



Government Enforcement Investigations What You Need to Know in 2018

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On October 4, 2017, Skadden presented the seminar “Government Enforcement Investigations – What You Need to Know in 2018.” Skadden partners Ryan Junck and Elizabeth Robertson, both based in London, moderated the panel discussion. Panelists included Nicolas Brooke, general counsel for litigation and investigations at Société Générale; Laura Durrant, head of litigation, regulatory and investigations at Royal Bank of Scotland; Matt Fitzwater, global head of litigation, investigations and enforcement at Barclays; Angus McBride, general counsel at News UK; and James Walker, head of ethics and compliance at Amec Foster Wheeler.

Keith Krakaur, who heads Skadden’s European Government Enforcement and White Collar Crime Group, gave introductory remarks. He described the continuing aggressiveness of U.S. regulators, which has resulted in \$13.5 billion in fines leveled at European banks over the past five years, with \$1.6 billion in penalties so far this year. Mr. Krakaur also noted the prevalence of large multijurisdictional settlements exemplified by VimpelCom, Telia and the Brazilian corruption investigations. He touched on the fact that four U.K. enforcement actions have been resolved with deferred prosecution agreements, and he noted the Sapin II developments in France, which created a new anti-corruption agency, L’Agence Française Anticorruption. Mr. Krakaur further remarked on the U.K.’s Criminal Finances Act, which came into force this year and will pose substantial challenges to businesses, particularly due to its “failure to prevent” tax evasion provision. Mr. Krakaur also commented on the difficulties that new U.S. sanctions against North Korea may pose for Chinese trade, and the ways in which cybersecurity and data protection concerns may expose companies to large fines going forward, citing the European Union’s General Data Protection Regulation that will go into effect in May 2018.

International Enforcement in an Unpredictable Geopolitical Climate

The panelists observed that financial institutions today can expect to enter into reasonable negotiations with enforcement authorities if those institutions fully disclose all that is going on in an investigation.

Speakers discussed the implications of evolving French financial regulation and the Sapin II law in particular. They explained how this opens up a new avenue (in matters of corruption, money laundering and tax fraud) to a disposition akin to a deferred prosecution agreement, and also introduces jurisdictional rules that are extraterritorial and thus novel from a French legal perspective.

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Key Takeaways

Another topic was the fact that there are still many open seats at the U.S. Department of Justice (DOJ) and elsewhere under the current administration. As a result, some cases have stalled without progressing at higher levels within various U.S. Attorneys' offices, and staff are often without more senior counterparts to make top-level decisions, the speakers observed. Despite post-election expectations, the enforcement environment has not become any more business-friendly. Mr. Junck also discussed the future implications of the recent departure of DOJ compliance counsel Hui Chen. The professionalization of compliance monitors was an additional topic the panelists discussed.

The speakers said Brexit is unlikely to have a material effect on enforcement trends in the U.K., which has tended to opt in and out of the EU's criminal justice regime on an ad hoc basis. One panelist remarked that Brexit is not expected to have a major impact on coordination between law enforcement in Europe and the U.K. It was further noted that the Serious Fraud Office has demonstrated an increasing tendency to demand a high level of cooperation at very early stages of investigations.

Panelists also touched on the evolving challenges that data compliance and cybersecurity concerns pose. One topic of discussion involved strategies for focusing executives' attention on the importance of securely handling data and the potential size of fines for violations in this arena.

Multijurisdictional Investigations and Coordinated Enforcement

Various speakers weighed in on strategic approaches when negotiating global settlements with multiple regulators. One of the speakers suggested disclosing substantial information to a long list of regulators and formulating this list from the start of an investigation. There are also benefits to maintaining frequent contact with regulators, challenges to managing competing dynamics among different regulatory bodies and considerable value in identifying parties on the ground to work with local enforcement authorities.

The speakers commented on the unique difficulties presented by multijurisdictional enforcement actions. One panelist discussed the impact of recent economic headwinds in the oil and gas industry, which has created additional pressures on the performance of due diligence, particularly with respect to new business opportunities that appear in risky jurisdictions.

Financial institutions will continually find themselves at risk of being ensnared in global corruption and money laundering probes, several panelists said. They spoke about cross-border corruption investigations and collaboration among international authorities. With respect to collaboration, they noted that there is currently a DOJ secondee rotating through the Financial Conduct Authority and the Serious Fraud Office in the U.K.

Individuals Targeted in White Collar Prosecutions

The speakers observed that the increased prosecutorial focus on targeting individuals is not merely a U.S. trend in light of the Yates Memorandum, but in fact a global pattern, as reflected by the Senior Managers Regime in the U.K. The panelists discussed the considerations made in decisions to charge corporations or individual actors and noted that individuals are often less amenable to settlement and more likely to litigate the facts in a matter. One of the panelists spoke about the risks that corporate cooperation poses on individual employees and how personnel are imperiled in a climate of ever-increasing disclosure to governments.

Whistleblowing Developments

Ms. Robertson asked the panelists about developments in whistleblowing. The speakers variously observed how frequently whistleblowers are embroiled in employment disputes with institutions and what incentives are at play. The speakers also remarked on the proliferation of compliance hotlines and the need for significant resources to devote to triaging, investigating and appropriately addressing whistleblower complaints.

Sanctions Trends and Compliance Challenges

Ms. Robertson posed the question, "Is it possible to adopt a gold standard of compliance in an ever-changing sanctions landscape?" One panelist described the shifting sands of international sanctions regimes as a "minefield" in which there is often friction between risk appetite and the letter of the law. Another panelist observed the varying levels of risk tolerance that may exist among business leaders within a given institution and the role of technology in vigilant sanctions compliance.

Privilege Issues in the UK

Mr. Krakaur closed the panel by highlighting recent developments with respect to questions of privilege in the U.K. and the implications therein for investigations (and for interview practices in particular). The panelists shared observations on the *RBS Rights Issue Litigation* and encouraged practitioners to consider that investigative files they create may well be disclosable at some point. The panelists also shared insights into *Serious Fraud Office v. Eurasian Natural Resources Corporation*, which is presently being appealed. Several speakers touched on the fact-specific determinations to be made with respect to taking notes or tape-recording interviews, and the benefits and drawbacks of both practices. The panelists discussed the possibility of seeking prior approval from regulators regarding interview plans and shared their hopes for a clear U.K. Supreme Court decision with practical principles to be applied to questions of privilege.