December 2016

Cross-Border Investigations Update

Since the publication of our June 2016 issue, the following significant cross-border prosecutions, settlements and developments have been announced.

July 2016
LAN Airlines Pays $22 Million to Settle FCPA Union-Bribery Charges

South American airline LAN Airlines SA (LAN) agreed to pay $22 million to settle allegations it violated the Foreign Corrupt Practices Act by facilitating bribes to union officials during a labor dispute. As alleged, when LAN encountered difficulty negotiating labor agreements, it was contacted by a consultant from Argentina who offered to negotiate on the company's behalf. The consultant made clear that he would expect compensation for such negotiations and that payments would be made to third parties who had influence over the unions. LAN's CEO approved $1.15 million in payments to the consultant. The payments were hidden through a sham contract for a purported study of existing air routes in Argentina. The CEO allegedly knew that no actual study would be performed and that it was possible the consultant would pass some portion of the money to union officials in Argentina to settle the wage disputes. LAN agreed to pay $9.4 million in disgorgement and prejudgment interest in connection with SEC charges that it failed to keep accurate books and records and maintain adequate internal accounting controls. The company paid a $12.75 million penalty to the DOJ pursuant to a deferred prosecution agreement.

August 2016
Hitachi to Pay $55 Million Fine for Shock Absorber Price-Fixing

Hitachi Automotive Systems Ltd. (Hitachi) agreed to pay a criminal fine of at least $55.5 million for its participation in a conspiracy to fix prices for shock absorbers installed in cars sold in the United States. From the mid-1990s until summer 2011, the company and its co-conspirators agreed to coordinate on price adjustments requested by the vehicle manufactures to keep prices up. In 2013, Hitachi pleaded guilty and paid a $195 million fine for fixing the price of starters, alternators and other electrical automotive components. At that time, Hitachi received credit for substantially assisting the division's investigation. But in the course of providing that assistance Hitachi failed to disclose that it had also conspired to fix the price of shock absorbers — the conduct that resulted in the present action.

September 2016
Swiss Court Limits Attorney-Client Privilege for Internal Anti-Money Laundering Investigations

The Swiss Federal Supreme Court ruled that reports and interview notes produced by external bank counsel during internal inquiries into anti-money laundering violations are not protected by attorney-client privilege. In a decision that may have far-reaching consequences for internal investigations, the Supreme Court said if a financial institution decides to delegate its investigation and reporting obligations under the Swiss Anti-Money Laundering Act to external counsel, it should not expect the external counsel's work to be covered by privilege. The Supreme Court was forced to rule on the issue following a two-year privilege dispute between the Swiss Attorney General's Office and a bank that had instructed a domestic and U.K. law firm to investigate a former employee who was suspected of money laundering and document forgery.

September 2016 (cont'd)

DFS Proposes Cybersecurity Requirements for Banks

New York state proposed a new regulation, to go into effect January 1, 2017, requiring banks, insurance companies and other financial services institutions regulated by the New York State Department of Financial Services (DFS) to establish and maintain a cybersecurity program. The proposal — the first of its kind — is in part the result of a DFS survey of approximately 200 regulated banking institutions and insurance companies regarding the industry's efforts to prevent cyberattacks. The regulation would set fairly general minimum standards, to not be "overly prescriptive so that cybersecurity programs can match the relevant risks and keep pace with technological advances." Although elements of the proposed regulation are similar to those found in existing regulatory and technical guidance, they have not previously been required as a matter of law. The related press release and preamble suggest that the rule is flexible and can accommodate the nuances of individual institutions' situations and the current state of technology; the proposed regulation's literature also makes clear that the rule is enforceable under the DFS' authority. It remains to be seen how these requirements will relate to the expectations of other regulators with overlapping jurisdiction, and how they requirements will be implemented by institutions operating in multiple states or countries.

The proposed regulation is subject to a 45-day notice and public comment period before its final issuance. If the regulation takes effect, those entities subject to it have 180 days to comply after the effective date.

South Korea Introduces Tough New Anti-Graft Laws

South Korea introduced a new anti-graft law aimed at rooting out perceived widespread low-level corruption. Referred to as the "Kim Young-Ran Law" after the former supreme court judge who drafted it, the sweeping legislation covers some 4 million public servants and employees of educational institutions. The law targets teachers bribed by parents to give better grades, journalists paid to give favorable publicity and officials bought off by businessmen to expedite decision-making. The law prohibits teachers, journalists and officials from accepting gifts worth 50,000 won ($45) or more, or meals of 30,000 won or more, and offenders face hefty fines or even a prison term. The law further prohibits the common practice among doctors and other workers at university hospitals of offering favorable treatment to personal acquaintances, including expedited scheduling of surgery. A mobile app launched recently provides details of the legislation and allows professionals and public officials to determine whether the law applies to them.

October 2016

Brazil's Embraer SA to Pay $205 Million FCPA Settlement

Brazilian aerospace firm Embraer SA agreed to pay $205 million to settle allegations by U.S. authorities that the company violated the Foreign Corrupt Practices Act by paying millions of dollars in bribes to officials in three countries and falsifying accounting records. Embraer admitted to bribing officials in the Dominican Republic, Saudi Arabia and Mozambique. The company made more than $83 million in profits from the bribes. The SEC also accused Embraer of an accounting scheme in India to hide payments there. Embraer is paying a $107 million criminal penalty to the Justice Department as part of a three-year deferred prosecution agreement, as well as more than $98 million in disgorgement and interest to the SEC.

November 2016

Bank Frey & Co. Executive Pleads Not Guilty to Tax Charges

Stefan Buck, the former head of private banking at now-defunct Bank Frey & Co. AG, pled not guilty on November 9 to a single charge of conspiring with U.S. taxpayer-clients and others to hide millions of dollars from the Internal Revenue Service. Buck had been a fugitive for approximately three years. He is accused of helping U.S. taxpayers hide millions in undeclared income in offshore bank accounts.

J.P. Morgan Chase & Co. Settles 'Sons and Daughters' Investigation

J.P. Morgan Chase & Co. (JPMC) agreed with the Department of Justice (DOJ) and Securities and Exchange Commission (SEC) to settle an investigation into the so-called "Sons and Daughters Program," in which a bank subsidiary sought to gain advantages in winning banking deals by awarding jobs to relatives and friends of Chinese government officials. The bank's Hong Kong-based subsidiary, JPMorgan Securities (Asia Pacific) Limited, entered into a nonprosecution agreement with the DOJ and agreed to pay a $72 million penalty. JPMC agreed to pay $130.5 million in disgorgement to the SEC, including prejudgment interest. The Federal Reserve System's Board of Governors also issued a consent cease-and-desist order and assessed a $61.9 million civil penalty. The combined U.S. criminal and regulatory penalties paid by JPMC and its Hong Kong subsidiary are approximately $264.4 million.

December 2016

Och-Ziff Contractor Pleads Guilty to Bribing African Officials

Samuel Mebiame, the son of a former prime minister of Gabon, pled guilty in Brooklyn federal court to conspiring to violate the Foreign Corrupt Practices Act while acting as a contractor for Och-Ziff Capital Management Group LLC (Och-Ziff). The DOJ alleged that Mebiame paid more than $3 million in bribes to high-level government officials in Chad, Niger and Guinea between 2007 and 2012 in connection with a mining company owned by a joint venture between Och-Ziff and an unidentified Turks and Caicos Island entity. Based, in part, on Mebiame's conduct, Och-Ziff entered into a deferred prosecution agreement with the DOJ and agreed to a criminal penalty of $213 million. Och-Ziff also agreed to pay the SEC approximately $199 million in disgorgement and interest. The prosecution is said to be the first U.S. foreign bribery case against a hedge fund. Mebiame faces up to five years in U.S. prison.

Torneos Enters Into Deferred Prosecution Agreement

Torneos y Competencias SA (Torneos), an Argentine sports marketing company, entered into a deferred prosecution agreement with the DOJ stemming from a 15-year scheme to pay millions of dollars in bribes and kickbacks to high-ranking FIFA officials to help secure the rights to broadcast numerous World Cups and other high-profile soccer matches. Torenos agreed to forfeit more than $89 million in profits made from corrupt contracts and pay a criminal penalty of nearly $24 million. In addition, the company terminated the employment of its entire senior management, accepted and acknowledged responsibility for its conduct, cooperated with the DOJ's investigation, and implemented enhanced internal controls and a corporate compliance program to deter corruption.

Brexit's Impact on Corporate Crime and Investigations

With or without the backdrop of EU legislation in the areas of anti-corruption, anti-money laundering and sanctions, U.K. regulators are expected to continue their aggressive enforcement actions against U.K. and non-U.K. companies engaged in wrongdoing.

In the wake of the June "Brexit" vote, predictions concerning the economic, political and legal ramifications of "Brexit" abound, but the impact of the vote remains unknown. With respect to corporate crime enforcement generally, and in particular across certain key areas, Brexit's likely impact appears to be limited:

- **U.K. Bribery Act 2010:** Brexit won't impact the U.K. Bribery Act, which criminalizes both commercial and official bribery and provides a cause of action against corporations that fail to take adequate steps to prevent acts of bribery by their employees. The Serious Fraud Office (SFO) is expected to continue aggressively prosecuting companies for domestic and foreign bribery, as it has done in the past few years. The SFO, however, has an uncertain future under Prime Minister May, who tried to shut down the agency while Home Secretary.
- **U.K. Deferred Prosecution Agreements:** The U.K.'s new Deferred Prosecution Agreement (DPA) regime, employed for the first time in November 2015 to resolve the investigation of Standard Bank, similarly will be unaffected, given that it is specific to the U.K.
- **Cross-Border Regulatory Cooperation:** While the SFO's cooperation with non-U.K. regulators, particularly in the United States and Asia, is expected to continue, Brexit likely will impact the SFO's and other U.K. regulators' cooperation with EU regulators. To continue to participate in EU cross-border cooperation regimes, these U.K. entities will need to re-establish such arrangements with either the EU or individual member states. We expect that such arrangements will in fact continue post-Brexit, consistent with the existing agreements between U.K. regulators and non-EU regulators, including U.S., China, Japan and India. We anticipate a similar approach to cooperation with EU member states.
- **European Arrest Warrants:** When the U.K. leaves the EU, the U.K. also leaves Europol, the EU's law enforcement agency, and Eurojust, its judicial cooperation unit. The U.K., like Canada and Austria, can maintain its relationship with these agencies by forming partnerships with Europol or rejoin these agencies in a restricted role. More importantly, the U.K. falls outside the scope of the European Arrest Warrant (EAW), which currently allows the extradition of EU nationals to the U.K. and vice versa. The Law Society, a professional

association of English and Welsh solicitors, has urged the U.K. to retain the EAW, lest it otherwise be viewed as a refuge for fugitives from justice from the continent.[1]

- **Data Protection:** By May 2018, the EU will require its members to pass the General Data Protection Regulation (GDPR) legislation. If Article 50 is triggered before then, the U.K. may no longer be part of the EU and thus will not be required to do so.

  Whether or not it passes the GDRP, the U.K. will need to ensure that its new information sharing regime mirrors its current position by agreeing to bilateral/multilateral treaties with the relevant institutions and states. Furthermore, the U.K. will need to ensure that its protection for EU citizens' data meets EU standards of sufficiency.[2] Otherwise, EU data will not be able to be transferred from the EU to the U.K. in the absence of additional safeguards.

- **Sanctions:** On March 31, 2016, the U.K. established the HM Treasury Office of Financial Sanctions Enforcement (OFSI). New legislation increasing the penalties for noncompliance is expected in the next year. The new Policing and Crime Bill includes larger fines and custodial sentences for sanctions violations and allows for the use of deferred prosecution agreements in resolving sanctions investigations.

  Post-Brexit, the U.K. must consider whether to issue sanctions independently, as it will no longer issue them via the EU. Whether the U.K. will follow the EU (like Norway and Switzerland) or issue sanctions independently, perhaps incorporating both EU and U.S. sanctions regulations, remains to be seen. In an independent regime, the OFSI likely will have increased responsibilities and require new powers.

- **Anti-Money Laundering:** All EU member states must implement the Fourth EU Money Laundering Directive (4MLD) by June 2017, when the U.K. likely will still remain part of the EU. Post-Brexit, the U.K. may continue to comply with the 4MLD, or it may set independent standards for anti-money laundering laws. The U.K. currently exceeds the requirements of the 4MLD in that it has opened for public inspection the U.K. PSC Register, a new statutory register of individuals or legal entities that have significant control over certain corporate entities. The U.K. also will remain a member of the Financial Action Task Force (FATF) and thus be required to adhere to FATF's money laundering policies. It is anticipated that the U.K. will continue to lead the EU in anti-money laundering enforcement, maintaining — or surpassing — EU anti-money laundering standards.

The U.K. has long been at the forefront of enforcement in Europe in the areas of anti-corruption, anti-money laundering and sanctions. With or without the backdrop of EU legislation in these areas, the U.K. regulators are expected to continue their aggressive enforcement actions against U.K. and non-U.K. companies engaged in wrongdoing.

[1] 'Fighting Crime Post-Brexit - The Law Society', Lawsociety.org.uk http://Lawsociety.org.uk (2016), https://www.lawsociety.org.uk/news/stories/fighting-crime-post-brexit/ accessed 26 Sept. 2016.

[2] Waithera Junghae, 'UK Data Protection Laws May Receive US Treatment In Post-Brexit World' (2016), *Global Investigations Review* http://globalinvestigationsreview.com/article/1038073/uk-data-protection-laws-may-receive-us-treatment-in-post-brexit-world accessed 26 Sept. 2016.

New French Anti-Corruption Legal Framework

Introduction

A new French law titled "Transparency, the Fight Against Corruption and Modernization of the Economy," which was published in the *French Official Journal* on December 10, 2016 (known as Sapin II, as it was named after the French minister of finance, Michel Sapin), aims to bring landmark changes to France's anti-corruption laws by strengthening the detection and prevention of corrupt business practices and improving enforcement mechanisms (the New Anti-Corruption Provisions); most of these provisions will enter into force on June 1, 2017.

In many ways, Sapin II will bring France closer to the U.K. and the U.S. in its approach to international anti-corruption enforcement, but there are also significant differences. By creating a new anti-corruption framework in France, Sapin II will impose new obligations on certain businesses throughout Europe and further complicate multijurisdictional anti-corruption investigations.

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Key Aspects of Sapin II

The key aspects of Sapin II include:

- introducing mandatory internal anti-corruption compliance programs for large French companies;
- establishing a new French anti-corruption agency, whose mission includes monitoring compliance programs and compliance with the French Blocking Statute;
- adopting a deferred prosecution agreement procedure;
- expanding French anti-corruption law to cover certain extraterritorial conduct; and
- enhancing the status and protection of whistleblowers.

Scope

Companies Subject to the New Anti-Corruption Provisions

The New Anti-Corruption Provisions apply to:

- French companies, including state-owned companies, with revenues or consolidated revenues exceeding €100 million that (a) have at least 500 employees, or (b) are part of a group of companies employing at least 500 people with a parent company incorporated in France; and
- subsidiaries[1] and controlled companies,[2] whether French or foreign, of the aforementioned French companies when the latter publish consolidated financial statements.[3]

Liability for Senior Management

If a company falls within the statute, the New Anti-Corruption Provisions also will apply to its senior management, *i.e.*, the chairman, CEO, the managing director, and, under certain circumstances, members of the management board of companies that have management and supervisory boards.

New Anti-Corruption Requirements

New Mandatory Requirements

Companies subject to Sapin II will be required to implement robust anti-corruption compliance programs that include, at a minimum:

- a code of conduct, which must be annexed to the internal policies and procedures, to define and illustrate prohibited conduct;
- a corruption risk assessment, which must be reviewed regularly, based on geography, sector and clients and/or use of third parties;
- a review of customers, suppliers, business partners and intermediaries taking into account the corruption risk assessment;
- training for executives and employees exposed to the risk of corruption and influence peddling;
- internal and external accounting controls to ensure that the company's books, accounts and records are not being used to cover up corruption or influence peddling;
- a disciplinary procedure for employees who breach internal policies and procedures;
- an internal whistleblowing mechanism; and
- monitoring and review of these internal policies and procedures.

In many respects this mandatory compliance framework mirrors acknowledged best practices in the U.S.[4] and the guidance issued by the U.K.'s Serious Fraud Office regarding the procedures that should be put into place by a commercial organization to prevent bribery.[5]

New Recommended Requirements

In addition to the above mandatory requirements, each covered company is encouraged to undertake the following additional steps:

- understand and prepare for the entry into force of the New Anti-Corruption Provisions;
- carry out an audit of its existing compliance program, if any, and assess its effectiveness;
- involve the board of directors, and consider the possibility of setting up board committees for the purposes of (a) assessing current compliance status and corruption risks, (b) implementing the anti-corruption policies and the compliance program, (c) assessing their implementation, and (d) periodically monitoring existing programs and policies;
- review its "tone from the top" message to demonstrate a commitment to compliance;
- appoint a head of compliance and provide for direct and periodic reports to both the CEO and board of directors, including to any specific committees that may have been established;
- include compliance with anti-corruption rules as part of remuneration and promotion procedures;

[1] Within the meaning of Article L. 233-1 of the French Commercial Code.

[2] Within the meaning of Article L. 233-3 of the French Commercial Code.

[3] These provisions apply also to "industrial and commercial public establishments" if they meet either of the two size or control/filing conditions mentioned above.

[4] See, for example, DOJ's "Resource Guide to the U.S. Foreign Corrupt Practices Act," p. 57.

[5] See the "Six Principles" described in the Bribery Act 2010 Guidance published by the U.K. Ministry of Justice, p. 20 *et seq.*

- analyze potential exposure to risks in the context of French-connected activities;
- determine conflicts, or potential conflicts, between the New Anti-Corruption Provisions and compliance with the rules of jurisdictions other than France; and
- establish the validity and the appropriateness of delegating authority in connection with the New Anti-Corruption Provisions, and more generally for compliance purposes.

Effective Date

These New Anti-Corruption Provisions will become effective on June 1, 2017.

Monitoring the New Requirements

Creation of a New Authority

Sapin II has created a new French Anti-Corruption Authority, called the *Agence française anticorruption* (the AFA), with broader powers than the previous French Central Service for the Prevention of Corruption (*Service Central de la prévention de la corruption*) (the SCPC).

Powers of the AFA

The powers of the old SCPC were limited, for example, it did not have any investigation powers. Its authority essentially was limited to collecting information on corruption and communicating that information to the public prosecutor.

The new AFA has significantly broader powers and is designed to:

- ensure the centralization and communication of information aimed to prevent corruption and to assist any legal entities, including the French state, with respect to such purpose;
- issue guidelines to facilitate compliance with obligations and to adopt adequate internal procedures to prevent and detect corruption;
- ensure that companies implement and monitor their compliance programs in a manner consistent with their risk profiles; and
- ensure that French companies under foreign investigation comply with the French Blocking Statute of July 26, 1968, which generally prohibits the production of commercial information from France in connection with a foreign judicial or administrative proceeding. In the past, some U.S. courts have found that the likelihood of French civil or criminal sanctions being imposed for violations of the French Blocking Statute was minimal (only some rare decisions of French courts have sanctioned violations of the French Blocking Statute), and that the French Blocking Statute is not a bar to ordering a party subject to U.S. jurisdiction to produce evidence from France (see *In Re AIG, Inc.*, 2008 Securities Litigation, N° 08 Civ. 4772; *In re Vivendi Universal S.A. Securities Litig.*, N° 02 Civ. 5571). The enactment of this provision may signal to French prosecutors and judges that they should step up their enforcement of the French Blocking Statute. If that happens, this new provision may significantly impact investigations being conducted by non-French authorities, in that it seems likely that such authorities will have to resort to bilateral agreements to obtain documents or testimony, whereas in the past cooperating defendants often construed the French Blocking Statute narrowly or developed various work arounds to produce documents despite the facial limits of the statute.

The AFA benefits from new enforcement powers, including the authority to launch investigations on its own initiative. During these investigations the AFA may request any information it considers relevant, as well as carry out on-site investigations to verify that the information provided is accurate and to conduct interviews. A decree, yet to be published, will, among other elements, detail the conditions under which these powers are to be exercised.

Effective Date

The powers of the AFA will become effective on June 1, 2017. The AFA will have the ability to enforce French Blocking Statute violations that occur on or after June 1, 2017. Under general principles of French law, the law should not have retroactive effect.

Sanctions

New Offenses and Remediation

If a company's compliance program is deemed insufficient, the enforcement committee of the AFA may:

- order the company and its legal representatives to improve the company's compliance program in accordance with the enforcement committee's recommendations in a time limit of up to three years; and
- issue fines of up to €1 million for the company and up to a maximum of €200,000 for directors and officers.

The AFA may make such penalties public.

When a company is found guilty of either (a) corruption or (b) influence peddling, as an additional penalty a court may require it to implement internal measures remediating its internal failures at its own expense for a maximum five-year term. These remediation measures may include the setting up of a compliance program. The AFA will be responsible for monitoring the implementation of any remediation measures in coordination with the public prosecutor. No similar sanctions were previously applicable.

French DPA

Sapin II creates a settlement agreement procedure that will be known as a Judicial Convention of Public Interest, a mechanism similar to the deferred prosecution agreements (the DPAs) used by U.S. and, more recently, U.K. authorities to resolve criminal investigations. Under this new procedure, the public prosecutor may propose that companies settle, either (a) during the course of criminal proceedings, in which case the company would have to plead guilty, or (b) before criminal proceedings are initiated, to avoid a criminal conviction, provided they agree to take certain actions, including:

- the payment of a fine (capped at 30 percent of the company's average revenues over the last three years);
- the implementation of a compliance program at the expense of the company; and/or
- payment of damages to the victims of the offence.

French DPAs may be used in cases involving corporate corruption, influence peddling and money laundering relating to tax fraud. In that sense, they have a broader application than the new compliance requirements, which apply only in cases involving corruption and influence peddling.

As in the U.S. and the U.K., the potential benefits of French DPAs do not extend to directors and officers, who remain subject to prosecution even if the company enters into an agreement; and as in the U.S. and the U.K., French DPAs must be approved by a judge. If the French DPA is not approved, the information shared by the company during the proceedings cannot be used during future criminal proceedings.

Extension of Existing Offenses

Sapin II extends the territorial reach of corruption and influence peddling involving foreign officials.

Influence peddling can now be prosecuted when committed against foreign officials, whereas the previous regime covered only cases involving French officials.

French authorities will now be able to bring charges for corruption and influence peddling occurring outside of France, not only against French nationals, but also against persons who mainly reside in France or against individuals and legal entities having all or part of their business in France. This constitutes a significant extension of the extraterritorial application of French criminal law.

New Whistleblowing Provisions

Sapin II introduces new whistleblowing rules, harmonizes existing laws and prohibits retaliation against a whistleblower. A whistleblower acting in good faith is protected if he or she reports a violation of French law or of an international treaty to which France is a party, or any issue that poses a threat or damage to the public interest. These protections are not limited to allegations involving corruption or influence peddling.

Pursuant to Sapin II, a whistleblower first must file a report to a line manager or compliance officer within the company. If the latter fails to respond appropriately to the report, or where there is serious and imminent danger, a whistleblower may disclose the information to the appropriate judicial or administrative authorities, as well as to the relevant professional association. The information may be made public only as a last resort.

Appropriate whistleblowing procedures must be implemented by all companies with at least 50 employees that are incorporated in or operate in France. A decree will further detail this obligation. Companies must ensure that the identity of the whistleblower remains confidential. Anti-retaliation protections for whistleblowers also are provided. Both of these new provisions are punishable by a fine or imprisonment if not adhered to. Contrary to the Dodd-Frank whistleblowing provisions in the U.S., Sapin II does not provide financial incentives for exposing wrongdoing.

Conclusion

Sapin II has significantly strengthened the anti-corruption regime and powers of enforcement in France, including through the creation of a specific DPA mechanism. Many French companies will now face new compliance requirements and, for the first time, will have to implement anti-corruption compliance programs whose scope will extend to foreign affiliates. Implementation of the New Anti-Corruption Provisions will require close monitoring by companies, which should prepare well in advance of June 1, 2017, when Sapin II becomes effective.

Sapin II also may signal that France will soon join the growing list of countries that are seeking to step up global anti-corruption enforcement. One thing is certain: Multiple prosecutions by different sovereign states is becoming ever more likely, which increases the risk that companies may find themselves being investigated and prosecuted in different jurisdictions for the same conduct.

Department of Justice Increases Use of Forfeiture Actions With International Implications

Cross-border transactions and required disclosure of beneficial ownership interests increase the opportunities for the DOJ to apply criminal and civil forfeiture laws to a broad range of matters, both domestic and foreign.

On July 20, 2016, the Department of Justice (the DOJ) filed civil forfeiture complaints seeking the recovery of more than $1 billion in assets allegedly misappropriated from the Malaysian sovereign wealth fund 1Malaysia Development Berhad (1MDB). As alleged, certain 1MDB officials, their relatives and other associates diverted more than $3.5 billion from the fund to bank accounts they controlled in Singapore, Switzerland, Luxemburg and the US. These filings highlight the broad jurisdictional reach and extent of the US forfeiture laws. In light of increased cross-border transactional activity, these laws, discussed in detail below, are expected to be employed with increasing frequency in cross-border investigations.

U.S. Federal Law

Forfeiture is the means by which the DOJ seizes property without compensation. Forfeiture proceedings can be criminal or civil in nature. Criminal forfeiture is employed in connection with a criminal prosecution. Prosecutors generally include in the indictment a "forfeiture allegation" that describes the defendant's interest in the property the government seeks to seize and alleges that it was used in or derived from the crime with which the defendant is charged.

Criminal forfeiture is imposed as part of the sentencing proceeding, and the government must prove its allegations with respect to proceeds it seeks to forfeit by preponderance of the evidence.[3] Where a third party has interests in the defendant's forfeitable property, an ancillary proceedings is required to address that third party's interests and determine whether the property can nonetheless be forfeited.[4]

[3] *Libretti v. United States*, 516 U.S. 29, 36 (1995).

[4] *See* Fed. R. Crim. P. 32.3(c). Forfeitures pursuant to the Controlled Substances Act (CSA), Racketeer Influenced and Corrupt Organizations (RICO), as well as money laundering and obscenity statutes, there is an ancillary hearing for third parties to assert their interest in the property. Once the interests of third parties are addressed, the court issues a final forfeiture order.

Department of Justice Increases Use of Forfeiture Actions With International Implications

Jurisdiction in a criminal forfeiture action flows from the federal court's jurisdiction over the defendant's person. In a civil forfeiture action, the federal court must have jurisdiction *in rem* — that is, over the property itself. This is an important distinction when a potential defendant is located abroad yet owns property in the United States. To bring an action against the property the government need only prove by a preponderance of the evidence that the property was associated with conduct constituting one or more of a range of federal offenses.

Who Brings Federal Forfeiture Actions

Any U.S. Attorney's Office can initiate and execute criminal forfeiture actions. The DOJ's Forfeiture Unit, operating within the Asset Forfeiture and Money Laundering Section (AFMLS), also litigates civil forfeiture actions. A separate AFMLS team, informally referred to as the Kleptocracy Team, is dedicated to the investigation and recovery of U.S.-based proceeds of foreign official corruption. The DOJ's International Unit, also under AFMLS, litigates the restraint and forfeiture of assets located abroad.

Notable Forfeiture Actions

In January 2015, the DOJ initiated a civil forfeiture action against a Louisiana property allegedly owned by a former executive director of the Honduran Institute of Social Security (HISS), Dr. Mario Roberto Zelaya Rojas. As alleged in the forfeiture complaint, Zelaya solicited and accepted more than $2 million in bribes from a state contractor in exchange for prioritizing and expediting payments HISS owed the contractor. The bribe proceeds allegedly were laundered into the United States and used by Zelaya and his brother to acquire real estate in the New Orleans area. The bribe was unlawful only under Honduran law, and the contact with the U.S. occurred only after the crime was complete. As of the time of publication, the U.S. District Court for the Eastern District of Louisiana had ordered the U.S. Department of Homeland Security's Homeland Security Investigations unit to take over management of the real estate pending final determination of the forfeiture action.

In December 2015, the DOJ announced that it had dismissed a civil forfeiture action pending for nearly eight years involving James Giffen and his company, Mercator. In 2007, AFMLS and the U.S. Attorney's Office of the Southern District of New York filed a forfeiture action against approximately $84 million plus interest in a Swiss bank account. The account was first restrained in 1999 in connection with the federal prosecution of Giffen and Mercator. The funds were allegedly the proceeds of illegal bribe payments to senior Kazakh officials in exchange for oil transactions and property. The funds had been transferred into an account in the name of the government of Kazakhstan, allegedly to evade detection.

Contemporaneous with filing the forfeiture action in 2007, the DOJ entered into a settlement agreement with the Kazakhstan government authorizing the release of the funds to an independent foundation focused on eradicating youth poverty. The Foundation was managed by a respected international nongovernmental organization and created with assistance from the World Bank. In addition, the Kazakhstan government agreed with the World Bank to participate in the Extractive Industries Transparency Initiative and a Public Finance Management Review. The December 2015 dismissal marked the formal satisfaction of the settlement terms.

In addition, as noted above, the DOJ is currently seeking the forfeiture of more than $1 billion laundered through the United States from 1MDB. Part of the assets subject to forfeiture are the royalties from "Wolf of Wall Street"; the government alleges that a portion of the misappropriated funds were used to produce the movie. Other assets include New York and Los Angeles real estate, works by Van Gogh and Monet, and rights in a music publishing company. The forfeiture action is in its beginning phases.

Conclusion

Cross-border transactions and required disclosure of beneficial ownership interests increase the opportunities for the DOJ to apply criminal and civil forfeiture laws to a broad range of matters, both domestic and foreign. Forfeiture actions generate substantial returns for the U.S. government, and there is every reason to expect the DOJ to continue to bring these actions going forward.

China: Current Trends

For multinational companies subject to the U.S. Foreign Corrupt Practices Act (FCPA), the past 12 months saw a continued focus by U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) on companies' business operations in China. According to industry sources, in the publicly announced FCPA enforcement actions brought last year by DOJ and the SEC, the alleged foreign bribery occurred most frequently in China. Moreover, from 2008 to the present, China has been mentioned 33 times in all publicly announced DOJ and SEC enforcement actions — more than all other countries combined.

The compliance environment in China becomes even more challenging in light of enforcement actions by the Chinese authorities themselves. The anti-corruption campaign that began more than three years ago under President Xi Jinping is still going strong. Since the GlaxoSmith-Kline (GSK) case in 2014, in which a Chinese court fined GSK's Chinese subsidiary nearly USD $500 million and sentenced five top China executives to prison for allegedly bribing doctors and hospitals to boost drug sales, it has become clear that multinational companies and their employees are not immune from scrutiny by Chinese law enforcement authorities. PTC, the Massachusetts software company, is a recent example. Having entered into settlement agreements with DOJ and the SEC over FCPA charges in February 2016, PTC disclosed in April that the Chinese regulatory authorities had begun an investigation into similar conduct about a month after the U.S. settlements.

DOJ's new policies have helped make the decision whether to self-disclose more challenging because the interests of the company and those of its employees may become more adverse.

Enforcement agencies have focused on a wide range of industries in the context of public corruption actions. Pharmaceutical companies have been frequent subjects of recent FCPA actions by the U.S. authorities for allegedly bribing Chinese hospitals and doctors to increase drug sales. Other FCPA settlements relating to alleged corrupt conduct in China have involved companies in the banking, computer software, gambling and telecommunications sectors, among others.

The Chinese authorities, like their U.S. counterparts, have cast a wide net. According to reports, multinational companies in the automotive, electronics, pharmaceutical, shipping and software industries have recently been investigated for alleged corrupt conduct and/or anti-competitive practices. In some cases, Chinese officials have executed "dawn raids" at these companies' offices in China to seize files and computers.

Such enforcement actions have been brought against companies and individuals by Chinese authorities and are expected to be brought on an increasing basis against individuals by U.S. authorities. Given the intense focus on China in recent FCPA enforcement actions, as well as DOJ's aggressive litigation posture that seeks to expand the FCPA's jurisdictional reach over non-U.S. citizens for conduct overseas, we would expect DOJ's new individual accountability policy set forth in the Yates Memorandum, named after Deputy Attorney General Sally Yates, to have a noticeable impact in China. Local Chinese employees may increasingly be viewed as persons of interest by U.S. authorities — both for their own involvement in the alleged misconduct and for their knowledge of wrongdoing by others higher up in the corporate hierarchy.

While the Yates Memo binds only prosecutors in DOJ's Fraud Section, it is noteworthy that, in the PTC case mentioned above, the SEC, for the first time, entered into a deferred prosecution agreement in an FCPA case with an individual, a Chinese national, "as a result of significant cooperation he has provided during the SEC's investigation." (SEC Press Release, Feb. 16, 2016). This suggests that the SEC is also pursuing the strategy of inducing individuals to cooperate to provide evidence of wrongdoing by their supervisors and companies, especially when the matter involves a jurisdiction like China, where securing evidence and witnesses overseas poses special challenges.

For their part, the Chinese authorities have pursued companies and individuals with equal vigour. Recent examples of actions taken against individuals include a sentence of life imprisonment imposed on the former deputy general manager of FAW-Volkswagen Sales (Volkswagen's Chinese joint venture partner and a state-owned company) in April 2015 for accepting bribes and kickbacks; the detention of six former employees of the Chinese social media company Tencent in July 2015 in connection with bribery allegations; and the detention of two Chinese managers of Schindler, the Swiss lift and escalator maker, in May 2015 on embezzlement and bribery charges.

Given the expansive jurisdictional reach of the FCPA statute, businesses that operate in China may be subject to prosecution by U.S. authorities, even if the alleged misconduct happened outside of the country. Aside from the more obvious bases for jurisdiction, even transitory contacts with the U.S. — *e.g.*, financial transactions conducted through a U.S. bank account, or a meeting that took place on U.S. territory — may suffice.

The closest Chinese analogy to the FCPA is Art. 164 (para. 2) of the Chinese Criminal Code, which makes it a crime to bribe a "foreign official" "to obtain an improper commercial advantage." Violators are subject to unspecified fines and a maximum of 10 years' imprisonment. Any Chinese national who violates any provision of the Chinese Criminal Code, including Art. 164, outside of China is subject to prosecution (Art. 7), as is any foreign national whose actions outside China "harm the Chinese nation and its citizens" (Art. 8). Hence, in theory at least, foreign bribery offenses are subject to extraterritorial enforcement under Chinese law. It is unclear from publicly available sources, however, whether Art. 164 has ever been enforced.

Collaboration between the U.S. and Chinese law enforcement and regulatory authorities is increasing, and it is expected to continue to increase going forward. Largely outside of the view of the media, and drowned out by news about frictions in other parts of the bilateral relationship, the U.S.-China Joint Liaison Group on Law Enforcement Cooperation (JLG) — the mechanism that promotes coordination between the two governments on criminal matters that is now in its 14th year — features more joint investigations and cases involving increasingly sophisticated criminal schemes each year. We would expect to see more successful instances of collaboration in anti-corruption and financial crime cases as well.

But even in the absence of closer collaboration, law enforcement authorities in the U.S. and China are beginning to piggyback on the enforcement actions of each other, as shown by the PTC case discussed above. As a result, companies with presence in both China and the U.S. can expect an increasing number of joint investigations, or at the very least, serial requests for information from U.S. and Chinese authorities as regulators in the two countries follow in each other's footsteps.

Investigations by enforcement agencies in China pose unique challenges to multinational companies operating in China — and the biggest challenge is likely to be unfamiliarity with the Chinese legal system. Bedrock legal precepts that U.S.-trained lawyers take for granted — the attorney-client privilege, the right to silence, separation of powers, etc. — do not apply without substantial modifications, if at all. Compounding the challenge is the fact that there are often multiple components of the Chinese government with overlapping jurisdictions over a particular substantive area, making it difficult to figure out all the potential decision-makers with which the company should communicate its concerns and press its defence.

While it is imperative to seek the advice of local Chinese counsel for local law and enforcement matters, companies should not overlook the importance of securing U.S. counsel to ensure that the attorney-client privilege and work product protections — whatever their status and level of protection under Chinese law — will be preserved under U.S. law. This is particularly critical because, as discussed above, suspected corporate misconduct in China involving a multinational corporation with minimum contacts with the U.S. may very well, sooner or later, pique the interests of U.S. investigators and prosecutors as well.

Combined U.S. and Chinese enforcement actions pose yet another challenge because the demands from the two jurisdictions are rarely congruent. To the contrary, they are often different and even conflicting. A company therefore may find itself caught in the middle. For example, China has restrictive data privacy and state secrecy laws that may prohibit the sharing of information with U.S. authorities. The disagreement that the Big Four accounting firms had with the SEC recently over the production of audit papers concerning Chinese clients is only one well-known example of this conflict. While DOJ's policy makes allowances for these situations, the burden of establishing such a prohibition rests with the company, which may be hard-pressed to do so to DOJ's satisfaction in an area of foreign law that may appear murky to foreign audiences. And even if data privacy and state secrecy laws do not pose a problem, law enforcement agents in one country sometimes prefer that companies refrain from sharing information with foreign authorities and regard such reporting as a hindrance to their investigation.

The interaction of the U.S. and Chinese legal systems raises delicate issues and underscores the importance of advanced planning, seamless coordination and practical know-how on maintaining effective responses to enforcement contingencies in multiple jurisdictions simultaneously.

One similarity between U.S. and Chinese law enforcement agencies' applicable laws in these jurisdictions is that both provide incentives for individuals to report criminal activity and to provide assistance to the government. A recent amendment to the Chinese anti-bribery laws added a new provision that allows an individual to be "exempted from punishment or receive mitigated punishment" only upon a showing that he "provided crucial information leading to the successful investigation of a major case" "by exposing corrupt activities of others." More generally, the Chinese Criminal Code gives credit, up to and including exemption from punishment, to any defendant who "gives himself up" (自首) (Art. 67) and provides information that leads to the successful prosecution of the case against others (Art. 68).

For companies in China that are subject to the FCPA, incentives to self-report may also come from DOJ's recently announced pilot programme. In essence, the programme holds out the promise of "a 50% reduction off the bottom end of the Sentencing Guidelines fine range" and exemption from monitorship for companies that self-disclose FCPA violations to DOJ before April 5, 2017. It is too early to tell, however, what practical impact the pilot programme will have. This is because, to be eligible for the benefits of the programme, many conditions will have to be satisfied, with the final determination vested exclusively in DOJ's discretion. Among other obligations, the company must "disclose all relevant facts" concerning the misconduct of individual employees, make "available for Department interviews those officers and employees who possess relevant information," including "officers and employees located overseas," and "facilitate third-party['s] production of documents and witnesses from foreign jurisdictions." (DOJ Pilot Program Memo at 5.)

DOJ's new policies, combined with the credit given under Chinese law to individuals who "give themselves up," have made the decision whether to self-disclose more challenging because the interests of the company and those of its employees may become more adverse. To avoid becoming pawns in the high-stakes negotiation between their employer and DOJ, local employees may take the offensive by beating the company to DOJ's door — a development that may make it difficult for the company to control whether and when to make voluntary self-disclosures to the authorities.

New York Court of Appeals Finds 'Repeated, Deliberate Use' of Correspondent Account Sufficient to Establish Personal Jurisdiction Over Non-US Banks

In a decision that has implications for non-U.S. financial institutions with correspondent accounts in New York, a closely divided New York Court of Appeals held on November 22, 2016, that the "[r]epeated, deliberate use [of a New York correspondent account] that is approved by the foreign bank on behalf and for the benefit of a customer" satisfies the purposeful availment prong of the test for personal jurisdiction under New York's long-arm statute.[1] In *Al Rushaid v. Pictet & Cie*, New York's highest court overturned decisions of two lower courts, emphasizing the need to analyze under New York's long-arm statute the "quantity and quality of a foreign bank's contacts with the correspondent bank" in determining whether personal jurisdiction exists for a nondomiciled bank.[2]

The multiple opinions in *Pictet* demonstrate that, as applied to correspondent accounts, the purposeful availment test will continue to be a fact-intensive inquiry without precise guidelines.

Background

In August 2011, Pictet & Cie (Pictet), a private Swiss bank with its principal place of business in Geneva, Switzerland, was sued by Saudi national Rasheed Al Rushaid and two companies owned by Al Rushaid for allegedly participating in a kickback and money-laundering scheme orchestrated by three of Al Rushaid's employees.[3]

Al Rushaid's company, Al Rushaid Parker Drilling, Ltd. (ARPD) was contracted to build six oil rigs for the Saudi Arabian national oil company. As alleged in the complaint, three of ARPD's employees engaged in a bribery and kickback scheme with certain ARPD vendors contracted to work on the rigs. Al Rushaid accused Pictet and its relationship-manager of establishing an offshore company in the British Virgin Islands (BVI) for the ARPD employees, setting up Geneva-based Pictet accounts for that BVI company and the ARPD employees, and effectuating the transfer of funds from ARPD's vendors to the

[1] *Al Rushaid v. Pictet & Cie*, 2016 N.Y. Slip Op. 07834, 2016 WL 6837930 (N.Y. Nov. 22, 2016), at *7, available at http://nycourts.gov/reporter/3dseries/2016/2016_07834.htm.

[2] *Id.*

[3] *Id.* at *2.

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employees with the knowledge that the sums of money deposited vastly exceeded the employees' annual pay.[4] The vendors allegedly "wired bribes in favor of 'Pictet and Co. Bankers Geneva' to Pictet's New York correspondent bank account," which "[f]rom there ... were credited by Pictet to [the BVI company's] Geneva-based account, and ... later divided up and transferred to the employees' individual accounts."[5]

Pictet moved to dismiss the complaint for lack of personal jurisdiction.[6] The Supreme Court agreed with Pictet, "concluding that the defendants' use of the correspondent accounts was passive not purposeful."[7] The Appellate Division, First Department agreed, finding that under prior precedent New York's long-arm statute required deliberate acts by Pictet.[8]

Analysis of the Court of Appeals

New York's long-arm statute requires that: (1) a defendant conduct sufficient activities to have transacted business in the state and (2) the claims arise from such activities.[9] Focusing on the first part of the test, the Court of Appeals examined prior cases involving correspondent accounts where courts analyzed whether the defendant purposely availed themselves of New York's jurisdiction. The court found that, as alleged in the complaint, Pictet's "correspondent banking activity [was] sufficient to establish a purposeful course of dealing, constituting the transaction of business in New York."[10] In a dissent, Judge Eugene F. Pigott, Jr. argued that the majority's opinion was "based on a misreading of" the court's prior decision in Licci v. Lebanese Canadian Bank, and "risk[ed] upending over forty years of precedent" holding that "mere maintenance of a New York correspondent account is insufficient to assert personal jurisdiction over a foreign bank."[11]

The key issue separating the decisions was whether Pictet's or its employees' actions were "purposeful" under the personal jurisdiction standard articulated in Licci. In Licci, the plaintiffs alleged that the Lebanese Canadian Bank (LCB) used a New York correspondent account to make multiple transfers worth several million dollars to the financial arm of Hizballah with the knowledge that Hizballah was a terrorist organization and as part of an LCB policy to support and assist Hizballah's goals.[12] The Licci court found that:

> "repeated use of a correspondent account in New York on behalf of a client — in effect, a course of dealing — show[s] purposeful availment of New York's dependable and transparent banking system, the dollar as a stable and fungible currency, and the predictable jurisdictional and commercial law of New York and the United States."[13]

In concluding that Pictet purposefully availed itself of New York, the Court of Appeals focused on allegations that: (1) the bank maintained and marketed business relations in New York on its website; (2) the correspondent account was used to wire money to Pictet that was then divided between the corrupted employees in other Pictet accounts; (3) Pictet employees had knowledge that the money being transferred was illicit; and (4) Pictet employees "orchestrated the money laundering and [] the New York account was integral to the scheme."[14] The complaint did not allege that Pictet or its employees directed the vendors to use Pictet's New York correspondent account, and importantly, the court concluded that prior "cases do not require that the foreign bank itself direct the deposits [to the correspondent account], only that the bank affirmatively act on them."[15]

Judge Pigott's dissent concluded that Licci required "something more than the mere receipt of funds in a New York correspondent account" at "the unilateral direction of third parties."[16] He distinguished Licci, arguing that unlike Pictet,

[4] *Id.* at *2-3.

[5] *Id.*

[6] Pictet's motion to dismiss also argued for dismissal for failure to state a claim, forum non conveniens, and lack of standing. Due to the posture of the prior decisions, the Court of Appeals only addressed the issue of personal jurisdiction.

[7] *Al Rushaid*, 2016 N.Y. Slip Op. 07834, at *4.

[8] *Id.*

[9] *Id.* at *5.

[10] *Id.* at *8. The court also found that the cause of action "easily" arose from contacts with New York. Id. at *9.

[11] *Id.* at *15 (Pigott, J. dissenting).

[12] *Licci v. Lebanese Can. Bank*, SAL, 20 N.Y. 3d. 327, 322 (N.Y. 2012). The decision was the result of two certified questions from the U.S. Court of Appeals for the Second Circuit.

[13] *Id.* at 339 (internal quotations and citations omitted).

[14] *Al Rushaid*, 2016 N.Y. Slip Op. 07834, at *8.

[15] *Id.*

[16] *Id.* at *14-15 (Pigott, J. dissenting)

LCB had "projected itself" into New York because it could have processed the transactions outside of the United States and LCB used the New York account to serve its shared goals with Hizballah.[17]

In a concurring opinion, Judge Michael Garcia wrote separately to dispute Judge Pigott's assertion that the plaintiffs in Licci alleged additional facts demonstrating purposeful availment or that it was necessary that Pictet engage in an "affirmative act ... directing the money into the New York correspondent bank account."[18] He emphasized that the "[f]unds arrived into the [account] at the direction of the front company the bank helped establish" and that "clearing these transitions through its New York correspondent account for a client depositing millions of dollars into that Swiss bank was certainly 'affirmative and deliberate' and done for the bank's own commercial purposes."[19]

Implications

The multiple opinions in Pictet demonstrate that, as applied to correspondent accounts, the purposeful availment test will continue to be a fact-intensive inquiry without precise guidelines on the specific actions that are necessary to establish personal jurisdiction under New York law. Judge Pigott's dissent warned that the majority's reasoning "eschew[ed] the clear and predictable rules that are important in this area of the law."[20] Financial institutions not domiciled in New York should be mindful that actions taken on behalf of clients in relation to New York-based correspondent accounts may increase the risk of a court finding personal jurisdiction in New York has been established.

[17] *Id.* at *15 (Pigott, J. dissenting).

[18] *Id.* at *13-14 (Garcia, J. concurring) (emphasis in original).

[19] *Id.* at *14 (Garcia, J. concurring).

[20] *Id.* at *16 (Pigott, J. dissenting).

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