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ARTICLES

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An Assessment of the Impact of the Foreign Corrupt Practices Act over Its Forty-Year History

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Introduction

Corruption is one of the greatest impediments to economic and social development around the world. Businesses and individuals pay an estimated $1.5 trillion in bribes each year.[1] This article examines the impact that the Foreign Corrupt Practices Act (FCPA)[2] has had on the fight against international corruption since its enactment in December 1977.

Enforcement of the FCPA remained relatively dormant during the first twenty-five years after its enactment. A dramatic increase in enforcement actions and in the amount of penalties and fines assessed began around the 2004–2007 period and has rocketed dramatically upward over the last ten years. Today, the FCPA represents one of the most significant compliance risks that U.S. companies face in conducting overseas business.

But the impact of the FCPA goes well beyond the number of enforcement actions commenced or the amount of penalties and fines imposed. It served as the catalyst and foundation for the adoption of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[3] The OECD Convention obligates each of the signatory nations to enact laws that criminalize the bribery of foreign officials. The Working Group of the OECD Convention pressures the signatory countries to strengthen and enforce their anti-corruption laws.

The FCPA enforcement actions taken by U.S. enforcement authorities also served as a model for other countries and has led to increasing multilateral cooperation and enforcement.

The result has been the establishment of a multilateral legal framework in the fight against corruption. Importantly, corruption is no longer accepted as the norm; it is seen, correctly, as a significant impediment to the economic and social development of many developing countries.

Nevertheless, as discussed further below, this international effort has barely scratched the surface in the effort to combat corruption.

Evolution of the Enforcement of the FCPA

The FCPA is a by-product of the Watergate scandal. As a result of revelations of unreported campaign contributions uncovered during the Watergate investigations, the U.S. Securities and Exchange Commission (SEC) initiated an investigation of undisclosed payments to domestic and foreign governments and politicians. It learned that over 200 corporations had made questionable foreign payments. As a result of these revelations and testimony before Congress, a consensus developed in Congress that foreign bribes were not only unethical but also bad business.

The FCPA entered into law on December 19, 1977. It established criminal and civil penalties for illicit payments made to foreign officials by U.S. companies and U.S. nationals. It imposed certain accounting requirements on public companies.[4]

The law was in many ways revolutionary. It applied a criminal law extraterritorially to U.S. companies and U.S. nationals that engaged in the bribery of foreign officials, irrespective of local laws or local enforcement and without regard to local customs and practices.[5] Virtually no other country had a law similar to the FCPA.[6]

During the initial twenty-five years after its enactment, the FCPA was infrequently enforced. From the enactment of the FCPA in 1977 to the end of 2003, the U.S. Department of Justice (DOJ) brought thirty criminal prosecutions and five civil injunction actions. The SEC brought fifteen civil enforcement actions. The total fines, fees, and penalties levied by the DOJ and SEC during this period totaled approximately $59.5 million.[7]

I first became acquainted with the FCPA during unsuccessful efforts by the Reagan administration in the early 1980s to amend the FCPA. In the mid 1980s, I was the only attorney in a large law firm that knew what the initials “FCPA” stood for when a major U.S. company requested legal advice on an FCPA issue. I spoke at numerous conferences and seminars on the FCPA during the 1980s and 1990s. As a general rule, there were more speakers at these conferences than attendees. During overseas training, the common mantra was: “You don’t understand how business is done in the real world.” Clearly, the FCPA had minimal impact on international business activity during this period.

The change in the enforcement environment began during the period from 2004 to 2007. The number of DOJ and SEC enforcement actions increased from five in 2005 to fifteen in 2006 to thirty-eight in 2007. In the prosecution of the Swiss engineering firm ABB Ltd., in July 2004, involving illicit payments made by its subsidiaries in Nigeria, Angola, and Kazakhstan, the SEC imposed, for the first time in an FCPA case, the remedy of disgorgement of profits (plus prejudgment interest).[8] The use of the disgorgement remedy has contributed significantly to the tremendous upsurge in the amount of penalties and fines imposed on FCPA cases since 2004.

In 2007, the DOJ and SEC prosecuted Baker Hughes, Inc. for bribes paid in regard to oil contracts in Kazakhstan. The SEC and DOJ imposed combined penalties and fines totaling $44 million, the highest combined penalties at the time.[9]

In 2008, FCPA enforcement rocketed upward dramatically. The enforcement action against Siemens AG and three of its subsidiaries resulted in criminal and civil fines totaling $800 million, the largest settlement in FCPA history.[10] The SEC portion included a disgorgement payment in the amount of $350 million. On the same date, Siemens settled outstanding corruption charges filed by the German government of approximately $569 million. This settlement was in addition to the payment of $290 million already levied by a court in Munich, Germany.[11] Thus, Siemens paid a combined fine of $1.6 billion to U.S. and German authorities. This prosecution also marked the first significant collaborative multilateral enforcement effort.

Several months later, the DOJ and SEC entered into a settlement with Kellogg Brown and Root LLC for a combined fine of $579 million.[12]

These record fines sent a strong message that the U.S. government would aggressively enforce the FCPA. They also marked a significant development in the multilateral cooperation on anti-corruption enforcement.[13] Both trends have continued unabated to the present. The fines and penalties imposed over the past ten years were unimaginable in 1977.

There are a number of notable developments that contributed to this wave of increased enforcement and penalties. Some of these developments are discussed in the following sections.

Prosecution of Foreign Companies and Foreign Nationals

The aggressive prosecution of foreign companies and foreign nationals has been a significant development in the enforcement of the FCPA.

The FCPA has, since its inception, applied to issuers—companies that have a class of securities registered pursuant to section 12 of the Securities Exchange Act of 1934 ("Exchange Act") or that are required to file reports under section 15(d) of the Exchange Act.[14] This includes foreign companies whose stocks are listed on national securities exchanges such as the New York Stock Exchange or are quoted on NASDAQ.[15] These foreign companies had not generally been subjected to the FCPA compliance culture that has developed in the United States since the enactment of the FCPA. They were ripe for anti-corruption enforcement action. In fact, ten of the twelve largest penalties imposed by the DOJ/SEC for FCPA violations have been imposed against foreign issuers.[16]

The 1998 amendments to the FCPA eliminated the differing treatment between U.S. and foreign nationals who are employees or agents of a U.S. company or an issuer. Previously, only U.S. nationals and permanent residents were subject to both civil and criminal penalties; foreign non-resident nationals were only subject to civil penalties. The amendment eliminated this disparity, subjecting foreign national employees of U.S. companies or foreign issuers to criminal liability.[17] This led to a number of prosecutions of foreign national employees of foreign companies who are issuers under the FCPA.[18]

The 1998 amendments to the FCPA also significantly expanded the scope of the FCPA to cover foreign natural and legal persons who commit an act in furtherance of the bribery of a foreign official "while in the territory of the United States."[19] The DOJ has taken an aggressive position in its enforcement of foreign companies under this provision. In its Resource Guide to the FCPA, the DOJ asserts that subject matter jurisdiction exists over foreign nationals and foreign companies if they engage, either directly or through an agent, in any act in furtherance of a corrupt act while in the territory of the United States.[20] This includes instances in which a foreign national or foreign company "causes" its agent to carry out such an act within the territory of the United States.[21]

This expansive interpretation and enforcement of the extraterritorial application of the FCPA by the DOJ has resulted in significant enforcement actions against foreign companies and foreign nationals.[22]

The DOJ has brought several FCPA enforcement actions against foreign subsidiaries of U.S. companies or issuers on the grounds that the foreign subsidiaries acted as agents of their parent companies. For example, DPC (Tianjin) Co. Ltd., a wholly owned Chinese subsidiary of Diagnostic Products Corporation (DPC), a U.S. company, pled guilty to a violation of the FCPA for improper payments made to government physicians and laboratory personnel in China. DPC had no knowledge of and did not authorize the improper conduct. The plea agreement charged the Chinese subsidiary with being an "agent of DPC" and specified the use of an instrumentality of interstate commerce as the jurisdictional nexus.[23] It provided no factual support for the assertion that DPC (Tianjin) Co. Ltd. was an "agent" of DPC. The legal basis for this position appears tenuous.

The SEC's Evolving Application of the FCPA

Several changes in SEC enforcement have also had a significant impact on the increased number of enforcement actions and the amount of the fines and penalties imposed.

Beginning in 2004 in the enforcement action against the Swiss engineering firm ABB Ltd.,[24] the SEC required disgorgement of profits (plus prejudgment interest). Disgorgement is an equitable remedy authorized by the Exchange Act to prevent unjust enrichment.[25] Since then, it has become a powerful enforcement tool for the SEC. Most FCPA enforcement actions brought by the SEC include a disgorgement remedy, even where the violations are limited to books and records and internal controls and do not include anti-bribery violations. The disgorgement amounts have ranged from as low as $259,000[26] to as high as $457 million.[27]

In addition, the SEC has applied the accounting requirements for issuers in a strict liability manner for the improper payments made by their foreign subsidiaries, even where the parent company (the issuer) had no knowledge of and did not authorize the misconduct.[28] This appears to have started with the enforcement case against Chiquita Brands[29] for the alleged conduct of its Colombian subsidiary in paying a $300,000 bribe to obtain a renewal of its permit for a port facility. The parent company had no knowledge of the improper conduct and had compliance procedures in place to prevent such conduct.[30] The SEC thereafter initiated numerous enforcement actions against issuers (both U.S. and foreign companies) for books-and-records and internal accounting control violations for the improper conduct of their subsidiaries, where the parent company had no knowledge of and did not participate in or authorize the alleged improper conduct.[31]

The Adoption of FCPA Compliance Programs

The DOJ and SEC have taken a number of important steps, in the enforcement of the FCPA, to foster and encourage the development of an anti-corruption compliance culture in U.S. companies. This has in turn led to the development of a significant support system of compliance professionals to assist in these efforts. While impossible to measure, these actions appear to have had some moderating effect on reducing international corruption by U.S. companies.

The SEC and DOJ began to make clear in their enforcement actions, beginning around 2006[32] and continuing thereafter, that the adequacy of an FCPA compliance program was an important element of an adequate system of internal controls.[33] This includes conducting appropriate due diligence on agents and distributors[34] and providing FCPA training of employees and agents.[35]

The Resource Guide reinforced this position: "An effective compliance program is a critical component of an issuer's internal controls."[36] The Resource

Guide identified some of the elements of an effective compliance program.[37] It also recognized that, without a culture of compliance within an organization, the compliance program will generally not be effective.[38]

The DOJ began to articulate the elements of a compliance program in its settlement agreements.[39] The existence and effectiveness of a company's compliance program is also one of the factors enforcement authorities consider in deciding whether to prosecute and what charges to bring.[40] In addition, the U.S. Sentencing Commission's Guidelines for the sentencing of organizations emphasize the existence of an effective compliance program in determining the fines and other penalties to be imposed on a company.[41] An effective compliance program can reduce significantly the amount of the fine.[42] The DOJ recently issued a guidance document on compliance programs, entitled "Evaluation of Corporate Compliance Programs."[43] This document provides some guidance on what the DOJ would consider in evaluating the effectiveness of a compliance program.[44]

The Evolution of Multilateral Enforcement Efforts Against Corruption

One of the strong criticisms of the FCPA, from its inception, has been that it created an uneven playing field for U.S. companies. This was true. While U.S. companies faced the possibility of an enforcement action for improper payments to foreign officials, foreign competitors had no similar constraint. While local foreign laws generally prohibit bribery, those laws were rarely enforced. This placed U.S. companies at a competitive disadvantage vis à vis their foreign competitors.[45]

In an effort to level the playing field, Congress included a provision in the 1998 amendments to the FCPA that directed the U.S. government to negotiate an anti-bribery convention with the OECD member nations.[46] After a number of unsuccessful efforts,[47] and to the surprise of many observers including this author, the effort resulted in the adoption of the OECD Convention, which came into force on February 15, 1999. The OECD Convention obligated each signatory nation to adopt laws that criminalize the bribery of foreign officials. There are, today, forty-four signatories to the OECD Convention.[48] In effect, there are now forty-four FCPA-type laws.

The OECD Convention represented a critical turning point in the fight against international corruption. It reflected a sea change internationally in both the attitude about and the enforcement of corruption. It has had the most significant impact on the international anti-corruption effort. But it was the FCPA that served as the standard and model and the impetus for the adoption of the OECD Convention. Without the FCPA, there would probably not be an OECD Convention. And it has been the FCPA enforcement actions undertaken by the DOJ/SEC that have provided a model for other countries in the enforcement of their own anti-corruption laws.

The 2008 anti-corruption enforcement action brought against Siemens AG by German authorities perhaps best demonstrates this sea change. Previously, German companies could deduct bribery expenditures from their taxes as a business expense.[49]

Importantly, the OECD Convention established a Working Group on Bribery to review, monitor, and comment upon the legislation enacted by each nation to implement the OECD Convention, and its enforcement by these nations.[50] In addition, it contained a strong provision for mutual assistance. This has encouraged cooperation and collaboration between U.S. enforcement authorities and their foreign counterparts in the fight against corruption.[51] It has become much easier to gather documents and information abroad.

This has led to a significant increase in multilateral anti-corruption enforcement efforts. It has also resulted in countries sharing the fines and penalties assessed.

Some noteworthy multilateral enforcement cases include the global foreign bribery enforcement action against VimpelCom Ltd., a Netherlands-based telecommunications company and an issuer under the FCPA, for bribery payments in Uzbekistan. The company paid combined U.S. and Dutch criminal and regulatory penalties in the amount of $795.3 million.[52]

The global anti-corruption enforcement action against Rolls Royce plc by the United States, United Kingdom, and Brazil resulted in a global settlement of approximately $800 million.[53] Rolls Royce, a U.K.-based manufacturer and distributor of power systems for the aerospace, defense, marine, and energy sectors, engaged in corruption in numerous countries. It agreed to pay a criminal penalty to the DOJ in the amount of approximately $195 million, a penalty to the United Kingdom's Serious Fraud Office in the amount of approximately $604 million, and a penalty of approximately $25 million to Brazilian authorities.[54]

The 2016 Odebrecht case perhaps best reflects the changed international enforcement environment. Odebrecht S.A., a global construction company based in Brazil, and Braskem S.A., a Brazilian petrochemical company that is a subsidiary of Odebrecht and an issuer under the FCPA, agreed to pay a combined penalty of at least $3.5 billion to U.S., Brazil, and Swiss enforcement authorities for corruption activities in many countries.[55] Brazilian enforcement authorities aggressively prosecuted this case in collaboration with the U.S. enforcement authorities. The United States and Switzerland will each receive 10% of the total criminal fine and Brazil will receive 80%.

Most recently, U.S., Dutch, and Swedish enforcement authorities collaborated in attaining a global foreign bribery settlement with Telia Company AB, a Stockholm-based telecommunications company, and its Uzbek subsidiary Coscom LLC, arising out of a scheme to pay bribes in Uzbekistan.[56] Telia and Coscom paid a combined total amount of $965 million in criminal and regulatory penalties to the United States, the Netherlands, and Sweden.[57]

Nevertheless, enforcement actions by the signatory countries to the OECD Convention remain uneven. Since the entry into force of the OECD Convention through 2016, twenty countries have sanctioned individuals and companies under criminal or administrative proceedings for foreign bribery. But twenty-four countries have yet to conclude an enforcement action. The United States has undertaken, by far, the most enforcement actions, followed by Germany, Hungary, Italy, the United Kingdom, France, Switzerland, and Belgium.[58]

Conclusion

The impact of the FCPA in the fight against corruption has generally been far more impactful than could have been envisioned in 1977. It has led to the globalization of anti-corruption enforcement, something unimaginable forty years ago. This enforcement effort began with the FCPA and expanded exponentially from there. Corruption is no longer accepted as the norm. It is recognized as an aberration, which adversely impacts economic development. When conducting training overseas, I still encounter—but much less frequently—the mantra "You don't understand how business is done here."

The risk of enforcement for a possible violation of the FCPA and the compliance culture that has grown up in the United States around the FCPA have, in fact, brought about change to U.S. companies doing business abroad. Companies increasingly view anti-corruption compliance as an asset. Generally, it has become more cost-effective to adopt and implement an anti-corruption compliance program than to risk possible prosecution for a violation.

Nevertheless, from my limited vantage point as an FCPA practitioner, I would estimate that more than half of U.S. companies doing business abroad, especially small- and medium-sized businesses, still lack effective anti-corruption compliance programs and have only a rudimentary understanding of the FCPA. In most of the other signatory countries to the OECD Convention, the adoption of compliance programs is still in its infancy, as enforcement is still in its early stages.

In effect, the international enforcement of anti-corruption laws, despite some very large penalties and extensive publicity surrounding some enforcement actions, has barely scratched the surface in the fight against bribery. It is an important step in that direction. But it needs to be recognized and acknowledged that corruption continues unabated. It remains endemic to many countries around the world. One of the enduring challenges for those living with corruption on a daily basis is how to change the culture of corruption.[59] Irrespective of the multilateral legal and enforcement efforts that have developed over the past forty years, the battle has barely begun.

Don Zarin is head of the FCPA Practice Group at Holland & Knight LLP. His experience includes serving as an independent compliance monitor for three years in an FCPA enforcement case. He is also the author of PLI's Doing Business Under the Foreign Corrupt Practices Act and the author of the chapter on the FCPA in PLI's Corporate Compliance Answer Book (2019 Edition).

NOTES

1. *Combating Corruption*, World Bank (Sept. 26, 2017), www.worldbank.org/en/topic/governance/brief/anti-corruption; *see also Corruption: Costs and Mitigating Strategies*, Int'l Monetary Fund (May 11, 2016).
2. Foreign Corrupt Practices Act of 1977 (FCPA), Pub. L. No. 95-213, 91 Stat. 1494 (amended 1988 and 1998).
3. Organization for Economic Cooperation and Development [OECD], *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (Nov. 21, 1997) [hereinafter OECD Convention], www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf. The OECD is an international organization that promotes economic progress and international trade.
4. The U.S. Department of Justice enforces the bribery provisions; the SEC enforces the accounting requirements.
5. The FCPA prosecutes the so-called supply side of the bribery—the companies and individuals paying the bribes, not the foreign officials who receive the bribes.
6. Sweden had one of the very few criminal laws that arguably dealt with the bribery of foreign officials, although there had not been any prosecution of foreign bribery by Swedish authorities. Lag om ändring i brottsbalken (Svensk författningssamling) [SFS] 1977:103 (Swed.) (entered into force Jan. 1, 1978).
7. *See* Shearman & Sterling LLP, FCPA Digest: Cases and Review Release Relating to Bribes to Foreign Officials Under the Foreign Corrupt Practices Act of 1977 (Jan. 2018), https://shearman.symplicity.com/files/32a/32ae4f446d680242c4eb148b7af145eb.pdf.
8. Disgorgement and prejudgment interest totaled $5.9 million. *See* SEC v. ABB Ltd., Accounting and Auditing Enforcement Release No. 2049 (July 6, 2004), www.sec.gov/litigation/litreleases/lr18775.htm.
9. *See* Press Release No. 07-296, U.S. Dep't of Justice, Baker Hughes Subsidiary Pleads Guilty to Bribing Kazakh Official and Agrees to Pay $11 Million Criminal Fine as Part of Largest Combined Sanction Ever Imposed in FCPA Case (Apr. 26, 2007), www.justice.gov/archive/opa/pr/2007/April/07_crm_296.html; SEC Release 2007-77 (Apr. 26, 2007). The criminal penalty was $11 million; the disgorgement amount was $33 million.
10. *See* Press Release No. 08-1105, U.S. Dep't of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines (Dec. 15, 2008), www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html; SEC Press Release No. 2008-294 (Dec. 18, 2008).
11. Eric Lichtblau & Carter Dougherty, *Siemens to Pay $1.34 Billion in Fines*, N.Y. Times (Dec. 15, 2008), www.nytimes.com/2008/12/16/business/worldbusiness/16siemens.html.
12. *See* Press Release No. 09-112, U.S. Dep't of Justice, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $402 Million Criminal Fine

(Feb. 11, 2009), www.justice.gov/opa/pr/kellogg-brown-root-llc-pleads-guilty-foreign-bribery-charges-and-agrees-pay-402-million.

13. During this time period, a number of other actions occurred to strengthen the multilateral legal framework against corruption. The United Nations Convention Against Corruption was adopted on December 14, 2005. United Nations Convention against Corruption, Dec. 9, 2003, GA res. 58/4, UN Doc. A/58/422 (2003), S. Treaty Doc. No. 109-6, 43 I.L.M. 37 (2004). This convention requires signatory countries to criminalize the bribery of national public officials, foreign public officials, and bribery in the private sectors. It currently has 186 signatories. The World Bank authorized a sanctions process against companies and individuals engaged in corruption on bank financed projects in 2004. The first sanction was imposed in June 2008. World Bank Group Sanctions Regime: An Overview 13 (2010), siteresources.worldbank.org/EXTOFFEVASUS/Resources/Overview-SecM2010-0543.pdf. On April 14, 2010, the World Bank and four other multinational financial institutions (the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank, and the African Development Bank) signed the Agreement for Mutual Enforcement of Debarment Decisions. Under this agreement, firms and individuals debarred by one of these banks may be sanctioned for the same misconduct by the other financial institutions. There are more than 700 firms and individuals that have been debarred or cross-debarred from the award of a World Bank financial contract due to fraud or corruption.
14. 15 U.S.C. § 78m(b)(2); *see* 15 U.S.C. §§ 78*l* , 78o(d).
15. As of December 31, 2011, 965 foreign companies were registered with the SEC. *See* U.S. Dep't of Justice & U.S. Sec. & Exch. Comm'n, A Resource Guide to the U.S. Foreign Corrupt Practices Act 11 (Nov. 14, 2012; rev. June 2015) [hereinafter Resource Guide], www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf. The DOJ and SEC issued the Resource Guide in November 2012 (revised in June 2015) as guidance on the application and enforcement of the FCPA.
16. Since Siemens AG, these companies include Alstom S.A. ($772 million) (the largest FCPA criminal fine ever imposed); Teva Pharmaceuticals Industries Ltd. ($519 million); Telia Co. AB (approximately $483 million, as part of global settlement); Keppel Offshore and Marine Ltd. ($422 million); Odebrecht/Brackem ($419.8 million) (plus additional payments of $354.9 million to Swiss authorities and $2.8 billion to Brazilian authorities); Total S.A. ($398.2 million); VimpelCom Ltd. ($397.6 million); Snamprogetti Netherlands B.V. ($365 million); Technip S.A. ($338 million); JGC Corp. ($218 million); Daimler AG ($185 million).
17. *See* 15 U.S.C. § 78ff(c) (2000); 15 U.S.C. § 78dd-2(g) (1977).
18. The jurisdictional nexus is only the "use of an instrumentality of interstate commerce." *See*, *e.g.*, Information, United States v. Colin Steven, Case 1:17-cr-00788-AJN (S.D.N.Y. Dec. 12, 2017), Press Release No. 17-1466, U.S. Dep't of Justice, Former Embraer Sales Executive Pleads Guilty to Foreign Bribery and Related Charges (Dec. 21, 2017), www.justice.gov/opa/pr/former-embraer-sales-executive-pleads-guilty-foreign-bribery-and-related-charges (Steven, a U.K. citizen residing in the United Arab Emirates and an employee of Embraer S.A., a foreign issuer, paid bribes to Saudi officials to secure the sale of aircraft); SEC v. Straub,

No. 11 Civ. 9645 (S.D.N.Y. Sept. 30, 2016) (upholding exercise of personal jurisdiction of foreign national employees of a Hungarian telecommunications company and foreign issuer involving a bribery scheme in Macedonia); *In re* Mikhail Gourevitch, Exchange Act Release No. 77,288 (Mar. 3, 2016) (Canadian/Israeli citizen who was an employee of a foreign issuer, Nordion (Canada), Inc., used instrumentality of interstate commerce in bribery scheme involving Russian officials); Indictment, United States v. Riedo, Case No. 13-CR-03789 (S.D. Cal. Oct. 15, 2013) (Riedo, a Swiss citizen and an officer of Maxwell Technologies, Inc., an issuer, was charged with conspiracy to violate the FCPA, falsify books and records, and circumvent internal accounting controls, violations of the FCPA, falsification of the books and records, and circumvention of internal controls), www.justice.gov/criminal/fraud/fcpa/cases/riedoa.html; United States v. Sapsizian, 1:06-CR-20797-PAS (S.D. Fla. Mar. 20, 2007) (a French citizen employed by Alcatel, a French telecommunications company whose ADRs were listed on the New York Stock Exchange, pled guilty to a conspiracy to violate the FCPA and violating the FCPA) (jurisdiction based on use of any means of instrumentality of interstate commerce in furtherance of an illicit payment); Press Release No. 07-411, U.S. Dep't of Justice, Former Alcatel Executive Pleads Guilty to Participation in Payment of $2.5 Million in Bribes to Senior Costa Rican Officials to Obtain a Mobile Telephone Contract (June 7, 2007), www.justice.gov/archive/opa/pr/2007/June/07_crm_411.html. But the assertion of jurisdiction is not without its limits. *See* Opinion and Order, SEC v. Sharef, No. 11 Civ. 9073 (S.D.N.Y. Feb. 19, 2013) (finding that the actions of a foreign executive at Siemens AG, a German citizen, were too attenuated to establish minimum contacts with the United States).

19. International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, § 4, 112 Stat. 3302, 3306 (1998); 15 U.S.C. § 78dd-3(a). This amendment was enacted in part to conform the FCPA to the OECD Convention (*see supra* note 3).
20. Resource Guide, *supra* note 15, at 11.
21. *Id*. at n.55. In addition, the DOJ has brought enforcement actions against and asserted jurisdiction over foreign companies that only "cause" conduct (by non-agents) to take place within the territory of the United States in furtherance of a bribe. *See* Information, United States v. Daimler Chrysler China Ltd., 1:10-CR-00066-RJI (D.D.C. Mar. 22, 2010) (DOJ alleged only that Daimler Chrysler "caused" funds to be sent from Germany to financial interests in the United States); Information, United States v. SSI Int'l Far East, Ltd., 3:06-CR-00398-KI (D. Or. 2006) (SSI Korea "caused" payments to be made from a bank account in the United States to officials in China); United States v. Panalpina World Transp. (Holding) Ltd., No. 10-769 (S.D. Tex. Nov 4, 2010) (DOJ alleged only that Panalpina used emails between its U.S. and Nigerian affiliates to cause payments to be made to foreign officials). In each of these settled cases, the jurisdictional basis for prosecuting the foreign companies appears tenuous.
22. *See* Deferred Prosecution Agreement, Société Générale S.A. (a French company), and Plea Agreement, SGA Société Générale Acceptance N.V. (its foreign subsidiary), for conspiracy to violate the anti-bribery provision of the FCPA. Jurisdiction was based upon acts occurring within the territory of the United States. Information, United States v. Société Générale S.A., 18-CR-253 (E.D. NY 2018); Information, United States v. SGA Société Générale

Acceptance, N.V., 18-CR-274 (E.D. NY 2018); Press Release. No. 18-722, U.S. Dep't of Justice, Société Générale S.A. Agrees to Pay $860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate (June 4, 2018), www.justice.gov/opa/pr/soci-t-g-n-rale-sa-agrees-pay-860-million-criminal-penalties-bribing-gaddafi-era-libyan; *see* Non-Prosecution Agreement Between U.S. Department of Justice and Parametric Technology (Shanghai) Software Co. & Parametric Technology (Hong Kong) Ltd. (Feb. 16, 2016); Press Release No. 16-179, U.S. Dep't of Justice, PTC Inc. Subsidiaries Agree to Pay More Than $14 Million to Resolve Foreign Bribery Charges (Feb. 16, 2016), www.justice.gov/opa/pr/ptc-inc-subsidiaries-agree-pay-more-14-million-resolve-foreign-bribery-charges (Chinese subsidiaries of PTC Inc. provided nonbusiness related travel and other improper payments to Chinese government officials); United States v. Weatherford Servs., Ltd., Case No. 4:13-cr-00734 (S.D. Tex. Nov. 26, 2015) (foreign subsidiary of Weatherford International Ltd., a Swiss oil service company, paid bribes to Angolan officials); Plea Agreement, United States v. Vetco Gray UK Ltd. & Vetco Gray Controls, Ltd., CR H-07-004 (S.D. Tex. Feb. 6, 2007); Plea Agreement, United States v. Syncor Taiwan, Inc., No. 02-CR-1244-SVW (C.D. Cal. 2002); United States v. ABB Vetco Gray, Inc. & ABB Vetco Gray UM Ltd., No. CR H-04-279 (S.D. Tex. June 22, 2004).

23. Plea Agreement, United States v. DPC (Tianjin) Co. Ltd., No. CR 05-482 (C.D. Cal. May 20, 2005); *see also* United States v. Teva LLC, No. 1:16-cv-20967-KMW (S.D. Fla. Dec. 22, 2016); Press Release No. 16-1522, U.S. Dep't of Justice, Teva Pharmaceutical Industries Ltd. Agrees to Pay More Than $283 Million to Resolve Foreign Corrupt Practices Act Charges (Dec. 22, 2016), www.justice.gov/opa/pr/teva-pharmaceutical-industries-ltd-agrees-pay-more-283-million-resolve-foreign-corrupt; Teva LLC ("Teva Russia"). A Russian wholly owned subsidiary of TEVA Pharmaceutical Industries Ltd. ("Teva Pharmaceutical"), an issuer, was charged with being an "agent" of Teva Pharmaceutical. The DOJ asserted only that Teva Russia was operated for the benefit and under the control of Teva Pharmaceutical and was principally responsible for the sale and marketing of Teva pharmaceutical products in Russia. The information specified that Teva Russia sent emails through the United States. Teva Russia pled guilty to conspiring to violate the FCPA. In a case against Unitel LLC, the criminal information charged Unitel, the Uzbekistan subsidiary of VimpelCom, a foreign issuer, with being an "agent of an issuer." There is no factual support for the agent relationship. Unitel pled guilty to conspiracy to violate the FCPA. *See* United States v. Unitel LLC, Case 1:16-cr-00137-ER (S.D.N.Y. Feb. 18, 2016); Press Release No. 16-194, U.S. Dep't of Justice, VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More Than $795 Million; United States Seeks $850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme (Feb. 18, 2016), www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million; *see also* SEC v. ENI, S.p.A. & Snamprogetti Netherlands B.V., No. 4:10-cv-2414 (S.D. Tex. July 7, 2010) (Snamprogetti Netherlands B.V.—a Dutch company and an indirect wholly owned subsidiary of ENI, S.p.A., an Italian company and an issuer under the FCPA—acted as an "agent" of ENI. The complaint asserted only that ENI exercised control and supervision over Snamprogetti, but provided no support for the assertion that it acted as an agent.).

24. SEC v. ABB Ltd., Accounting and Auditing Enforcement Release No. 2049 (July 6, 2004).
25. 15 U.S.C. §§ 78u-2(e), 78u-3(e). The SEC has utilized disgorgement as an equitable remedy. However, in Kokesh v. SEC, 137 S. Ct. 1635 (2017), the U.S. Supreme Court held that disgorgement orders constitute a penalty, not an equitable remedy. It is therefore subject to the five-year statute of limitations set forth in 28 U.S.C. § 2462.
26. SEC v. Westinghouse Air Brake Tech. Corp., Litigation Release No. 20,457 (Feb. 14, 2008).
27. *In re* Telia Co. AB, Accounting and Auditing Enforcement Release No 3898 (Sept. 17, 2017); Press Release No. 2017-71, U.S. Sec. & Exch. Comm'n, Telecommunications Company Paying $965 Million for FCPA Violations (Sept. 21, 2017), www.sec.gov/news/press-release/2017-171.
28. False entries made by a foreign subsidiary in its books and records are then consolidated and reported by the parent company in its consolidated financial statements. The parent company may also be liable for failing to devise internal controls across the organization to detect and prevent improper payments to foreign officials.
29. SEC v. Chiquita Brands Int'l, Inc., Accounting and Auditing Enforcement Release No. 1464 (Oct. 3, 2001).
30. Chiquita Brands paid a $100,000 civil penalty. *Id*. In this situation, the conduct of the Colombian subsidiary would not be subject to the bribery provisions of the FCPA, unless some act in furtherance of the corrupt payment occurred in the United States. Since Chiquita Brands did not knowingly participate in or authorize the alleged misconduct, it would not be liable under the bribery provisions of the FCPA.
31. *See*, *e.g*., *In re* Novartis AG, Accounting and Auditing Enforcement Release No. 3759 (Mar. 23, 2016) (Chinese subsidiaries of Swiss company made improper payments to Chinese healthcare officials without knowledge of parent company; Novartis charged with violation of the books and records, and internal accounting control provisions of the FCPA); *In re* The Goodyear Tire & Rubber Co., Accounting and Auditing Enforcement Release No. 3640 (Feb. 24, 2015) (Goodyear had no knowledge of bribery payments made by its subsidiaries); *In re* Alcoa, Inc., Accounting and Auditing Enforcement Release No. 3525 (Jan. 9, 2014) (Alcoa had no knowledge of bribery payments made by its subsidiaries); *In re* Koninklijke Philips Elecs. N.V., Accounting and Auditing Enforcement Release No. 3452 (Apr. 5, 2013) (Polish subsidiary of Netherlands company made improper payments to healthcare officials without knowledge of parent company); SEC v. Smith & Nephew PLC, 1:12-CV-00187 (D.D.C. Feb. 6, 2012) (British company charged with FCPA violations for actions taken by its U.S. and German subsidiaries); SEC v. Oracle Corp., Civil Action No. CV-12-4310 CRB (N.D. Cal. Aug. 16, 2012), Litigation Release No. 22450 (Aug. 16, 2012) (violations of books and records and internal control provisions of FCPA due to Indian subsidiary secretly setting aside excess funds paid to distributors, without the knowledge or authorization of Oracle); *In re* Rockwell Automation, Inc., Accounting and Auditing Enforcement Release No. 3274 (May 3, 2011) (Rockwell had no knowledge of improper payments made by one of its Chinese subsidiaries); SEC v. Int'l Bus. Machs. Corp., Accounting and Auditing Enforcement Release No. 3254 (Mar. 8, 2011) (Korean and Chinese subsidiaries made improper payments without the knowledge of the parent company); *In re* Helmerich & Payne, Accounting and Auditing Enforcement Release No. 3026 (July 30, 2009) (involved

payments by second-tier subsidiaries to Customs officials); SEC v. Fiat S.p.A. & CNH Glob. N.V., Litigation Release No. 20,835 (Dec. 22, 2008) (alleging that U.S. issuer's subsidiaries, without issuer's knowledge, made illegal kickback payments in connection with sales to Iraq under the OFFP); SEC v. ITT Corp., Accounting and Auditing Enforcement Release No. 2934 (Feb. 11, 2009) (alleging that ITT did not maintain accurate books and records or a proper system of internal controls because its foreign subsidiary's illicit payments were improperly classified as commission expenses and consolidated into ITT's financial statements); *In re* Elec. Data Sys. Corp., Accounting and Auditing Enforcement Release No. 2727 (Sept. 25, 2007) (EDS maintained inaccurate books and records due to false invoicing scheme undertaken without EDS's knowledge by employee of subsidiary who made improper payments to officials of Indian government-owned companies). In SEC v. Dow Chem. Co., Litigation Release No. 20,000, 2007 WL 460874 (Feb. 13, 2007), the SEC settled an enforcement action against Dow for violating the books-and-records and internal control provisions. Dow's majority-owned Indian subsidiary had made payments to Indian officials to expedite the registration of its products. Dow had no knowledge of and did not authorize the improper conduct. *See also In re* Monsanto Co., Accounting and Auditing Enforcement Release No. 2159 (Jan. 6, 2005) (Monsanto did not have knowledge of and did not authorize most of the improper conduct engaged in by its foreign subsidiaries); *In re* ABB Ltd., Accounting and Auditing Enforcement Release No. 18,775 (July 6, 2004) (SEC settled an enforcement action against ABB Ltd. for violating the anti-bribery, books-and-records, and internal accounting controls of its subsidiaries when ABB had no knowledge of and did not authorize the improper conduct); *In re* Schering-Plough Corp., Accounting and Auditing Enforcement Release No. 2032 (June 9, 2004); SEC v. Schering-Plough Corp., Case No. 1:04-CV-00945 (D.D.C. June 9, 2004) (settlement of violation of sections 13(b)(2)(A) and 13(b)(2)(B) and payment of $500,000 penalty arising from improper payments made by the Polish office of Schering-Plough's Swiss subsidiary to a charitable foundation headed by the director of a Polish government health fund; the payment was made to induce the director to influence purchases of pharmaceutical products by the health fund without Schering-Plough's knowledge or authorization of the improper conduct); *In re* BellSouth Corp., Accounting and Auditing Enforcement Release No. 1494 (Jan. 15, 2002) (BellSouth had no knowledge of and did not participate in or authorize the alleged improper conduct).

32. *See In re* Statoil, Exchange Act Release No. 54,599 (Oct. 3, 2006) (finding that Statoil's management had performed "no due diligence concerning the named or the unnamed parties to the contract"); *In re* Schnitzer Steel Indus., Inc., Accounting and Auditing Enforcement Release No. 2493 (Oct. 16, 2006) (lack of internal controls includes lack of training and education regarding the requirements of any of its employees, agents or subsidiaries regarding the requirements of the FCPA).
33. *See* Non-Prosecution Agreement Between the SEC and Akamai Techs., Inc. (June 7, 2016) (company lacked adequate internal accounting controls such as formalized due diligence of China-based channel partners, exercising audit rights to monitor compliance with anti-bribery policies, translating anti-corruption policy into Mandarin, inadequate employee training on compliance, and lack of effective procedures to review and approve business entertainment). In a case involving the concealment of more than $8 million in gifts, cash

and nonbusiness meals, travel and entertainment it gave to Chinese government officials, Avon subsidiaries pled guilty to criminal charges of conspiracy to violate the accounting provisions of the FCPA. Press Release No. 14-1419, U.S. Dep't of Justice, Avon China Pleads Guilty to Violating the FCPA by Concealing More Than $8 Million in Gifts to Chinese Officials (Dec. 17, 2014), www.justice.gov/opa/pr/avon-china-pleads-guilty-violating-fcpa-concealing-more-8-million-gifts-chinese-officials. Avon Products, Inc., the parent, entered into a deferred prosecution agreement and admitted to conspiracy to violate the books-and-records provisions, and the internal controls provisions of the FCPA. Deferred Prosecution Agreement, United States v. Avon Prods., Inc. (Dec. 15, 2014), www.justice.gov/file/188591/download. The statement of facts made clear that Avon had an inadequate compliance program, as part of its inadequate internal controls. It did not have an anticorruption policy, lacked stand-alone FCPA training, did not conduct corruption-related due diligence on third parties, had no controls on the approval process of third parties, did not require adequate documentation supporting the retention of third parties, did not conduct a periodic risk assessment of its compliance program, and lacked oversight of its gift, travel, and entertainment expenditures. *See also* Non-Prosecution Agreement Between the DOJ and Bio-Rad Laboratories, Inc. (Nov. 3, 2014), www.justice.gov/sites/default/files/criminal-fraud/legacy/2014/11/03/Bio-Rad-NPA-110314.pdf (citing in its statement of facts numerous compliance program weaknesses in finding a criminal violation of the internal controls provisions of the FCPA).

34. *See In re* Cadbury Ltd. & Mondelez Int'l, Inc., Administrative Proceeding File No. 3-17759 (Jan. 6, 2017) (internal control violation when company failed to conduct appropriate due diligence on and properly monitor activities of its agent); *In re* LAN Airlines, S.A., Administrative Proceeding File No. 3-17357 (July 25, 2016) (internal controls did not require due diligence on third parties); *In re* United Indus. Corp., Accounting and Auditing Enforcement Release No. 2981 (May 29, 2009) (internal control violations where president approved payments to agent without written contract and no written record of any due diligence, and contract, when signed, lacked adequate representations and audit rights); SEC v. Halliburton Co. & KBR, Inc., Accounting and Auditing Enforcement Release No. 2935A (Feb. 11, 2009). The KBR and Halliburton attorneys conducting due diligence of a U.K. agent failed to seek information on the beneficial owners of the shell company of the agent, how the agent would carry out duties from the United Kingdom for a Nigerian contract, what duties had been undertaken by the agent on an existing $60 million contract, and references provided by the agent, some of which were false. SEC v. Halliburton Co., Civil Action No. 4:09-CV-399 (S.D. Tex. Feb. 11, 2009). Also, no senior Halliburton or KBR official responsible for signing the agent contract "undertook any independent review or asked any questions concerning the UK agent." *Id.*; *see also* SEC v. Siemens AG, Accounting and Auditing Enforcement Release No. 2911 (Dec. 15, 2008); SEC v. Siemens AG, Civil Action No. 1:08-CV-02167 (D.D.C. Dec. 15, 2008) (alleging that Siemens' due diligence on foreign consultants was inadequate in implementing sufficient internal controls); SEC v. El Paso Corp., Litigation Release No. 19,991, 2007 WL 414353 (Feb. 7, 2007) (alleging that El Paso had failed to "maintain an adequate system of internal controls to detect and prevent the payments [and] although El Paso inserted a provision in some contracts requiring

the third party to represent that it had not paid surcharges, El Paso failed to conduct due diligence to ensure that surcharges were not paid"); *In re* Statoil, Exchange Act Release No. 54,599 (Oct. 13, 2006) (finding that Statoil's management had performed "no due diligence concerning the named or the unnamed parties to the Contract" and that the lack of "adequate controls sufficient to provide reasonable assurances that the Contract complied with applicable laws . . . enabled executives responsible for the Contract to conceal the illegal payments to Iranian officials").

35. *See In re* Gen. Cable Corp., Administrative Proceeding File No. 3-17755 (Dec. 29, 2016) (company failed to adequately train employees of its subsidiaries on anti-corruption risks, require third parties involved in sales to foreign state-owned enterprises to comply with the FCPA, and perform anti-corruption due diligence on third parties); *In re* BHP Billiton Ltd. & BHP Billiton Plc, Exchange Act Release No. 74998 (May 20, 2015) (finding the company's internal controls were insufficient regarding its use of a hospitality application form to invite individuals, including government officials, to the 2008 Beijing Summer Olympic Games); *In re* Bruker Corp., Accounting and Auditing Enforcement Release No. 3611 (Dec. 15, 2014) (inadequate internal controls included the failure to translate its FCPA training materials, FCPA policy, and its code of conduct into local languages, including Mandarin); Deferred Prosecution Agreement Between the DOJ and Weatherford Int'l Ltd., Case No. 4:13-cr-00733 (S.D. Tex. Nov. 26, 2013) (Weatherford failed to institute effective internal controls, including corruption-related due diligence on third parties, acquisitions, and joint ventures, procedures for gifts, travel and entertainment, a dedicated compliance officer or compliance personnel, anticorruption training, and a process for reporting and investigating ethics complaints); *see* SEC v. Agco, Civil Action No. 1:09-CV-01865 (D.D.C. Sept. 30, 2009) (Agco failed to conduct due diligence on the foreign agent it hired to facilitate sales of agricultural equipment to the Iraqi government, to require that the agent undergo FCPA training, to accurately explain the agent's services and payments in the agent's contract, and to include FCPA language in that contract and thereby failed to maintain an effective system of internal controls to prevent or detect FCPA violations); SEC v. Siemens AG, Civil Action No. 1:08-CV-02167 (D.D.C. Dec. 15, 2008) (lack of internal controls includes failure "to conduct appropriate anti-bribery and corruption training"); *In re* Westinghouse Air Brake Techs. Corp., Exchange Act Release No. 57,333, Accounting and Auditing Release No. 2785 (Feb. 14, 2008) (finding that Wabtec lacked internal controls because it did not provide training regarding FCPA requirements or monitor compliance with the FCPA); *In re* Schnitzer Steel Indus., Inc., Accounting and Auditing Enforcement Release No. 2493, 2006 WL 2933839 (Oct. 16, 2006) (lack of internal controls includes lack of training and education for any of its employees, agents or subsidiaries regarding the requirements of the FCPA, and lack of procedures to monitor its employees, agents and subsidiaries for compliance with the FCPA).
36. Resource Guide, *supra* note 15, at 40.
37. *Id.* at 57–62.
38. *Id.* at 57.
39. *See*, *e.g.*, United States v. Metcalf & Eddy, Inc., No. 99 Civ. 12566 (D. Mass. Dec. 14, 1999); United States v. Titan Corp., 05-cr-00411 (S.D. Cal. 2005); Plea Agreement at app. D,

United States v. BAE Sys. plc, Case No. 1:10-cr-00035 (D.D.C. 2010); Plea Agreement at Exhibit 2, United States v. Marubeni Corp., Case No. 3:14-cr-00052-JBA (D. Conn. Mar. 9, 2014).

40. *See* U.S. Attorneys' Manual § 9.28.300 (Principles of Federal Prosecution of Business Organizations: Factors to Be Considered).
41. U.S. Sentencing Guidelines Manual § 8B2.1, Amendments to the Sentencing Guidelines (effective Nov. 1, 2010).
42. *Id.* § 8C2.5(f).
43. U.S. Dep't of Justice, Evaluation of Corporate Compliance Programs (Feb. 8, 2017), www.justice.gov/criminal-fraud/page/file/937501/download.
44. The OECD also published guidance on compliance, which it adopted on February 18, 2010. OECD, Good Practice Guidance on Internal Controls, Ethics and Compliance (Feb. 18, 2010), www.oecd.org/daf/anti-bribery/44884389.pdf.
45. For the period May 1994 through April 2000, the U.S. government received information that 353 contracts valued at $165 billion may have been affected by bribery by foreign firms. U.S. companies are alleged to have lost ninety-two of these contracts, at an estimated value of $26 billion. Addressing the Challenges of International Bribery and Fair Competition: July 2000 (Second Annual Report to Congress on the OECD Antibribery Convention) at v (Executive Summary) (July 2000), http://tcc.export.gov/wcm/groups/marketresearch/@tcc/documents/briberyreport/exp_005908.pdf. An unclassified summary of a classified report on foreign competitive practices released by the Department of Commerce identified approximately 100 cases of foreign firms using bribery to win international contracts. 12 Int'l Trade Rep. (BNA) 1711 (Oct. 18, 1995). Congressional hearings on possible revisions to the FCPA elicited testimony regarding instances of business lost by U.S. companies as a result of the FCPA.
46. Omnibus Trade and Competitiveness Act of 1998, Pub. L. No. 100-418, § 5003(d)(l), 102 Stat. 1107, 1107-1574 (codified as amended at 15 U.S.C. § 78dd-1 (1994)).
47. *See* Elizabeth K. Spahn, *Multijurisdictional Bribery Law Enforcement: The OECD Anti-Bribery Convention*, 53 Va. J. of Int'l L. (2012).
48. The forty-four signatories to the OECD Convention include all thirty-six members of the OECD, as well as eight non-OECD countries (Argentina, Brazil, Bulgaria, Colombia, Costa Rica, Peru, Russia, and South Africa).
49. *See* OECD, Update on Tax Legislation on the Tax Treatment of Bribes to Foreign Public Official in Countries Parties to the OECD Anti-Bribery Convention (June 2011), www.oecd.org/tax/crime/41353070.pdf.
50. Pressure from the OECD Working Group was a major reason for the enactment by the United Kingdom of the U.K. Bribery Act. This law, which became effective in July 2011, has led to a number of significant enforcement actions. OECD, Fighting the Crime of Foreign Bribery: The Anti-Bribery Convention and the OECD Working Group on Bribery (2017), www.oecd.org/corruption/Fighting-the-crime-of-foreign-bribery.pdf.
51. DOJ and SEC press releases announcing enforcement settlements frequently refer to and thank the support and assistance received from enforcement authorities in other countries. *See*, *e.g.*, Press Release No. 17-1348, U.S. Dep't of Justice, SBM Offshore N.V. and United

States-Based Subsidiary Resolve Foreign Corrupt Practices Act Case Involving Bribes in Five Countries (Nov. 29, 2017), www.justice.gov/opa/pr/sbm-offshore-nv-and-united-states-based-subsidiary-resolve-foreign-corrupt-practices-act-case; Press Release No. 16-194, U.S. Dep't of Justice, VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More Than $795 Million; United States Seeks $850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme (Feb. 18, 2016) [hereinafter VimpelCom Press Release], www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million. The DOJ has also assisted other enforcement authorities in their investigations. *See*, *e.g.*, Press Release No. 16-1240, U.S. Dep't of Justice, Embraer Agrees to Pay More than $107 Million to Resolve Foreign Corrupt Practices Act Charges (Oct. 24, 2016), www.justice.gov/opa/pr/embraer-agrees-pay-more-107-million-resolve-foreign-corrupt-practices-act-charges.

52. *See* VimpelCom Press Release, *supra* note 51.
53. *See* Press Release No. 17-074, U.S. Dep't of Justice, Rolls-Royce plc Agrees to Pay $170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case (Jan. 17, 2017), www.justice.gov/opa/pr/rolls-royce-plc-agrees-pay-170-million-criminal-penalty-resolve-foreign-corrupt-practices-act.
54. *Id*. The DOJ credited the $25 million penalty paid to Brazil against the total fine to the DOJ.
55. *See* Press Release No. 16-1515, U.S. Dep't of Justice, Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History (Dec. 21, 2016), www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve.
56. *See* Press Release No. 17-1035, U.S. Dep't of Justice, Telia Company AB and Its Uzbek Subsidiary Enter into a Global Foreign Bribery Resolution of More Than $965 Million for Corrupt Payments in Uzbekistan (Sept. 21, 2017), www.justice.gov/opa/pr/telia-company-ab-and-its-uzbek-subsidiary-enter-global-foreign-bribery-resolution-more-965.
57. *Id*.; *see also* Press Release No. 17-1476, U.S. Dep't of Justice, Keppel Offshore & Marine Ltd. and U.S. Based Subsidiary Agree to Pay $422 Million in Global Penalties to Resolve Foreign Bribery Case (Dec. 22, 2017) (Keppel Offshore Marine Ltd., a Singapore company, and its U.S. subsidiary entered into a global settlement in the amount of $422 million with the United States, Singapore, and Brazil arising out of bribes paid to Brazilian officials), www.justice.gov/opa/pr/keppel-offshore-marine-ltd-and-us-based-subsidiary-agree-pay-422-million-global-penalties.
58. OECD, Fighting the Crime of Foreign Bribery: The Anti-Bribery Convention and the OECD Working Group on Bribery (2017), www.oecd.org/corruption/Fighting-the-crime-of-foreign-bribery.pdf; OECD Working Grp. on Bribery, 2016 Data on Enforcement of the Anti-Bribery Convention (Nov. 2017), www.oecd.org/daf/anti-bribery/Anti-Bribery-Convention-Enforcement-Data-2016.pdf.

59. This author had the opportunity to live and work in Kenya for one year during 2015. In Kenya, as in many other countries throughout the world, corruption is a part of one's daily life. For a brief perspective on this problem, *see* Don Zarin, *To Break the Cycle of Graft Costs Must Outweigh Gains*, NATION [Kenya] (Aug. 22, 2015), www.nation.co.ke/oped/opinion/Corruption-Kenya-Government-Graft-Law/440808-2842706-xhpov6/index.html.

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FCPA Transactional Issues: Acquisition Due Diligence

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Introduction

The Trump presidency has prompted intense speculation concerning the future of Foreign Corrupt Practices Act (FCPA) enforcement. Prior to taking office, both President Trump and Jay Clayton, Chair of the Securities and Exchange Commission (SEC), openly questioned whether FCPA enforcement impedes U.S. businesses overseas.[1] However, in a series of speeches beginning in early 2017, Department of Justice (DOJ) and SEC leaders committed to continued vigorous FCPA enforcement,[2] and DOJ subsequently announced significant prosecutions of individuals and high-penalty resolutions with corporations, many of which were the product of close international law enforcement coordination.[3] On the enforcement side, the level of international cooperation among anti-corruption law enforcement agencies—long promoted by DOJ—appears to have gathered real momentum. In countries from Europe to South America to Asia, new anti-corruption laws are taking effect, and enforcement actions are being pursued.[4]

With DOJ apparently remaining committed to FCPA enforcement, and additional countries entering the anti-corruption fray, companies making acquisitions internationally must continue to pay very close attention to FCPA and related anti-corruption risk. Under the FCPA, companies can be held liable for FCPA violations by the target company if they fail to detect, cease, and remediate the target company's wrongful conduct. Thus, it is critical that companies do adequate due diligence before acquiring a foreign business and be prepared to mitigate the risk and take care of a problem if one is discovered after the fact.

Conducting Effective and Efficient Diligence on a Target

The resource guide to the FCPA, jointly issued by DOJ and the SEC in 2012,[5] outlines general steps that a company considering a transaction should take. The FCPA Resource Guide also sets forth the government's views of the adequacy of an acquirer's response to FCPA red flags in an acquisition target. The FCPA Resource Guide advises that a company considering a potential new business acquisition should take the following five affirmative steps:

(1) conduct thorough risk-based FCPA and anti-corruption due diligence on potential new business acquisitions;

(2) ensure that the acquiring company's code of conduct and compliance policies and procedures regarding the FCPA and other anti-corruption laws apply as quickly as is practicable to newly acquired businesses or merged entities;

(3) train the directors, officers, and employees of newly acquired businesses or merged entities, and when appropriate, train agents and business partners, on the FCPA and other relevant anti-corruption laws and the company's code of conduct and compliance policies and procedures;

(4) conduct an FCPA-specific audit of all newly acquired or merged businesses as quickly as practicable; and

(5) disclose any corrupt payments discovered as part of its due diligence of newly acquired entities or merged entities.[6]

Companies that act in accordance with this guidance may benefit from cooperation credit and, in certain circumstances, perhaps even obtain a declination and avoid any enforcement action entirely.

Pre-Acquisition Due Diligence

Conducting risk-based FCPA and anti-corruption due diligence on potential new business acquisitions is likely to involve a multi-faceted review. It is important to consider a target's FCPA risk profile as early as possible in the process. Specific areas to consider include the manner in which the company does business, its industry, and whether that industry is the subject of recent enforcement activity. Also important is the target's reputation and general record for compliance and business integrity. The target's owners, officers, and directors should be vetted as well.

The target's code of conduct and specific anti-corruption policies and procedures, and related training materials, should be carefully reviewed to ensure that they are state-of-the-art. Policies relating to travel, entertainment, gift/hospitality practices, and the use of third-party intermediaries, including agents, consultants, distributors, and the like, should be similarly reviewed. Find out if there have been any whistleblower reports relating to anti-corruption.

The acquirer should also review the countries in which the target has business operations and the nature of the target's business. Key questions to focus on include whether the target does business in locations such as Brazil, Russia, India, China, Africa, the Middle East, or in other high-risk countries that have generated FCPA enforcement actions in the past or that rate poorly in Transparency International's Corruption Perception Index.[7] Similarly, questions should be asked about whether the target's business is in an industry that is considered high-risk and whether the industry is one with a heavy concentration of foreign government customers, government regulation, or substantial government contact.

One way to gather this type of information is for the acquirer to require prospective targets to complete a detailed FCPA questionnaire at the beginning of the process. However, in many instances, the acquirer will be well advised not to rely solely on information provided by the target. There should be some independent confirmation of details that are critical to the business, such as consultant contracts and third-party payments.

When reviewing information obtained in the due diligence process, the acquirer should be alert to the discovery of certain red flags that may suggest a higher potential for FCPA violations. Troublesome items that might warrant further investigation include, among other things:

(1) past FCPA violations or investigations, as well as any other corruption-related investigation or allegations relating to business integrity or other violations of local law, including tax and customs compliance;

(2) the use of agents or third parties that are paid unusually high commissions or billing rates without sufficient supporting details and documentation or who demand unusual payment terms, such as payments in cash, or payments to third parties that are not well-known in the industry or that reside outside the country where the goods or services are to be provided; and

(3) employment or engagement of any person or party based on personal, familial, or professional relationships with a government official, or the suggested use of any party by a foreign official.

If potential violations are discovered during the pre-acquisition due diligence phase, the acquiring company may want to add certain contractual protections in the applicable deal documents. Appropriate compliance-related representations and warranties and indemnification provisions providing protection against post-closing discovery of a legacy anti-corruption related issue can be negotiated. Other possible provisions could include, if appropriate, a spin-off or closing of the problematic business unit, putting some portion of the purchase price in escrow, or indemnification provisions.

What to Do If You Find a Problem

If, notwithstanding careful due diligence, a problem is discovered after the fact, a company will want to immediately stop the wrongful conduct and consider whether disclosure to the government is warranted.[8] DOJ has recently made clear that it will apply the principles in the recently issued FCPA Corporate Enforcement Policy (the “Enforcement Policy”), described below, to incentivize successor companies that discover wrongdoing in connection with acquisitions to disclose the wrongdoing and cooperate with the government.[9]

The Enforcement Policy codifies into the *U.S. Attorneys' Manual* the key incentives of the FCPA Pilot Program, which was announced in 2016.[10] However, there are some significant changes. Most importantly, where the FCPA Pilot Program offered only the possibility of a declination of prosecution for corporations that satisfied the program's requirements, the new Enforcement Policy establishes a presumption that DOJ will decline prosecution against all companies that voluntarily and promptly self-disclose FCPA misconduct, make proactive efforts to cooperate, adopt appropriate remediation programs, and disgorge any ill-gotten profits (absent aggravating circumstances, such as particularly serious offenses or recidivism). This enhanced incentive represents a positive step toward greater clarity around the benefits of self-disclosure and greater predictability regarding DOJ charging decisions. Deputy Assistant Attorney General Matthew Miner stressed recently that "if an acquiring company unearths wrongdoing subsequent to the acquisition, we want to encourage its leadership to take the steps outlined in the FCPA Policy, and when they do, we want to reward them, accordingly for stepping up, being transparent, and reporting and remediating the problems they inherited."[11]

Even when DOJ requires a criminal resolution, the new Enforcement Policy provides some important incentives to companies. Those incentives operate on two levels: First, they provide for a fine reduction of 50% off of the low end of the Federal Sentencing Guidelines range, along with a presumption that no monitor will be required, for a corporation that voluntarily and promptly self-discloses FCPA misconduct, makes proactive efforts to cooperate, adopts appropriate remediation programs, and disgorges any ill-gotten profits; and, second, an alternative provision promises corporations that fail to voluntarily self-disclose FCPA misconduct, but otherwise meet the policy's requirements, a form of "limited credit," including up to a 25% reduction below the bottom of the Federal Sentencing Guidelines range. As in the FCPA Pilot Program, the new Enforcement Policy sets forth detailed expectations concerning cooperation and timely remediation. The policy expressly incorporates the Principles of Federal Prosecution of Business Organizations[12] and states, among other things, that the following items will be required for a company to receive credit for full cooperation in an FCPA investigation:

(1) Disclosure on a timely basis of all facts relevant to the wrongdoing at issue, including: all relevant facts gathered during a company's independent investigation; attribution of facts to specific sources where such attri-

bution does not violate the attorney-client privilege, rather than a general narrative of the facts; timely updates on a company's internal investigation, including but not limited to rolling disclosures of information; all facts related to involvement in the criminal activity by the company's officers, employees, or agents; and all facts known or that become known to the company regarding potential criminal conduct by all third-party companies (including their officers, employees, or agents);

(2) Proactive cooperation, rather than reactive—that is, the company must timely disclose facts that are relevant to the investigation, even when not specifically asked to do so, and, where the company is or should be aware of opportunities for DOJ to obtain relevant evidence not in the company's possession and not otherwise known to the department, it must identify those opportunities to DOJ;

(3) Timely preservation, collection, and disclosure of relevant documents and information relating to their provenance, including (a) disclosure of overseas documents, the locations in which such documents were found, and who found the documents, (b) facilitation of third-party production of documents, and (c) where requested and appropriate, provision of translations of relevant documents in foreign languages;

(4) Where requested, coordination of the scheduling of witness interviews and other investigative steps that a company intends to take as part of its internal investigation with steps that DOJ intends to take as part of its investigation and making available for interviews by DOJ those company officers and employees who possess relevant information, including, where appropriate and possible, officers, employees, and agents located overseas as well as former officers and employees (subject to the individuals' Fifth Amendment rights), and, where possible, the facilitation of third-party production of witnesses.

In order for a company to receive full credit for timely and appropriate remediation, a company must demonstrate that it has done a thorough analysis of the causes of the underlying conduct (*i.e.*, a root cause analysis) and, where appropriate, has adequately remediated the problem. The company must also show that it has implemented an effective compliance and ethics program, the criteria for which will be periodically updated and which may vary based on the size and resources of the organization. Those criteria include, among other things:

(1) the company's culture of compliance, including awareness among employees that any criminal conduct, including the conduct underlying the investigation, will not be tolerated;

(2) the resources the company has dedicated to compliance, including the quality and experience of the personnel involved in compliance, and the authority and independence of the compliance function and the availability of compliance expertise to the board;

(3) the effectiveness of the company's risk assessment and the manner in which the company's compliance program has been tailored based on that risk assessment;

(4) the compensation and promotion of the personnel involved in compliance, in view of their role, responsibilities, performance, and other appropriate factors; and

(5) the auditing of the compliance program to ensure its effectiveness.

There are other conditions that a company must meet before receiving credit for remediation. The company must discipline the relevant employees, including those identified by the company as responsible for the misconduct, either through direct participation or failure in oversight, as well as those with supervisory authority over the area in which the criminal conduct occurred. In addition, the company must be sure to retain its relevant business records and guard against the improper destruction or deletion of those materials. Finally, the government will look to see what additional steps the company is taking that demonstrate its recognition of the seriousness of the misconduct, its acceptance of responsibility for it, and the implementation of measures to reduce the risk of repetition of such misconduct, including measures to identify future risks.

Declinations

The first declination in an FCPA action under the Enforcement Policy was issued by DOJ on April 23, 2018, in a matter involving Dun & Bradstreet.[13] The investigation concerned allegations of unlawful payments at two of the company's indirect subsidiaries in China. DOJ's letter identified a number of factors that contributed to DOJ's decision to decline to bring any enforcement action, "despite the bribery committed by the Company's subsidiaries in China." One important consideration was that the company settled an SEC investigation into the same misconduct by agreeing to pay more than $9 million.[14] Other factors cited by the government in the letter include:

> the fact that the Company identified the misconduct; the Company's prompt voluntary self-disclosure; the thorough investigation undertaken by the Company; its full cooperation in this matter, including identifying all individuals involved in or responsible for the misconduct, providing the Department all facts relating to that misconduct, making current and former employees available for interviews, and translating foreign language documents to English; the steps that the Company has taken to enhance its compliance program and its internal accounting controls; the Company's full remediation, including terminating the employment of 11 individuals involved in the China misconduct, including an officer of the China subsidiary and other senior employees of one subsidiary, and disciplining other employees by reducing bonuses, reducing salaries, lowering performance reviews, and formally reprimanding them. . . [15]

Dun & Bradstreet has been followed by two additional declinations. On August 20, 2018, a declination letter was issued to Guralp Systems Limited relating to what DOJ described as "possible violations" of the FCPA and U.S. money laundering statutes resulting from the company's payments to the Director of the Earthquake Research Center at the Korea Institute of Geoscience and Mineral Resources.[16] Among other things, the letter noted that Guralp, a U.K. company, was the subject of a parallel investigation by the Serious Fraud Office (SFO) relating to the same conduct and had committed to accepting responsibility with the SFO.

On August 23, 2018, DOJ issued a letter to the Insurance Corporation of Barbados Limited (ICBL), closing its investigation without taking any enforcement action.[17] Pursuant to the letter, DOJ required ICBL to pay approximately $93,000 in disgorgement. Unlike the brief letter issued days earlier to Guralp, the ICBL declination letter recited the underlying facts in some detail, including that ICBL had paid approximately $36,000 in bribes to Donville Innis, a Barbadian government official, in exchange for government contracts worth approximately $686,000 and $93,000 in profits, and that Innis was arrested and charged with money laundering in early August 2018. The letter noted that high-level employees of ICBL arranged payments of bribes to Innis, who was a member of the Parliament of Barbados and Minister of Industry, International Business, Commerce and Small Business Development of Barbados. In exchange, Innis secured two government contracts for ICBL.

The first FCPA action under the Trump administration was a declination issued under the FCPA Pilot Program, which highlighted the importance of careful pre-acquisition FCPA due diligence and thoughtful post-acquisition integration. That action also suggested a potential path for acquiring companies that discover misconduct at acquired entities.

The investigation focused on a bribery scheme at Spectra Gases, a Linde Group subsidiary, which began before Linde acquired Spectra in 2006 and continued for three years thereafter. As part of the scheme, foreign officials in the Republic of Georgia received a share of profits from Spectra's Georgian operations in exchange for the selection of Spectra as the purchaser of valuable Georgian assets.

The DOJ declination letter, dated June 16, 2017,[18] identified a number of determining factors consistent with the FCPA Pilot Program's requirements, including Linde's timely, voluntary self-disclosure upon discovering the scheme when it dissolved Spectra; a thorough and proactive internal investigation; Linde's full cooperation (including its provision of all known relevant facts about the individuals involved in or responsible for the misconduct and agreement to cooperate in any ongoing investigations of those individuals); full remediation, including terminating and/or taking disciplinary action against the employees from both companies involved in the misconduct; the steps Linde took to improve its compliance and internal audit controls; and the agreement to both disgorge profits and forfeit proceeds that Linde withheld from Georgian officials after discovery of the scheme.

Another FCPA Pilot Program declination, a year earlier, similarly illustrates both the difficulties of integrating compliance initiatives at acquired companies and the factors the government may look to when deciding whether prosecution is appropriate. On July 11, 2016, the SEC announced that Johnson Controls, Inc. (JCI) had agreed to pay more than $14 million to settle charges based upon improper payments made by a Chinese subsidiary.[19] That subsidiary had been acquired as part of the acquisition of York International in 2005. York itself was the subject of an FCPA enforcement proceeding in 2007, based in part on improper conduct in China by that same subsidiary. According to the SEC administrative release, despite the efforts by JCI to ensure compliance with its anti-corruption policies, the Chinese subsidiary continued paying bribes but altered its scheme to use vendors rather than agents to facilitate the improper payments. When JCI finally discovered the misconduct, it immediately self-reported to the SEC and cooperated with the investigation. While the company settled with the SEC, DOJ declined to prosecute. As in the more recent actions, the declination letter noted that DOJ's decision was based upon a number of factors, including, but not limited to:

> the voluntary self-disclosure of the matter by JCI; the thorough investigation undertaken by the Company; the Company's full cooperation in this matter (including its provision of all known relevant facts about the individuals involved in or responsible for the misconduct) and its agreement to continue to cooperate in any ongoing investigations of individuals; the steps that the Company has taken and continues to take to enhance its compliance program and its internal accounting controls; the Company's full remediation (including separating from the Company all 16 employees found to be involved in the misconduct, including high-level executives at the Chinese subsidiary); and the fact that JCI will be disgorging to the SEC the full amount of disgorgement as determined by the SEC, as well as paying a civil penalty to the SEC.[20]

Post-Closing Integration

There are numerous steps a company must take post acquisition as well in order to avoid successor liability. Among other things, the company must ensure that the anti-corruption code of conduct and compliance policies and procedures of the acquiring company are made applicable to the newly acquired business as soon as practicable and that all of its employees are adequately trained on the FCPA and other relevant anti-corruption laws. The company may also need to do an FCPA-specific audit.

In a recently settled administrative action arising out of the acquisition by Mondelēz International (formerly Kraft) of Cadbury Limited, both Mondelēz and Cadbury agreed to pay $13 million to settle charges that Cadbury violated the internal controls and books-and-records provisions of the FCPA.[21] According to the SEC order, the FCPA violations arose from payments made by a Cadbury subsidiary in India to a consultant to obtain government licenses and approvals for a chocolate factory in Baddi, India.

According to the SEC, the subsidiary failed to conduct appropriate due diligence on, and monitor the activities of, the agent and its books and records, which were consolidated into the books and records of Cadbury and Mondelēz, and did not accurately and fairly reflect the nature of the services rendered by the agent. Nor did Cadbury implement adequate FCPA compliance controls at its Cadbury India subsidiary, which created the risk that funds paid to the agent could be used for improper or unauthorized purposes.

The SEC found that that Cadbury violated sections 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and that Mondelēz, as the acquirer of Cadbury, was also responsible for Cadbury's violations. The press release notes that in determining to accept the settlement offer, the SEC considered Mondelēz's cooperation and remedial actions. The order states that, because of the nature of the transaction, the acquirer was unable to conduct complete pre-acquisition due diligence. The SEC acknowledged, however, that the acquirer did engage in "substantial, risk-based, post-acquisition compliance-related due diligence reviews of Cadbury's business, which involved reviews in 24 countries, including India."[22] Mondelēz also got credit for conducting an internal investigation, which "included the retention of external counsel and forensic accountants and cooperated with the SEC's investigation. Mondelēz also undertook extensive remedial actions with respect to Cadbury, including implementing Mondelēz's global compliance program at Cadbury and conducting a comprehensive review of the use of third parties in Cadbury India's business."[23]

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NOTES

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7. *See Corruption Perceptions Index 2017*, Transparency Int'l (Feb. 21, 2018), www.transparency.org/research/cpi/overview.
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Challenging the DOJ's Accomplice Liability Strategy for Reaching Foreign Conduct in International Bribery Schemes

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Overview

In recent years, the U.S. Department of Justice (DOJ) aggressively has asserted jurisdiction over foreign defendants acting outside the United States in international bribery schemes. In an effort to circumvent the jurisdictional obstacles presented by the Federal Corrupt Practices Act (FCPA)[1]—the federal statute

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that criminalizes bribery of foreign officials—the DOJ has invoked accomplice liability theories against foreign defendants under both the FCPA and the Money Laundering Control Act (MLCA).[2]

In August 2018, the U.S. Court of Appeals for the Second Circuit, in a long-awaited and high-profile decision in *United States v. Hoskins*,[3] unanimously rejected the DOJ's FCPA accomplice liability theory as inconsistent with the statute. *Hoskins* was a major blow to the DOJ, which formally took the position that it could hold non-resident foreign nationals liable for conspiring to violate the FCPA even if they were not, or could not be, independently charged with a substantive FCPA violation. While courts have not yet scrutinized the DOJ's MLCA accomplice liability theory in the same way, the judicial challenges are coming, and the government very well may lose again.

This article explores the impacts (and limits) of the Second Circuit's *Hoskins* decision and analyzes the legal and jurisdictional obstacles facing the DOJ's MLCA accomplice liability theory. It ultimately provides a roadmap on how foreign defendants (and international companies facing FCPA-related risks) should fight back against the DOJ's aggressive use of the MLCA in international bribery cases.

The Second Circuit in *Hoskins* Rejects the DOJ's Expansive FCPA Accomplice Liability Theory

The FCPA does not make it a crime for a foreign official to receive a bribe. The FCPA only reaches a foreign national whose alleged FCPA violation has occurred outside the United States when the foreign national is an "officer, director, employee, or agent" of a "domestic concern" or U.S. "issuer" of securities.[4] In an attempt to circumvent this jurisdictional obstacle against charging foreign nationals who cannot be connected to a "domestic concern," the DOJ has relied on twin charges of (1) conspiracy to violate the FCPA, and (2) aiding and abetting an FCPA violation.[5]

Until recently, the boundaries of the DOJ's FCPA accomplice liability theory had gone untested in federal courts. Foreign defendants routinely would take plea deals and pay penalties to resolve the charges against them rather than challenge the theory and risk harsher consequences. In August 2018, however, the tide shifted significantly.

Overview of the Second Circuit's *Hoskins* Decision

On August 24, 2018, the DOJ's FCPA accomplice liability theory was thrown into substantial doubt by the Second Circuit's decision in *Hoskins*, which held, in a rare decision interpreting the FCPA, that the "government may not expand the extraterritorial reach of the FCPA by recourse to the conspiracy and complicity statutes."[6]

The Second Circuit in *Hoskins* held that the "government may not expand the extraterritorial reach of the FCPA by recourse to the conspiracy and complicity statutes."

The *Hoskins* case originally came into the spotlight back in August 2015 when a Connecticut federal district court held that the defendant Lawrence Hoskins, a British citizen who worked for Alstom, S.A., based in France, could not be held criminally liable for conspiring to violate, or aiding and abetting a violation of, the FCPA.[7] Following a very lengthy appeal, a unanimous three-judge panel of the Second Circuit affirmed the district court in substantial part, concluding that because the FCPA defines precisely the categories of persons who may be charged for violating its provisions, and because it also states clearly the extent of its extraterritorial application, the FCPA does not comport with the government's use of the complicity or conspiracy statutes against Hoskins.[8]

The Second Circuit in *Hoskins* was guided by the "*Gebardi* principle," set forth long ago by the U.S. Supreme Court in *United States v. Gebardi*,[9] which stands for the proposition that where Congress excludes a class of individuals from liability under a criminal statute, the government may not rely on accomplice theories of liability to prosecute those same individuals. Applying *Gebardi*, the Second Circuit extensively analyzed the text, structure, and legislative history of the FCPA.[10] It ultimately concluded that Congress had demonstrated an "affirmative policy . . . to leave foreign nationals outside the FCPA when they do not act as agents, employees, directors, officers, or shareholders of an American issuer or domestic concern, and when they operate outside U.S. territory."[11]

The Second Circuit further concluded that even if no such affirmative legislative policy had been demonstrated, it would still rule for Hoskins because the government had not established a clearly expressed congressional intent to allow conspiracy and complicity liability to broaden the extraterritorial reach of the FCPA.[12] The panel's decision was guided by a recent trilogy of Supreme Court cases recognizing that, absent clearly expressed congressional intent to the contrary, federal courts should presume that a federal statute applies only within the territorial jurisdiction of the United States.[13] This "presumption against extraterritoriality" flows from the principle that "United States law governs domestically but does not rule the world."[14]

Applying these lessons, the Second Circuit in *Hoskins* easily concluded that "the presumption against extraterritoriality bars the government from using the conspiracy and complicity statutes to charge Hoskins with any offense that is not punishable under the FCPA itself because of the statute's territorial limitations."[15] This included both charges that were the subject of Hoskins's motion to dismiss—conspiracy to violate two provisions of the FCPA, and liability as an accomplice for doing so—"because the FCPA clearly dictates that foreign nationals may only violate the statute outside the United States if they are agents, employees, officers, directors, or shareholders of an American issuer or domestic concern."[16] The court stated that "[t]o hold Hoskins liable, the government must demonstrate that he falls within one of those categories or acted illegally on American soil."[17]

Key Takeaways from the *Hoskins* Decision

The Second Circuit's *Hoskins* decision is noteworthy because it narrows the DOJ's jurisdictional reach over non-resident foreign nationals. It directly contradicts the DOJ's and SEC's FCPA Resource Guide, which states that the U.S. government may hold non-resident foreign nationals liable for conspiring to violate the FCPA "even if they are not, or could not be, independently charged with a substantive FCPA violation."[18]

The full impact of *Hoskins*, however, has yet to be seen. First, it is very likely that the DOJ will continue to pursue the same *Hoskins*-style FCPA prosecutorial theory in other circuits. While *Hoskins* is binding on the DOJ in the Second

Circuit, nothing precludes the DOJ from pursuing its theory in other circuits, perhaps in the hopes of generating a circuit split (and the likelihood of Supreme Court review).[19] As of this writing, the DOJ continues to stand by its theory.[20]

Second, it is possible that the DOJ will adopt a very broad definition of "agent" under the FCPA to get around the limits of the *Hoskins* opinion. While the Second Circuit affirmed the district court in substantial part, it reversed that portion of the district court's decision that prohibited the government from proving that

Hoskins will likely embolden the DOJ to use the MLCA even more aggressively to reach conduct in international bribery cases that falls outside the FCPA.

Hoskins acted as an agent of a domestic concern when conspiring with employees and other agents of that domestic concern who took part in the scheme while in the United States.[21] The *Hoskins* case thus may generate still additional guidance regarding the scope and limits of the FCPA agency theory.

But perhaps the most likely outcome of the *Hoskins* decision is that it will embolden the DOJ to become even more aggressive in using the MLCA to reach conduct in international bribery cases that falls outside the FCPA. Even before *Hoskins*, the DOJ was incentivized to assert money laundering charges in FCPA cases because MLCA offenses carry significantly higher sentences than FCPA offenses.[22] The DOJ's new aggressiveness after *Hoskins* will simply put added pressure on foreign individuals (particularly bribe recipients who cannot be charged under the FCPA) and concomitantly will increase the FCPA-related risks for international companies operating abroad.

Given this likely new aggressiveness, it is only a matter of time before the DOJ's MLCA accomplice liability theory is put to the test by courts. As explored in the next section, there are a number of legal and jurisdictional obstacles that the DOJ will need to confront.

Potential Limits to the DOJ's MLCA Accomplice Liability Theory

Much like the DOJ's FCPA accomplice liability theory, which only recently was rejected by the Second Circuit, the legal limits of the DOJ's MLCA accomplice liability theory have gone untested in federal court as foreign defendants plead out rather than risk significant sentences.[23] These guilty pleas have bolstered the DOJ's expansive view of the MLCA while allowing it to obtain convictions of foreign defendants who otherwise could not be charged with underlying FCPA offenses. But can the DOJ's expansive view of the MLCA pass judicial muster?

Key Provisions of the MLCA

To analyze the DOJ's MLCA accomplice liability theory, it is necessary to understand the key provisions of the MLCA, which was enacted in 1986, nine years after Congress passed the FCPA.[24] As the term "laundering" connotes, the MLCA targets the transformation of "dirty" money from the commission of certain predicate crimes into a "clean" and usable form.[25]

Section 1956(a)(1) of the MLCA addresses domestic money laundering. Section 1956(a)(2), in turn, addresses international money laundering and applies when money is transported into or out of the United States. It contains both a "promotion" prong and a "concealment" prong.

The promotion prong, set forth in section 1956(a)(2)(A), criminalizes the transportation of monetary instruments into or out of the United States when the transportation is carried out with the "intent to promote" a "specified unlawful activity."[26]

The concealment prong, set forth in section 1956(a)(2)(B), criminalizes the transportation of money that the defendant knows represents "the proceeds of some form of unlawful activity" and that is designed in whole or in part to "conceal or disguise the nature, the location, the source, the ownership, or control of the proceeds of a specific unlawful activity."[27]

The MLCA defines "specified unlawful activity" to include dozens of federal criminal statutes—including any felony violation of the FCPA.[28]

In addition to enforcing the MLCA criminally under section 1956(a), the government may seek to impose civil liability for the same conduct under section 1956(b)(1).

How the DOJ's MLCA Accomplice Liability Theory Works

The DOJ's MLCA accomplice liability theory generally takes the form of charging two accomplice liability offenses. One offense charged is conspiracy to commit money laundering under the MLCA's conspiracy provision in section 1956(h).[29] The other offense charged is aiding and abetting or "willfully causing" under 18 U.S.C. § 2.[30] The predicate offenses—or the "specified unlawful activities"—are bribery-related violations of the FCPA.

Even before the Second Circuit's *Hoskins* decision, the DOJ had begun shifting to an MLCA accomplice liability theory under which it charged foreign nationals with conspiracy to violate the MLCA. For example, the DOJ used money laundering conspiracy charges in an FCPA case against a former official of Haiti's state-owned national telecommunications company, Telecommunications D'Haiti ("Haiti Teleco"), who was charged with accepting bribes from three U.S. telecommunications companies in exchange for giving the companies favorable rates and contracts with Haiti Teleco.[31] Although the defendant could not be charged with the underlying FCPA violations, the DOJ was able to obtain via plea agreement the first-ever conviction of a foreign official based on money laundering conspiracy charges "where the specified unlawful activity to which the laundered funds related was a felony violation of the FCPA."[32]

In another case, the DOJ brought MLCA charges against former Thai Tourism Authority governor Juthamas Siriwan and his daughter Jittisopa for allegedly accepting $1.8 million in bribes from Hollywood producer Gerald Green and his wife Patricia Green in exchange for contracts to run a film festival.[33] In an effort to overcome the FCPA's limits on charging foreign officials in corruption cases, the DOJ characterized the transfer of alleged bribe payments as money laundering transactions intended to promote the carrying on of the bribe scheme and asserted MLCA conspiracy and 18 U.S.C. § 2 "willfully causing" charges against the Siriwans. Although the Siriwan action remains stayed pending Thailand proceedings,[34] the case highlights many of the legal and jurisdictional obstacles facing the DOJ under the MLCA as it tries to reach foreign officials who are alleged to be on the receiving end of FCPA-violating bribes.[35]

Analysis of the Legal and Jurisdictional Obstacles Facing the DOJ's MLCA Accomplice Liability Theory

As detailed below, there are a number of legal and jurisdictional obstacles that foreign defendants can exploit to fight back against the DOJ's MLCA theory.

The "Double Duty" Issue

An initial problem with the DOJ's prosecutorial theory that some foreign defendants have tried to exploit is a so-called double duty issue, which arises when the very same payment of bribe money necessary to complete the "specified unlawful activity" under the FCPA concurrently serves as the money laundering transaction that "promotes" that same "payment." Defendants pursuing this argument have cited case law recognizing that the offense of money laundering "must be *separate* and *distinct* from the underlying offense that generated the money to be laundered."[36] From this principle, defendants have argued that the government properly cannot recast the same bribe payments that are necessary to complete the "specified unlawful activity" under the FCPA as money laundering transactions that promote the carrying on of the same bribe scheme. Defendants, in other words, have asserted that the government cannot make an indictment's alleged bribe payments pull "double duty" as elements of the specified bribery offenses and as MLCA transactions.[37]

The "double duty" issue is one of the legal issues that is front and center in the *Siriwan* case. But it could be an uphill battle for defendants. The Second Circuit, for example, has recognized that section 1956(a)(2), unlike other money laundering provisions, "contains no requirement that 'proceeds' first be generated by unlawful activity, followed by a financial transaction with those proceeds, for criminal liability to attach."[38] Other courts have followed the Second Circuit's lead—indeed, just recently.[39] Still, the issue has not been resolved definitively, and defendants will continue to press the argument.

Obstacles in Establishing Jurisdiction over Foreign Defendants

Even if the DOJ can get past the "double duty" issue in charging foreign defendants, its MLCA accomplice liability theory faces significant jurisdictional obstacles that have yet to be addressed by the courts. As explained below, the MLCA references jurisdiction over foreign persons in two places: sections 1956(b)(2) and 1956(f). The proper scope and interaction of these provisions significantly will impact the scope of the DOJ's prosecutorial theory.

Personal Jurisdiction Under Section 1956(b)(2). One key jurisdictional provision under the MLCA is section 1956(b)(2), which addresses "jurisdiction over foreign persons." It allows a court to assert personal jurisdiction over a non-resident "foreign person" only if "the foreign person commits an offense under [section 1956(a)] involving a financial transaction that occurs in whole or in part in the United States."[40]

The MLCA's personal jurisdiction provision, in other words, grants a court authority to bind a foreign defendant only for direct violations. It does not include a similar grant of jurisdiction over foreign persons who violate section 1956(h) (the MLCA's conspiracy provision) or 18 U.S.C. § 2 (aiding and abetting or causing an act to be done). Moreover, as *Hoskins* teaches, this extraterritorial grant of personal jurisdiction is to be narrowly construed if the presumption against extraterritoriality is applied. For these reasons, jurisdiction may not exist over a foreign person who is charged criminally with a derivative violation under the MLCA.

But that raises the central issue about section 1956(b)(2): Does it apply to criminal charges under the MLCA? Or is it limited to the civil penalty context? Given the structure and language of the MLCA's personal jurisdiction provision, the answer is unclear. Part of the uncertainty stems from the fact that section 1956(b)(2) appears immediately after the civil penalty provisions in section 1956(b)(1), which suggests they should be read together. There is also the language of section 1956(b)(2) itself, which vests federal courts with jurisdiction over foreign persons "against whom the action is brought, *if service of process upon the foreign person is made under the Federal Rules of Civil Procedure or the laws of the country in which the foreign person is found*. . . ."[41] The government has argued that it makes no sense for extraterritorial criminal jurisdiction over foreign persons to be established upon service of process under the Federal Rules of Civil

Procedure.[42] It thus takes the position that section 1956(b)(2) is limited to civil penalty jurisdiction while section 1956(a)(2) addresses criminal enforcement of international money laundering.[43]

The counter-argument is that there is no express language in section 1956(b)(2) stating that it applies only to civil actions. Instead, it provides that "[f]or purposes of adjudicating an action filed or enforcing a penalty ordered *under this section*, the district courts shall have jurisdiction over any foreign person . . . ."[44] Foreign defendants should rely on principles of statutory interpretation to argue that the words "under this section" apply to all of 18 U.S.C. § 1956, not simply the civil penalty provision of section 1956(b)(1).[45] Moreover, given that the MLCA is both a civil and criminal statute, defendants can argue that it makes sense that section 1956(b)(2) would confer jurisdiction over defendants in both civil and criminal actions. Finally, to the extent that section 1956(b) is ambiguous, this works against the government because the rule of lenity "requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them."[46]

Courts to date have not yet grappled with the proper construction of section 1956(b)(2). But if the provision is construed broadly, it will significantly limit the DOJ's MLCA theory.

Extraterritorial Criminal Jurisdiction Under Section 1956(f). As noted, the MLCA references jurisdiction over foreign persons not only in section 1956(b)(2), but also in section 1956(f), which addresses "extraterritorial jurisdiction." This provision states in relevant part that "[t]here is extraterritorial jurisdiction over the conduct prohibited by this section if . . . in the case of a non-United States citizen, the conduct occurs in part in the United States. . . ."[47] Relying on this language, the government has argued that section 1956(f) explicitly sets forth criminal jurisdictional authority for section 1956 offenses, and its language clearly encompasses conduct prohibited by section 1956(a) and the conspiracy provisions in section 1956(h).[48]

The weakness with the government's argument, however, is that section 1956(b)(2) and section 1956(f) act independently. Section 1956(b)(2) deals with obtaining *personal* jurisdiction over foreign persons whereas section 1956(f) concerns *subject matter* jurisdiction. Thus, if section 1956(b)(2) is construed broadly to apply beyond the civil context, the government in criminal cases would not be permitted to assert personal jurisdiction over foreign defendants acting outside the United States who are not alleged to have committed a direct (as opposed to a derivative) violation of the MLCA under section 1956(a).

Moreover, while there is a clear congressional indication that the extraterritorial reach of the MLCA applies to non-U.S. citizens, that reach is limited to conduct that "occurs in part in the United States." This limitation applies to the entire statutory scheme and, therefore, should include the conduct-regulating provision of section 1956(a)(2), as well as money laundering conspiracy under section 1956(h).

Ultimately, courts will need to interpret the scope of sections 1956(b)(2) and 1956(f). If section 1956(f)'s conduct requirement is read alongside a broad construction of section 1956(b)(2), then only foreign defendants who can be charged with a direct violation of section 1956(a) would be subject to section 1956(f)'s jurisdictional reach. For this reason, foreign defendants should be arguing aggressively for a broad reading of section 1956(b)(2).

Finally, and relatedly, foreign defendants should argue that the government cannot use 18 U.S.C. § 2 to overcome the jurisdictional obstacles facing it under the MLCA. While section 2 generally imputes liability for "willfully caus[ing]" the violation of any other criminal statute, courts have held that section 2 is "not so broad as to expand the extraterritorial reach of the underlying statute."[49] Thus, if the extraterritorial reach of the MLCA is limited to foreign persons who have committed a direct violation of section 1956(a), then extraterritorial jurisdiction cannot be expanded vis à vis a bare section 2 violation.

Conclusion

Similar to what it tried to do (unsuccessfully) in *Hoskins*, the DOJ is relying on an MLCA accomplice liability theory to extend derivative criminal liability to bribe-receiving foreign defendants who themselves cannot be directly liable for an FCPA violation. As analyzed above, there are serious open questions whether the DOJ's MLCA accomplice liability theory impermissibly pushes legal and jurisdictional boundaries in allowing the DOJ to accomplish through the

MLCA what it cannot accomplish through the FCPA. *Hoskins* shows how foreign defendants need to be aggressive in resisting these assertions of extraterritorial jurisdiction.

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NOTES

1. 15 U.S.C. § 78dd-1 to -3 [hereinafter FCPA].
2. 18 U.S.C. § 1956 [hereinafter MLCA].
3. United States v. Hoskins, 902 F.3d 69 (2d Cir. 2018).
4. 15 U.S.C. § 78dd-2(a).
5. *See* U.S. Dep't of Justice & U.S. Sec. & Exch. Comm'n, A Resource Guide to the U.S. Foreign Corrupt Practices Act 12 (Nov. 14, 2012; rev. June 2015) [hereinafter Resource Guide], www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf ("A foreign national or company may also be liable under the FCPA if it aids and abets, conspires with, or acts as an agent of an issuer or domestic concern, regardless of whether the foreign national or company itself takes any action in the United States.").
6. *Hoskins,* 902 F.3d. at 97.
7. *See* United States v. Hoskins, 123 F. Supp. 3d 316, 327 (D. Conn. 2015). Hoskins was charged with conspiracy to violate the FCPA for allegedly facilitating a bribery scheme involving Alstom's U.S. subsidiary. *Id*. at 318.
8. *See Hoskins*, 902 F.3d at 71–72.
9. United States v. Gebardi, 287 U.S. 112 (1932). In *Gebardi*, a man and a woman were charged with conspiring to violate the Mann Act, 18 U.S.C. §§ 2421–24, which prohibits the knowing transportation or the causing, aiding, or assisting of transportation, of any woman or girl for the purpose of "prostitution or debauchery or for any other immoral purpose" in interstate or foreign commerce. The Court in *Gebardi* reasoned that Congress intended to deal with cases where the woman consented to the forbidden transportation, "yet this acquiescence . . . was not made a crime under the Mann Act itself." *Id*. at 118, 121.
10. *See Hoskins*, 902 F.3d at 83–96.
11. *Id*. at 93. The Second Circuit in *Hoskins* favorably cited the Fifth Circuit's decision in United States v. Castle, 925 F.2d 831 (5th Cir. 1991), which applied *Gebardi* to conclude that foreign officials who accept bribes but who cannot be liable as principals under the FCPA also cannot be prosecuted for conspiracy to violate the FCPA. *Id*. at 836.
12. *See Hoskins*, 902 F.3d at 95 (citation omitted).
13. The Supreme Court first invoked the presumption against extraterritoriality in its 2010 decision in Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010), to hold that civil actions for securities fraud under section 10(b) of the Securities Exchange Act of 1934 could not be based on foreign conduct. The Court stated that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Id*. at 255. Additionally, if a statute "provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms." *Id*. at 265. Three years later, in Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013), the Supreme Court invoked the presumption against extraterritoriality to dismiss a complaint brought under the Alien Tort Statute, 28 U.S.C. § 1350, alleging that certain Dutch, British, and Nigerian corporations had aided and abetted the Nigerian government in committing violations of the law of nations in Nigeria.

Although the relevant conduct in *Kiobel* took place outside American territory, the Court noted that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." *Kiobel*, 569 U.S. at 124–25. Most recently, in RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090 (2016), the Supreme Court applied the presumption against extraterritoriality to the civil and criminal provisions of the Racketeer Influences and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962, to hold that a violation of the statute may be based on a pattern of racketeering that includes predicate offenses committed abroad, provided that each of those offenses violates a predicate statute that is itself extraterritorial. *See RJR Nabisco*, 136 S. Ct. at 2102. The Court in *RJR Nabisco* reiterated that "[a]bsent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application." *Id.* at 2100.

14. Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454 (2007).
15. *See Hoskins*, 902 F.3d at 97.
16. *Id.*
17. *Id.*
18. Resource Guide, *supra* note 5, at 34.
19. Indeed, not even a month after *Hoskins* was decided, the DOJ argued in response to a motion to dismiss in Chicago federal court that *Hoskins* is "non-binding" and should not be followed. *See* Government's Second Supplemental Response to Defendants' Motions to Dismiss Indictment at 4, United States v. Firtash, Case No. 13 CR 515 (N.D. Ill. Sept. 22, 2018), ECF No. 70. The government argued that the Second Circuit's interpretation of the FCPA's legislative history was incorrect. *Id.* at 12. Relying instead on the Seventh Circuit's decision in United States v. Pino-Perez, 870 F.2d 1230 (7th Cir. 1988) (en banc), the government asserted that "[w]hile the statutory text of the FCPA, like most statutes, is silent as to the liability of accomplices and conspirators, in the face of such silence, courts routinely apply the default presumption that normal principles of conspirator liability and accomplice liability apply to individuals not expressly enumerated in the statute." *Id.* at 11.
20. Resource Guide, *supra* note 5, at 34.
21. *Hoskins*, 902 F.3d at 72 (stating that "the government's intention to prove that Hoskins was an agent of a domestic concern places him squarely within the terms of the statute and takes that provision outside our analysis on the other counts"). The issues on remand may be significant. As co-author Colin Jennings elsewhere has observed: "Joint ventures and other entities or individuals outside the United States should take a very hard look and make sure there is clear, direct jurisdiction over them under the FCPA. A lot of tough conversations may occur between folks under investigation and the Department as people work through the scope of what is an 'agent.'" Jaclyn Jaeger, *Second Circuit Ruling Limits Scope of FCPA Liability*, Compliance Wk. (Aug. 29, 2018). Jennings noted that while *Hoskins* may provide guidance on the agency issue, it also may spawn a new area of jurisprudence: "Where do you create enough of an 'agent' relationship to generate extraterritorial liability under the FCPA?" *Id.*
22. *Compare* 18 U.S.C. § 1956(a)(3) (twenty-year maximum sentence under the MLCA) *with* 15 U.S.C. § 78dd-2(g)(2)(A) (five-year maximum sentence under the FCPA).

23. *See* Press Release No. 18-506, U.S. Dep't of Justice, Former Venezuelan Official Pleads Guilty to Money Laundering Charge in Connection with Bribery Scheme (Apr. 19, 2018), www.justice.gov/opa/pr/former-venezuelan-official-pleads-guilty-money-laundering-charge-connection-bribery-scheme; Press Release No. 18-477, U.S. Dep't of Justice, Aruban Telecommunications Purchasing Official Pleads Guilty to Money Laundering Conspiracy Involving Violations of the Foreign Corrupt Practices Act (Apr. 13, 2018), www.justice.gov/opa/pr/aruban-telecommunications-purchasing-official-pleads-guilty-money-laundering-conspiracy; Press Release No. 17-939, U.S. Dep't of Justice, Former Guinean Minister of Mines Sentences to Seven Years in Prison for Receiving and Laundering $8.5 Million in Bribes from China International Fund and China Sonangol (Aug. 25, 2017), www.justice.gov/opa/pr/former-guinean-minister-mines-sentenced-seven-years-prison-receiving-and-laundering-85; Press Release No. 17-658, U.S. Dep't of Justice, Former Swiss Banker Pleads Guilty to Money Laundering Charge in Connection with Soccer Bribery Scheme (June 15, 2017), www.justice.gov/opa/pr/former-swiss-banker-pleads-guilty-money-laundering-charge-connection-soccer-bribery-scheme.
24. The Money Laundering Control Act is codified in 18 U.S.C. §§ 1956 and 1957.
25. United States v. Shepard, 396 F.3d 1116, 1119 (10th Cir. 2005).
26. 18 U.S.C. § 1956(a)(2)(A).
27. *Id.* § 1956(a)(2)(B)(i).
28. *Id.* § 1956(c)(7)(D).
29. *See id.* § 1956(h) ("Any person who conspires to commit any offenses defined in this section or [18 U.S.C. § 1957] shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.").
30. *See* 18 U.S.C. § 2(a) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."); 18 U.S.C. § 2(b) ("Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.").
31. *See* Press Release No. 10-260, U.S. Dep't of Justice, Former Haitian Government Official Pleads Guilty to Conspiracy to Commit Money Laundering in Foreign Bribery Scheme (Mar. 12, 2010), www.justice.gov/opa/pr/2010/March/10-crm-260.html; Press Release No. 12-310, U.S. Dep't of Justice, Former Haitian Government Official Convicted in Miami for Role in Scheme to Launder Bribes Paid by Telecommunications Companies (Mar. 13, 2012), www.justice.gov/opa/pr/2012/March/12-crm-310.html.
32. Steps Taken by the United States to Implement and Enforce the OECD Anti-Bribery Convention (Information as of 25 February 2013), at 76–77, www.justice.gov/criminal/fraud/fcpa/docs/2013-02-25-steps-taken-oecd-anti-bribery-convention.pdf (last visited Oct. 10, 2018).
33. *See* Indictment, United States v. Siriwan, No. 09-CR-081 (C.D. Cal. Jan. 28, 2009).
34. *See* Hearing Transcript, United States v. Siriwan, No. 2:09-cr-0081 (C.D. Cal. Mar. 20, 2013), ECF No. 115 at 4, 11.
35. There are many other examples of how the DOJ uses an MLCA accomplice liability theory to support claims against foreign defendants in international bribery schemes. *See, e.g.*, United States v. Duperval, 777 F.3d 1324, 1328 (11th Cir. 2015) (upholding MLCA conspiracy

violations under section 1956(h) and concealment violations under 1956(a)(1)(B)(i), but never addressing an argument about the extraterritorial reach of the MLCA); Press Release No. 18-506, *supra* note 23; Press Release No. 18-477, *supra* note 23; Press Release No. 17-939, *supra* note 23; Press Release No. 17-658, *supra* note 23.

36. United States v. Hall, 613 F.3d 249, 254 (D.C. Cir. 2010) (citing case law) (emphasis added).
37. *See* Motion to Dismiss the Indictment at 4, United States v. Siriwan, No. 2:09-cr-0081 (C.D. Cal. Apr. 19, 2011), ECF No. 64 (arguing that the indictment's alleged bribe payments pull "double duty" as elements of the specified bribery offenses and as MLCA promotion transactions).
38. United States v. Piervinanzi, 23 F.3d 670, 680 (2d Cir. 1994).
39. Exactly two weeks before the Second Circuit handed down its decision in *Hoskins*, the D.C. federal district court in United States v. Tajideen, 319 F. Supp. 3d 445 (D.D.C. 2018), followed *Piervinanzi* in rejecting an argument made by a Lebanese-Belgian defendant who claimed that section 1956(a)(2) requires a distinct act of money laundering separate and apart from the transactions that allegedly violated the underlying statute and constituted the specified unlawful activity for money laundering. *Id.* at 468–69. Finding the absence of a distinct act requirement under section 1956(a)(2), the court in *Tajideen* refused to dismiss the money laundering conspiracy count against the defendant.
40. 18 U.S.C. 1956(b)(2); *see also* United States v. Lloyds TSB Bank PLC, 639 F. Supp. 2d 314, 317 (S.D.N.Y. 2009) (stating in a civil penalty case that "Subsection 1956(b)(2) deals with obtaining *personal jurisdiction* over a foreign person in cases where *subject matter jurisdiction* is established by other provisions of the MLCA [such as subsection (f)]"); *see also* Defendants' Brief in Reply at 21, United States v. Siriwan, No. 2:09-cr-0081, 21 (C.D. Cal. Oct. 4, 2011), ECF No. 74 (citing same).
41. 18. U.S.C. § 1956(b)(2) (emphasis added).
42. *See* Government's Response in Opposition to Defendants' Motion to Dismiss at 34, United States v. Siriwan, No. 2:09-cr-0081 (C.D. Cal. Sept. 9, 2011), ECF No. 67 ("It would be nothing short of nonsensical to allow for extraterritorial criminal jurisdiction over foreign persons to be perfected upon 'service of process . . . under the Federal Rules of Civil Procedure . . . .' Yet this is how defendants insist on reading the statute while entirely ignoring the provision directly on point, § 1956(f).").
43. *Id.* at 34 ("The civil penalty provisions of § 1956(b)(2)(A) have nothing to do with the criminal enforcement of international promotion money laundering under § 1956(a)(2)(A).").
44. 18 U.S.C. § 1956(b)(2) (emphasis added).
45. *See, e.g.*, Bruce v. Grieger's Motor Sales, 422 F. Supp. 2d 988, 993 (N.D. Ind. 2006) (interpreting the term "this section" in 15 U.S.C. § 1681m(h)(7) to mean all of 15 U.S.C. § 1681m) (citing Lamie v. U.S. Tr., 540 U.S. 526, 536 (2004)).
46. United States v. Santos, 553 U.S. 507, 514 (2008) (citing cases); *see also* United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221–22 (1952) ("[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.").
47. 18 U.S.C. § 1956(f)(1).

48. *See* Government's Response in Opposition to Defendants' Motion to Dismiss at 31–32, United States v. Siriwan, No. 2:09-cr-0081 (C.D. Cal. Sept. 9, 2011), ECF No 67.
49. United States v. Yakou, 428 F.3d 241, 252 (D.C. Cir. 2005) (holding that 18 U.S.C. § 2 does not provide jurisdiction over foreign conduct where the underlying statute does not provide extraterritorial jurisdiction); *see also* Defendants' Brief in Reply, United States v. Siriwan, No. 2:09-cr-0081 (C.D. Cal. Oct. 4, 2011), ECF No. 74 at 15 n.11 (citing *Yakou*).

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Private Ownership and Public Trust: Combating Money Laundering by Requiring Beneficial Owners to Disclose Their Interests

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The EU's Anti-Money Laundering Directive

The European Union's fifth anti-money laundering directive ("5AMLD"), which entered into force on July 9, 2018, with implementation dates beginning on January 10, 2020, requires EU member states to establish central registers of company ownership information to permit regulatory and law enforcement authorities, financial institutions, and the public, to obtain information regarding the beneficial owners of companies, and where a "legitimate interest" exists, of trusts.[1] The EU was motivated to impose these disclosure requirements, in part, by the revelations in the Panama Papers regarding the misuse of legal entities for illicit purposes, as well as to conceal the ownership of assets by sanctioned individuals, criminals, and public officials.[2] The 5AMLD's registration and disclosure provisions reflect the EU's effort to deter and prevent the misuse of legal entities for money laundering and its predicate offenses, terrorist financing, and other serious criminal violations.[3] Similarly, since April 6, 2016, the United Kingdom has required companies to disclose their beneficial owners, referred to as "people with significant control."[4]

The United States has no such legislation. There is no central ownership register similar to that now required by the 5AMLD. Instead, each state issues its own corporate charters, and many states permit shareholders and directors, as well as beneficial owners, to remain undisclosed.[5] And while U.S. persons must disclose their interests in foreign bank accounts to the IRS and pay U.S. income taxes

"Permitting beneficial owners to conceal their identities has real consequences."

on those accounts, as required, their ownership interests in domestic or foreign entities are not otherwise subject to disclosure. Moreover, the identity of the beneficial owners of any U.S. domiciled entity may be concealed through layers of direct and indirect ownership, making it difficult for even regulatory and law enforcement authorities to identify the ultimate beneficial owners. Despite this, federal legislation mandating the disclosure of beneficial ownership information has been repeatedly proposed, yet with equal regularity, Congress has failed to consider such legislation.[6]

Permitting beneficial owners to conceal their identities has real consequences. Among other things, it prevents the effective enforcement of U.S. law, including anti-money laundering laws and regulations. Beginning in 2016 with the Panama Papers, as well as in an extensive series of articles in the *New York Times* concerning undisclosed ownership of Manhattan real estate,[7] and continuing with the still-unfolding disclosures regarding the large-scale corruption and money-laundering of the 1MDB scandal,[8] have revealed the extent to which members of an international elite, who can afford the services of lawyers, bankers, and other professionals, are able to hide behind corporate entities and trusts to conceal their ownership and control of companies and assets. While there is nothing per se illegal about using companies and trusts to own and control assets, whether in the United States or abroad, and while there may be legitimate business or security reasons for doing so, the current system goes far beyond those concerns and permits the misuse of legal entities including to avoid taxes or conceal the illegal source of funds used to purchase assets.[9] The recent conviction of Paul Manafort on bank fraud and tax charges is a case in point.[10] Among other things, Manafort concealed his ownership and control of foreign accounts and companies and failed to pay taxes on those offshore assets, all of which funded his lavish lifestyle.

The push to require the disclosure of beneficial ownership has been fueled by such revelations. Where the ultimate beneficial owners of companies and trusts may have obtained their assets through corruption, fraud, state capture, and other misconduct, or are using legal entities to engage in crime or finance terrorism, their privacy interests should not overcome the legitimate public interest in identifying beneficial owners.

The United States has taken some steps to require the disclosure of beneficial owners of assets. For example, since 2016, FinCEN, the bureau of the U.S. Treasury Department responsible for collecting and analyzing suspicious activity reports (SARs) filed by financial institutions, requires title insurers to supply information regarding the identities of cash purchasers of real estate in certain locations and above certain price thresholds.[11] Further, as of May 11, 2018, FinCEN requires "covered" financial institutions to identify and verify the beneficial ownership of "legal entity customers" when a new account is opened.[12] And regardless of whether a customer or third party is a natural person or a legal entity, financial institutions must file SARs when they have reason to suspect suspicious activity is occurring. However, like the blind man and the elephant, because a financial institution may see only a portion of any customer's or third party's financial activity, it may be unable to discern whether the activity warrants filing a SAR. Additionally, FinCEN or law enforcement authorities may be missing sufficient information to connect the dots.

Although the United States has been unwilling to take more effective action to require disclosure, the use of corporate entities and trusts as a screen for beneficial ownership is not hard-wired into the U.S. legal or financial systems. When the United States was founded, corporations and trusts did not exist in their current expansive form. Rather, business entities were generally limited in size and scope.[13] Until the nineteenth century, most U.S. businesses were not operated as corporations, but as sole proprietorships or partnerships.[14] While the development of the corporate form with its accompanying limited liability spurred investment and growth, corporations were not initially seen as having legal rights comparable to those granted to or inherent in natural persons.[15]

In the civil sphere, the courts have been increasingly sympathetic to arguments that corporate entities have legal rights once reserved to individuals.[16] The criminal law still preserves the distinction between legal and natural persons, at least with respect to the privilege against self-incrimination.[17]

"It is long past time for Congress to finally take up legislation. . . ."

Ultimately, if the beneficial owners of legal entities are to be permitted to continue to benefit from use of the corporate form, or the privacy afforded to trusts, then it is reasonable for the public to require them to submit to certain requirements, including disclosing their ownership interests. It is long past time for Congress to finally take up legislation to require disclosure of beneficial ownership of legal entities that are domiciled or own assets, are doing business, or are conducting financial transactions in the United States. While there are legitimate concerns regarding the protection of beneficial owners' privacy interests, safeguards can be implemented. The risks to the financial system are simply too great not to take action.

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NOTES

1. *See* Directive 2018/843, of the European Parliament and of the Council of 30 May 2018 Amending Directive (EU) 2015/849 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing, and Amending Directives 2009/138/EC and 2013/36/EU, 2018 O.J. (L 156) 43 [hereinafter 5AMLD] ¶¶ 32–35, 41, 42; and arts. 30, 31. The 5AMLD provides that information regarding the beneficial ownership of a trust or "similar legal arrangement" is available to: "competent authorities" (*e.g.*, law enforcement or regulatory authorities); financial intelligence units; financial institutions "within the framework of customer due diligence"; "any natural or legal person that can demonstrate a legitimate interest"; and "any natural or legal person that files a written request in relation to a trust or similar legal arrangement which holds or owns a controlling interest in any corporate or other legal entity . . . , through direct or indirect ownership, including through bearer shareholdings, or through control via other means."
2. In 2016, the German newspaper *Süddeutsche Zeitung* and the International Consortium for Investigative Journalists began publishing a database as well as analyses of information leaked from the now-defunct Panamanian law firm, Mossack Fonseca. *See An ICIJ Investigation, The Panama Papers: Exposing the Rogue Offshore Finance Industry*, Int'l Consortium of Investigative Journalists, www.icij.org/investigations/panama-papers/ (last visited Sept. 18, 2018). This information, known as the Panama Papers, revealed that numerous individuals—including over 150 public officials, drug cartel members, and sanctioned individuals—beneficially owned or controlled assets held in over 214,000 entities domiciled in over twenty jurisdictions. *See Explore the Panama Papers Key Figures*, Int'l Consortium of Investigative Journalists (Jan. 31, 2017), www.icij.org/investigations/panama-papers/explore-panama-papers-key-figures/. While many of these entities may have been formed for legitimate privacy reasons, others were owned or controlled by individuals on U.S. and international sanctions lists, government officials whose known assets and income appear insufficient to support such ownership, and persons affiliated with criminal enterprises.
3. The discovery that terrorists involved in the 2015 and 2016 attacks on Paris and Brussels had used anonymous prepaid cards and cryptocurrency to fund these attacks in part, also led to the 5AMLD's adoption. *See* 5AMLD, *supra* note 1, ¶ 4:

   > The prevention of money laundering and of terrorist financing cannot be effective unless the environment is hostile to criminals seeking shelter for their finances through non-transparent structures. The integrity of the Union financial system is dependent on the transparency of corporate and other legal entities, trusts and similar legal arrangements. This Directive aims not only to detect and investigate money laundering, but also to prevent it from occurring. Enhancing transparency could be a powerful deterrent.

4. *Keeping Your People with Significant Control (PSC) Register,* GOV.UK (July 10, 2017), www.gov.uk/government/news/keeping-your-people-with-significant-control-psc-register.

5. *See G20 Leaders and Laggards? Reviewing G20 Promises on Ending Anonymous Companies*, Transparency Int'l 13, 20, 32 (Apr. 19, 2018), www.transparency.org/whatwedo/publication/g20_leaders_or_laggards.
6. On February 3, 2016, Sen. Sheldon Whitehouse (R-RI) introduced Incorporation Transparency and Law Enforcement Assistance Act, S. 2489, 114th Cong. (2015–16), "[t]o ensure that persons who form corporations in the United States disclose the beneficial owners of those corporations, in order to prevent the formation of corporations with hidden owners, stop the misuse of United States corporations by wrongdoers, and assist law enforcement in detecting, preventing, and punishing terrorism, money laundering, tax evasion, and other criminal and civil misconduct involving United States corporations, and for other purposes." *See* S.2489—Incorporation Transparency and Law Enforcement Assistance Act, Congress.Gov, www.congress.gov/bill/114th-congress/senate-bill/2489/titles?q=%7B%22search%22%3A%5B%22shell+companies%22%2C%22shell%22%5D%7D&r=12 (last visited Oct. 26, 2018)
7. Louise Story & Stephanie Saul, *Towers of Secrecy: Stream of Foreign Wealth Flows to Elite New York Real Estate*, N.Y. Times (Feb. 7, 2015), www.nytimes.com/2015/02/08/nyregion/stream-of-foreign-wealth-flows-to-time-warner-condos.html.
8. *See* Shamim Adam & Laurence Arnold, *The Story of Malaysia's 1MDB, The Scandal That Shook the World of Finance*, Bloomberg (May 24, 2018), www.bloomberg.com/news/articles/2018-05-24/how-malaysia-s-1mdb-scandal-shook-the-financial-world-quicktake.
9. Recognizing this concern, the 5AMLD permits member states to exempt disclosures on a case-by-case basis if there is a "disproportionate" risk of harm, including fraud, kidnapping, blackmail, extortion, harassment, violence, or intimidation, or if the beneficial owner is a minor or otherwise legally incapable.
10. *See* Sharon LaFraniere, *Paul Manafort, Trump's Former Campaign Chairman, Guilty of 8 Counts*, N.Y. Times (Aug. 21, 2018), www.nytimes.com/2018/08/21/us/politics/paul-manafort-trial-verdict.html.
11. At present, these "geographic targeting orders" (known as "GTOs") require title insurers to collect and provide to FinCEN, information concerning the identifies of cash purchasers of real estate as follows: the borough of Manhattan, New York ($3 million); the boroughs of Brooklyn, Queens, and Bronx, New York ($1.5 million); Miami-Dade, Broward, and Palm Beach counties, Florida ($1 million); the counties of San Francisco, San Mateo, Santa Clara, Los Angeles, and San Diego, California ($2 million); Bexar County, Texas ($500,000); and Honolulu, Hawaii ($3 million). *See, e.g.*, FinCEN, Geographic Targeting Order (Aug. 22, 2017), www.fincen.gov/sites/default/files/shared/Real%20Estate%20GTO%20Order%20-%208.22.17%20Final%20for%20execution%20-%20Generic.pdf.
12. *See* 31 C.F.R. § 1010.230. The term "covered financial institutions" are defined as federally insured banks and credit unions, mutual funds, securities brokers or dealers, futures commission merchants, and introducing brokers in commodities. 31 C.F.R. § 1010.605(e)(1). "Legal entity customers" are defined as corporations, limited liability companies, other entities created by the filing of a public document with the secretary of state or similar office, general partnerships, any similar entity formed under the laws of a foreign jurisdiction that opens an account, limited partnership, or business trust that is created by filing with a state office. 31 C.F.R. § 1010.230(e)(1).

13. There are obvious exceptions, of course. In the seventeenth century, governments issued charters to certain large enterprises such as the Dutch and British East India Companies, which essentially served as arms of the state. *See* Bryan Taylor, *The Rise and Fall of the Largest Corporation in History*, Bus. Insider (Nov. 6, 2013), www.businessinsider.com/rise-and-fall-of-united-east-india-2013-11; *see also East India Company*, Encyclopedia Britannica (Oct. 16, 2018), www.britannica.com/topic/East-India-Company; Dutch East India Company, Encyclopedia Britannica, www.britannica.com/topic/Dutch-East-India-Company (last visited Oct. 26, 2018).
14. "There were approximately 335 charters issued to business corporations in the United States by the end of the 18th century." Citizens United v. Federal Election Com'n, 558 U.S. 310, 386 (2010) (Scalia, J., concurring); *see also* Cook County, Ill. v. U.S. *ex rel.* Chandler, 538 U.S. 119, 126 (2003) ("Indeed, the archetypal American corporation of the eighteenth century was the municipality only in the early 19th century did private corporations become widespread.") (court's alterations and citation omitted).
15. *See, e.g.*, Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518 (1819) (New Hampshire legislature was not empowered to deprive college of right to appoint president, in violation of college's charter and Contracts Clause); Bank of U.S. v. Deveaux, 9 U.S. 61 (1809) (corporations have the capacity to sue).
16. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (holding that corporations have the First Amendment right to fund partisan electoral political activity); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (holding that a closely held for-profit corporation may deny female employees medical insurance coverage for contraceptives because of the corporate owners' religious objections).
17. *See, e.g.*, Braswell v. United States, 487 U.S. 99 (1988) (under "collective entity rule," Fifth Amendment privilege against self-incrimination does not apply to corporations, therefore, custodian was not privileged to refuse to produce corporate records); Bellis v. United States, 417 U.S. 85, 90 (1974) (custodian of records of dissolved three-member law partnership could not refuse to produce records on Fifth Amendment grounds); *In re* Grand Jury Subpoena Issued June 18, 2009, 593 F.3d 155 (2d Cir. 2010) (affirming contempt order and refusing to carve out exception to *Braswell* and *Bellis* rules; companies owned by single individual who was also the sole employee could not assert Fifth Amendment privilege against self-incrimination to avoid producing documents); *cf.* United States v. Doe, 465 U.S. 605, 617 (1984) (although content of company records was not privileged, where act of production would have implicated owner's privilege against self-incrimination, sole proprietor could refuse to turn over documents).

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The Three Pillars of Corporate Internal Investigations

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There are three pillars to successfully conducting corporate internal investigations: evaluating triggers, navigating ethical issues, and witness preparation. This article provides a broad overview of important points that every white collar attorney should keep in mind as he or she coordinates an internal investigation.

Conducting Corporate Internal Investigations—Evaluating Triggers

Companies are under constant pressure to investigate and self-report corporate misconduct as government agencies more aggressively investigate allegations of corporate fraud and abuse. This in turn has caused companies to sometimes become “trigger-happy” and has led to an increase in the number of internal investigations. But is an internal investigation always necessary? This first part provides guidance on the initial decision of whether to conduct an internal investigation and the importance of ensuring an independent investigation.

Business disruption, PR problems, criminal charges, and fines are legitimate concerns for a company to consider in deciding whether and how to conduct an internal investigation.

Numerous factors go into the calculus of determining whether a company should conduct an internal investigation: a company's management style, its corporate culture, whether the circumstances are already under investigation by the government, and the nature of the suspected wrongdoing. At the same time, companies want to minimize business disruption, avert potential public relations problems, and avoid being charged with a crime or assessed a catastrophic civil penalty. Companies are right to consider these legitimate goals in deciding whether and how to conduct an internal investigation. With these goals in mind, any internal investigation should consider the possibility of a potential government investigation, if one is not already underway. Although a company may not believe it is a target, it should approach any credible allegation of misconduct as if it will have to answer to the government. It may be that precautionary steps taken in the beginning will pay off in avoiding a government enforcement action altogether, or at least minimizing penalties in the event of an enforcement action.

Maintaining independence in the internal investigative process is crucial. All of these considerations should be tempered by the rule of reason. If a company has limited resources and the risk of liability is remote, it may not be prudent to undertake an expensive internal investigation. However, in some circumstances, failing to investigate could have severe consequences. This balance can be a difficult one to strike. With these considerations in mind, the most important question the company must address is whether to initiate an investigation.

Generally, the decision to investigate may be triggered by:

(1) a routine internal audit;
(2) a private or public complaint by a consumer, employee, or competitor;
(3) a manager or board member who learns of suspected impropriety or anomaly in a business practice;
(4) an anonymous tip; or
(5) a government or law enforcement inquiry.

Assuming it is not a law enforcement inquiry (which typically will necessitate some kind of internal review), a company must first evaluate the credibility of the complaint or allegation that might trigger an internal investigation. The company should have a compliance plan in place designating a person or committee with knowledge of the company's key players and departments. That person or team should be notified of all triggers and be responsible for conducting an initial assessment of the complaint or allegation as well as logging all triggering events in a centralized location to enable the company to monitor complaints for trends. This serves a dual purpose, as logging and monitoring triggering events help show that the company has an effective compliance plan and that it does not turn a blind eye to complaints and misconduct allegations, but addresses them by taking them seriously and investigates them.

Companies must also ensure that the persons charged with initially evaluating complaints are free from perceived bias or taint. This is vital as an "insider" may taint the effort to maintain the perception of independence. Companies should have a protocol in place that mandates that a person who is tasked with investigating a complaint or allegation and who is also implicated in that complaint or allegation must recuse himself or herself. The company should also have a designated alternative.

While there is no exact formula to determining whether an internal investigation should be conducted, the following chart lists some of the most important questions underlying the decision process.

Evaluating Triggers
When No Government Involvement Is Anticipated

- ❒ Is there a legal duty to investigate the complaint or allegation?
- ❒ Who must be notified and included in the evaluation process?
- ❒ Is the designated person or team independent and objective?
- ❒ Is the source of the complaint or allegation credible?
- ❒ Is the source an employee subject to protections, and does the law provide such source an incentive to proceed against the company?
- ❒ Have there been prior similar complaints or allegations?

Navigating Ethical Issues

Corporate internal investigations can implicate a number of ethical issues for white collar attorneys. Ethical issues come in all shapes and sizes and can arise at any point in the internal investigation, or even before the investigation has begun! For example, an attorney has a duty to ensure that he or she is not being compensated with tainted assets (such as stolen money, ill-gotten gains, etc.). Nonetheless, most ethical issues tend to arise at the beginning of the representation. Conflicts of interest leading to the potential disqualification of counsel can arise where corporate counsel fails to clearly define the identity of the client (for example, the company or the company's board of directors) or fails to define the purpose and scope of the internal investigation.

Once a company decides to investigate potential wrongdoing, it must define the scope and extent of the internal investigation. A company must balance competing interests. On the one hand, business as usual must go on, because most companies cannot afford to spend precious resources investigating frivolous and incredible allegations of misconduct. On the other hand, credible allegations of misconduct must be investigated and the results documented in a way that will withstand subsequent scrutiny. One critical factor in defining the scope of the internal investigation is how quickly the company needs the information. The scope of the investigation can depend, in part, on whether the company wants to complete its investigation before the government becomes aware of the issue; whether the government is willing to defer its own investigation to the completion of the company's internal investigation; the timeline for making any mandated self-disclosures to the government; and the need to establish affirmative defenses for the company. The scope of an internal investigation also can be defined by inquiries from government investigators (whether informal or by subpoena), lawsuits or pre-lawsuit demands, and internal compliance reports from employees or customers. Whatever the scope of the internal investigation, it must be clearly defined.

After defining the scope of the internal investigation, the company should prepare and formally approve a written document "chartering" the investigation. The charter can take the form of a resolution from the board of directors or the board audit committee, an engagement letter, or a memorandum issued by senior management or the general counsel. The charter should be a "living document" because companies may need to re-evaluate the scope of the investigation based on new information and allow the action plan to develop and evolve as documents are reviewed and witnesses are interviewed.

Charters for internal investigations should include a number of the following basic elements:

- Specify, where appropriate, that the investigation is being conducted in anticipation of litigation and for the purpose of obtaining legal advice.
- Clearly identify the client—the company, the board of directors, or a board committee.
- Describe the scope of the internal investigation.
- Identify who is responsible for searching for documents, including electronically stored information (ESI).
- Identify who will be interviewed, at least initially.
- Describe how witness interviews will be conducted.
- Explain how third-party witnesses will be handled.
- Describe who the investigators will report to (the entire board, liaison, etc.).

In order to preserve the company's attorney-client privilege during an internal investigation conducted on behalf of a company, an attorney for the company should give some kind of *Upjohn* warning to a company employee before beginning an interview. There are several parts to an *Upjohn* warning. The interviewer, preferably counsel, should state to the employee/interviewee that:

- counsel represents the company and not the employee personally;
- the purpose of the interview is to learn about facts that will enable counsel to give legal advice to their client, the company;
- the conversation is privileged;
- the privilege belongs *solely* to the company because it is the client;
- it is entirely up to the company whether to waive that privilege; and
- the conversation should be kept confidential in order to preserve the attorney-client privilege.

The importance of providing an *Upjohn* warning is illustrated in *United States v. Ruehle*,[1] in which outside counsel conducted an internal investigation on behalf of a company and interviewed company employee William J. Ruehle. During the interview, Ruehle made statements that exposed him to criminal liability. Ruehle was charged, and at his criminal trial, the prosecution sought to admit Ruehle's statements, while Ruehle sought to suppress them.

Ruehle argued that the statements were privileged, because outside counsel had represented him and other individual officers in shareholder suits, and that outside counsel failed to advise him that his statements could be disclosed to third parties. The court found no record that outside counsel ever gave Ruehle an *Upjohn* warning, which would have put Ruehle on notice that outside counsel did not represent him. In so finding, the court gave weight to the fact that the interviewing attorney's notes did not state that an *Upjohn* warning had been given.[2]

Furthermore, even if the attorney gave an *Upjohn* warning, the court found that it was inadequate, because the attorney failed to inform Ruehle that counsel were not representing him and that his statements could be shared with third parties, including the government, for the purpose of a criminal investigation.[3] Although the decision was reversed on the grounds that Ruehle knew his statements would be disclosed, the case illustrates the harsh consequence of failing to give an adequate *Upjohn* warning.

Thus, an attorney conducting an internal investigation should provide some kind of an *Upjohn* warning to his client's employees to ensure that his client is the holder of the privilege. This seems simple enough, but may cause tension, especially if an attorney is tasked with interviewing C-Suite executives. Another ethical issue that an attorney should consider is whether it would be appropriate to offer separate, un-conflicted counsel to employees who are going to be interviewed.

Witness Preparation

Following an internal investigation, company counsel may be tasked with preparing company witnesses for law enforcement interviews, depositions, or even court testimony. It is often a challenge to convince a corporate manager that he or she needs extensive preparation before testifying in a legal proceeding, particularly if that corporate manager is "just a witness." Clients, especially those who have pursued higher education, are often insulted at the notion that they need an attorney to prepare them to testify. They believe that they are going to simply answer questions—something they have done hundreds of times. It is your job as their attorney to dispel them of this myth.

Testifying in a legal proceeding is never simple, even if your client is "just a witness." Witnesses may be eager to complete their testimony and end up providing more information than a question calls for. An experienced attorney can tell you that this has the opposite effect: it does not shorten the process; it makes it longer. This is because the questioner now has more information than was sought, and any good questioner will probe around these additional areas of testimony in hopes of finding information related to his or her original question.

Witness preparation should never be an afterthought.

Clients may also be eager assist the process and in their attempts to be helpful will end up guessing and speculating. This only confuses the record and is detrimental to the fact-finding process because the witness is speaking about things that he or she has no personal knowledge about. An attorney should ensure that his or her client knows the difference between guessing and speculating, on the one hand, and estimating, on the other hand.

Lastly, an attorney should advise the client to listen to the question and answer *only* the question before them. This is best exemplified by the question "Do you know what time it is?" The right answer is the difference between a conversation and testimony. In testimony, the right answer is "yes" and nothing else. Testimony should be succinct and to the point. Testimony is not a conversation. It does not "flow" or entertain. It has its own language and its own rhythm.

Witness preparation should never be an afterthought. It is an attorney's job to ensure that his or her client does not go into a legal proceeding without being prepared, even if the client is "just a witness." At the very least, an attorney should present the client with the following "Ten Rules to Testifying."

Ten Rules to Testifying

1. Take Your Time – A witness should not rush to answer a question.
2. Testimony Is Forever – A witness cannot simply take back what he or she said while testifying. A witness should choose words carefully.
3. Tell the Truth – A witness will be under oath in a legal proceeding.
4. Be Polite – A witness should not get defensive or argumentative.
5. Understand the Question – A witness should never answer a question he or she doesn't understand.
6. "I Don't Remember" Is an Acceptable Answer – If a witness does not remember, he or she should simply say so.
7. Do Not Guess or Speculate – This only confuses the record. "I don't know" is also an acceptable answer.
8. Do Not Volunteer – A witness should answer *only* the question before him or her.
9. Carefully Read Documents – A witness should thoroughly read all documents placed before him or her.
10. Listen to Counsel – A witness hired an attorney for a reason: his or her expertise.

Witness preparation is no easy feat, and every witness needs a different amount of preparation, while most witnesses will likely feel that no preparation is needed. Remember, it is your job as an attorney to ensure that at the very least your client knows the "Ten Rules to Testifying."

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NOTES

1. United States v. Ruehle, 583 F.3d 600 (9th Cir. 2009).
2. United States v. Nicholas, 606 F. Supp. 2d 1109, 1111 (C.D. Cal.), *rev'd sub nom*. United States v. Ruehle, 583 F.3d 600 (9th Cir. 2009).
3. *Id*. at 1117.

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Cooperation Credit, Ethical Implications, Privilege, and *Upjohn* Warnings

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Recent Agency Pronouncements on Cooperation Credit

Relatively recent policy pronouncements by law enforcement agencies, including the U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC), have led to calls for revisions to the information provided when giving *Upjohn* warnings during internal investigations. These pronouncements include the newly titled DOJ *Justice Manual*, the now-permanent DOJ FCPA Pilot Program (a/k/a DOJ's FCPA policy), and the SEC's *Enforcement Manual*. A brief review of the pertinent elements of each is warranted.

Under the *Justice Manual*, companies can earn significant, albeit unquantified, cooperation credit, only if they "identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority."[1] Additionally, the *Justice Manual* clearly states:

> Provable individual culpability should be pursued, particularly if it relates to high-level corporate officers, even in the face of an offer of a corporate guilty plea or some other disposition of the charges against the corporation, including a deferred prosecution or non-prosecution agreement, or a civil resolution.[2]

These policy pronouncements are consistent with the Deputy Attorney General's recent announcement that prosecutors "should be focused on trying to identify culpable individuals, and not just corporations."[3] Thus, DOJ's focus on individual culpability is very likely to continue, if not increase.

DOJ's FCPA policy also obligates companies to disclose all relevant facts in order to obtain cooperation credit, up to and including a declination, which is now a presumed outcome for institutions that self-report, cooperate fully, and remediate. As the *Justice Manual* states:

> When a company has voluntarily self-disclosed misconduct in an FCPA matter, *fully cooperated*, and timely and appropriately remediated, all in accordance with the standards set forth below, *there will be a presumption that the company will receive a declination absent aggravating circumstances involving the seriousness of the offense or the nature of the offender*. Aggravating circumstances that may warrant a criminal resolution include, but are not limited to, involvement by executive management of the company in the misconduct; a significant profit to the company from the misconduct; pervasiveness of the misconduct within the company; and criminal recidivism.[4]

For DOJ's FCPA policy, "full cooperation" means timely disclosure of all relevant facts, such as those "gathered during a company's independent investigation" and attributable to "specific sources where such attribution does not violate the attorney-client privilege, rather than a general narrative of the facts."[5] The SEC's *Enforcement Manual* is less detailed on the requirements for cooperation credit, at least with respect to corporate clients. It does, however, include the requirement that companies provide the Commission's Staff "with all information relevant to the underlying violation. . . ."[6] As a practical matter, providing such information is almost certain to include facts gathered during the course of internal investigation interviews.

In fact, it may prove difficult to disclose relevant facts, attributable to specific sources and derived solely through internal investigation interviews, without waiving the attorney-client privilege held by the institution on whose behalf the investigation was conducted. Unless those facts are presented as wholly hypothetical, with equally hypothetical attribution—which may not meet certain prosecutors' definitions of "attributable to specific sources"—there is a risk that a later challenge concerning privilege waiver will be difficult to defeat. Recent case law further confirms this risk by holding that company counsel that provided oral downloads of witness interviews to adverse parties, such as the SEC, waived the company's privilege.[7]

***Upjohn* Warnings**

In *Upjohn v. United States*, the Supreme Court confirmed that communications between corporate counsel and corporate employees *can* be privileged—with the company holding the privilege—as long as the primary purpose of the communication was to provide legal advice to the company.[8] This holding makes sense, as "Officers, directors, employees, and shareholders are the constituents of the corporate organizational client."[9] Thus, one of the primary purposes of providing an *Upjohn* warning is to protect the attorney-client communication privilege held by the institution.

In the context of employee interviews by company counsel during an internal investigation, the privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney. As the Supreme Court noted:

> [T]he protection of the privilege extends only to communications, and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.[10]

In essence, this means that the answers provided by interviewees are generally not privileged. The privilege really covers the questions that are asked and/or the combination of both the questions and answers in the interview context when the interview is conducted for the purposes of providing legal advice to the institutional client. It does not cover the underlying facts incorporated into an interviewee's answer.

The government frequently insists that it is interested only in facts and does not, generally, seek to obtain information protected by a valid claim of attorney-client communications privilege. Nor can the government leverage cooperation credit to require privilege waivers.[11] The government is free, however, to question anyone willing to speak with it about the underlying facts relevant to most internal investigations. As the Supreme Court noted in *Upjohn*:

> the Government was free to question the employees who communicated with [the General Counsel] and outside counsel. Upjohn has provided the IRS with a list of such employees, and the IRS has already interviewed some 25 of them.[12]

Providing adequate *Upjohn* warnings is critical not only to establishing the proper foundation for a claim of attorney-client communications privilege that only the institutional client can assert or waive, it is also in keeping with the ethical rules governing attorneys' conduct. For example, the ethical rules are relatively clear that:

> [i]n dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client *when the lawyer knows or reasonably should know that the organization's interests are adverse* to those of the constituents with whom the lawyer is dealing.[13]

Situations where the interests of the institutional client and individual witness *are* adverse at the nascent stages of an internal investigation, however, are the exception rather than the rule. Rarely does one initiate an internal investigation with a willing interviewee who acknowledges conduct adverse to his/her employer's interests. More often than not, adversity is not known or even easily discernable at the outset of an internal investigation. In those situations, it is still a good practice to provide an *Upjohn* warning to protect the institution's attorney-client communications privilege, confirm who represents whom, and because there is almost always a possibility that interests *may* become adverse. Once again, the ethical rules provide guidance:

> There are times *when the organization's interest may be or become adverse to those of one or more of its constituents.* In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.[14]

Since it is often impossible to know if interests *may become adverse* at the outset of, and, at times, even well into, an investigation, prudence dictates providing an *Upjohn* warning as a matter of course when interviewing company employees and other affiliated individuals. Providing an *Upjohn* warning addresses these concerns by making it clear that you represent the institution, not the individual, and that the institution holds the attorney-client communications privilege and has the ability to assert or waive it.

The American Bar Association's guidance on *Upjohn* warnings provides the following template as a suggested approach:

> I am a lawyer for or from Corporation A. I represent only Corporation A, and I do not represent you personally.
>
> I am conducting this interview to gather facts in order to provide legal advice for Corporation A. This interview is part of an investigation to determine the facts and circumstances of X in order to advise Corporation A how best to proceed.
>
> Your communications with me are protected by the attorney-client privilege. But the attorney-client privilege belongs solely to Corporation A, not you. That means that Corporation A alone may elect to waive the attorney-client privilege and reveal our discussion to third parties. Corporation A alone may decide to waive the privilege and disclose this discussion to such third parties as federal or state agencies, at its sole discretion, and without notifying you.

> In order for this discussion to be subject to the privilege, it must be kept in confidence. In other words, with the exception of your own attorney, you may not disclose the substance of this interview to any third party, including other employees or anyone outside of the company. You may discuss the facts of what happened but you may not discuss *this* discussion.
>
> Do you have any questions?
>
> Are you willing to proceed?[15]

This template accomplishes five important objectives:

(i) It clarifies that the lawyer conducting the interview represents the institution, not the individual;

(ii) It clarifies that the interview is privileged because the lawyer is conducting it to provide legal advice to his/her client;

(iii) It clarifies that only the institution can decide whether to assert or waive the privilege;

(iv) It clarifies that the discussion must be kept confidential in order to preserve the privilege; and

(v) It clarifies that the individual is willing to proceed.

In the same vein, the ABA's *Upjohn* guidance recommends that the warning be given before the substantive interview begins and that it be memorialized in the attorney's notes or a memo of the interview.[16] Under appropriate circumstances, it may also be advisable to provide the *Upjohn* warning in writing, although a well-documented account of the oral rendering of an *Upjohn* warning should suffice, provided it includes the elements noted above, rather than simply stating that an *Upjohn* warning was provided.[17]

Key Takeaways

If provided correctly and memorialized in a contemporaneous memo, an *Upjohn* warning can ensure that investigating attorneys adhere to their ethical obligation to state who they represent and who they do not. Such a warning can also clarify who holds and/or can waive the attorney client privilege, which reinforces the information provided concerning representation. And it also provides some security that the interviewee will keep the matter confidential and has agreed to the interview voluntarily. These are all important factors to memorialize in case there is ever a dispute about what was or was not said during the interview. To buttress these points, particularly in light of agency policies that reward institutions for disclosing facts concerning the culpability of individuals, additional safeguards should also be considered.

First, both for accuracy and for further support if there is a dispute, it makes sense to have at least two attorneys present at such interviews, where feasible. This approach enables both attorneys to review and provide input concerning the interview memo before it is finalized. It also ensures that there will be two witnesses, supported by a contemporaneous written memorialization, in the event that there is a later dispute about what transpired during the interview.

Second, although the ABA template is very comprehensive, particular circumstances may warrant that additional elements be included in particular *Upjohn* warnings. For example, if you represent a company that has self-reported under the DOJ's FCPA policy and is hoping to maximize its ability to obtain cooperation credit, it may make sense to inform the witness that there is an ongoing investigation with which the company is cooperating and during the course of which it may share information gleaned from the interview with the government. This will not always be practical or advisable, to be sure, and it could even harm the company's chances at cooperation credit in certain circumstances. For example, if DOJ or SEC has an ongoing investigation, and there has been no public disclosure about the self-report, disclosing the ongoing investigation during an internal investigation interview may undermine the government's investigation if there is a leak about it. Nonetheless, such information is worth considering under the circumstances described above.

Third, there may be circumstances where it makes sense to provide the *Upjohn* warning in writing. Keeping with the FCPA example, if the interview involves witnesses who do not have a strong command of the English language, it is always a good idea to use an interpreter for the actual interview. Furthermore, since the *Upjohn* warning is replete with legal concepts concerning representation issues and privilege that are not common concepts for the average non-lawyer, much less so the average non-lawyer who does not speak English fluently, providing a written version in both English and the interviewee's native language may prove beneficial if recollections later diverge as to what was or was not said. Doing so will also offer the interviewee an opportunity to review the warning in his or her native language and ask questions.

Conclusion

The ABA template continues to provide attorneys conducting internal investigations with appropriate guidance to protect the client's attorney-client communications privilege and ensure that the attorney follows applicable ethics rules. Supplemental practices, including preparing a contemporaneous and detailed memo of the interview and having an additional attorney present (when feasible), can also be very beneficial in the face of a dispute over what was or was not said. Additional content in the *Upjohn* warning—such as explicit statements about the institution's intent to share the contents of the interview—may also be beneficial in certain circumstances, even if not required, to ensure that there was no misunderstanding about what might or might not occur with respect to the information learned during the interview. However, thought should be given to the unintended consequences of any such additional content to ensure that you are not harming your client's efforts to obtain cooperation credit by providing information that might later be perceived as undermining an ongoing investigation.

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NOTES

1. U.S. Dep't of Justice, Justice Manual [hereinafter JM] 9-28.700, Principles of Federal Prosecution of Business Organizations: The Value of Cooperation (Nov. 2015), www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.010. The *Justice Manual* was formerly known as the *U.S. Attorney's Manual*.
2. *Id*. at 9-28.210, Principles of Federal Prosecution of Business Organizations: Focus on Individual Wrongdoers.
3. *2.26.18 – Rosenstein on Yates Memo*, C-Span (Mar. 8, 2018), www.c-span.org/video/?c4717957/22618-rosenstein-yates-memo.
4. JM, *supra* note 1, at 9-47.120, FCPA Corporate Enforcement Policy (Nov. 2017), www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977.
5. *Id*.
6. U.S. Sec. & Exch. Comm'n, Enforcement Manual § 6.1.2 (Nov. 28, 2017), www.sec.gov/divisions/enforce/enforcementmanual.pdf. (The *Enforcement Manual* was first published in 2008.)
7. *See* SEC v. Herrera, 324 F.R.D. 258 (S.D. Fla. 2017).
8. Upjohn Co. v. United States, 449 U.S. 383 (1981).
9. Model Rules of Prof'l Conduct r.1.13(a) cmt. 1 (Am. Bar Ass'n 2004).
10. *Upjohn*, 449 U.S. at 395–96 (quoting Philadelphia v. Westinghouse Elec. Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962)).
11. JM, *supra* note 1, at 9-28.720 ("Eligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection.").
12. *Upjohn*, 449 U.S. at 396.
13. Model Rules of Prof'l Conduct r. 1.13(f) (Am. Bar Ass'n 2004) (emphasis added).
14. Model Rules of Prof'l Conduct r. 1.13(f) cmt. 10 (Am. Bar Ass'n 2004) (emphasis added).
15. ABA White Collar Crime Working Group, Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts with Corporate Employees 3 (July 17, 2009). N.B.: The author of this article co-chaired the ABA's Upjohn Warnings Task Force that issued this guidance.
16. *Id*.
17. *Id*. at 5–6.

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Cooperate and Risk Waiver? Balancing the Benefits of Government Cooperation with the Risks of Privilege Waiver in Conducting Internal Investigations

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When faced with suspected wrongdoing, companies hire legal counsel to conduct privileged internal investigations, often running parallel with existing or subsequently initiated government investigations regarding the same underlying conduct. Privileged investigations serve several purposes, including allowing the company to uncover wrongdoing and take appropriate remedial action. Though kept entirely confidential in many cases, in certain situations it may be advantageous for the company to choose to share certain information with the government. As anyone who has conducted or been part of an internal investigation knows, the *Upjohn* warning is an ever-present reminder that the company can unilaterally choose to disclose information to third parties—including the government.

Historically, the disclosure of information to the government has carried with it a somewhat limited risk of privilege waiver. Recent court decisions, however, highlight the current-day challenges of balancing government cooperation with privilege. Risk of waiver should no doubt impact what information companies and counsel choose to share with the government, and it should also impact what the government expects when it comes to cooperation.

This article examines recent U.S. and U.K. decisions addressing waiver of the attorney-client privilege and work-product doctrine in the internal investigations context, which seem to suggest a trend toward an erosion of privilege. Given that the government's cooperation policies present unique challenges for both corporations and individuals seeking cooperation credit, this article offers recommendations for practitioners who must navigate the privilege issues that stem from internal investigations.

Brief Overview of the Attorney-Client Privilege and Work-Product Doctrine

Attorney-Client Privilege

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law."[1] The privilege applies to confidential communications between an attorney and client if the communication was made for the purpose of obtaining or providing legal advice to the client, so long as the communications are intended to be and are ultimately kept confidential.[2] It is well established that the attorney-client privilege "protects communications rather than information."[3]

Although the attorney-client privilege is absolute in that it cannot be overcome by a showing of hardship by another party, generally speaking the attorney-client privilege is waived when otherwise privileged communications are disclosed to third parties, including the government (and in other circumstances such as the crime-fraud exception).

Work-Product Doctrine

The work-product doctrine, codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure, generally provides that a party may not ordinarily discover documents and tangible things prepared by counsel (or others acting at the direction of counsel) in anticipation of litigation, unless they are otherwise discoverable and the party seeking discovery shows that it has a substantial need for the materials and cannot, without undue hardship, obtain its substantial equivalent by other means.[4]

Generally speaking, "materials containing mental impressions, conclusions, opinions, or legal theories of an attorney or other representative that were prepared in anticipation of litigation are protected from disclosure to third parties."[5] "[T]o demonstrate that material is protected by the attorney work product doctrine, a party need only show that in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation."[6]

Although voluntary disclosure of materials to third parties does not necessarily destroy work-product protection, waiver does occur when protected materials are disclosed in a manner that "substantially increased the opportunities for potential adversaries to obtain the information."[7] By way of example, the majority of courts have found that a corporation's disclosure of protected materials to its independent auditor does not waive work-product protection because outside auditors do not have the "tangible adversarial relationship" requisite for waiver.[8] Courts also find that work-product protections are not lifted when materials are shared with a third party that shares a "common interest," although courts disagree as to how much commonality is required in order to be protected by the doctrine. Nevertheless, as discussed in greater detail below, disclosing work-product materials to the government during the course of a government investigation waives work-product protections as to third parties.

Assessing the Risks of Cooperation: The Government's Position on Cooperation and Privilege Waivers and Additional Considerations Regarding the Attorney Proffer

DOJ Policies Require Companies to Provide Facts Discovered During Internal Investigations

The *U.S. Attorneys' Manual* (USAM) explains that a company is not required to waive attorney-client privilege or attorney work-product protection in order to receive cooperation credit, and specifically directs prosecutors not to ask for a waiver.[9] However, the stance of the U.S. Department of Justice (DOJ) on privilege waiver has evolved significantly over the past twenty years since adopting its first policy statement on corporate cooperation.

DOJ had no formal policy regarding the prosecution of corporate entities until the 1999 issuance of the "Holder Memorandum."[10] In stressing the importance of corporate cooperation in an investigation, the Holder Memorandum noted: "In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation . . . to disclose the complete results of its internal investigation, and to waive the attorney-client and work product privileges." The guidelines in the Holder Memorandum were reinforced by then Deputy Attorney General Holder's successor in the 2003 "Thompson Memorandum"[11] and again in 2006 in the "McNulty Memorandum."[12]

DOJ's insistence on privilege waivers, however, was controversial, causing significant backlash from corporate America. Congress eventually threatened legislation that would have prohibited government attorneys from demanding or even requesting that a corporation waive attorney-client privilege or use a corporation's failure to waive privilege as a factor in deciding whether to bring charges.[13]

In 2008, DOJ replaced the then-operative McNulty Memorandum with the "Filip Memorandum"[14] and revised the USAM's "Principles of Federal Prosecution of Business Organizations" (the "Principles")[15] accordingly to address Congress's concern with privilege waivers. Going forward, DOJ could require, as part of a company's cooperation, that it disclose *facts* revealed during internal investigations, but DOJ could no longer require privilege and work-product waivers. The

Principles now expressly state that cooperation credit only depends on disclosure of "facts known to the corporation about the putative criminal misconduct under review" rather than waiver of the attorney-client privilege.[16]

In September 2015, DOJ issued the "Individual Accountability for Corporate Wrongdoing" memorandum under then–Deputy Attorney General Sally Yates.[17] The Yates Memo states that in order for a corporation to receive *any* consideration for cooperation credit, it *must* "provide to the [DOJ] all facts relating to . . . misconduct" and "identify culpable individuals at all levels."[18] The Yates Memo gives a somewhat anemic nod to the privilege issue inherent in its directives, noting cryptically that companies cooperate completely as to individuals, "*within the bounds of the law and legal privileges.*"[19]

DOJ's current guidance on cooperation presents an inherent conflict over whether a company can provide all facts relating to misconduct without directly or inadvertently waiving privilege.

DOJ's FCPA Corporate Enforcement Policy[20] also exhibits a tension between what is required for a corporation to be considered fully cooperative versus maintaining and protecting privileges. DOJ's FCPA Corporate Enforcement Policy explains that when a company has voluntarily self-disclosed misconduct in an FCPA matter, fully cooperated, and timely and appropriately remediated in accordance with the standards set forth in the policy, there will be a presumption that a company will receive a declination, absent aggravating circumstances.[21] Notably, in a recent declination, DOJ explained that the company's "provision of all known relevant facts about the individuals involved in or responsible for the misconduct" factored into DOJ's decision to close its investigation against the company. Once again, DOJ's FCPA Corporate Enforcement Policy gives a nod to privilege issues, but what it does *not* address is how a company is supposed to provide what is required—*all facts*—while still protecting privilege.

Thus, DOJ's current guidance on corporate cooperation presents an inherent conflict over whether a company can, practically speaking, provide *all facts* in order to secure cooperation credit without directly or inadvertently waiving privilege.

SEC Policies Similarly Require Disclosure of Facts Obtained in Internal Investigations

The Securities and Exchange Commission (SEC) follows guidelines similar to DOJ's Principles including assessing "whether the company provided the SEC with the results of its investigation and cooperated with the SEC's investigation" (known as the "Seaboard Factors").[22]

The SEC's *Enforcement Manual* states, "Voluntary disclosure of information need not include a waiver of privilege to be an effective form of cooperation and a party's decision to assert a legitimate claim of privilege will not negatively affect their claim to credit for cooperation."[23] However, it goes on to say that "if a party seeks cooperation credit for timely disclosure of relevant facts, the party *must disclose all such facts within the party's knowledge*."[24] Thus, the SEC's policies similarly raised the question of whether a company can practically disclose relevant facts and findings of internal investigations without risking waiver of privilege and work-product protections.

Recent Decisions Demonstrate the Importance of Taking Precautionary Steps to Protect Privilege When Sharing Information with the Government

An examination of recent decisions that implicate attorney-client privilege and work-product protections raises issues for lawyers to consider when balancing the benefits of cooperation with potential waiver.

Oral Downloads: *SEC v. Herrera*

The Principles provide that prosecutors may not request "protected notes or memoranda generated by the interviews conducted by counsel for the corporation," but they may request relevant factual details an attorney obtains from interviews.[25] However, in light of *SEC v. Herrera* and similar court decisions, disclosing facts by way of "oral downloads" may still risk attorney-client privilege and work-product doctrine waivers.

In *SEC v. Herrera*,[26] a federal magistrate judge in the Southern District of Florida found that a law firm waived work-product protections over its interview notes and memoranda when it gave the government "oral downloads" of the witness interviews conducted during the course of its internal investigation. In *Herrera*, U.S.-based General Cable Corporation (GCC) retained a law firm to provide legal advice regarding accounting irregularities the company identified at its Brazilian subsidiary. The law firm conducted an internal investigation, during which it interviewed GCC employees and drafted attorney notes and memoranda of each interview. The law firm disclosed to the SEC that it was conducting an investigation of the accounting errors, and the SEC initiated its own investigation. As part of its inquiry, the SEC issued several requests for information to GCC and asked for the law firm's investigative findings.

GCC's law firm provided information about its findings, including a PowerPoint presentation and specific information from witness interviews. The presentation, which was labeled "FOIA Confidential Treatment Request[ed]," contained an events timeline, the names of witnesses interviewed, details regarding the accounting discrepancies at issue, and the results of its investigation. Counsel from the investigating law firm met with SEC staff and delivered the presentation along with "oral downloads" of twelve witness interviews.

The SEC's investigation eventually resulted in a cease-and-desist order against GCC. The SEC later brought a civil action against three former GCC employees, and those employee defendants issued a Rule 45 subpoena to the law firm seeking production of various materials from its internal investigation. The employees eventually moved to compel production of the law firm's interview notes and memoranda, asserting that the law firm had waived work-product protection over the materials by providing oral downloads to the SEC. The law firm argued that verbally providing information from witness interviews did not waive work-product protection for the underlying materials.

The magistrate judge determined that there was no meaningful distinction between providing information from witness notes and memoranda orally and actually producing the witness interview notes and memoranda themselves. The law firm conceded that the oral downloads provided the substance of the witness interviews rather than only providing detail-free conclusions or general impressions. The magistrate concluded that the oral downloads served as the “functional equivalent” of giving the actual witness notes and memoranda to the SEC.

The law firm conceded that the PowerPoint prepared for its presentation to the SEC did not constitute work product (noting specifically that it simply listed the names of interviewees in the presentation). The magistrate agreed, because the presentation was prepared specifically for the SEC and, notably, contained only facts rather than attorney mental processes.

Herrera’s holding that an oral download to the government can result in a waiver of work-product protection over witness interview memoranda and the attorney’s contemporaneous notes is not the first decision to find privilege waiver resulting from oral descriptions of investigation materials. Indeed, *Herrera* looked to two prior decisions—*SEC v. Vitesse Semiconductor Corp.* and *SEC v. Berry*—in reaching its conclusion on waiver.

In *SEC v. Vitesse Semiconductor Corp.*,[27] Southern District of New York Judge Jed Rakoff compelled production of interview notes (which had not been memorialized into formal interview memoranda) because the oral download provided to the SEC contained “very detailed, witness-specific” information from the witness interviews.[28] Judge Rakoff noted that waiver “would probably not apply” if oral downloads merely offered general impressions without organizing the material “in a witness-specific fashion,” but might very well apply if a party “orally relayed in substantial part” the contents of witness interviews to the SEC.[29]

Similarly, in *SEC v. Berry*,[30] the U.S. District Court for the Northern District of California held that oral descriptions of interviews resulted in waiver of privilege of the final interview memoranda (but not draft memoranda or contemporaneous attorney notes) because it appeared that the oral downloads relied exclusively on the final interview memoranda. Accordingly, counsel should be mindful of the waiver risks associated with the *Herrera* line of cases when preparing for and giving “oral downloads” to the government.

Implied Waiver: *In re Grand Jury Investigation*

A recent decision from the U.S. District Court for the District of Columbia found that disclosing privileged communications to DOJ resulted in a waiver, and as a result, the government was allowed to compel the interviewing attorney's testimony before a grand jury.

The *In re Grand Jury Investigation*[31] decision by Chief Judge Beryl A. Howell relates to the DOJ Special Counsel's Office (SCO) investigation into foreign interference in the 2016 presidential election. In connection with a request for documents and information by the Foreign Agents Registration Act (FARA) Registration Unit, an attorney prepared letters on behalf of two clients, which she then submitted on their behalf. As part of the SCO's investigation, the SCO examined representations made by the attorney in the two letters.

The SCO issued a subpoena to the attorney, seeking to compel grand jury testimony regarding certain aspects of her legal representation of the clients. The attorney refused to testify because her clients invoked attorney-client and work-product protections. The SCO specifically sought to ask the attorney the following questions about eight topics regarding the FARA submissions:

(1) Who are the sources of the specific factual representations in the November 2016 and February 2017 letters that the attorney sent to the FARA Registration Unit?

(2) Who are the sources of the email retention policy attached to the November 2016 letter?

(3) Did the targets or anyone at the target company approve the two letters before the attorney sent the submissions to the FARA Registration Unit?

(4) For each source identified in response to the above three questions, what did the source say to the attorney about the specific statement in the letters?

(5) When and how did the attorney receive communications from the clients, including whether the conversations took place by telephone or email?

(6) Did anyone raise questions or corrections with respect to the letter?

(7) Did the attorney memorialize the conversations with the clients in any way?

(8) Was the attorney careful with submitting the representations to the DOJ, and whether it was the attorney's practice to review the submissions with her clients in advance?

The SCO asserted that the attorney-client privilege and work-product protections were overcome by the crime-fraud exception and implied waiver.[32] With respect to implied waiver, the SCO asserted that the targets impliedly waived the attorney-client privilege by disclosing the letters to DOJ and that waiver extended to the targets' specific conversations with the attorney that were substantively released to DOJ in the letters.[33]

The court determined that upon voluntarily submitting the letters to DOJ, the targets had waived any attorney-client privilege in their contents. The submissions "made specific factual representations to the DOJ that are unlikely to have originated from sources other than the targets" and, in large part, "were explicitly attributed to one or both of the targets' recollections." The court also determined that the targets impliedly waived the attorney-client privilege with respect to "their communications with the [attorney] to the extent that these communications related to the FARA submissions' contents."[34] Thus, the attorney-client privilege did not prevent the SCO from compelling the attorney's testimony about the limited subjects already disclosed in the FARA submissions.

As to waiver of work-product protection, the court found that, without further foundation, only the seventh question—*Did the attorney memorialize the conversations with the clients in any way?*—sought opinion work product (which the court would not compel), whereas the remaining questions posed by the SCO amounted, "if anything," to fact work product only. Thus, answers could be compelled if the SCO could show a "substantial need for the materials and an undue hardship in acquiring the information any other way."[35] And because the SCO could not plausibly obtain the evidence it sought from sources other than the attorney or targets themselves, the court granted the SCO's motion to compel the attorney's testimony before a grand jury.

The court rejected the targets' reliance on the Fourth Circuit's decision in *In re Grand Jury Subpoena*, which held that "the question 'What did [the Witness] tell you' sought opinion work product."[36] Instead, the court pointed to Judge Niemeyer's dissenting opinion in *In re Grand Jury Subpoena*, drawing a distinction between an attorney's present memory of a witness statement and the attorney's contemporaneous notes and memoranda of a witness statement, finding that only the latter "provides a window into the attorney's thought process." The court explained that Judge Niemeyer's analysis was "more persuasive and better comports with D.C. Circuit work-product privilege jurisprudence, which rejects 'a virtually omnivorous view' of opinion work product, than the majority of the Fourth Circuit panel" in *In re Grand Jury Subpoena*.[37] Judge Howell noted that the Fourth Circuit panel majority appeared to conflate as the same question "What did the client tell you?" and "What of importance did the client tell you?" when only the latter implicates opinion work product.[38] Relying on *Boehringer*, the court explained that the SCO sought to compel the attorney to testify only as to "factual information."[39] The fact that the attorney may have selected which disclosures to include or omit in the FARA submissions "does not bring the proposed testimony within the scope of opinion work product protection."[40]

Nevertheless, the district court's decision is significant: If an attorney submits information to a government agency on behalf of a client, and the attorney obtained the information as a result of conversations with the client, the attorney can be compelled to testify about the conversations and the context upon a showing of substantial need for the information and undue hardship in obtaining the information any other way. The SCO's aggressive and successful approach will not go unnoticed by other DOJ components (or other litigants for that matter), and this likely will not be the last time an attorney will be asked to answer questions stemming from client communications.

Privilege Considerations in Attorney Proffers

Though neither of the recent cases discussed above specifically involved attorney proffers, the rulings serve as a cautionary tale to counsel when deciding whether to divulge investigative findings to the government. Two cases illustrate the considerations for counsel before engaging in proffer sessions with the government.

An attorney proffer tells the government what a client would say if called to testify, and is often viewed as the first step in a defendant's effort to obtain a cooperation agreement.[41] Once the government has that information, the due process rights of any criminal defendant who might benefit from that information are implicated. The government of course has a duty to disclose all material evidence favorable to a criminal defendant.[42] "When the government violates this duty and obtains a conviction, it deprives the defendant of his or her liberty without due process of law."[43]

In *Triumph Capital*, the Second Circuit held that the government's obligation to disclose *Brady* material includes material exculpatory evidence communicated to the government by a witness's lawyer in an attorney proffer.[44] And in that case, the court found a reasonable probability that the evidence suppressed by the government would have resulted in a different outcome had the evidence been disclosed. Explaining that the government "inexplicably" withheld the agent's proffer notes, the court ruled that the defendant was entitled to a new trial on charges of racketeering, conspiracy, bribery, and wire fraud.[45]

In recognition of these due process concerns, the U.S. District Court for the Southern District of New York has confirmed that "[u]nder the circumstances set forth in *Triumph Capital*, the [U.S. Attorney's Office's] *Brady* obligations are broad enough to include exculpatory and impeachment information that might be found in communications from a witness's counsel to the USAO . . . ."[46] Counsel should understand that proffers made to the government could ultimately be revealed to criminal defendants, and, if necessary, counsel could be called to testify about conversations with their clients.

Privilege Considerations for Counsel Conducting Global Internal Investigations: The Complexity of Legal Professional Privilege in Internal Investigations in the United Kingdom

Director of the Serious Fraud Office v. Eurasian Natural Resources Corp. Ltd.

In 2017, the U.K. High Court issued a decision in *Serious Fraud Office v. Eurasian Natural Resources Corp. Ltd.*[47] with serious implications for litigation privilege and legal advice privilege ("legal professional privilege") in the context of internal investigations. The case stemmed from a whistleblower's allegations of bribery and financial misconduct in relation to a Eurasian Natural Resources Corp. (ENRC) foreign subsidiary. Based on those allegations, ENRC engaged counsel to conduct an internal investigation. ENRC reported its findings to the Serious Fraud Office (SFO), which investigates complex fraud and corruption matters in the United Kingdom. The SFO ultimately initiated a criminal investigation and moved to compel ENRC to produce documents. Invoking either litigation privilege, legal advice privilege, or both, ENRC refused to produce four categories of documents:

(1) attorney notes drafted by the law firm of the evidence given to the firm by individuals when asked about the events being investigated ("Category 1");

(2) materials generated by forensic accountants as part of "books-and-records" reviews ("Category 2");

(3) documents containing factual evidence that lawyers presented to an ENRC committee and its board of directors ("Category 3"); and

(4) documents referenced in a letter sent from lawyers to SFO, including emails between a senior ENRC executive and the head of ENRC's M&A group, a Swiss-qualified lawyer who had previously served as ENRC's general counsel ("Category 4").

ENRC asserted that the Category 1 documents were subject to litigation privilege and, alternatively, legal advice privilege; the Category 2 materials were subject to litigation privilege; the Category 3 documents were subject to legal advice privilege and, alternatively, litigation privilege; and the Category 4 emails were subject to legal advice privilege because they documented requests for, and the giving of, legal advice by a qualified lawyer acting in the role of a lawyer.

The High Court rejected the majority of ENRC's arguments, holding that litigation privilege did not apply to Categories 1, 2, and 3 because ENRC failed to satisfy the test that it was "aware of circumstances which rendered litigation between itself and the SFO a real likelihood rather than a mere possibility." Applying the so-called dominant purpose test, the High Court found that the documents for which litigation privilege had been asserted were not created for the dominant purpose of being used in defense to a criminal prosecution. The mere fact that ENRC anticipated that an SFO investigation was imminent alone was insufficient to sustain a claim of litigation privilege.

The High Court also rejected the argument that the attorney notes described in Category 1 were subject to legal advice privilege, concluding that there was no evidence that any of the witnesses interviewed were authorized to seek and obtain legal advice on behalf of ENRC. The High Court similarly rejected claims of legal advice privilege as to the emails in Category 4, finding that the former General Counsel was engaged not as a lawyer but as a "man of business" at the time the emails were exchanged—regardless of whether the former general counsel felt he was acting as a lawyer, at the time he served as head of M&A. Privilege extended only to the third category—those materials containing factual updates prepared by ENRC for the board of directors since, the court reasoned, they constituted factual information communicated from an attorney to the client in conjunction with legal advice. Ultimately, the High Court compelled production of the disputed documents in Categories 1, 2, and 4.

This narrow application of privilege in internal investigations sparked considerable debate and created challenges for practitioners seeking to retain privilege over attorney notes and other investigative materials. ENRC appealed the High Court's decision, and the English Law Society intervened. In the meantime, two other decisions added to the U.K. debate regarding the possibility of maintaining privilege over certain investigation materials in the United Kingdom.

R v. Jukes

In another recent U.K. decision, *R (For and on Behalf of the Health and Safety Executive) v. Jukes*,[48] the English Court of Appeal (Criminal Division) endorsed the *Eurasian Natural Resources* court's reasoning in ruling that litigation privilege did not apply to an employee's statement made to the company's lawyers as part of an investigation of a workplace death. The Court of Appeal explained that the statement was made while the Health and Safety Executive had not made a decision to prosecute, and matters were still in an "investigatory stage" which did not amount to adversarial litigation. Agreeing with the trial court, the Court of Appeal followed *Eurasian Natural Resources* in holding that a criminal investigation is not adversarial litigation for purposes of litigation privilege and that criminal proceedings cannot reasonably be contemplated "unless the prospective defendant knows enough about what the investigation is likely to unearth, or has unearthed, to appreciate that it is realistic to expect a prosecutor to be satisfied that it has enough material to stand a good chance of securing a conviction."[49]

The *Jukes* ruling effectively created a higher bar for claiming litigation privilege in the context of an investigation into potential criminal allegations than in the context of pending civil proceedings, emphasizing that litigation privilege is unlikely to attach to documents created in the early stages of such an investigation. But the *Eurasian Natural Resources* appeal decision, discussed in greater detail below, concluded that the High Court's distinction between civil and criminal proceedings was "illusory," and explained that "it would be wrong for it to be thought that, in a criminal context, a potential defendant is likely to be denied the benefit of litigation privilege when he asks his solicitor to investigate the circumstances of any alleged offence."

Bilta (U.K.) Ltd v. Royal Bank of Scotland Plc

In contrast with the High Court's sweeping rejection of privilege in *Eurasian Natural Resources*, in *Bilta (U.K.) Ltd v. Royal Bank of Scotland Plc*,[50] the court applied litigation privilege to protect interview notes and transcripts prepared following allegations raised by a U.K. tax authority. The case turned on whether the documents were created for the sole or dominant purpose of conducting litigation. Emphasizing that the answer to this question is fact-based, the court distinguished *Eurasian Natural Resources* on the ground that the interviews were conducted by outside counsel after the tax authority sent the company a letter stating that it had sufficient grounds to deny tax claims made by Royal Bank of Scotland (RBS). Referring to the letter as a "watershed moment," the court found that RBS's reaction to the letter demonstrated that it anticipated litigation to follow. The court also pointed out that the "ostensibly collaborative and cooperative nature" of RBS's interactions with the tax authority did not change that position.

The *Bilta* decision stressed the fact-intensive nature of determining whether legal professional privilege applies, and *Jukes* suggested that the privilege only applied where the purpose of the investigation is to defend litigation rather than prevent it. But the Court of Appeal in *Eurasian Natural Resources* ultimately rejected the suggestion that documents prepared for the purpose of settling or avoiding a claim are not prepared with the dominant purpose of litigation, concluding that this was an error of law. Indeed, the *Eurasian Natural Resources* appeal decision and its implications for legal professional privilege in the United Kingdom settled some, but not all, of the privilege issues that had been hanging in balance after the High Court's *Eurasian Natural Resources* decision and its progeny.

Court of Appeal's Ruling on Legal Professional Privilege in Eurasian Natural Resources a Mixed Bag for Companies Navigating Internal Investigations

In September 2018, the England and Wales Court of Appeal issued its highly anticipated decision in *Eurasian Natural Resources*,[51] providing some clarity regarding the applicability of litigation privilege in criminal investigations but limiting its ruling with respect to legal advice privilege.

The court upheld ENRC's claims of litigation privilege, finding clear factual grounds for ENRC to believe that a criminal prosecution was in "reasonable contemplation." The Court of Appeal further rejected the High Court's suggestion that, as a matter of principle, litigation privilege cannot attach either until a defendant knows what details an investigation is likely to unearth or until a prosecution decision has occurred. Furthermore, the Court of Appeal found that the documentary evidence showed that litigation quickly became the dominant purpose of the investigation even though that may not have been the case at the onset of the investigation.

With respect to the Category 1 documents, the Court of Appeal disagreed with the High Court that these documents were created for the specific purpose of being shown to the SFO. Rather, the Court of Appeal concluded that ENRC never agreed to disclose to the SFO materials created during the course of its investigation—including notes of interviews and work product. It further clarified that the mere fact that solicitors prepare a document with the ultimate goal of showing it to the other party does not "automatically deprive the preparatory legal work that they have undertaken of litigation privilege," noting the significant time solicitors likely spend fine-tuning a response to a claim to give their client the best chance of achieving early settlement. The Court of Appeal reached the same conclusion with respect to documents in Categories 2 and 4. Thus, the court's ruling highlights the central role documentary evidence plays in demonstrating when litigation is contemplated and whether it is the dominant purpose of an investigation.

As to legal advice privilege, the Court of Appeal adhered to the 2003 decision in *Three Rivers (No. 5)*,[52] which established the rule that legal advice privilege would not attach to communications between an employee of a corporation and the corporation's lawyers unless the employee was tasked with seeking and receiving such advice on behalf of the client. The Court of Appeal acknowledged that this narrow definition of "client" serves as a disadvantage to large national and multinational corporations and puts the United Kingdom "out of step" with international common law, including the U.S. Supreme Court's decision in *Upjohn Co.* The Court of Appeal went a step further and indicated that, had it been at liberty to do so, it would have held that the *Three Rivers (No. 5)* decision was wrong. But the Court of Appeal concluded that it was bound by the decision and made clear that this is a question that can only be determined by the Supreme Court of the United Kingdom.

Given that English law is still bound by the *Three Rivers (No. 5)* decision, companies conducting investigations must assume the narrow definition of "client" adopted in that case. For now, companies will continue to face challenges in obtaining information needed to investigate suspected wrongdoing without the assurances of maintaining legal advice privilege in internal investigations.

Recommendations for Practitioners When Conducting Internal Investigations

Deciding whether or not to disclose information obtained during the course of an internal investigation can be complicated. Proffering information to the government from a client in an effort to stave off criminal charges may result in that information being disclosed to other defense counsel. Providing an oral download of witness interviews conducted during an internal investigation may constitute waiver of what would otherwise be attorney-client-privileged communications. An attorney who submits information to the government in connection with FARA registrations or other government programs may be called upon to testify about the underlying client communications. In the United Kingdom, legal professional privilege in the internal investigation context is tricky, to say the least. Counsel must be mindful of this landscape when deciding whether to create and share confidential information that in the recent past was considered privileged and sacrosanct.

In deciding whether and to what extent to disclose investigative facts and findings with the government, counsel can consider taking steps to limit potential privilege waivers, including:

- limiting oral downloads to the government to high-level conclusions rather than specific facts elicited from particular witnesses;
- limiting oral downloads to facts that are supported by things other than witness interviews, such as documents and emails;
- discussing legal issues arising from the facts while avoiding a specific discussion of the facts themselves;
- referring to "hypothetical facts" rather than actual facts; and
- exercising diligence in communicating with the government to avoid any implication of intentionally waiving privilege over investigative materials.

It remains to be seen whether the government will be satisfied with these approaches, or whether it will simply insist on learning the facts irrespective of a company's concerns about privilege waivers and the civil litigation risks that might follow. The use of "hypothetical facts" in proffers, for example, seems to be in vogue. When the government repeats that characterization in a search warrant affidavit, for example, as it has done in at least one recent case, query whether the warrant is defective, as it is based not on facts, but on "hypothetical facts," whatever those are. If indulging a desire not to waive privilege causes problems for the government down the road, it may eventually not be willing to play along.

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NOTES

1. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (citing 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961)).
2. *See, e.g.*, United States v. Int'l Bhd. of Teamsters, 119 F.3d 210, 214 (2d Cir.1997); *In re* Gen. Motors LLC Ignition Switch Litig., 80 F. Supp. 3d 521 (S.D.N.Y. 2015).
3. *Gen. Motors*, 80 F. Supp. 3d at 528 (quoting *In re* Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983, 731 F.2d 1032, 1037 (2d Cir. 1984)).
4. Fed. R. Civ. P. 26(b)(3).
5. SEC v. Vitesse Semiconductor Corp., 2011 WL 2899082, at *2 (S.D.N.Y. July 14, 2011) (citing United States v. Adlman, 134 F.3d 1194, 1197 (2d Cir. 1998)); *see also* Fed. R. Civ. P. 26(b)(3).
6. *Gen. Motors*, 80 F. Supp. 3d at 532 (quoting Schaeffler v. United States, 22 F. Supp. 3d 319, 335 (S.D.N.Y. 2014) (quotations omitted)).
7. *See, e.g.*, Niagra Mohawk Power Corp. v. Stone & Webster Eng'g Corp., 125 F.R.D. 578, 587 (N.D.N.Y. 1985) (quoting *In re* Grand Jury Subpoenas Dated December 18, 1981 and January 4, 1982, 561 F. Supp. 1247, 1257 (E.D.N.Y. 1982); *see also* 8 Wright & Miller, Federal Practice and Procedure § 2024 at 209–10 (1970).
8. *See* SEC v. Berry, 2011 WL 825742, *7 (N.D. Cal. 2011) (quoting Merrill Lynch & Co. v. Allegheny Energy, Inc., 229 F.R.D. 441 (S.D.N.Y. 2004).
9. U.S. Dep't of Justice, U.S. Attorneys' Manual [hereinafter USAM] 9-28.700 to 9-28.710.
10. Memorandum from Eric H. Holder, Jr., Deputy Att'y Gen., U.S. Dep't of Justice, Bringing Criminal Charges Against Corporations (June 16, 1999) [hereinafter Holder Memorandum].
11. Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003) [hereinafter Thompson Memorandum] (as clarified by Memorandum from Robert D. McCallum, Jr., Acting Deputy Att'y Gen., U.S. Dep't of Justice, Waiver of Corporate Attorney-Client and Work Product Protections (Oct. 21, 2005) [hereinafter McCallum Memorandum]). The McCallum Memorandum tasked supervisory prosecutors (*e.g.*, Criminal Chiefs) with approving requests for privilege waivers and encouraged each U.S. Attorney's Office to adopt its own local policies as to when to seek privilege waivers.
12. Memorandum from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice, Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006) [hereinafter McNulty Memorandum]. The McNulty Memorandum (which expressly superseded and replaced the Thompson Memorandum and the McCallum Memorandum) imposed a "legitimate need" test for requesting waiver, but remained heavily criticized for the pressures it placed on corporations in making waiver demands.
13. *See* Attorney-Client Privilege Protection Act of 2006, S. 30, 109th Cong. (as introduced to Senate, Dec. 8, 2006) (days before the issuance of the McNulty Memorandum); *see also* Attorney-Client Privilege Protection Act of 2008, S. 3217, 110th Cong. (as introduced to

Senate, June 26, 2008) (reintroduced by Sen. Specter (R-PA) following continued criticism of DOJ's waiver policy).

14. Memorandum from Mark Filip, Deputy Att'y Gen., U.S. Dep't of Justice, Principles of Federal Prosecution of Business Organizations (Aug. 28, 2008) [hereinafter Filip Memorandum].
15. USAM 9-28.000 to 9-28.1500 ("Principles of Federal Prosecution of Business Organizations").
16. *Id*. 9-28.710.
17. *See* Memorandum from Sally Quillian Yates, Deputy Attorney Gen., U.S. Dep't of Justice, Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015) [hereinafter Yates Memo], www.justice.gov/archives/dag/file/769036/download.
18. *Id*. at 2–3.
19. *Id*. at 3 (emphasis added).
20. USAM 9-47.120 ("FCPA Corporate Enforcement Policy").
21. *Id*. § 1.
22. *See* Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Rel. No. 44,969 (Oct. 23, 2001).
23. U.S. Sec. & Exch. Comm'n, Enforcement Manual § 4.3 (2017).
24. *Id*. (emphasis added).
25. USAM 9-28.720, at n. 2.
26. SEC v. Herrera, 324 F.R.D. 258 (S.D. Fla. 2017).
27. SEC v. Vitesse Semiconductor Corp., 2011 WL 2899082 (S.D.N.Y. July 14, 2011).
28. *Id*. at *3.
29. *Id*. (citing United States v. Treacy, 2009 WL 812033, at *2 (S.D.N.Y. Mar. 24, 2009).
30. SEC v. Berry, 2011 WL 825742 (N.D. Cal. Mar. 7, 2011).
31. *In re* Grand Jury Investigation, 2017 WL 4898143 (D.D.C. Oct. 2, 2017).
32. Though the crime-fraud exception is not discussed in detail in this article, the court found that the SCO met its burden of making a prima facie showing that the crime-fraud exception applied in this case.
33. Judge Howell noted that the SCO was not seeking privileged notes or discussions between the attorney and her clients, but rather, the SCO wanted to ask questions to determine if the clients had lied to counsel who, in turn, unwittingly passed the information along to DOJ.
34. *Grand Jury Investigation*, 2017 WL 4898143 at *11.
35. *Id*. at *12 (quoting Office of Thrift Supervision v. Vinson & Elkins, LLP, 124 F.3d 1304, 1307 (D.C. Cir. 1997); *see also In re* Gen. Motors LLC Ignition Switch Litig., 80 F. Supp. 3d 521, 532 (S.D.N.Y. 2015) ("A party may obtain 'fact' work product if it 'shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.'"); Fed. R. Civ. P. 26(b)(3)(ii).
36. *Grand Jury Investigation*, 2017 WL 4898143 at *13 (quoting *Grand Jury Subpoena*, 2017 WL 3567824 at *3).
37. *Id*. (quoting FTC v. Boehringer Ingelheim Pharm., Inc., 778 F. 3d 142, 152 (D.C. Cir. 2015) (internal citations omitted)).
38. *Id*.

39. *Id*.
40. *Id*.
41. *See* United States v. Triumph Capital Grp.p, Inc., 544 F.3d 149, 157 (2d Cir. 2008).
42. *See, e.g.*, United States v. Madori, 419 F.3d 159, 169 (2d Cir. 2005) (citing Brady v. Maryland, 373 U.S. 83, 87 (1963)); *see also* Giglio v. United States, 405 U.S. 150, 154–55, (1972) (holding that *Brady* evidence extended to impeachment evidence of prosecution witnesses). *Giglio* material is impeachment evidence that is "favorable to the accused." *Giglio*, 405 U.S. at 186.
43. *Triumph Capital*, 544 F.3d at 161.
44. *Id*. at 152.
45. *Id*. at 165.
46. United States v. Martoma, 2014 WL 31704, at *3 (S.D.N.Y. Jan. 6, 2014) (ordering the production of *Brady* and *Giglio* material in communications from the U.S Attorney's Office to counsel for defendant's co-conspirators that either threatened prosecution of co-conspirators or promised a non-prosecution agreement to co-conspirators if they implicated defendant).
47. Dir. of Serious Fraud Office v. Eurasian Natural Res. Corp. Ltd. [2107] EWHC (QB) 1017 (U.K.).
48. R v. Jukes [2018] EWCA (Crim) 176 (U.K.).
49. *Jukes* at ¶ 23 (quoting *Eurasian Natural Resources* at ¶ 160).
50. Bilta (UK) Ltd. v. Royal Bank of Scot. Plc [2017] EWCA (Ch) 3535 (U.K.).
51. Dir. of Serious Fraud Office v. Eurasian Natural Res. Corp. Ltd. [2018] EWCA (Civ) 2006 (U.K.).
52. Three Rivers Dist. Council et al. v. Governor & Co. of Bank of Eng. (No. 5) [2003] QB 1556 (U.K.).

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Tips for Navigating an Internal Investigation with Implicated In-House Counsel or Board Members

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Over the past few years and most significantly since September 2015, when then Deputy Attorney General Sally Yates issued a memorandum on "Individual Accountability for Corporate Wrongdoing," the U.S. Department of Justice (DOJ) has sharpened its focus on and prosecution of individuals. This focus in turn strengthens the imperative for any internal investigation of potential wrongdoing to identify those individuals responsible—by commission or knowing omission. For outside counsel engaged to lead internal investigations, matters can become especially fraught with issues when the facts suggest the client's internal legal or compliance personnel (who may have hired or directed the outside counsel) engaged in bad acts or permitted them to occur. Similarly, an investigation may raise potential exposure for individual members of a board of directors, which often bears oversight responsibility for the investigation. How outside counsel deals with these challenges is increasingly significant for the integrity of investigations and any cooperation with authorities. Planning ahead, establishing ground rules and lines of communication, and adhering to them will help you as outside counsel to avoid unnecessary complications.

In this article, we discuss several stages of an investigation and provide suggestions for managing potential issues at each stage.

Stage One: Retention

As outside counsel, you are hired by the general counsel of ABC Inc. to conduct an internal investigation. You report directly to the general counsel, Nicole Smith, and often interact with her relevant subordinates. The investigation centers on a recent whistleblower allegation that certain employees in ABC Inc.'s procurement department engaged in money laundering and bribery through fraudulent contracts with suppliers. The whistleblower alleges that the contracts were executed last year.

At the inception of your client relationship, it is helpful to do the following:

- **Clearly identify the client.** In your engagement letter and throughout your discussions with the employees of ABC Inc., be clear about who your client is and who it is not. It is essential to make clear to individuals with whom you interact that you represent only the company (or, as the case may be, the board of directors) as an entity and not any individual. Be careful not to treat your in-house contact as your client, rather than as your client's representative. If there is separate outside counsel for the board of directors or a board committee, clearly communicate with that counsel regarding the delineation of responsibilities. If the board of directors is ultimately overseeing your investigation, clarify how this will be done, including reporting lines and the board's involvement in investigation decisions. A clear understanding of your client will help in the event that an executive or other employee seeks your legal advice for personal reasons or tries to assert that you cannot reveal statements he or she made to you because you had an obligation to him or her personally.

- **Set expectations of independence.** To preserve the integrity and value of your external presence, set expectations of independence and consistently adhere to and seek to secure the client's adherence to those expectations. This can be done through a variety of ways, including the following:
    - Setting boundaries for involvement in the investigation. It may be advisable to limit the involvement of in-house personnel in data collection and review. Likewise, consider if in-house personnel should be present for interviews of their colleagues and others. The American Bar Association (ABA) Model Rules of Professional Conduct state that a lawyer shall "keep the client reasonably informed about the status of the matter."[1] Significantly, the model rules provide that the client can dictate the objectives of an engagement, but the lawyer is responsible for the "means."[2] The model rules do not require an attorney to include a client in the conduct of an investigation itself.
    - Leading the direction of the investigation. If in-house personnel suggest a particular direction for the investigation, take it under advisement, but do not let it control your actions. The ABA model rules state that an attorney should "reasonably consult with the client about the means by which the client's objectives are to be accomplished,"[3] but do not require an attorney to let the client lead the investigation. By owning the investigation, you as outside counsel will help preserve the investigation's integrity in the event in-house personnel with whom you may have interacted are implicated in the investigation.
- **Establish reporting lines.** Establish at least two lines of potential reporting. In the above scenario, day-to-day reporting (the "solid line" reporting) may be with the general counsel. However, at the outset of the investigation, outside counsel should establish "dotted-line" reporting to another party, such as ABC Inc.'s board of directors, a committee of the board, an independent director, the chair of the board's audit committee, or the chief compliance officer. Such reporting lines need not be formal and can oftentimes be informally established, but they are critical in ensuring

proper corporate oversight of the investigation. Keep in mind that with allegations of recent wrongdoing, there may be widespread involvement by current company employees, management, and board members.

Stage Two: Beginning the Investigation

You submit a budget and investigation work plan to Nicole. Nicole accepts the budget and work plan, subject to some budget adjustments, but without substantive changes to the work plan. You commence the investigation. Under your direction, ABC Inc. issues a data preservation notice to all relevant employees. You initiate a data pull of targeted email accounts and request certain potentially relevant files from internal audit and other departments. You draft a list of employees to interview.

At this stage, consider the following:

- **Forensic data collection.** Unless you are required by law to disclose collection or analysis of data to data holders, consider whether you can collect data without informing the individual employees whose data you would like to collect. It may be best to use a third-party vendor to collect data from the company (rather than relying on the company to collect and transmit the data to you). Doing so will make it more difficult for employees at the company to tamper with the data and will also make it more difficult for those who may be potentially involved in the alleged wrongdoing to see the data that you have collected.
- **Confidentiality in interviews.** Consider maintaining utmost confidentiality surrounding interviews. In addition to asking interviewees not to discuss their interviews with others to the extent possible, work to ensure that the very fact of each interview is confidential. This confidentiality will help interviewees not feel or be pressured to withhold information or mislead the investigation. It is best if anyone who may be implicated in the investigation, regardless of his or her position (and including management), not know who your interviewees are. You may want to conduct interviews off site if there are no appropriately private places at the client's office for the interviews. If the client is located in a country with wide-

spread fears of surveillance, consider bringing sensitive employees out of the country. Additionally, consider whether having in-house personnel present in interviews may chill discussion.

Stage Three: Gathering Information

You collect and analyze data and interview company personnel in procurement and other functions who may have relevant information. Many of the employees you speak with were employed by ABC Inc. at the time of the alleged wrongdoing. During the course of the investigation, you begin to suspect that the general counsel and the chief financial officer may have been involved in the wrongdoing. An interviewee and some emails point to Nicole's involvement in drafting the fraudulent contracts and to the chief financial officer's involvement in approving them. You have not been able to verify the allegations, but in your opinion, the allegations against both Nicole and the chief financial officer are credible.

The risks discussed in this scenario are not merely theoretical. In one of the most recent individual FCPA actions involving an attorney, Jeffrey Chow, a former in-house counsel at Keppel Offshore & Marine USA Inc. ("Keppel"), pleaded guilty on August 29, 2017, to conspiring to violate the FCPA.[4] Chow admitted that he helped draft contracts with an agent in Brazil whom Keppel was overpaying so that the agent could bribe Brazilian officials. Chow cooperated with the DOJ investigation into Keppel, and Keppel ultimately agreed to pay a total penalty of more than $422 million in connection with agreements reached with authorities in the United States, Brazil, and Singapore.

In our scenario above, once you, as outside counsel, believe that Nicole or the chief financial officer may be involved in wrongdoing, you must report this information up your established "dotted line."[5] Ideally, you have conducted the investigation in a way that maintains its integrity, even if Nicole, to whom you have been reporting, is potentially implicated.

However, it is important to evaluate whether at this stage you need to step out of the investigation as outside counsel, if the integrity of your investigation has been compromised. To help determine whether you need to step out of the investigation, consider:

- Was Nicole substantively engaged in the investigation scoping?
- Did Nicole direct any portion of the investigation?
- Is it possible that Nicole or the chief financial officer otherwise influenced the investigation, such as by directing or intimidating interviewees or interfering with data collection or analysis?
- Have you personally developed a loyalty to Nicole or the chief financial officer that may influence your ability to be objective in the investigation?

If you determine that you can stay in the investigation, report up to your "dotted line" a strategy for completing the investigation (and reporting on its findings) without the involvement of the implicated parties. Your revised strategy may include:

- establishing a new reporting structure for the investigation;
- analyzing parts of the investigation in which Nicole or the chief financial officer may have been involved to determine if any information needs to be re-examined;
- assisting the company in procuring individual counsel for Nicole and the chief financial officer; and
- re-scoping parts of the investigation in light of these allegations in order to ensure that you are adequately investigating all relevant information.

A Twist on the Scenario: Board Representation

The board of directors of ABC Inc., rather than the general counsel, engages you as outside counsel to advise it in connection with the same allegations detailed above. Nicole retains another attorney to represent ABC Inc. and conduct the investigation on a day-to-day basis. During the course of the investigation and your representation, the U.S. government notifies ABC Inc. that it is also investigating the company. It appears that the whistleblower has

> reported her allegations to the government as well as to ABC Inc. You and the company's counsel have met with attorneys from the DOJ and the Securities and Exchange Commission (SEC), and the company and board of directors have agreed to cooperate with the U.S. government's investigation into ABC Inc. Since the information about Nicole's potential involvement has come to light, she has stepped aside from the investigation. Your main points of contact within the company are the new chief compliance officer and the deputy general counsel (a subordinate of Nicole). You occasionally communicate with Nicole, who maintains her position at ABC Inc.
>
> You are friendly with all of the board members and hope that this representation will lead to more work for you in the future. As the investigation and your representation continue, a board member, Henry Jones, approaches you to discuss concerns regarding his own potential personal liability in connection with the investigation. In the course of the conversation, you understand that multiple current board members were present when the board authorized one of the transactions that the U.S. government is investigating and that they differently recall the surrounding conversation, including whether or not Henry may have indicated that he understood the purpose of the transaction to be bribery. Henry adamantly denies that he knew of any wrongdoing and asks you to keep your conversation with him confidential.

The issue of board participation in wrongdoing recently arose in the case of Telia Company AB ("Telia"), which resolved FCPA wrongdoing with the DOJ in 2017 in one of the largest FCPA settlements to date.[6] In Telia's deferred prosecution agreement with the DOJ, the DOJ specifically applauded Telia's "extensive remedial measures," which included "terminating all individuals who had a supervisory role over those engaged in the misconduct, including every member of the Company's board who took part in the decision to enter Uzbekistan, or failed to detect the corrupt conduct described . . . ."[7] Board members were faulted both for participating in the wrongdoing and for failing to prevent it. This notion is underscored by recent changes to the *U.S. Attorneys' Manual*, which defines corporate remediation for purposes of corporate prosecution to include the "[a]ppropriate discipline of employees, including those identified by the company as responsible for the misconduct, either through direct participation or *failure in oversight*, as well as *those with supervisory authority* over the area in which the criminal conduct occurred."[8]

As counsel for the board as a whole, how do you navigate our above scenario? With an individual seeking advice on a personal issue, as well as the knowledge that others on the board may be involved or potentially adverse to Henry Jones, what is the best way to proceed?

Consider the following:

- **Emphasize your obligations to the board.** Just as when you represent a company, maintaining clarity on your client relationship is key. When representing a board, it is particularly important that individual board members, like Henry, understand that you are not their personal attorney and that issues they raise individually may be relevant to the board as a whole.[9] Make sure that you are acting in the best interests of your client, even if they are not synonymous with your own business development aspirations. Given your representation of the board as a whole, as soon as Henry raises the request for a conversation about his own liability, you should remind him that because you represent the board (not him personally), you cannot agree to keep his secrets. In fact, you may need to report your conversation to the whole ABC Inc. board. You also cannot offer him advice as to his personal liability. Model Rule 1.13 requires that you obtain permission from the board before you agree to represent one of its constituents, because doing so may well create a conflict with your representation of the board. If you find yourself in such a conflict, Henry may be able to prevent you from disclosing his secrets and you may thus have to withdraw from your representation of the board—forcing it to find new counsel because of your failure to draw clear lines.
- **Advise on process.** Although you cannot advise an individual on a particular personal issue, it may be helpful to advise both the individual and the board as a whole on the best practice steps for the board to take in order to address the issue. Advising on process can help all members of a board, without you representing any particular individual or creating a conflict in your representation.

- **Have a plan for referral to individual counsel.** The only advice that you can give Henry, when he asks you for legal advice, is to suggest to him that if he has such questions he could consult a lawyer.[10] However, you are not obligated to give him Miranda warnings or to direct every employee with a conflict with the board to retain a personal attorney. When advising an individual to seek personal representation, it is useful to have the names of reputable attorneys with relevant experience to recommend. This may make the process go more smoothly and quickly. Also, you should familiarize yourself with ABC Inc.'s indemnification policy, as questions about whether the company or the board will pay for such representation often arise. You should also make sure that you are aware of the company's policies that may mandate an employee's cooperation, on pain of discipline if the employee refuses—which may be in tension with the advice of the individual's attorney. If a board member or an employee retains counsel, keep in mind your obligations in communicating with represented parties, which may require you to speak to the attorney rather than the individual.[11]
- **Be mindful of your obligations to U.S. agencies and opposing parties.** It is in your client's interest to be as transparent as possible with all parties regarding your—and its—disclosure obligations. If your client, in this case the board, decides that it does not want to disclose information that you believe needs to be disclosed, you may face additional ethical issues. With the SEC, your ethical obligation of "candor toward the tribunal" may create a conflict between your client's instructions and your ethical obligations.[12] Similarly, you cannot make material misstatements of law or fact to the DOJ, despite your client's inclinations.[13] This can be avoided by ensuring that the person or persons from whom you take direction understands the value of candor and the necessity for it.
- **Recognize board member duties.** Ensure that board members are aware of their duties of care and loyalty. Communicate to the board that each member should exercise reasonable care in their responsibilities on the board and that they should be faithful to the company.
- **Engage with company counsel.** Establish and maintain lines of communication with investigative counsel. As in all matters, having complete and up-to-date information on the status of the investigation is needed to enable you to best represent your client, in this case the board, and assist it in fulfilling its obligations to the company.

The DOJ has taken steps to emphasize that it is focusing on prosecuting individuals in connection with FCPA violations. Just last fall, in a speech announcing changes to the *U.S. Attorneys' Manual* on corporate prosecution and cooperation, Deputy Attorney General Rod Rosenstein remarked that cases against individuals "reinforce the Department's commitment to hold individuals accountable for criminal activity. Effective deterrence of corporate corruption requires prosecution of culpable individuals."[14] According to public sources, in 2017, the DOJ charged sixteen individuals with FCPA-related offenses.

This government focus adds a layer of scrutiny to the actions of outside counsel as they navigate their representations of companies and boards in investigations. With no "one size fits all" for these representations, outside counsel may encounter a variety of ethical issues, including:

- managing individual interests of employees and board members while balancing and fulfilling obligations to the client entity;
- maintaining the integrity of an investigation, including when this means stepping aside; and
- dynamics in interacting with other counsel and represented individuals.

Foresight and planning can help counsel react quickly and seamlessly to complicating factors as they arise in the course of an investigation.

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NOTES

1. Model Rules of Prof'l Conduct r. 1.4(a)(3) (Am. Bar Ass'n 2017).
2. *See id*. r. 1.2 and cmt. 2 (2017).
3. *Id*. r. 1.4(a)(2).
4. *See* Press Release No. 17-1476, U.S. Dep't of Justice, Keppel Offshore & Marine Ltd. and U.S. Based Subsidiary Agree to Pay $422 Million in Global Penalties to Resolve Foreign Bribery Case (Dec. 22, 2017), www.justice.gov/opa/pr/keppel-offshore-marine-ltd-and-us-based-subsidiary-agree-pay-422-million-global-penalties.
5. *See* Model Rules of Prof'l Conduct r. 1.13 (Am. Bar Ass'n 2017).
6. *See* Press Release No. 17-1035, U.S. Dep't of Justice, Telia Company AB and Its Uzbek Subsidiary Enter into a Global Foreign Bribery Resolution of More Than $965 Million for Corrupt Payments in Uzbekistan (Sept. 21, 2017), www.justice.gov/opa/pr/telia-company-ab-and-its-uzbek-subsidiary-enter-global-foreign-bribery-resolution-more-965; *see also* Deferred Prosecution Agreement, United States v. Telia Company AB (Sept. 21, 2017) [hereinafter Telia DPA], www.justice.gov/usao-sdny/press-release/file/997851/download.
7. Telia DPA, *supra* note 6, at 3–4.
8. U.S. Dep't of Justice, U.S. Attorneys' Manual 9-47.120(3)(c) (2017) (emphasis added).
9. *See* Model Rules of Prof'l Conduct r. 1.13 (Am. Bar Ass'n 2017).
10. *Id*. r. 1.13 and cmt. 10.
11. *Id*. r. 4.2.
12. *See id*. r. 3.3.
13. *See id*. r. 3.4.
14. *See Deputy Attorney General Rosenstein Delivers Remarks at the 34th International Conference on the Foreign Corrupt Practices Act*, U.S. Dep't of Justice (Nov. 29, 2017), www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign (full text of Rod J. Rosenstein, Deputy Att'y Gen., Dep't of Justice, Remarks at the 34th Int'l Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017)).

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Double Whammy: How the Landscape of Insider Trading Law Has Been Altered by the Second Circuit's *Martoma* Decision and Prosecutors' Creative Tactics Since *Newman*

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Introduction

In December 2014, the Second Circuit in *Newman* issued what seemed to be a landmark insider trading decision that added tough new language raising the bar for what the government would have to prove to show an insider trading violation. Less than four years later, on June 25, 2018, the Second Circuit returned to insider trading law by issuing an amended decision in *Martoma*, upholding Martoma's 2014 conviction for the second time in as many years, with a new rationale that seems to undo *Newman* without expressly reversing it. Less than a month earlier, prosecutors secured convictions in an insider trading case against four men in a tipping chain reminiscent of *Newman*, notwithstanding their *acquittal* on all insider trading charges brought under the traditional securities law statute. In combination, these developments amount to a substantial retreat from the higher bar for insider prosecutions set by *Newman* and portend continued aggressive prosecution and regulatory efforts in this area.

Background

Dirks v. SEC

The story of tippee liability begins, in an important sense, with the U.S. Supreme Court's 1983 decision in *Dirks v. SEC*.[1] Raymond Dirks was a research analyst at a New York broker-dealer who covered companies in the insurance sector.[2] One day Dirks received a call from someone who identified himself as a former employee of Equity Funding Corporation of America, a publicly traded insurance company.[3] The source told Dirks that his former employer was creating fictitious life insurance policies and selling them to reinsurers, significantly inflating Equity Funding's assets.[4] He said that other whistleblowers had reported these violations to regulators without effect, and he pressed Dirks to corroborate his account and to spread the word.[5]

After investigating, Dirks discussed the tip he had received and his findings with the clients of his firm who held Equity Funding stock. He also contacted the *Wall Street Journal*, which later published a story.[6] Three days after news of the fraud broke, Equity Funding was placed into receivership.[7] The SEC investigated and charged Dirks administratively with aiding and abetting securities fraud through his selective disclosure of material nonpublic information.[8] Dirks was found liable and appealed all the way up to the Supreme Court.[9]

Addressing tippee liability for the first time, the Supreme Court's analysis turned on whether there had been a breach of duty by an insider, without which there could be no fraud.[10] Breach, the Court stated, occurs when insiders disclose information entrusted to them in exchange for "a direct or indirect *personal benefit* . . . such as a pecuniary gain or a reputational benefit that will translate into future earnings."[11] In addition, the Court stated that a personal benefit may be

Since *Dirks*, courts have wrestled with what it means for a tippee to receive a "personal benefit" in the absence of an exchange of information for a tangible gain.

inferred where there is "a relationship between the insider and the recipient that suggests a quid pro quo from the latter, or an intention to benefit the particular recipient[,]"[12] or "when an insider makes a gift of confidential information to a trading relative or friend" such that "[t]he tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient."[13] Under such circumstances, the Court reasoned, the tippee inherits the insider's duty to maintain the information in confidence and to abstain from trading.[14]

Applying this analysis, the Supreme Court reversed, holding that the tipper's disclosure breached no duty to Equity Funding's shareholders because he "received no monetary or personal benefit for revealing Equity Funding's secrets, nor was it [his] purpose to make a gift of valuable information to Dirks."[15] Rather, the tipper's purpose, in the Court's view, was to blow the whistle on corporate fraud at Equity Funding.[16] As a result, Dirks had not improperly obtained the information from the tipper and therefore owed no derivative duty to Equity Funding's shareholders. And with that, the personal benefit rule was born.

Since *Dirks*, courts have wrestled with what it means for a tippee to receive a "personal benefit" in the absence of an exchange of information for a tangible gain. During this period, much of the focus was on the relationship between tipper and tippee, and whether their relationship was sufficiently close to permit an inference that the tipper received a personal benefit through gifting the information to the tippee. For instance, a relationship that involved a tip from a college friend was sufficient,[17] as was a tip from a "good friend."[18] A tip to one's boss was sufficient, at least when done with a hope improving the tipper's professional standing.[19] A fifteen year hair-cutting relationship between a barber and a customer, apparently, was insufficient.[20]

United States v. Newman

The personal benefit issue was brought to a boil in 2014 with the Second Circuit's decision in *United States v. Newman*.[21] The insider trading charges in *Newman* centered on a group of financial professionals who collectively shared material nonpublic information related to Dell and NVIDIA.[22] The charged traders at the end of the tipping chain were Todd Newman at Diamondback Capital Management and Anthony Chiasson at Level Global Investors.[23] With respect to Dell, the government alleged that the information wound its way from a Dell insider through three individuals before it came to Newman, and four individuals before it came to Chiasson.[24] With respect to NVIDIA, the government alleged that Newman and Chiasson both were four levels removed from the NVIDIA insider.[25] At trial, the district court instructed the jury that it could convict if it found that the defendants knew the information had been disclosed in breach of a duty of confidentiality, but did not require a separate finding that the defendants knew the tipper had received a personal benefit in exchange for the tip.[26] The jury convicted.[27]

Because the instructions allowed the jury to convict the defendants without finding that they knew the insiders tipped the information in exchange for a personal benefit, on appeal, Newman and Chiasson argued that the jury instructions ran afoul of the *Dirks* personal benefit rule.[28] The Second Circuit agreed and reversed.[29] The Second Circuit grounded its ruling in the common law requirement "that the defendant know the facts that make his conduct illegal."[30] That mens rea requirement acts as a safety valve in insider trading cases, the circuit reasoned, because "it is easy to imagine a trader who receives a tip and is unaware that his conduct was illegal and therefore wrongful."[31] The circuit noted that it could not find "a single case" in which a tippee three levels removed from the insider tipper had been held criminally liable.[32] The panel criticized "the doctrinal novelty of [the government's] recent insider trading prosecutions, which are increasingly targeted at remote tippees many levels removed from corporate insiders."[33]

In addition, the Second Circuit found the evidence insufficient to constitute a personal benefit under *Dirks*.[34] In that respect, the panel held that:

> [t]o the extent *Dirks* suggests that a personal benefit may be inferred from a personal relationship between the tipper and tippee, where the tippee's trades "resemble trading by the insider himself followed by a gift of the profits to the recipient," we hold that such an inference is impermissible in the absence of proof of a *meaningfully close personal relationship* that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature. In other words, . . . this requires evidence of "a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention to benefit the latter."[35]

Prosecuting Insider Trading After *Newman*

In the wake of the Second Circuit's decision in *Newman*, the U.S. Attorney's Office for the Southern District of New York was outspoken in its criticism of the ruling's effect on its ability to prosecute downstream tippees. The then U.S. Attorney said that it would "limit the ability to prosecute people who trade on leaked inside information"[36] and ultimately would create "a category of conduct that arguably will go unpunished going forward."[37] Addressing the decision, the then U.S. Attorney stated that the office "would have to think long and hard, given *Newman*, about whether or not we can prosecute a person like that."[38]

In the years that followed, prosecutors and regulators have returned to insider trading cases against downstream tippees in ways that have made clear that any sense that the government would pull back its efforts against downstream tippees was misplaced. Two high-profile examples of these creative efforts are discussed below. In the first case, *SEC v. Payton*,[39] the SEC successfully worked around *Newman*'s knowledge of benefit requirement by, among other things, shortening the tipping chain through its theory of the case. The SEC's efforts in *Payton* were notable in light of the fact that the U.S. Attorney's Office had withdrawn criminal charges against the same defendants for the same conduct after *Newman* was issued, and a guilty plea was thrown out.[40] In the second, *United States v.*

Blaszczak,[41] the U.S. Attorney's Office brought insider trading charges under various other criminal statutes and secured convictions under those statutes, including securities fraud under title 18 ("title 18 securities fraud"),[42] despite acquittals on the title 15 securities fraud charges under which insider trading cases traditionally have been brought.

SEC v. Payton

Shortly after *Newman*, the SEC in *Payton* used creative charging tactics to ease its ability to prove knowledge of personal benefit by the downstream tippees.[43] In *Payton*, as charged, a Cravath associate told a friend, Trent Martin, that he was working on IBM's acquisition of SPSS, a publicly traded company.[44] Martin traded on the information and tipped his roommate, Thomas Conradt, an employee of a New York brokerage.[45] Conradt, too, traded on the tip and told several co-workers, including Daryl Payton and Benjamin Durant, both of whom also traded on the information.[46] The SEC charged Payton and Durant with insider trading, and a jury found them liable after trial.[47]

Like the remote tippees in *Newman*, Payton and Durant were four levels removed from the original insider, the Cravath associate. But counterintuitively, the SEC did not charge the associate with insider trading for tipping his friend in breach of a duty he owed to IBM, Cravath's client. Rather, the SEC alleged that Martin had embezzled the information from the associate, breaching a duty owed him grounded in *friendship*.[48] The SEC argued that the associate and Martin "ha[d] a history, pattern, or practice of sharing confidences, such that the recipient of the information kne[w] or reasonably should [have] know[n] that the person communicating the material nonpublic information expect[ed] that the recipient w[ould] maintain its confidentiality."[49] In support, the SEC offered evidence that the associate and Martin had shared information about "their careers, salaries, friends, and romantic partners."[50] The SEC argued that the associate shared the information about the merger in the context of complaining about the difficulties he was having with the "fearsome" partner he was working for on the deal.[51] By trading and by tipping Conradt, the SEC argued that Martin had breached his friend's trust.

The SEC argued that Martin received a personal benefit in exchange for breaching this duty to the associate because Martin and Conradt "shared a close mutually-dependent financial relationship, and had a history of personal favors"[52];

and that there was evidence that Martin had used the tip as a means of thanking Conradt for making an effort to assist him with finding an attorney to help Martin with a criminal legal matter.[53]

As to the downstream tippees, the SEC argued that Payton and Durant consciously avoided knowing that Martin had tipped the information to Conradt in breach of a duty and in exchange for a personal benefit because: (1) Conradt had told them that the information came from Martin, who they knew worked at a broker-dealer and who had told Conradt that it should not be shared; and (2) Payton and Durant took steps to avoid knowing about Martin's source of the information.[54]

Discussion

There were two creative aspects of the SEC's approach, the impact of which was to make possible the charging of downstream tippees Payton and Durant. One creative aspect was factual. By moving the breach down the tipping chain from IBM → associate to associate → Martin, the SEC shortened the tipping chain from four levels to three. And yet, there were reasons to question whether this theory of the case was factually compelling. Martin, who cooperated with the SEC, had testified that he believed the associate *had* expected him to trade on the information.[55] The associate had told Martin the names of both companies to be involved in the acquisition, and the expected date and price of the transaction, and provided updates over time—information necessary if he was tipping Martin to trade but arguably unnecessary to get Martin to appreciate the meanness of his boss. Martin later texted the associate "I'm gonna hit that stock, I reckon."[56]

The second creative aspect had to do with the type of relationship that the SEC argued had created the duty of trust and confidence. Past cases offer examples of the kinds of relationship that could create such a duty: a husband and wife[57]; a psychiatrist and patient[58]; and, more generally, a principal and its agent—all of which are special relationships recognized by law. The relationship between the associate and Martin was decidedly not any of these classic types. The evidence offered at trial to support that their relationship was one of trust and confidence was testimony by each indicating that they discussed what was going on in their lives, including details ranging from their jobs to their romantic entanglements, and expected the other to keep such things in confidence. This creative approach to the type of relationships that might constitute a relationship of trust and confidence has the effect of broadening the universe of potential liability, because such a relationship could exist anywhere in a tipping chain.

The decision to charge the case with Martin as the person who breached a duty, and not the associate, had critical consequences for Payton and Durant. As had been the case in *Newman*, there was no evidence that downstream tippees Payton and Durant knew the information had come from the associate or even who the associate was. Nonetheless, the fact that Payton and Durant knew that Conradt received the information from his roommate Martin, who worked for a broker-dealer, and did not ask follow up questions, was enough for them to be held liable. If the associate had been viewed as the tipper, by contrast, the SEC likely could not have met its burden under *Newman* because it did not have evidence that Payton and Durant knew that the associate had breached his fiduciary duty to IBM in exchange for a benefit.

United States v. Blaszczak

In *United States v. Blaszczak*,[59] which was tried in April 2018, the government returned to criminal prosecution of remote tippees for the first time since *Newman*. Using a potpourri of legal theories to avoid the burdens of *Newman*,[60] the government alleged that federal agency employee Christopher Worrall provided information about upcoming agency decisions to David Blaszczak, a former colleague turned political intelligence consultant. Blaszczak passed the information to an analyst at a healthcare-focused hedge fund,[61] who shared the information within his fund and the fund traded on it.[62] Because the hedge fund defendants did not ask Blaszczak who the source of the information was, the government argued that they consciously avoided learning of the tipper's breach and benefit.[63] The government charged Worrall, Blaszczak, and two hedge fund analysts with violations of title 15 securities fraud, title 18 securities fraud,[64] wire fraud,[65] theft of government property,[66] and conspiracy under two different statutes.[67]

In charging the defendants under the three title 18 statutes, the government sought and was able to avoid the elements of insider trading under title 15 crafted by sixty years of case law going back to *Cady, Roberts*[68]: duty, breach, and knowledge of both by any downstream tippee. Instead, the government argued that under *Carpenter v. United States*,[69] the scheme to defraud or false statements at the heart of an insider trading offense could be established through embezzlement—the fraudulent taking of property by someone to whom it has been entrusted.[70]

Indeed, on the theft of government property counts, the government argued that the tippee defendants could be convicted if they received government information knowing that it was embezzled irrespective of whether the tipper received a benefit in exchange for providing the information, and irrespective of whether the downstream tippees knew that the tipper had received such a benefit.[71]

The jury returned a mixed verdict. All four defendants were acquitted on all title 15 securities fraud counts, a total of twenty-two counts of acquittal across the four defendants.[72] The jury instructions on those counts expressly required duty, breach, personal benefit to the tipper, and knowledge of personal benefit by the tippee defendants, including the downstream hedge fund defendants.[73] And yet, all four defendants were convicted on at least one count of theft of government property, and at least one count of wire fraud.[74] Three of the four defendants were convicted of at least one count of title 18 securities fraud.[75] For these offenses, the jury instructions included no requirement that the defendants have knowledge of a personal benefit to the original tipper.[76] In sum, the result was acquittals for alleged insider trading conduct under insider trading law, but convictions for the same conduct under other criminal theories; and most conspicuously within that, different results for the same conduct under two different securities fraud statutes.

Discussion

Blaszczak is not an outlier. The government has included wire fraud and/or title 18 securities fraud charges in at least three other post-*Newman* insider trading prosecutions.[77] Where title 18 securities fraud has been charged, the district court gave jury instructions for those counts that do not include all of the traditional elements of insider trading.[78] Continued growth of this trend risks a schism separating criminal insider trading cases brought under title 18 statutes, and criminal or civil insider trading cases brought as title 15 securities fraud. Further, proving criminal liability for insider trading under title 18 statutes may prove to be a lower hurdle for the government than establishing civil liability under title 15. Indeed, one downstream tippee in the criminal case was not charged by the SEC.[79] Notably, jury instructions for the title 18 offenses do not take into account personal benefit, including the relationship between tipper and tippee, or knowledge of personal benefit—sidestepping the *Newman* panel's concerns about the "doctrinal novelty" of pursuing remote tippees who are less likely to "know the facts that make [their] conduct illegal"[80]

The Personal Benefit Requirement After *Martoma*

In the years after *Newman*, court decisions have resulted in a degradation of the personal benefit rule of *Newman*. First, the Supreme Court in *Salman* abrogated any requirement in *Newman* that a tipper receive something "pecuniary or similarly valuable nature" in exchange for a tip to family or friends.[81] More recently, two decisions by the Second Circuit in *Martoma* (the second replacing the first) seem to expand the universe of actionable insider trading activity by reinterpreting the personal benefit requirement of *Dirks* and *Newman*.

Martoma I

Mathew Martoma was an S.A.C. Capital portfolio manager who traded on confidential clinical drug trial results for an experimental Alzheimer's drug, which he received from a doctor who had confidential access to the test results.[82] Despite his duty of confidentiality to the drug manufacturers, the doctor tipped Martoma in exchange for payments he had previously received through consulting engagements with Martoma. Martoma was charged criminally under title 15 and convicted.[83] On appeal, Martoma argued that the jury instructions were inconsistent with *Newman*, which was decided after his conviction, in that they did not require a finding that he had a meaningfully close personal relationship with the doctor for the jury to convict.[84]

In its original decision in August 2017, the Second Circuit ruled 2-1 that *Salman* had abrogated the *Newman* requirement that a gift of material nonpublic information can satisfy the personal benefit requirement of *Dirks* only where there is a "meaningfully close personal relationship" between tipper and tippee.[85] In addition, the Second Circuit ruled that:

> an insider or tipper personally benefits from a disclosure of inside information whenever the information was disclosed "with the expectation that the recipient would trade on it," and the disclosure "resembles trading by the insider followed by a gift of the profits to the recipient," whether or not there was a "meaningfully close personal relationship" between the tipper and tippee.[86]

Notwithstanding the change, the Second Circuit upheld Martoma's conviction, finding that the district court did not err in failing to give a now-abrogated

Newman instruction, and that the evidence was sufficient to support the conviction, noting that Martoma had paid the doctor money in exchange for the tip.[87] Martoma appealed the panel's decision for rehearing en banc.[88]

Martoma II

On June 25, 2018, eight months after Martoma's petition for rehearing, the *Martoma* panel issued an amended 2-1 decision (replacing its original decision), again reinterpreting the requirements for personal benefit under *Dirks*, and again upholding Martoma's conviction.[89] In *Martoma II*, the Second Circuit declined to overrule the meaningfully close personal relationship test articulated in *Newman*.[90] Even so, the panel found that the instructions were erroneous, though not reversibly so, "because they allowed the jury to find a personal benefit in the form of a 'gift of confidential information to a trading relative or friend' without requiring the jury to find either that tipper and tippee shared a relationship suggesting a *quid pro quo* or that the tipper gifted confidential information with the intention to benefit the tippee."[91]

Looking to *Dirks*, the panel identified examples by which an insider can personally benefit from the disclosure of confidential information:

> [1] a "pecuniary gain," [2] a "reputational benefit that will translate into future earnings," [3] a "relationship between the insider and the recipient that suggests a quid pro quo from the latter," [4] the tipper's "intention to benefit the particular recipient," and [5] a "gift of confidential information to a trading relative or friend" where "[t]he tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient."[92]

Notably, this formulation expressly allows a finding of breach where the tipper's disclosure was motivated by intent to benefit a recipient with whom the tipper had no relationship; the intent to benefit the recipient, by itself, is enough to satisfy *Dirks*.[93] "Intent to benefit," as formulated in *Martoma II*, is now a freestanding path to satisfy the personal benefit requirement.

Discussion

By decoupling intent to benefit from the relationship between the tipper and tippee, the *Martoma II* majority appears to have greatly expanded the universe of actionable insider trading prosecutions. The panel's interpretation seems at odds with the circuit's *Newman* decision and, in the authors' view, would appear to render superfluous the past forty years of case law developing the contours of what counts as a "personal benefit." It seems likely that in most cases it will be easier for the government to prove intent to benefit than it will be to prove some quid pro quo exchange or a relationship of a particular type. For cases in which the tipper received a concrete benefit that resembles a quid pro quo, there will be no change and liability will attach. But in cases in which there is no obvious benefit, or in which the benefit seems slight, the government can now satisfy the personal benefit requirement simply by showing that the tipper had an intention to benefit the tippee. Such a showing likely will be met by demonstrating that the tipper expected the tippee to trade on the tip.[94] Because in any insider trading prosecution there will have been trading by a tippee, the government will by definition have a factual basis from which to argue that there was intent to benefit the tippee.[95] And while an intent to benefit standard is appealing in its simplicity, it seems to put at risk people who believe they were trading legally by neutering the protections that the personal benefit requirement had provided, as articulated in *Newman*.[96]

Conclusion

Taken together, the defanging by the *Martoma II* majority of the *Newman* decision's personal benefit teeth, and the creative charging decisions by prosecutors and regulators, including charging insider trading conduct under other fraud statutes, have expanded the field of potential liability for insider trading in a way that few would have predicted after the December 2014 *Newman* decision, nearly four years ago. To the extent the *Newman* panel was concerned about the government's pursuit of remote tippees, that concern has not chilled efforts by prosecutors and regulators to pursue cases against them. Similarly, the circuit's decision in *Martoma II* creates a rule that will make it easier to prosecute insider trading cases where there is no concrete personal benefit to the tipper; and seemingly fails to provide a safeguard for remote tippees trading on information from sources they do not know. It remains to be seen—perhaps until the next remote tippee appeal is heard—whether the concern that the *Newman* court expressed concerning prosecutors' pursuit of remote tippees is a concern the circuit still has, or one that it has abandoned.

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NOTES

1. Dirks v. SEC, 463 U.S. 646 (1983).
2. *Id*. at 648.
3. *In re* Raymond L. Dirks, Exchange Act Release No. 17,480, at *1 (Jan. 22, 1981).
4. *Id*. at *2.
5. *Dirks*, 463 U.S. at 649–50.
6. *Id*. at 649.
7. *Id*. at 650.
8. *Id*. at 650–51.
9. *Id*. at 651–52.
10. *Id*. at 663.
11. *Id*. (emphasis added).
12. *Id*. at 664.
13. *Id*.
14. *Id*. at 667.
15. *Id*.
16. *Id*.
17. *See* SEC v. Obus, 693 F.3d 276, 291 (2d Cir. 2012).
18. *See* SEC v. Warde, 151 F.3d 42, 48 (2d Cir. 1998).
19. *See Obus*, 693 F.3d at 292.
20. *See* SEC v. Maxwell, 341 F. Supp. 2d 941, 948–49 & n.2 (S.D. Ohio 2004) ("As Defendant Jehn argues, 'Surely it cannot be claimed that the purpose of the alleged disclosure was so Mr. Maxwell would receive a better haircut, a better appointment slot, a better price?'").
21. United States v. Newman, 773 F.3d 438 (2d Cir. 2014).
22. *Id*. at 443. The substantive charges in *Newman* were brought under 15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5, also known as section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5. For purposes that will become obvious below, we refer herein to charges brought under these provisions as "title 15 securities fraud."
23. *Id*. at 442.
24. *Id*. at 443.
25. *Id*.
26. *Id*. at 444.
27. *Id*.
28. *Id*. at 444–45.
29. *Id*. at 448–49. The *Newman* panel also held that the evidence at trial was insufficient to establish that Newman or Chiasson knew that the information was obtained in exchange for a benefit. *Id*. at 452.
30. *Id*. at 450 (citing Staples v. United States, 511 U.S. 600, 605 (1994)).
31. *Id*. (quoting United States v. Kaiser, 609 F.3d 556, 569 (2d Cir. 2010)) (alteration omitted).
32. *Id*. at 443, 448.

33. *Id*. at 448.
34. *Id*. at 451–52.
35. *Id*. at 452 (quoting *Dirks*, 463 U.S. at 664, subsequently quoting United States v. Jiau, 734 F.3d 147, 153 (2d Cir. 2013)) (internal citations and alterations omitted) (emphasis added). Since *Newman*, the Supreme Court has abrogated at least the pecuniary or pecuniary-like gain requirement in the context of a gift of information to a trading relative or friend. *See* Salman v. United States, 137 S. Ct. 420, 428 (2016) ("To the extent the Second Circuit held that the tipper must also receive something of a 'pecuniary or similarly valuable nature' in exchange for a gift to family or friends, . . . this requirement is inconsistent with *Dirks*." (internal citation to *Newman* omitted)).
36. Press Release, U.S. Atty's Office, S.D.N.Y., Statement of Manhattan U.S. Attorney Preet Bharara on the U.S. Court of Appeals Second Circuit Decision in *U.S. v. Todd Newman and Anthony Chiasson* (Dec. 10, 2014).
37. Ed Beeson, *Feds to Rethink Insider Trading Strategy After Newman Snub*, Law360 (Oct. 5, 2015), www.law360.com/articles/711045/feds-to-rethink-insider-trading-strategy-after-newman-snub.
38. *Id*.
39. SEC v. Payton, No. 14 Civ. 4644 (JSR) (S.D.N.Y.).
40. *See* Nolle Prosequi, United States v. Conradt, No. 12 Cr. 887 (ALC) (S.D.N.Y. Feb. 3, 2015), ECF No. 170; Order, United States v. Conradt, No. 12 Cr. 887 (ALC) (S.D.N.Y. Jan. 22, 2015), ECF No. 166.
41. United States v. Blaszczak, No. S1 17 Cr. 357 (LAK) (S.D.N.Y.).
42. 18 U.S.C. § 1348.
43. The SEC initially charged Payton and Durant before the Second Circuit issued *Newman*, but filed an amended complaint after it was issued. *See* Complaint, SEC v. Payton, No. 14 Civ. 4644 (JSR) (S.D.N.Y. June 25, 2014), ECF No. 2; Amended Complaint, SEC v. Payton, No. 14 Civ. 4644 (JSR) (S.D.N.Y. Mar. 2, 2015), ECF. No. 32 [hereinafter *Payton* Am. Compl.].
44. *See* SEC v. Payton, 97 F. Supp. 3d 558, 560 (S.D.N.Y. 2015).
45. *Id*.
46. *Id*. at 560–61.
47. SEC v. Payton, 219 F. Supp. 3d 485, 488–89 (S.D.N.Y. 2016), *aff'd*, 726 F. App'x 832 (2d Cir. Feb. 13, 2018) (summary order). The SEC also charged Martin and Conradt, who settled with the SEC.
48. *Id*. at 489.
49. *Id*. (quoting 17 C.F.R. § 240.10b5-2(b)(2)).
50. *Id*.
51. *Id*.
52. *Payton* Am. Compl., *supra* note 43, at ¶ 56. The defense argued that this theory was preposterous because the supposed benefits that the SEC claimed Conradt provided Martin, his Craigslist roommate, were paying the cable bill for the apartment, the expense of which the roommates split; arranging for a cleaning person to come to the apartment, the expense

of which the roommates split; and calling the city to complain about a foul odor outside their apartment window. *See Payton*, 97 F. Supp. 3d at 560; *Payton*, 219 F. Supp. 3d at 491.

53. *Payton*, 219 F. Supp. 3d at 491.
54. *Id*. at 491–92.
55. *Id*. at 489.
56. *Id*.
57. *See* Complaint, SEC v. Hawk, No. 14 Civ. 1466 (N.D. Cal. Mar. 31, 2014), EFC No. 1; Complaint, SEC v. Chen, No. 14 Civ. 1467 (N.D. Cal. Mar. 31, 2014), EFC No. 1: Complaint, SEC v. Balchan, No. 13 Civ. 22612 (S.D. Tex. Feb. 6, 2013), EFC No. 1; Complaint, SEC v. Marovitz, No. 11 Civ. 5259 (N.D. Ill. Aug. 3, 2011).
58. *See* United States v. Willis, 737 F. Supp. 269 (S.D.N.Y. 1990).
59. United States v. Blaszczak, No. S1 17 Cr. 357 (LAK) (S.D.N.Y. Mar. 12, 2018).
60. The *Blaszczak* indictment was filed before the Supreme Court issued *Salman*.
61. Indictment ¶¶ 1–66, *Blaszczak*, No. S1 17 Cr. 357 (LAK) (S.D.N.Y. May. 24, 2017), ECF. No. 10 [hereinafter *Blaszczak* Indictment]. Blaszczak also published his "tips" to other institutional clients in written "notes" he circulated. *Id*.
62. *Id*.
63. *See* Letter from the United States, United States v. Blaszczak, No. S1 17 Cr. 357 (LAK) (S.D.N.Y. Apr. 22, 2018), ECF No. 259.
64. 18 U.S.C. § 1348.
65. *Id*. § 1343.
66. *Id*. § 641.
67. *Id*. §§ 371, 1349.
68. *In re* Cady, Roberts & Co., 40 S.E.C. 907 (1961).
69. Carpenter v. United States, 484 U.S. 19 (1987). In *Carpenter*, a *Wall Street Journal* employee tipped two securities industry professionals with the contents of upcoming "Heard on the Street" articles, which the three expected would impact the stock of the companies mentioned. The *Journal* had an internal policy prohibiting early disclosure of information by employees and the *Journal* employee, the Court ruled, breached that duty to keep the information confidential by tipping. He also was found to have deceived the Journal by pretending to be an honest employee despite his misappropriation. The Court ruled that this violation amounted to mail and wire fraud by embezzlement. *Id*. at 22–28.
70. *Id*. at 27.
71. Request to Charge, United States v. Blaszczak, No. S1 17 Cr. 357 (LAK) (S.D.N.Y. Mar. 16, 2018), ECF No. 151.
72. *Blaszczak* Tr. at 4072:22–4075:15.
73. *Id*. at 3948:12–3967:18.
74. *Id*. at 4071:18–4072:21, 4075:16–4076:15.
75. *Id*. at 4076:16–4077:9.
76. Three of the four defendants also were convicted of conspiracy counts. *Blaszczak* Tr. at 4077:10–4078:16.
77. *See* Indictment, United States v. Chow, No. 17 Cr. 667 (GHW) (S.D.N.Y. Oct. 30, 2017), ECF No. 2; Verdict Form, United States v. Walters, No. 16 Cr. 338 (PKC) (S.D.N.Y.

May 19, 2016), ECF No. 129; Superseding Indictment, United States v. Stewart, No. S1 15 Cr. 287 (LTS) (S.D.N.Y. July 15, 2015), ECF No. 25 [hereinafter *Stewart* Superseding Indictment].
78. *See Chow* Tr. at 1518:20–1520:25, No. 17 Cr. 667 (GHW) (S.D.N.Y. Apr. 20, 2018).
79. *Compare* Complaint, SEC v. Blaszczak, No. 17 Civ. 3919 (AJN) (S.D.N.Y. May 24, 2017), ECF No. 1, *with Blaszczak* Indictment.
80. *Newman*, 773 F.3d at 450.
81. *Salman*, 137 S. Ct. at 428.
82. United States v. Martoma (*Martoma I*), 869 F.3d 58, 67, 61–63 (2d Cir. 2017).
83. *Id*.
84. *Id*. at 61.
85. *Id*. at 69.
86. *Id*. at 70 (2d Cir. 2017) (quoting *Salman*, 137 S. Ct. at 428, subsequently quoting *Salman*, 137 S. Ct. at 427 (quoting *Dirks*, 463 U.S. at 664)) (alteration and internal citations omitted), *opinion amended and superseded*, 2017 WL 9620394 (2d Cir. Aug. 23, 2017).
87. *Id*. at 67, 74.
88. Petition for Rehearing en Banc, *Martoma*, No. 14-3599 (2d Cir. Oct 6, 2017), ECF No. 192.
89. However, Martoma has sought an extension of time during which he can petition for rehearing en banc. *See* Order Granting Motion to Extend Time, United States v. Martoma, 14-3599 (2d Cir. July 3, 2018), ECF No. 237.
90. United States v. Martoma (*Martoma II*), 894 F.3d 64, 71 (2d Cir. 2017).
91. *Id*. at 68.
92. *Id*. at 74 (quoting *Dirks,* 463 U.S. at 663–64) (final alteration in *Martoma II*).
93. *Id*. at 73–77. The dissent argued that the key sentence from *Dirks* required objective facts demonstrating a relationship between tipper and tippee to permit an inference of intent to benefit the tipper. *See id*. at 82–84; *see also Dirks*, 463 U.S. at 664 ("[T]here may be a relationship between the insider and the recipient that suggests a quid pro quo from the latter, or an intention to benefit the particular recipient.").
94. As such, *Martoma II* may appear to implicitly reanimate the panel's earlier decision.
95. It remains to be seen how knowledge of personal benefit will be interpreted in cases where the benefit is the tipper's intent to benefit the recipient. The authors' concern is that, in practice, there will be a rebuttable presumption that there was intent to benefit and, to prevail, defendants will have to offer proof of alternative reasons for the disclosure.
96. *See Martoma II*, 894 F.3d at 81–82 (Pooler, J., dissenting) ("Restricting proof of a personal benefit to objective evidence avoids turning the rule into a mere formality. Absent objective evidence, a slip of the tongue might be presented to a jury as a purposeful tip with a good cover story, an off-the-record comment to a trusted reporter might be portrayed as a means of bribing a journalist for favorable coverage. The difference between guilty and innocent conduct would be a matter of speculation into what a tippee knew or should have known about the tipper's intent. A trader, journalist, or analyst attempting to avoid running afoul of criminal law would have little to guide her behavior. The conservative thing to do would be to avoid seeking inside information too aggressively, even if the whole market could

benefit from such investigation. Those who decided to cultivate insider sources would risk prosecution in any case, so they might have fewer scruples about compensating their sources and trading on the information they purchased.").