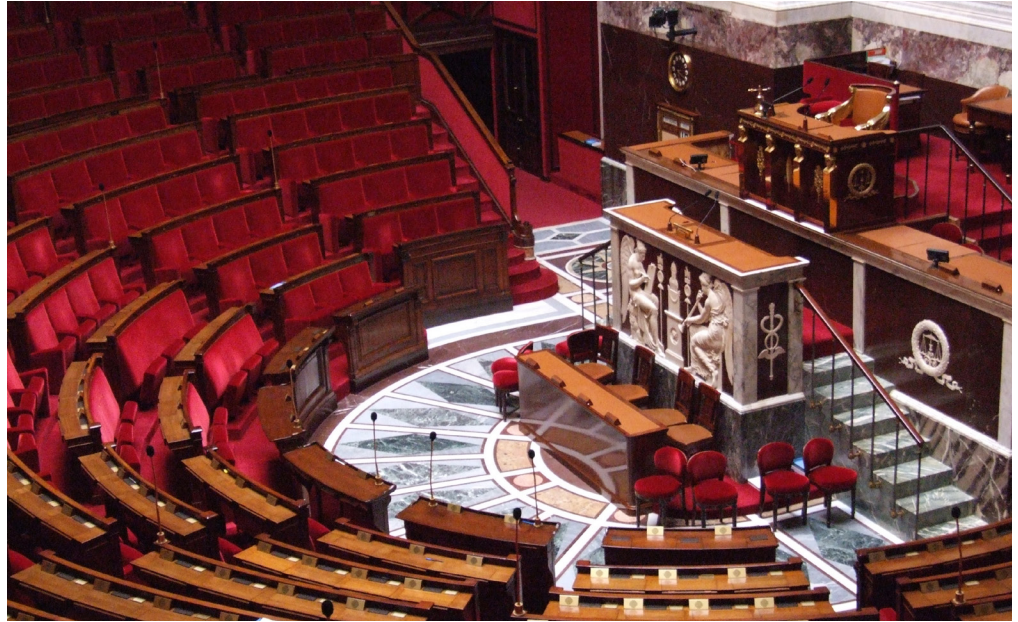
CRPC agreements differ from deferred DPAs, which do not extinguish criminal liability until the end of the period set forth by the agreement, and NPAs, which are an alternative to criminal charges. Further, in contrast to the U.S. system, the facts of CRPC cases are investigated by the judiciary, not the defendant, and CRPC settlements do not leave room for negotiation between the defendant and prosecutor.

More importantly, DPAs and NPAs do not require defendants to plead guilty, whereas CRPC settlements require a guilty plea that appears on a defendant's criminal record. In light of the repercussions guilty pleas may have for financial institutions active in international markets, large financial institutions may decline CRPC deals.

The CJIP: A Step Closer to US and UK DPAs?

The French Parliament is currently working on an anti-corruption bill that would set forth a settlement procedure more closely aligned with the U.S. and U.K. models. The “convention judiciaire d'intérêt public” (CJIP) — “judicial agreement of public interest” — would be proposed to defendants before criminal proceedings are initiated, in which case it would not require a guilty plea. The CJIP would be automatically made public, could set forth required remedial measures and would suspend criminal proceedings until the measures in the agreement are completed. Like the current CRPC procedure, CJIP agreements would still require judicial review and approval. Although the CJIP is currently only foreseen to apply to corruption cases, this new transaction mechanism represents a significant evolution in how France approaches international financial crime enforcement.

France to Substantially Strengthen Anti-Corruption Legal Framework



On March 30, 2016, French Minister of Finance Michel Sapin submitted for review to the French Parliament a draft bill on transparency, the fight against corruption and modernization of the economy (the Sapin II Draft Bill). The bill would bring landmark changes to France's anti-corruption framework, previously criticized for lacking efficient prevention, detection and enforcement mechanisms.

New Requirements

Under the current version of the Sapin II Draft Bill, companies with at least 500 employees (or that are part of a group of companies with at least 500 employees overall) and a turnover or consolidated turnover exceeding €100 million (Covered Companies) will be required to implement robust anti-corruption compliance programs, comprising policies and procedures, codes of conduct (including disciplinary sanctions for breach thereof), whistleblowing procedures, training programs, and due diligence procedures for clients, main suppliers and intermediaries (together, the "Anti-Corruption Requirements").

Extraterritorial Reach of the Law

All subsidiaries, whether French or foreign, of Covered Companies publishing consolidated financial statements will be required to comply with the Anti-Corruption Requirements. Moreover, part of Sapin II Draft Bill's provisions relating to trading in influence will be applicable to foreign officials; current French law applies only to French officials and officials of international organizations. Finally, French authorities will be able to investigate corruption and trading-in-influence offenses committed by French nationals abroad or foreign nationals in France.

Administrative Monitoring and Sanctions of Anti-Corruption Requirements

Compliance with the Anti-Corruption Requirements will be supervised by the new National Anti-Corruption Agency (the French Anti-Corruption Agency). Unlike its predecessor,⁴²

The bill would bring landmark changes to France's anti-corruption laws.

the French Anti-Corruption Agency will be vested with broad enforcement powers, including the authority to investigate and impose administrative fines to Covered Companies that do not comply with the Anti-Corruption Requirements.⁴³ In the context of foreign proceedings, the French Anti-Corruption Agency also will be responsible for ensuring that Covered Companies comply with the provisions of the French “Blocking Statute” of July 1968.

Enhanced Criminal Sanctions

Although the Sapin II Draft Bill does not amend the amount a judge is allowed to fine companies found liable of corruption or trading in influence, it introduces an additional penalty, whereby companies would be required to implement remedial measures — at their own expense and within five years — to ensure the efficiency of internal anti-corruption compliance programs. The French Anti-Corruption Agency will be responsible for monitoring the implementation of judge-ordered remedial measures.

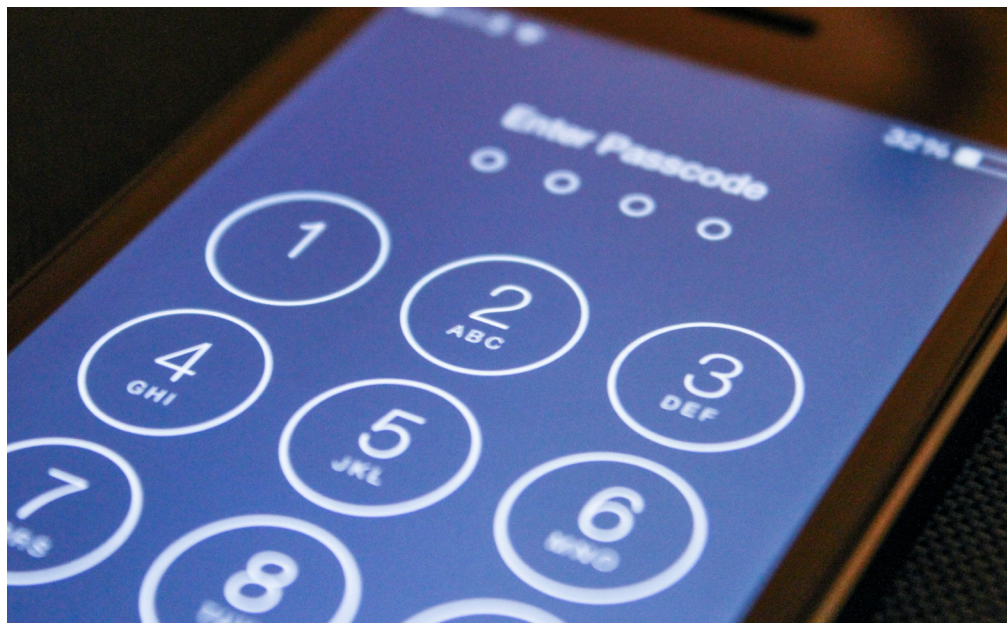
Judicial Agreement of Public Interest

Perhaps the most interesting aspect of the Sapin II Draft Bill is the possibility for companies to enter out-of-court settlements with financial prosecutors in cases of corruption or trading in influence. As described above, the “convention judiciaire d’intérêt public” (CJIP) — “judicial agreement of public interest” — can be proposed to defendants either (1) during the course of criminal proceedings, in which case defendants would enter guilty pleas, or (2) before criminal proceeding are initiated, in which case defendants would not have to plead guilty. Under CJIPs, companies would pay a fine of up to 30 percent of their average turnover for the past three years and be required to take remedial measures. All CJIPs would be reviewed and approved by a judge.

Implementation Timeline

The adoption of the Sapin II Draft Bill will constitute a major upgrade for France’s current anti-cooperation framework, with consequences for companies and officials both in France and abroad. The Parliament is expected to release the final version of the bill in the coming weeks, with a view to vote on it before the end of the year.

Data Encryption and the DOJ



The underlying issues exposed by the dispute remain highly relevant to technology companies and their customers.

Earlier this year, the law and policy worlds were riveted by Apple's dispute with the DOJ concerning whether Apple should be compelled to help unlock the iPhone used by the alleged San Bernardino terrorist Syed Farook. The DOJ then filed a letter with the court announcing that it had "successfully accessed the data stored on Farook's iPhone and therefore no longer require[d] the assistance from Apple, Inc.,"⁴⁴ temporarily resolving a battle between the DOJ and one of the world's largest technology companies.

The underlying issues exposed by the dispute remain highly relevant to technology companies and their customers. Magistrate Judge Sheri Pym of the U.S. District Court for the Central District of California had directed Apple to provide "reasonable technical assistance to assist law enforcement agents in obtaining access to the data."⁴⁵ Reasonable technical assistance was defined to include creating software that could accomplish the following "three important functions": (1) bypass the "auto-erase" function (which would delete the phone's data after 10 unsuccessful attempts to enter the passcode), (2) enable the FBI to electronically submit passcodes to the device for testing, and (3) remove any time delays between entering incorrect passcodes.⁴⁶ With these three capabilities, the FBI would have been able to execute a "brute-force" attack on the iPhone's passcode in order to access its encrypted data.

Apple's two legal arguments in opposition to the court order were: (1) that the "All Writs Act," 28 U.S.C. § 1651, did not authorize the court to compel Apple to provide involuntary technical assistance, and (2) forcing Apple to provide this assistance would violate its First and Fifth Amendment rights. But the majority of Apple's opposition brief was devoted to four policy arguments: first, that the creation of the software would result in a vulnerability that others could exploit; second, that the order would open the floodgates to such requests from law enforcement; third, that helping the U.S. government bypass an iPhone's security would make it harder to resist similar demands from foreign governments; and fourth, that the precedent could be used to compel companies to engage in other, more invasive actions, such as activating the camera, microphone or location tracking.

More broadly, the dispute between the government and Apple illustrates the tension between two compelling and potentially conflicting values: the need to investigate and prevent dangerous crimes, and the need to safeguard data security and privacy. Put simply, law enforcement advocates fear that criminals and terrorists are getting closer to “going dark” — *i.e.*, hiding their communications with unbreakable and inaccessible encryption — while privacy advocates raise the specter of pervasive, Orwellian governmental surveillance.

This fundamental tension underlies several recent disputes — Apple vs. DOJ is only the latest. For instance, the bulk metadata collection program authorized by the U.S. Foreign Intelligence Surveillance Court was challenged in the 2nd, 9th and D.C. circuits before these cases were mooted by the USA Freedom Act. Now pending before the 2nd Circuit is *Microsoft Corp. v.*

United States, 14-2985-cv, which will address whether Microsoft must execute a warrant for its customer emails stored in Dublin. And in *United States v. Davis*, 785 F.3d 498 (11th Cir. 2015), the *en banc* U.S. Court of Appeals for the 11th Circuit held that the warrantless seizure and search of cellphone location data did not violate the Fourth Amendment.

The cheap storage of vast amounts of electronic data and the ubiquity of electronic devices have greatly expanded the universe of evidence that the government can seek during an investigation. Legal limits on the government’s ability to search, seize and compel the release of the data and contents of electronic devices is evolving in unpredictable ways. While the Apple vs. DOJ matter may be resolved for the moment, we have not heard the last of this debate.



UK SFO Actions on Bribery Cases Set Precedent

The recent enforcement actions show that the SFO is willing and able to prosecute U.K. companies for failure to prevent bribery by “associated persons.”

Between November and December 2015, the U.K. SFO had a series of enforcement firsts. On November 30, 2015, the SFO and ICBC Standard Bank PLC entered into the first U.K. DPA.⁴⁷ It was also the SFO’s first enforcement action under Section 7 of the Bribery Act 2010. Shortly thereafter, on December 18, 2015, the SFO secured its first guilty plea from Sweett Group PLC for the same Bribery Act offense. The cases are of interest as they set the precedent for both the DPA process and Bribery Act proceedings in the United Kingdom, and show that the SFO is willing and able to prosecute U.K. companies for failure to prevent bribery by “associated persons,” or individuals outside the U.K. who provide services for or on behalf of a U.K. organization.

Standard Bank

The SFO’s first DPA case related to alleged bribery of government officials in Tanzania. In 2012 and 2013, Standard Bank and its former sister company, Stanbic Bank Tanzania, were parties to a US\$600 million sovereign note private placement, carried out on behalf of the government of Tanzania. Negotiations did not progress until Stanbic agreed to a 2.4 percent fee to the government, of which 1 percent was paid to a Tanzanian company called Enterprise Growth Market Advisors (EGMA) for consultancy services. This fee was to be paid to EGMA’s account at Stanbic. Unbeknownst to Standard Bank, directors of EGMA were officials of the government of Tanzania. Red flags were raised at Stanbic when the majority of the fee was withdrawn in cash shortly after the transaction. The matter was escalated to the head office of Standard Bank, which quickly made a disclosure to the Serious Organised Crime Agency (now the National Crime Agency) and SFO.

The SFO opened an investigation into the matter with ample cooperation from Standard Bank. Following its investigation, the SFO concluded that there was reasonable suspicion that Standard Bank had failed to prevent bribery and determined that the “evidential” test under the DPA regime had been met. The SFO also considered that the public interest would likely be served by a DPA and thus began DPA negotiations.

DPAs were new to the U.K., having been brought into effect in February 2014 by Section 45 of the Crime and Courts Act 2013 (CCA).⁴⁸ The CCA directs that (1) DPAs are available to companies only, (2) DPAs are limited to certain offenses described in Schedule 17 (including

bribery, money laundering and various types of fraud), and (3) judicial approval must be obtained to initiate and finalize the DPA.

The courts also have to satisfy themselves that the DPA is in the public interest and “fair, reasonable and proportionate.” In approving the DPA with Standard Bank, Lord Justice Brian Leveson noted that he only considered the terms of the DPA after concluding that the evidential test and the public interest test were met.

The judge praised Standard Bank for being proactive and promptly self-reporting the matter to the authorities, and accordingly reduced the bank’s fine.⁴⁹ However, he also warned that self-reporting would not guarantee that a DPA would be granted, especially if the offense is considered “serious.”

Taking into account the reduction in the fine, the penalty imposed was US\$32.2 million (which included compensation to the government of Tanzania, disgorgement of profits, a financial penalty and the SFO’s costs). Additionally, the DPA had a three-year term (comparable to U.S. DPAs) and required the appointment of an independent monitor.⁵⁰ Standard Bank also agreed to pay a \$4.2 million penalty to settle charges with the U.S. Securities and Exchange Commission under a cease-and-desist order.⁵¹ The penalty is significant compared to prior SFO settlements.

Sweett Group PLC

The SFO also secured a corporate conviction by guilty plea pursuant to Section 7 of the Bribery Act by Sweett Group PLC, a project management company specializing in the construction industry. Sweett Group was charged with failing to prevent its subsidiary from paying bribes to win a construction contract in Dubai.⁵²

The case appears to have begun with allegations in a *Wall Street Journal* article in June 2013 regarding the payment of bribes to a government official to secure a contract to build a hospital

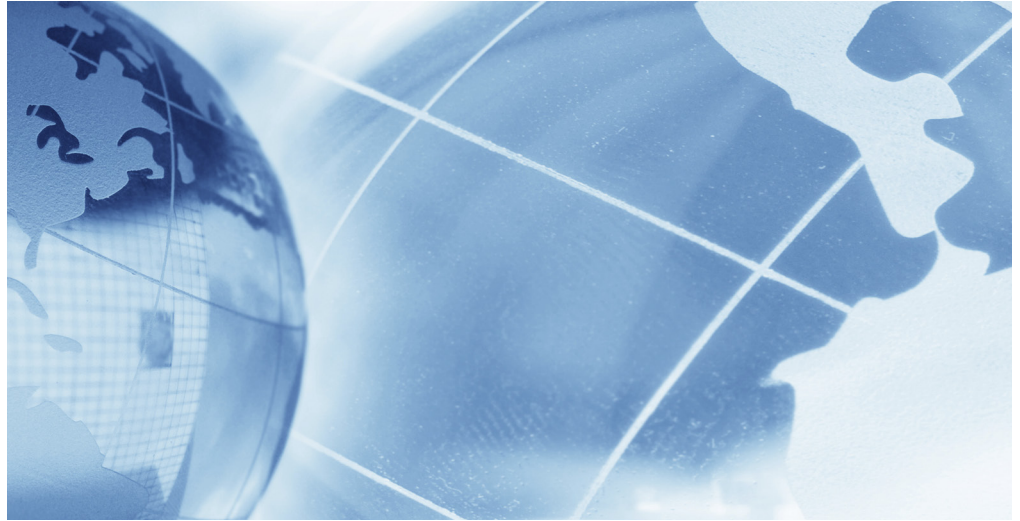
in Morocco.⁵³ The company’s internal investigation revealed potential offenses in Dubai that were reported to the SFO. In particular, Sweett’s subsidiary, Cyril Sweett International, was alleged to have paid bribes to the vice chairman of the board of Al Ain Ahlia Insurance Company, Khaled Al Badie, to win a £1.6 million contract for the building of a Dubai hotel. Sweett admitted to these charges on December 18, 2015. On February 19, 2016, the company was ordered to pay \$3.3 million (consisting of a \$2 million penalty, a \$1.2 million confiscation order and the SFO’s costs).⁵⁴ Sweett has since put an end to its activities in the Middle East and has publicly admitted to failings in its compliance systems and controls.

Key Takeaways

Both cases demonstrate that the Bribery Act provisions are far-reaching and not confined to conduct within the U.K. The conduct of any foreign person associated with a U.K. company could subject that company to a Bribery Act investigation and enforcement action by the SFO. The cases also show that the SFO will not shy away from prosecution, and that the DPA process is only available to those companies that cooperate extensively with the SFO, once the courts determine that the evidential and public interest tests for a DPA are met.

The SFO has maintained that in order to benefit from a DPA, a defendant company should show that it has genuinely cooperated with the investigation. Indeed, the SFO agreed to its first DPA with Standard Bank because the bank self-reported at the earliest opportunity and then cooperated with the SFO’s investigation. The SFO, however, refused to offer Sweett the same opportunity. In sentencing, Judge Martin Beddoe stated that the company had not admitted that bribes had been paid and noted the company’s attempts to deliberately mislead the SFO.⁵⁵ Sweett’s approach undoubtedly influenced the SFO’s decision not to enter into a DPA with the company and to prosecute instead. The SFO has announced that it has other DPAs in the pipeline; these are expected to shed more light on the process and what companies need to do to be considered for a DPA.⁵⁶

DOJ Increases International Collaboration



In March 2016, Assistant Attorney General Leslie Caldwell delivered a speech at the American Bar Association's 30th Annual National Institute on White Collar Crime in which she highlighted the increasing collaborative efforts between the DOJ and foreign regulators and prosecutors in cross-border matters.

Citing the DOJ's recent efforts to coordinate enforcement of international fraud and corruption cases with its counterparts in countries including Belgium, Latvia, Singapore and the United Kingdom, Caldwell highlighted the increasing appetite among foreign counterparts for prosecuting white collar crime and the DOJ's strong commitment to working with foreign regulators to investigate and prosecute cross-border conduct.

Recent examples of such coordination include assistance in referring cases, obtaining documentary evidence such as bank records, executing search warrants, sharing intelligence, seeking civil forfeiture and coordinating foreign prosecutions.

Caldwell acknowledged that these efforts often implicate important legal concerns, such as foreign data privacy laws and the use of foreign compelled testimony that would be inadmissible in a U.S. prosecution, but warned that the DOJ is finding ways to proceed despite perceived hurdles. Caldwell agreed with concerns about the significant unfairness of regulatory "piling on" when companies are asked by different regulators to pay for the same misconduct multiple times; she noted that the DOJ is making strides to address these concerns so that companies are not punished unfairly, including by dividing fines among agencies and reducing the share payable to the DOJ for penalties imposed by other countries or regulators for the same conduct.

The DOJ and foreign regulators and prosecutors are collaborating more often to investigate cross-border matters.



France Seeks to Strengthen Anti-Money Laundering Regulations

On April 15, 2016, in the aftermath of the Panama Papers leaks, France agreed with Germany, Italy, Spain and the U.K. to automatically exchange information on ultimate beneficial owners (UBOs) of companies and “trusts with tax consequences.” The countries announced they will explore the best ways to exchange information and develop a standard for information-sharing on UBOs by linking national registries to create an international registry. The creation of registries for identifying UBOs is one of the main innovations of the Fourth European Union Anti-Money Laundering Directive (the Fourth Directive), which also creates heightened customer due diligence obligations for financial institutions.

Following the recent terrorist attacks in Europe, the French government decided to accelerate the implementation of the Fourth Directive well ahead of the pre-existing June 26, 2017, deadline. In late February 2016, the French government proposed a bill to reinforce the fight against organized crime, terrorism and their financing. The bill is in the final stage of approval by the French Parliament.

The bill authorizes the government to expeditiously implement the Fourth Directive by special order. The bill also imposes obligations that go beyond those found in the Fourth Directive, including the following measures:

- Tracfin, the French financial intelligence unit, will not only continue to receive suspicious activity reports but will also have the ability to provide information to entities with anti-money laundering obligations, such as banks and other financial institutions, about any person or transaction Tracfin has identified as posing a high level of risk of money laundering (because of the nature of the transaction, the geographic zone or persons involved), in order for such institutions to carry out appropriate due diligence.
- Tracfin’s right of access to information will be extended to additional financial institutions, such as credit and debit cards management services companies like Visa or MasterCard, or the French payment cards consortium.
- Financial institutions will have access to the public registry of stolen or lost identity documents for the purpose of confirming the identity of their clients and UBOs.
- The scope of freezing orders will be modified to include not only bank accounts held by the designated persons but also proxies on such accounts.
- The definition of freezing of assets will be modified in accordance with European legislation so that it includes not only cash and bank accounts but also real estate and other personal properties, including vehicles.
- The government has asked that bank secrecy be waived for obtaining more information about targeted individuals and entities for the purpose of preparing and implementing a European freezing order.

Banks and other financial institutions should carefully monitor French legislative developments to ensure compliance with these enhanced obligations.

The bill would reinforce the fight against organized crime, terrorism and their financing.

DOJ Adds Resources for FCPA Cases, Offers Pilot Program Incentives for Voluntary Disclosures



On April 5, 2016, the DOJ's Fraud Section made two related announcements in its FCPA Enforcement Plan and Guidance.⁵⁷ First, the Fraud Section announced a substantial addition of investigative and prosecutorial resources — 10 more prosecutors in its FCPA unit, a 50 percent increase, and three new FBI squads devoted to FCPA cases. Second, the Fraud Section announced that any company making a voluntary disclosure regarding possible FCPA violations to the Fraud Section between April 5, 2016, and April 5, 2017 — assuming all other requirements are met — could receive “up to a 50% reduction off the bottom end of the Sentencing Guidelines fine range” and avoid the appointment of a monitor. This pilot program is designed to encourage companies to make voluntary disclosures to the Fraud Section by delineating specific benefits they could receive through such disclosures.

Companies should expect that the allocation of additional resources, coupled with the incentives being offered for voluntary disclosures, will result in an increase in FCPA investigations and prosecutions.

Companies should expect that the allocation of additional resources, coupled with the incentives being offered for voluntary disclosures, will result in an increase in FCPA investigations and prosecutions, including against individuals. However, given the multiple predicate conditions to obtain the voluntary disclosure benefits and the time required to resolve complex FCPA matters, it may take some time before we know whether the pilot program, in practice, provides the tangible benefits identified by DOJ. In addition, it is not clear whether the initial voluntary disclosure must take place on or after April 5, 2016, to qualify for the incentives, or whether DOJ intended to include companies that currently are engaged in making voluntary disclosures and cooperating with the Fraud Section. As explained below, we believe the language in the announcement supports the latter interpretation. In any event, including current cooperators within the purview of the pilot program may provide the best pathway for DOJ to establish the bona fides of the program in the near term.

Guidance and Pilot Program

Additional Resources. The Fraud Section, which provides “centralized supervision, guidance, and resolution” for FCPA matters, plans to increase its ranks by more than 50 percent by adding 10 prosecutors. Given the typical time requirements for DOJ to make new hires, including the background clearance process, the planned increase in resources may take some

DOJ Adds Resources for FCPA Cases, Offers Pilot Program Incentives for Voluntary Disclosures

time unless the positions are filled from within the department. The addition of three new FBI teams also will take time to implement and may potentially move more slowly than the Fraud Section hiring process. Notwithstanding the long lead time to increase the resources as announced, companies should expect that the dedication of additional resources will, over the long run, increase the number of FCPA investigations and prosecutions, whether through voluntary self-disclosures or traditional law enforcement efforts (such as through the use of confidential informants, wiretaps, execution of search warrants and data mining).

The Pilot Program. The pilot program applies only to FCPA matters handled by the Fraud Section. Acceptance into the pilot program requires a voluntary self-disclosure, full cooperation and remediation, all as defined by DOJ. The Fraud Section defines each of these concepts as follows:

Voluntary Self-Disclosure. First, for a self-disclosure to qualify as voluntary, it must occur “prior to an imminent threat of disclosure or government investigation.” Second, the company must make the disclosure “within a reasonable time after becoming aware of the conduct.” The company has the burden of demonstrating “timeliness.” Third, the company must disclose “all relevant facts known to it, including all relevant facts about the individuals involved in any FCPA violation.”

Full Cooperation. The Fraud Section guidance includes an extensive set of requirements for a company to receive credit for full cooperation:

- The company must disclose “on a timely basis” “all facts relevant” to the potential FCPA violation, “including all facts related to involvement in the criminal activity by the corporation’s officers, employees or agents.”
- The cooperation must be “proactive,” not “reactive.” This concept includes “identify[ing] opportunities for the government to obtain relevant evidence not in the company’s possession and not otherwise known to the government.”
- The company must impose a document retention directive that is consistent with a comprehensive litigation hold.
- The company must provide timely and potentially rolling updates on its internal investigation.
- The company must “de-conflict” its internal investigation from the government investigation, if requested to do so by Fraud Section.
- The company must provide “all facts relevant to potential criminal conduct by all third-party companies and individuals.”

- The company must make “available for Department interviews” company officers and employees, including any who live abroad.
- In providing complete disclosure of facts learned in the internal investigation, the company must “attribute[e] facts to specific sources” (without waiving the attorney-client privilege).
- Disclosure of “overseas documents,” including sources and locations, unless such disclosure is prohibited by foreign law.
- Where lawful, the company must facilitate “third party production of documents and witnesses from foreign jurisdictions.”
- When requested by the Fraud Section, the company must provide translations of “relevant documents in foreign languages.”

The Fraud Section also will evaluate a company’s cooperation in accordance with the “threshold requirements” of the Yates memorandum regarding individual accountability. As noted in the guidance: “[N]ot all companies will satisfy all the components of full cooperation, either because they decide to cooperate only later in an investigation, or they timely decide to cooperate but fail to meet all of the criteria listed above.”

Timely and Appropriate Remediation. Remediation requirements including the following:

- The company must have a culture of compliance.
- The company must dedicate sufficient resources to compliance.
- The compliance program must be independent, with experienced personnel capable of identifying risky transactions, and it must be audited for efficacy.
- The Fraud Section will evaluate “[h]ow a company’s compliance personnel are compensated and promoted compared to other employees” and the “reporting structure of compliance personnel.”

Achievable Credit Through the Pilot Program. The guidance establishes two avenues for credit, measured by a percentage reduction in fine as established by the U.S. Sentencing Guidelines:

- **Up to 25 percent off if the company does not voluntarily disclose:** Company must “later fully cooperate[] and timely and appropriately remediate[].”
- **Up to 50 percent off and no requirement of a monitor if it voluntarily self discloses:** Company must fully cooperate in a manner consistent with the Yates memo, meet the “additional stringent requirements” of the pilot program” and “timely and appropriately remediate.”

DOJ Adds Resources for FCPA Cases, Offers Pilot Program Incentives for Voluntary Disclosures

Commentary

There is little question that the dedication of additional DOJ and FBI resources will result in an increase in FCPA investigations and prosecutions. This increase in activity will be slow and measured, and the new resources are likely to bear fruit within a year of being assigned to the FCPA team.

It remains to be seen whether the pilot program triggers an increase in voluntary self-disclosures. Although there is potential for a 50 percent reduction in the criminal fine for fully qualifying self-disclosures, the hurdles imposed to achieve “full cooperation,” the uncertainty associated with the calculation of the Sentencing Guidelines fine and the complete discretion granted to the Fraud Section in determining both may dissuade some companies from coming forward until there is a proven track record establishing what qualifies as full cooperation and how DOJ applies the guidelines in voluntary disclosure cases. In this regard, it will be important for DOJ to be transparent regarding application of these criteria and the benefits derived from participating in the pilot program.

There is some ambiguity regarding whether companies currently engaged in making a voluntary disclosure and cooperating with the Fraud Section will be grandfathered into the pilot program. The Fraud Section’s announcement states that the pilot program will apply to “organizations that voluntarily self-disclose *or* cooperate” during the pilot period (emphasis added). It thus appears that a voluntary disclosure made before the announcement of the pilot program with cooperation during the year-long test period is sufficient to qualify for the program benefits. It certainly would behoove DOJ to apply the qualification criteria in this manner in order to provide positive examples of the benefits of the program in the shorter term. Because of the complexity of FCPA matters, it is highly unlikely that any matter disclosed after April 5, 2016, will be resolved with a public settlement by April 5, 2017.

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DC Circuit Affirms Primacy of Prosecutorial Discretion Over Deferred Prosecution Agreements in *United States v. Fokker Services BV*

The district court opinion had raised questions over the interplay between prosecutorial discretion and judicial review of criminal settlements.

On April 5, 2016, the D.C. Circuit overturned the decision of the District of Columbia district court in *United States v. Fokker Services B.V.*, finding that the requirement of court approval to exclude time under the Speedy Trial Act does not grant judges the authority “to second-guess the Executive’s exercise of discretion over the initiation and dismissal of criminal charges.”⁵⁸ The district court opinion had provoked considerable interest from both prosecutors and the defense bar, raising questions over the interplay between prosecutorial discretion and judicial review of criminal settlements. In finding the district court had overstepped its authority, the D.C. Circuit confirmed that charging decisions (as opposed to sentencing) are firmly within the purview of the executive branch, and that deferred prosecution agreements concern the core prosecutorial decisions about what charges to bring and, if brought, whether to dismiss them.

Background

Fokker Services B.V., a Dutch aerospace company, was charged by the DOJ with violating U.S. export laws in connection with the export of aircraft parts, technology and services to customers in Iran, Myanmar and Sudan during 2005-10.

In June 2014, DOJ and Fokker Services agreed to an 18-month deferred prosecution agreement. Under the terms of the proposed DPA, Fokker Services agreed to accept responsibility for its conduct and the conduct of its employees, to forfeit \$10.5 million, to continue to cooperate with U.S. authorities and agencies regarding the conduct at issue, to implement its new compliance program and policies, and to comply with U.S. export laws. DOJ, for its part, agreed to dismiss without prejudice the charges against Fokker Services at the end of the 18-month term, provided that the company fully complied with the terms of the DPA during that period.

Fokker Services also reached parallel civil settlements with the Office of Foreign Assets Control and the Bureau of Industry and Security of the U.S. Department of Commerce.⁵⁹ The company agreed to pay another \$10.5 million in those proceedings, for a total of \$21 million to be paid in the various settlements. This total was equivalent to the amount of revenues that allegedly resulted from the improper conduct.

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District Court Holding

In June 2014, DOJ and Fokker Services filed the proposed DPA with the district court in conjunction with a joint motion to exclude time under the Speedy Trial Act (the Motion). The Speedy Trial Act⁶⁰ requires a trial to begin within 70 days of the filing of an information or indictment, but excludes certain periods of delay, including that during which a DPA is in force, in calculating the 70-day limit.⁶¹

In pleadings filed at the request of the court, the parties argued that the district court's role was "limited to reviewing the proposed exclusion of time pursuant to the Speedy Trial Act."⁶² The parties also argued that the Speedy Trial Act requires a court to approve a proposed DPA unless there is an indication that the defendant did not enter into the agreement willingly and knowingly, or if the agreement was designed solely to circumvent the limits of the Speedy Trial Act.

DOJ also argued in the alternative, "should the Court conclude that it has inherent supervisory authority to review and approve (or disapprove) the DPA,"⁶³ then the DPA should be approved on its merits "because it is in the interests of justice."⁶⁴ DOJ focused on several key facts to support this argument, including that Fokker Services: (1) voluntarily disclosed the conduct at issue "at a time when the United States government was not actively investigating it and had not even taken any investigatory steps,"⁶⁵ (2) provided extensive cooperation during the investigation, (3) engaged in significant remediation, including cessation of shipments to U.S.-sanctioned jurisdictions and disciplinary measures taken against all involved employees, and (4) agreed to a monetary settlement that represented the outer limit of its ability to pay, given what DOJ characterized as the company's "precarious financial situation."⁶⁶

In February 2015, the district court denied the Motion and declined to approve the proposed DPA.

The district court rejected the parties' arguments, ruling that first, a court has the ability to approve or reject a DPA pursuant to its inherent supervisory power over matters before it, and second, that the proposed DPA was not in the public interest.⁶⁷

The district court held that in this role, a court "must consider the public as well as the defendant. After all, the integrity of judicial proceedings would be compromised by giving the Court's stamp of approval to either overly-lenient prosecutorial action, or overly-zealous prosecutorial conduct."⁶⁸

Citing the Eastern District of New York's 2013 opinion in *United States v. HSBC Bank USA, N.A.*,⁶⁹ the district court drew a distinction between the decision whether to bring charges, and if

brought, the decision to dismiss them: "Indeed, this Court would have no role here if the Government had chosen not to charge Fokker Services with any criminal conduct — even if such a decision was the result of a non-prosecution agreement."⁷⁰ Once a DPA was filed, however, the district court reasoned that the case would remain on the court's docket during the entirety of the DPA period, thereby bringing it under the supervisory authority of the court.

The district court further noted various perceived deficiencies in the terms of the DPA in light of this conduct, including that: (1) the total forfeiture amount was "not ... a penny more"⁷¹ than the revenue from the improper transactions, (2) an independent monitor was not imposed, and Fokker Services was not required to file periodic compliance reports, and (3) no individuals were being prosecuted, and involved employees were allowed to remain at the company.

The district court concluded that "it would undermine the public's confidence in the administration of justice and promote disrespect for the law for it to see a defendant prosecuted so anemically for engaging in such egregious conduct for such a sustained period of time and for the benefit of one of our country's worst enemies."⁷² Accordingly, the DPA did not "constitute an appropriate exercise of prosecutorial discretion."⁷³ Finally, the district court noted: "I am not ordering or advising the Government, or the defendant, to undertake or refrain from undertaking any particular action — I am merely declining to approve the document before me."⁷⁴

The Analysis of the DC Circuit

Both DOJ and Fokker Services promptly appealed the decision to the D.C. Circuit,⁷⁵ arguing that the district court had erred by refusing to exclude time under the Speedy Trial Act based on its judgment that the DPA between the government and the defendant was not an appropriate exercise of prosecutorial discretion because it was too lenient, and had erred by failing to determine whether the DPA was in accordance with the Speedy Trial Act for the purpose of allowing Fokker Services to demonstrate its good conduct.

Oral argument was held on September 11, 2015. During that argument, DOJ conceded that a judge can reject a DPA under certain limited circumstances, but argued that the district court had gone "well beyond" those circumstances in the instant case. The court-appointed *amicus curiae* argued that the court's authority over DPAs was similar to its authority over pleas.

On April 5, 2016, in an opinion authored by Judge Sri Srinivasan on behalf of the three-judge panel (Judge David B. Sentelle,

DC Circuit Affirms Primacy of Prosecutorial Discretion Over Deferred Prosecution Agreements in *United States v. Fokker Services BV*

Judge Laurence H. Silberman and Judge Srinivasan), the D.C. Circuit vacated the district court's order. The D.C. Circuit concluded that the Speedy Trial Act "confers no authority in a court to withhold exclusion of time pursuant to a DPA based on concerns that the government should bring different charges or should charge different defendants."⁷⁶ In so finding, the D.C. Circuit cited the Constitution's allocation of primacy with respect to criminal charging decisions to the executive branch, the long-settled independence of the executive in such decisions, and the judiciary branch's general lack of authority to second-guess such decisions. The D.C. Circuit stated that nothing in the Speedy Trial Act's "terms or structure" suggested congressional intent to subvert those principles.⁷⁷

The D.C. Circuit explained that the district court had exceeded its authority under the Speedy Trial Act by "rejecting the DPA based primarily on concerns about the prosecution's charging choices,"⁷⁸ and stated that the court's review power under the Speedy Trial Act was limited to evaluating whether the parties entered into a DPA in order to evade speedy trial limits and whether the DPA served the purpose of allowing the defendant to demonstrate its good conduct.⁷⁹ The D.C. Circuit stated that the court approval required in order to exclude time under the Speedy Trial Act should be read "against the background of settled constitutional understandings under which authority over criminal charging decisions resides fundamentally with the Executive, without the involvement of — and without oversight power in — the Judiciary."⁸⁰

The D.C. Circuit rejected an argument analogizing the court's review of a DPA to its review of a proposed plea agreement, explaining that the court's review of a plea agreement was rooted in the judiciary's power over criminal sentencing, which was not unfettered in any event and did not permit judges to withhold approval based on disagreement with the prosecutor's underlying charging decisions.⁸¹

Instead, the D.C. Circuit drew a parallel between the Speedy Trial Act's requirement of court approval and the requirement under Rule 48(a) of the Federal Rules of Criminal Procedure that a prosecutor must obtain leave of court before dismissing criminal charges. The D.C. Circuit reasoned that in the context of either a DPA or dismissal under Rule 48(a), withholding of approval by the court would be a "substantial and unwarranted intrusion on the Executive Branch's fundamental prerogatives,"⁸² and concluded that there was no basis for finding that courts had greater power to second-guess charging decisions in the context of a DPA than in any other exercise of criminal charging

authority. The D.C. Circuit expressly rejected the district court's reasoning that the filing of the DPA conferred such supervisory power. The D.C. Circuit opinion thus also rejects the reasoning of the Eastern District of New York *HSBC* decision.

The D.C. Circuit also cited the judiciary branch's "lack of competence" to review the government's decision to pursue a DPA and the terms thereof, citing Supreme Court precedent regarding the executive branch's unique ability to make the decision whether to prosecute based on multiple factors, and the judiciary's inability to undertake such an inquiry.⁸³ The D.C. Circuit explained that the provisions of a DPA "manifest the Executive's consideration of factors such as the strength of the government's evidence, the deterrence value of a prosecution, and the enforcement priorities of an agency, subjects that are ill-suited to substantial judicial oversight."⁸⁴

Implications

The D.C. Circuit's decision firmly clarifies the role of a district court in reviewing terms of a DPA, and emphasizes that DPAs are a charging tool subject to significant executive branch discretion. In *dicta*, the D.C. Circuit also endorsed the use of DPAs, lending legitimacy to their widespread use as an alternative between declinations and proceeding to trial:

DPAs have become an increasingly important tool in the government's efforts to hold defendants accountable. They afford prosecutors an intermediate alternative between, on one hand, allowing a defendant to evade responsibility altogether, and, on the other hand, seeking a conviction that the prosecution may believe would be difficult to obtain or would have undesirable collateral consequences for the defendant or innocent third parties. The agreements also give prosecutors the flexibility to structure arrangements that, in their view, best account for the defendant's culpability and yield the most desirable long-term outcomes.⁸⁵

For corporations and defense lawyers seeking the certainty of being able to negotiate a binding agreement with executive branch prosecutors, the D.C. Circuit decision provides clarity and forward-looking comfort. For those who have criticized DPAs as excessively collusive and unreviewable, the opinion is a significant setback.

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UK Establishes New HM Treasury Office to Implement Financial Sanctions



OFSI is tasked with providing guidance to the private sector on sanctions and working with law enforcement and other branches of the government on the implementation and enforcement of sanctions measures.

On March 31, 2016, the U.K. launched the new Office of Financial Sanctions Implementation (OFSI) within HM Treasury. OFSI, which assumes the financial sanctions responsibilities previously carried out by HM Treasury's Asset Freezing Unit, is tasked with providing guidance to the private sector on sanctions and working with law enforcement and other branches of the U.K. government on the implementation and enforcement of sanctions measures. HM Treasury's announcement of OFSI's launch emphasizes that a key function of the new office is to provide "high-quality service" to U.K. businesses to promote an understanding of and compliance with financial sanctions.⁸⁶

In its announcement of the establishment of OFSI, HM Treasury also noted that the U.K. government is seeking to pass legislation to increase the penalties for noncompliance with financial sanctions. Both the establishment of OFSI and the U.K. government's plan to legislate new penalties had been included in HM Treasury's Summer Budget of July 2015 and have therefore been expected.⁸⁷ The OFSI announcement highlights that provisions in the Policing and Crime Bill, presented to Parliament in February 2016, include new administrative penalties such as larger fines, the use of deferred prosecution agreements for breaches of financial sanctions and an increase in the maximum custodial sentence for violations of financial sanctions to seven years. As before, fines for breaches of financial sanctions can be imposed on individuals and companies.

While the creation of OFSI does not affect the scope of any financial sanctions currently in place, its launch coupled with the Policing and Crime Bill sends a strong signal that the U.K. government is actively ramping up efforts to ensure compliance with, and enforcement of, financial sanctions measures. Companies should review their sanctions compliance policies and procedures and business processes to confirm they appropriately reflect recent modifications to certain financial sanctions, such as those applicable to Iran, as well the new U.K. compliance and enforcement environment.

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- ¹ The AUCL also regulates product counterfeiting, abuse of market monopoly power, misleading commercial advertisement and violation of commercial secrets.
- ² Article 7(3) of the draft amendments to the AUCL.
- ³ Article 7 of the draft amendments.
- ⁴ Article 8 of the existing AUCL.
- ⁵ Article 8 of the existing AUCL.
- ⁶ Article 7(2) of the draft amendments.
- ⁷ Article 7(1) of the draft amendments.
- ⁸ Article 22 of the existing AUCL.
- ⁹ Article 20 of the draft amendments.
- ¹⁰ Article 28 of the draft amendments.
- ¹¹ Article 15 of the draft amendments.
- ¹² See U.K. Financial Services and Markets Act §§ 171, 172, 177 (2000).
- ¹³ See FCA's Warning Notice Statement 14/1—Individual (Nov. 28, 2013), U.K. Financial Services and Markets Act §§ 171, 172, 177 (2000).
- ¹⁴ Indictment of Paul Robson, et al., No. 14 Cr. 272, Dkt. No. 5 (Apr. 28, 2014).
- ¹⁵ Superseding Indictment, No. 14 Cr. 272, Dkt. No. 24 (Oct. 16, 2014).
- ¹⁶ Motion to Dismiss the Superseding Indictment, No. 14 Cr. 272, Dkt. No. 75 (July 17, 2015).
- ¹⁷ *Kastigar v. United States*, 406 U.S. 441 (1972).
- ¹⁸ Opinion and Order re: Motion to Dismiss the Superseding Indictment, No. 14 Cr. 272, Dkt. No. 216 (Feb. 11, 2016).
- ¹⁹ See *id.* at 9 n.8 (“The Government devotes much of its original brief on the *Kastigar* motion to the argument that *Kastigar* does not apply when compelled testimony is elicited by a foreign government. ... Defendants argue, by contrast, that *Kastigar* is applicable even in such circumstances. ... Deeply interesting though this question is, the Court has no occasion to resolve it here, because, even assuming *Kastigar* applies to testimony compelled by a foreign sovereign, the Government has met its *Kastigar* burden on the facts here determined.”) (internal citations omitted).
- ²⁰ *Id.* at 17.
- ²¹ *Id.* at 18.
- ²² Rakoff subsequently sentenced Allen to 24 months in prison and Conti to 12 months plus one day. These two sentences were the first handed down in the U.S. to any individual accused of rate manipulation.
- ²³ See, e.g., Mike Koehler, “Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement,” 49 U.C. DAVIS L. REV. 497, 515-27 (2015); Laurie Kratky Dore, “Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement,” 74 NOTRE DAME L. REV. 283 (1999).
- ²⁴ *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763, 2016 WL 347670 (E.D.N.Y. Jan. 28, 2016) (*HSBC II*).
- ²⁵ See *The New York Times*, “HSBC to Pay \$1.92 Billion to Settle Charges of Money Laundering” (Dec. 10, 2012).
- ²⁶ See *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 121-22 (2d Cir. 2006).
- ²⁷ *United States v. Erie Cnty., N.Y.*, 763 F.3d 235, 241 (2014).
- ²⁸ *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763, 2013 WL 3306161, at *5 (E.D.N.Y. July 1, 2013) (*HSBC I*).
- ²⁹ *Erie Cnty.*, 763 F.3d at 240-41 (“The public’s ability to scrutinize such judicial decision-making helps assure its confidence in the orderly administration of justice. If the reports show progress in compliance, the public can be confident that the judge’s [evaluation of the conditions of the DPA] is appropriate; if the reports show worsening conditions, legitimate questions could be raised ...”).
- ³⁰ *United States v. Fokker Servs. B.V.*, --- F.3d ---, No. 15-3016, slip op. at 21 (D.C. Cir. Apr. 5, 2016).
- ³¹ *HSBC II*, 2016 WL 347670, at *4.
- ³² *Erie Cnty.*, 763 F.3d at 240.
- ³³ *Id.* at 241 (citing *Lugosch*, 435 F.3d at 120); see also *Bernstein v. Bernstein Litowitz Berger & Grossman LLP*, No. 14-CV-6867, 2016 WL 1071107, at *4 (Jan. 12, 2015) (applying the balancing test).
- ³⁴ See HSBC letter dated Dec. 11, 2015, at 3-5, *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763 (E.D.N.Y.), ECF Docket Entry 46.
- ³⁵ See Memorandum of Points and Authorities in Support of Siemens’ Motion for Summary Judgment, Mar. 23, 2016, at 17, *100Reporters LLC v. U.S. Dep’t of Justice*, No. 14-CV-1264 (D.D.C.), ECF Docket Entry 58-1 (quoting *Public Citizen v. U.S. Dep’t of Health & Human Servs.*, 975 F. Supp. 2d 81, 116-17 (D.D.C. 2013)).
- ³⁶ NPAs are “similar [to DPAs] except that the charges are not filed, thus giving a small public relations benefit to the company, which can truthfully assert it was never prosecuted for the misconduct.” Peter Henning, “The Organizational Guidelines: R.I.P.?” 16 YALE L.J. POCKET PART 312, 314 n.9 (2007).
- ³⁷ *Bernstein*, 814 F.3d at 142 (quoting *United States v. Amodeo*, 71 F.3d 1044, 1051 (2d Cir. 1995)).
- ³⁸ *HSBC I*, 2013 WL 3306161, at *5.
- ³⁹ In the *HSBC* case, the DOJ marshaled support from, *inter alia*, the U.K. Financial Conduct Authority, the Hong Kong Monetary Authority and Bank Negara Malaysia. Gov’t letter dated Dec. 11, 2015, at 7, *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763 (E.D.N.Y.), ECF Docket Entry 45.
- ⁴⁰ Subject to limited exceptions, including tax fraud cases which, in contrast to money laundering, are governed by a specific procedure and may not be settled using CRPCs.
- ⁴¹ The investigating judge is not the only party to the procedure authorized to suggest CRPCs. The prosecutor, victim and defendant may also ask for this type of settlement.
- ⁴² The French Anti-Corruption Authority will replace the French Central Service for the Prevention of Corruption (“Service Central de la Prévention de la Corruption”), which was created in 1993 with no investigative or prosecutorial powers.
- ⁴³ Up to €200,000 for individuals and up to €1 million for companies.

⁴⁴ *In the Matter of the Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300, California License Plate 35KGD203*, No. 5:16-cv-00010, Dkt. No. 209 (C.D. Cal. Mar. 28, 2016).

⁴⁵ Order Compelling Apple, Inc. to Assist Agents in Search, No. ED 15-0451M, at ¶ 1 (C.D. Cal. Feb. 16, 2016).

⁴⁶ *Id.* ¶ 2.

⁴⁷ See SFO press release “[SFO Agrees First UK DPA With Standard Bank](#)” (Nov. 30, 2015).

⁴⁸ DPAs only became available after the SFO and Crown Prosecution Service finalized their Deferred Prosecution Agreements Code of Practice.

⁴⁹ See [approved judgment](#) in case number U20150854 between the Serious Fraud Office and Standard Bank PLC (Nov. 30, 2015).

⁵⁰ *Id.* ¶ 36.

⁵¹ See SEC press release “[Standard Bank to Pay \\$4.2 Million to Settle SEC Charges](#)” (Nov. 30, 2015).

⁵² See SFO press release “[Sweett Group PLC Pleads Guilty to Bribery Offence](#)” (Dec. 18, 2015).

⁵³ See *The Wall Street Journal*, “[Inside a Bribery Probe at Storied Architecture Firm HLW](#)” (June 21, 2013).

⁵⁴ See SFO press release “[Sweett Group PLC Sentenced and Ordered to Pay £2.25 Million After Bribery Act Conviction](#)” (Feb. 19, 2016).

⁵⁵ See Bloomberg, “[Sweett Group Told to Pay \\$3.3 Million in UK Bribery Case](#)” (Feb. 19, 2016).

⁵⁶ See The All-Party Parliamentary Group on Anti-Corruption, “[Briefing with David Green CB QC, Director of the Serious Fraud Office](#)” (Jan. 26, 2016).

⁵⁷ Although the Fraud Section announced that the United States was “not going at this alone” and that it was “sharing leads with our international law enforcement counterparts,” this is not a new development. Past press announcements by DOJ on FCPA prosecutions repeatedly have touted joint enforcement efforts with numerous international law enforcement agencies.

⁵⁸ *United States v. Fokker Servs. B.V.*, No. 15-3016, 2016 WL 1319226, at *1 (D.C. Cir. Apr. 5, 2016).

⁵⁹ These settlements were announced on June 5, 2014, and remain in effect regardless of the status of the DOJ DPA.

⁶⁰ 18 U.S.C. § 3161.

⁶¹ *Id.* § 3161(c)(1), (h).

⁶² DOJ Supplemental Memorandum at 2, *United States v. Fokker Servs. B.V.*, No. 14-CR-121 (RJL) (D.D.C. July 18, 2014), ECF No. 11.

⁶³ *Id.* at 3.

⁶⁴ *Id.* at 15.

⁶⁵ *Id.*

⁶⁶ *Id.* at 17.

⁶⁷ In so doing, the district court cited a 2013 opinion of the Eastern District of New York in which Judge John Gleeson questioned, but ultimately approved, the DPA between DOJ and HSBC (resolving sanctions-related and anti-money laundering violations by that bank) and those parties’ application for abeyance under the Speedy Trial Act. *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763, 2013 WL 3306161 (E.D.N.Y. July 1, 2013).

⁶⁸ *United States v. Fokker Servs. B.V.*, 79 F. Supp. 3d 160, 166 (D.D.C. 2015).

⁶⁹ *HSBC*, 2013 WL 3306161.

⁷⁰ *Fokker Servs.*, 79 F. Supp. 3d at 165.

⁷¹ *Id.* at 166.

⁷² *Id.* at 167.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ DOJ filed its notice of appeal with the district court on March 10, 2015 (*United States v. Fokker Services B.V.*, No. 14-CR-121 (RJL) (D.D.C. filed March 9, 2015), ECF No. 29) and the D.C. Circuit assigned to the case the docket number 15-3017. Fokker Services filed its notice of appeal with the district court on February 18, 2015 (*United States v. Fokker Services B.V.*, No. 14-CR-121 (RJL) (D.D.C. filed Feb. 18, 2015), ECF No. 24) and the D.C. Circuit assigned to the case the docket number 15-3016. On March 10, 2015, the D.C. Circuit ordered the consolidation of these appeals as docket number 15-3016.

⁷⁶ *United States v. Fokker Services B.V.*, No. 15-3016, 2016 WL 1319266, at *1 (D.C. Cir. Apr. 5, 2016).

⁷⁷ *Id.*

⁷⁸ *Id.* at *4.

⁷⁹ See *id.* at *10-11.

⁸⁰ *Id.* at *4.

⁸¹ *Id.* at *9.

⁸² *Id.* at *7.

⁸³ *Id.* (citing *Wayte v. United States*, 470 U.S. 598, 607 (1985)).

⁸⁴ *Id.* In laying out the background of the case, the D.C. Circuit also had described the interplay between DPAs generally and the Speedy Trial Act’s requirement that trial commence within 70 days of filing, noting that the exclusion of time provided for under the Speedy Trial Act is “essential” to the effective operation of a DPA. The D.C. Circuit explained that, without the exclusion of time, the government would lose its ability to prosecute the defendant for any violation of the agreement after 70 days, which would “largely eliminate the leverage that engenders the defendant’s compliance with a DPA’s conditions.” *Id.* at 6.

⁸⁵ *Id.* at *14.

⁸⁶ See HM Treasury press release “[New Body to Support Financial Sanctions Implementation Launched](#)” (Mar. 31, 2016).

⁸⁷ See HM Treasury, “[Policy Paper: Summer Budget 2015](#)” (July 8, 2015).

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