
# 2016 Mid-Year Cross-Border Government Investigations and Regulatory Enforcement Review

BakerHostetler

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Welcome back to BakerHostetler's *Cross-Border Government Investigations and Regulatory Enforcement Review*, with this issue delivering highlights and analysis of important legislative, regulatory and enforcement activities that crossed national borders in the first half of 2016. Particularly noteworthy are the evolving challenges presented by technology's increasing role in the securities markets, with algorithmic trading and cyber hacking providing fertile grounds for cross-border legislative, regulatory and enforcement actions. Other high-profile incidents, such as the Panama Papers release, have highlighted the necessity for legislators and regulators around the world to prioritize anti-money laundering initiatives. Companies and counsel involved in these spaces should pay close attention, and prepare themselves to adapt to the evolving cross-border landscape as we head into the second half of 2016 and beyond.

We encourage you to read this report in conjunction with BakerHostetler's other year-end reviews: *Foreign Corrupt Practices Act 2015 Year-End Update, 2016 Mid-Year Securities Litigation and Enforcement Highlights*, and *2015 Class Action Year-End Review*. Please feel free to contact any member of the BakerHostetler White Collar Defense and Corporate Investigations team listed at the end of this report with any questions.

# I. Securities Fraud

The U.S. government has continued its aggressive enforcement of U.S. securities laws against individuals and entities located outside the U.S. for conduct occurring overseas. From legislation and enforcement actions targeting manipulative "spoofing" to enforcement actions against foreign hackers and continued cross-border collaboration in regulating credit default swaps, the first half of 2016 has seen a number of key developments in cross-border securities law issues.

## A. Spoofing

Coming off a year that saw the first-ever criminal spoofing conviction and a significant increase in civil enforcement actions targeting spoofing-related activity, regulators continue to aggressively pursue criminal and civil liability for spoofers. Spoofing is a high-frequency trading tactic in which traders place sham orders to artificially inflate or depress the price of a security, with the intent to cancel the order and profit off the manipulated price. U.S. regulators began prosecuting this manipulative practice after crediting it as the main cause of the May 6, 2010, "Flash Crash," which saw the Dow Jones Industrial Average plummet 1,000 points in minutes. And foreign regulators followed suit, as this manipulative practice spread overseas and began impacting the foreign securities markets.

### *1. Regulations*

Even with the recent surge in cross-border antispoofing regulation and enforcement, spotting this manipulative trading practice continues to be a significant challenge for regulators, especially considering spoofers' ability to layer their trades across multiple markets and firms to avoid detection. On Jan. 5, 2016, the U.S. Financial Industry Regulatory Authority (FINRA) announced that it would lend its sophisticated automated surveillance technology to study market trends and identify irregular trading activity that it suspects to be spoofing-related.[1] On April 28, 2016, FINRA announced that it had sent the first of a monthly series of report cards to firms that it suspects to be engaging in spoofing-related activity.[2] These report cards have not been made public, but reportedly contain analyses regarding the trading history of the recipient firms going back six months and highlight the trading activity that FINRA's automated surveillance programs identified as potential spoofing-related activity. While these report cards are not meant to be read as conclusions by FINRA that illegal spoofing activity has occurred, the intention is clearly for investment firms to take action internally or face potential regulatory consequences.

European regulators are also making surveillance their top priority. As reported in the *2015 Year-End Review*, the European Union adopted new market abuse regulations that became effective on July 3, 2016. Under these regulations, investment companies trading in European securities markets are required to, among other things, record their own trading activity so that market abuse can be detected.[3] This requirement will likely be daunting for many investment companies that do not already have an in-house surveillance system in place, as building or purchasing one would likely be very expensive and/or time-consuming. Nevertheless, it is telling that European legislators and regulators are willing to create significant barriers to entry in return for better surveillance, over increasingly sophisticated trading markets, in order to combat spoofing and other forms of market manipulation.

### *2. Enforcement*

After a historic 2015, the first half of 2016 has seen more successes by U.S. and foreign regulators in their enforcement of antispoofing laws. On April 6, 2016, a federal district court in Chicago denied an attempt by futures trader Michael Coscia to overturn his 2015 criminal conviction under the Dodd-Frank Wall Street Reform and Consumer Protection Act and the Commodity Exchange Act (CEA) for commodities fraud and spoofing.[4] Coscia had argued that the U.S. Department of Justice (DOJ) failed to prove that the purchase orders that he placed and canceled within

1 Financial Industry Regulatory Authority, "2016 Regulatory and Examination Priorities," Letter, Jan. 5, 2016, available at https://www.finra.org/industry/2016-regulatory-and-examination-priorities-letter#13.

2 Financial Industry Regulatory Authority, "FINRA Issues First Cross-Market Report Cards Covering Spoofing and Layering," News Release, April 28, 2016, available at https://www.finra.org/newsroom/2016/finra-issues-first-cross-market-report-cards-covering-spoofing-and-layering.

3 Press Release, European Commission, European Commission seeks criminal sanctions for insider dealing and market manipulation to improve deterrence and market integrity, Feb. 4, 2014, available at http://europa.eu/rapid/press-release_IP-11-1218_en.htm.

4 *United States v. Coscia*, No. 14-cr-551 (N.D. Ill. 2016) (Dkt. No. 124).

milliseconds were fraudulent, as well as that the antispoofing laws were unconstitutionally vague because they encompass innocuous conduct that commodities traders routinely undertake. The district court held that each of Coscia's arguments was unfounded and ruled that the country's first-ever spoofing-related criminal conviction must be upheld based on the evidence presented at Coscia's trial. On July 13, 2016, the district court sentenced Coscia to a three-year prison term.[5] Although this sentence is significantly less than the seven-year sentence the DOJ requested, it sets a precedent that could deter current and would-be spoofers from engaging in this prohibited activity.

On March 23, 2016, the DOJ notched another victory when a U.K. court ruled that Navinder Sarao should be extradited to the United States to face criminal charges.[6] He was indicted by a U.S. federal grand jury last year on 22 counts of fraud and commodities manipulation for his alleged involvement in spoofing-related activity that led to the Flash Crash in 2010. Despite the victory, Sarao may not be extradited to the U.S. to face his charges for some time, as he is currently appealing the U.K. court's decision.

On the civil enforcement side, the U.S. Commodities Futures Trading Commission (CFTC) is seeking to ban Igor B. Oystacher and his firm 3Red Trading LLC from certain markets for his use of bait-and-switch techniques allegedly designed to induce market participation and artificially manipulate the securities markets.[7] This spoofing case is unique in that Oystacher did not undertake high-frequency electronic trades through sophisticated algorithms. Nevertheless, during a hearing that lasted from April to June 2016, the CFTC argued to a Chicago federal court that the evidence overwhelmingly suggested that Oystacher entered trade orders he never intended to execute. For support, the CFTC introduced evidence that the Germany-based Eurex Exchange twice fined Oystacher for engaging in this activity in the past and that Chicago-based CME Group Inc. has fined and banned Oystacher. A decision on this matter is expected to issue in the coming months.

### B. Hacking and Securities Fraud

In May 2016, a Ukrainian hacker admitted his role in what has been called the largest known criminal hacking and securities fraud scheme.[8] Vadym Iermolovych, 28, of Kiev, Ukraine, pleaded guilty to a three-count information charging him with conspiracy to commit wire fraud, conspiracy to commit computer hacking and aggravated identity theft.[9]

As alleged in indictments handed down by the DOJ in the summer of 2015,[10] Ukrainian hackers used advanced techniques to hack into newswire services such as Marketwired L.P., PR Newswire Association LLC and Business Wire and steal hundreds of corporate earnings announcements before they were publicly released.[11] The hackers allegedly created a secret web-based location to transmit the stolen data to traders in Russia, Ukraine, Malta, Cyprus, France and the United States.[12] On December 21, 2015, Georgia-based real estate developer Alexander Garkusha pleaded guilty in connection with the charges, admitting that he used nonpublic information from the Ukrainian hackers to place illicit trades in stocks, options and other securities, while funneling a portion of his illegal profits to the hackers in return. [13]

Iermolovcyh, who was arrested in November 2014 in connection with other charges relating to computer hacking and credit card fraud, admitted during a May 16, 2016, plea hearing that he obtained a set of user credentials of PR Newswire Association LLC employees from a computer hack into a social networking website and then used at least one of those credentials to gain access to PR Newswire Association LLC's computer

5 *Id.*, at Dkt. Nos. 158-59.
6 *Financial Times*, "UK Trader in 'Flash Crash' Probe Appeals Extradition," May 16, 2016, available at http://www.ft.com/fastft/2016/05/26/uk-trader-in-flash-crash-probe-appeals-extradition/.
7 *CFTC v. Oystacher*, No. 15-cv-09196 (N.D. Ill. 2015).
8 Press Release, Department of Justice, Ukrainian Hacker Admits Role In Largest Known Computer Hacking And Securities Fraud Scheme (May 16, 2016), available at https://www.justice.gov/usao-nj/pr/ukrainian-hacker-admits-role-largest-known-computer-hacking-and-securities-fraud-scheme.
9 *Id.*
10 Press Release, Department of Justice, Nine People Charged In Largest Known Computer Hacking And Securities Fraud Scheme (Aug. 11, 2015), available at http://www.justice.gov/usao-edny/pr/nine-people-charged-largest-known-computer-hacking-and-securities-fraud-scheme.
11 *Id.*
12 Press Release, Securities and Exchange Commission, SEC Charges 32 Defendants in Scheme to Trade on Hacked News Releases (Aug. 11, 2015), available at http://www.sec.gov/news/pressrelease/2015-163.html.
13 *Supra* note 8.

network.[14] Iermolovcyh also admitted that he sold press releases stolen from a network intrusion into Marketwired L.P. and purchased access into Business Wire's network in furtherance of a conspiracy to profit from stolen drafts of press releases.[15] He was sentenced on Aug. 22, 2016.[16]

More recently, the Securities and Exchange Commission (SEC) on June 22, 2016, announced that it had obtained an emergency court order freezing the assets of a U.K. resident charged with hacking online brokerage accounts of U.S. investors and making unauthorized stock trades that netted a hefty profit.[17] The SEC's complaint, filed in the U.S. District Court in the Southern District of New York,[18] alleges that Idris Dayo Mustapha hacked into U.S. customers' accounts and placed stock trades without the customers' knowledge, and then traded in the same stocks through his own brokerage account. The SEC obtained an emergency court order that froze more than $100,000 in Mustapha's assets and prohibited Mustapha from destroying evidence.

### C. Credit Default Swaps

*1. Regulations*

During the first half of 2016, U.S. and European regulators have continued to work together to increase regulatory visibility into the derivatives and swaps markets. As we reported in our *2015 Year-End Review*, the CFTC last year proposed regulations that, among other things, aim to veer swaps trading from over-the-counter markets to centralized execution facilities. In that same vein, the European Union has been pursuing a landmark legislation called the European Market Infrastructure Regulation (EMIR), which will require derivatives contracts to be traded on exchanges or electronic trading platforms and will implement other measures designed to reduce risk in the credit derivatives markets.[19]

Although the European Union had previously announced that EMIR would have a September 2016 start date, the European Commission announced on June 10, 2016, that this body of legislation will take effect sometime before mid-2017.[20] Part of the delay appears to be caused by the European Commission's ongoing review of the draft regulatory standards submitted by the European Supervisory Authority (ESA). On March 9, 2016, the ESA proposed rules pertaining to collateral exchanges in the noncentrally cleared, over-the-counter derivatives market.[21] These rules would be similar to those proposed by the CFTC last year. Their goal is to prevent regulatory arbitrage by market participants between the centrally cleared exchanges required by EMIR and the over-the-counter markets that are not centrally cleared.

If accepted by the European Commission, the ESA's proposed rules will continue to harmonize how U.S. and European regulators are regulating the derivatives markets. We reported in our *2015 Year-End Review* that there had been increasing tensions in the past years between the two sets of regulators regarding inconsistencies between the U.S. and European approaches. This lack of harmonization had led European regulators to resist recognizing U.S.-based clearinghouses and caused the European Commission to contemplate the imposition of higher capital charges on banks clearing through U.S.-based central counterparties. But on March 15, 2016, the European Commission announced that it finally considers the regulations covering the central clearing of derivatives trades established by the CFTC to be in harmony with those required by the European Union.[22] Now, central counterparties currently registered with the CFTC will be able to obtain recognition from the European Securities and Markets Authority and continue clearing derivatives under U.S. rules. On March 16, 2016, the CFTC followed suit and formally declared that European regulations regarding the central

14 *Id.*
15 *Id.*
16 *Id.*
17 Press Release, SEC, Release No. 2016-126 (June 22, 2016), available at http://www.sec.gov/news/pressrelease/2016-127.html.
18 *Securities and Exchange Commission v. Mustapha*, 1:16-cv-04805-AJN (June 22, 2016).
19 Banking & Insurance, "EMIR II: Requirements, improvements, developments," Aug. 11, 2015, available at http://en.finance.sia-partners.com/emir-ii-requirements-improvements-developments.
20 European Commission, "Daily News 10/06/2016," Press Release, June 10, 2016, available at http://europa.eu/rapid/press-release_MEX-16-2171_en.htm.
21 European Securities and Markets Authority, "ESAS Publish Final Draft Technical Standards on Margin Requirements for Non-Centrally Cleared Derivatives," Press Release, March 9, 2016, available at https://www.esma.europa.eu/press-news/esma-news/esas-publish-final-draft-technical-standards-margin-requirements-non-centrally.
22 European Commission, "European Commission adopts equivalence decision for CCPs in USA," Press Release, March 15, 2016, available at http://europa.eu/rapid/press-release_IP-16-807_en.htm.

clearing of swaps and derivatives are now equivalent to its own regulations.[23]

These announcements have seemingly put an end to the increasing tension in the years-long negotiations between U.S. and European regulators regarding swaps and derivatives regulations. If so, CFTC Chairman Timothy Massad said in a March 16, 2016, statement, this cooperation "helps make sure that U.S. and European derivatives markets can continue to be dynamic, with robust competition and liquidity across borders."[24] But the cross-border regulatory efforts are just starting, as the implementation of the CFTC's rules and EMIR loom in the near future. As CFTC Commissioner J. Christopher Giancarlo stated, "The CFTC and its global counterparts must now recommit themselves to work together to implement an equivalent and substituted compliance process, particularly for swaps execution and the cross-border activities of swaps dealers and major swaps participants, based on common principles in order to increase regulatory harmonization and reduce market balkanization."[25]

While it is clear that EMIR will work in harmony with U.S. laws, it is less clear whether the U.K. will adopt this comprehensive European legislation after its so-called "Brexit" occurs. It is possible that the U.K. will refuse to recognize EMIR or adopt similar legislation, which will add confusion and uncertainty to the European markets. But the more likely outcome is that the U.K. will adopt similar legislation to EMIR, especially considering that EMIR is borne out of international standards that the U.K. has previously agreed to adopt.

*2. Enforcement*

In 2016, yet another lawsuit was filed against the United Kingdom's Financial Conduct Authority (FCA) in connection with its investigation of the $6.2 billion credit derivatives trading losses that occurred within J.P. Morgan Chase & Co's chief investment office in 2012. On June 2, 2016, former J.P. Morgan Chase & Co. trader Julien Grout, who was indicted in connection with his role in the losses, became the latest trader to sue the FCA on the basis that it improperly identified him in an enforcement notice directed to the bank in September 2013.[26] In his suit, which was brought in the Upper Tribunal of the U.K., Grout claimed that the FCA improperly identified him in the enforcement notice when it referenced a group of people deemed "traders on the SCP," or Synthetic Credit Portfolio.[27] According to Grout's lawyer, once the group was identified, of which Grout was a member, his anonymity was lost.[28] In August 2016, the Upper Tribunal of the U.K. issued a preliminary decision in favor of Grout, determining not only that Grout was identified improperly by the FCA's September 2013 enforcement notice, but that he was prejudiced by the identification.[29] Central to the Upper Tribunal's decision was its finding that the references to "traders on the SCP" were clear references to persons separate from J.P. Morgan Chase & Co. itself and that relevant readers of the enforcement notice would have known at the time of the publication that Grout was one of those traders.[30]

A similar result was reached in a suit that was filed against the FCA by Achilles Macris, a former London-based international chief investment officer involved in trading losses. In May 2015, a London court of appeal found in connection with Macris' suit that the FCA's use of the term "CIO London management" in the enforcement notices – a deliberate and easily identifiable reference to Macris – without providing him with an opportunity to respond to the allegations was improper.[31] Court of Appeal Judge Elizabeth Gloster stated that the reference to "CIO London management" in the FCA's

23 CFTC, "Comparability Determination for the European Union: Dually-Registered Derivatives Clearing Organizations and Central Counterparties," Report, March 16, 2016, available at http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/federalregister031616.pdf.

24 "Remarks of Chairman Timothy Massad before the CCP12 Founding Conference and CCP Forum, Shanghai, China," Speech, June 7, 2016, available at http://www.cftc.gov/PressRoom/SpeechesTestimony/opamassad-46.

25 "Statement of CFTC Commissioner J. Christopher Giancarlo Comparability Determination for the European Union: Dually-Registered Derivatives Clearing Organizations and Central Counterparties," Speech, March 16, 2016, available at http://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement031616.

26 Suzi Ring, Ex-JPMorgan Trader Grout Sues FCA Over London Whale Report, Bloomberg (June 2, 2016), available at http://www.bloomberg.com/news/articles/2016-06-02/ex-jpmorgan-trader-grout-sues-regulator-over-london-whale-report.

27 *Id.*

28 *Id.*

29 DAC Breachcroft, Preliminary decision against FCA opens way for further action: *Grout v. FCA*, Lexology (Aug. 3, 2016), available at http://www.lexology.com/library/detail.aspx?g=4709ab6d-4777-4abf-a79c-02135c3f5a6d.

30 *Id.*

31 Kit Chellel, Ex-JPMorgan Executive Wins Appeal on FCA London Whale Report, Bloomberg Business (May 19, 2015), available at http://www.bloomberg.com/news/articles/2015-05-19/ex-jpmorgan-executive-wins-appeal-over-fca-london-whale-report-i9v4tql0.

reports and notices "was in context clearly a reference to a particular individual, and not to a body of people."[32]

These lawsuits against the FCA could have a substantial impact on how the FCA conducts and concludes its investigations in the future, particularly with regard to potential settlements with regulated financial institutions. The decision could force the regulator to draft its final notices more carefully and to provide individuals referenced in its notices against corporate defendants with an opportunity to respond to allegations concerning their individual actions.[33] A number of other individuals have initiated similar appeals with the British courts concerning FCA enforcement notices related to the alleged foreign exchange market and London Interbank Offered Rate (LIBOR) manipulations.[34]

In the United States, the SEC's case continues against Grout and against Javier Martin-Artajo, a former managing director and trading supervisor in the bank's London office, and is now in active discovery. The DOJ's criminal action against the two former traders, however, has not moved forward because it has been unable to secure the extradition of Grout or Martin-Artajo, who are foreign nationals residing in France and Spain, respectively.[35]

### D. Benchmark Rates

LIBOR is the minimum interest rate, or benchmark interest rate, at which banks lend unsecured funds to each other.[36] Banks all over the world use LIBOR as a base rate for setting interest rates on consumer and corporate loans such as auto, student and home loans.[37] The foreign currency exchange spot market (FX market), which permits traders to buy, sell, exchange and speculate on currencies, is one of the world's largest and most actively traded financial markets, with trading volumes that have averaged close to $5 trillion a day.[38] The alleged manipulations of LIBOR and the FX market purportedly had worldwide effects and have been the focus of several large-scale, cross-border enforcement actions.

#### 1. *Fines and Lawsuits for Alleged Manipulation of LIBOR*

On May 25, 2016, the CFTC issued an order settling charges against Citibank N.A., Citibank Japan Ltd. and Citigroup Global Markets Japan Inc. relating to alleged abuses of the LIBOR as well as the Euroyen Tokyo Interbank Offered Rate (TIBOR) benchmarks.[39] According to the CFTC, Citigroup Global Markets Japan Inc. and Citibank Japan Ltd. attempted to manipulate Yen LIBOR and Euroyen TIBOR on multiple occasions in 2010 in order to benefit the derivatives trading positions of those traders.[40] Specifically, the Order states that a senior Yen derivatives trader based in Tokyo, who was hired to enhance the bank's reputation in the Tokyo derivatives market, attempted to manipulate the benchmarks using his contacts at other Yen LIBOR panel banks and interdealer brokers to influence the Yen LIBOR submissions at other Yen panel banks.[41] In addition, the Order made findings that between the spring of 2008 and the summer of 2009, Citibank, N.A.'s U.S. Dollar LIBOR submitters in London manipulated their LIBOR submissions to avoid generating media attention and to protect the bank's reputation in the market.[42] As part of the settlement, Citibank and its Japanese affiliates were ordered by the CFTC to pay a civil monetary penalty of $175 million,

32 Leanna Orr, London Whale Boss Wins Privacy Case Against Regulator, Chief Investment Officer (May 20, 2015), available at http://www.ai-cio.com/channel/REGULATION,-LEGAL/London-Whale-Boss-Wins-Privacy-Case-Against-Regulator/.

33 Alan Ward, Why bankers must be allowed to speak out in their own defense, Law 360 (May 26, 2015), available at http://www.cityam.com/216388/why-bankers-must-be-allowed-speak-out-their-own-defence.

34 Suzi Ring, Ex-Barclays Forex 'Cartel' Trader Ashton Loses Identity Case, The Washington Post (Jan. 13, 2016), available at http://washpost.bloomberg.com/Story?docId=1376-O0W8S06JIJW101-7QI6D92AJ17MBJJSM5SF901TGK.

35 Nate Raymond, Ex-JPMorgan traders, citing arrest risk, avoid SEC deposition in N.Y., Reuters (Oct. 21, 2015), available at http://www.reuters.com/article/us-usa-jpmorgan-londonwhale-idUSKCN0SF2D420151021.

36 James McBride, Understanding the Libor Scandal, Council on Foreign Relations (May 21, 2015), available at http://www.cfr.org/united-kingdom/understanding-libor-scandal/p28729.

37 *Id.*

38 Anirban Nag, Foreign Exchange, the world's biggest market, is shrinking, Reuters (Feb. 11, 2016), available at http://www.reuters.com/article/us-global-fx-peaktrading-idUSKCN0VK1UD; CFTC Order Instituting Proceedings Against Citibank, N.A., CFTC Docket No. 15—03, available at http://www.cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfcitibankorder111114.pdf.

39 Jeff Patterson, CFTC Fines Citi, Affiliates for $175m for Yen Libor Manipulation, Finance Magnates (May 25, 2016), available at http://www.financemagnates.com/institutional-forex/regulation/cftc-fines-citi-affiliates-175m-yen-libor-manipulation/.

40 Press Release, CFTC, CFTC Orders Citibank N.A. and Japanese Affiliates to Pay $175 Million Penalty for Attempted Manipulation of Yen LIBOR and Euroyen TIBOR, and False Reporting of Euroyen TIBOR and U.S. Dollar LIBOR, *available at* http://www.cftc.gov/PressRoom/PressReleases/pr7372-16.

41 *Id.*

42 *Id.*

to cease and desist from further violations of the CEA, and to ensure the integrity of their LIBOR, Euroyen TIBOR and other benchmark rate submissions.[43] Citigroup was also fined an additional $250 million for improperly influencing ISDAfix, a reference rate for fixed interest rate swaps, from January 2007 through January 2012.[44]

Private investors have also filed class action antitrust lawsuits against major banks, alleging that the banks' collusion to manipulate LIBOR and Euroyen TIBOR harmed their interests. As one of 20 defendants, HSBC agreed to pay $35 million to settle its case in June 2016.[45] Earlier this year, Citigroup also entered into a similar agreement with private litigants for $23 million.[46] Despite the staggering amount of fines and penalties that have been amassed, the fallout from the alleged manipulation appears likely IBOR to continue.

2. *Sanctions for Individuals Charged with Criminal Conduct in Connection to LIBOR and FX Market Manipulation*

August 2015 saw the conviction by a British jury of former UBS and Citigroup trader Tom Hayes, who was billed as the "ringmaster" of a network of more than 25 traders from 16 banks who manipulated LIBOR for their own personal gain. In October 2015, former London-based Deutsche Bank derivatives trader Michael Curtler pleaded guilty to one count of conspiracy to commit wire and bank fraud for his role in the scheme.[47] Further, in November 2015, former Rabobank traders and British citizens Anthony Allen and Anthony Conti became the first to be convicted in the U.S. of charges relating to the manipulation of LIBOR.[48]

Finally, in June 2016, two former Deutsche Bank workers were indicted by the DOJ for their alleged roles in manipulating LIBOR.[49] Matthew Connolly, a supervisor in New York, and Galvin Black, a London trader, are the latest bankers to face charges in connection with the LIBOR manipulation. Connolly, who was taken into custody in early August, is the first American citizen to be charged in a LIBOR case.[50] According to the indictment, Connolly and Black conspired to manipulate LIBOR from 2005 through at least 2011, with the participation of several other individuals of the bank, including managing directors and vice presidents in Europe, North America and Asia.[51] They face charges including conspiracy to commit wire and bank fraud and several counts of wire fraud.[52]

43 *Id.*

44 The Money Street!, CitiGroup Smiley Face Turns Sour as CFTC Finds ISDAfix Rigging (May 25, 2016), available at http://www.themoneystreet.com/citigroup-smiley-face-turns-sour-as-cftc-finds-isdafix-rigging/; CFTC, Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, Making Findings, and Imposing Remedial Sanctions (May 25, 2016), available at http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfcitibankisdaorder052516.pdf.

45 Reuters, HSBC to Pay $35 Million to Resolve Yen Libor Litigation in U.S. (June 17, 2016), available at http://www.reuters.com/article/us-libor-yen-hsbc-idUSKCN0Z32L3.

46 Reuters, Citigroup Reaches $23 Million 'Ice Breaker' Yen Libor Settlement (Feb. 2, 2016), available at http://www.reuters.com/article/us-libor-yen-citigroup-idUSKCN0VB1TC.

47 Antoine Gara, Two Deutsche Bank Traders Charged by DOJ in Widening LIBOR Rigging Probe, Forbes (June 2, 2016), available at http://www.forbes.com/sites/antoinegara/2016/06/02/two-deutsche-bank-traders-charged-by-doj-in-widening-libor-rigging-probe/#6bfb0f716231.

48 Jill Treanor, Two former Rabobank traders convicted in US Libor rigging trial, The Guardian (Nov. 5, 2015), available at http://www.theguardian.com/business/2015/nov/05/two-former-rabobank-traders-convicted-us-libor-rigging-trial.

49 Ambereen Choudhury, Two Former Deutsche Bank traders charged by U.S. in Libor Probe, The Independent (June 3, 2016), available at http://www.independent.co.uk/news/business/news/two-former-deutsche-bank-traders-charged-by-us-in-libor-probe-a7064116.html.

50 Ben Protess, Libor Prosecution Snares Two Former Deutsche Traders, The New York Times (June 2, 2016), available at http://www.nytimes.com/2016/06/03/business/dealbook/former-deutsche-bank-traders-charged-in-libor-case.html?_r=0.

51 Ambereen Choudhury, Two Former Deutsche Bank traders charged by U.S. in Libor Probe, The Independent (June 3, 2016), available at http://www.independent.co.uk/news/business/news/two-former-deutsche-bank-traders-charged-by-us-in-libor-probe-a7064116.html.

52 *Id.*

# II. Money Laundering

### A. Regulation and the Panama Papers

In the wake of the Panama Papers release, anti-money laundering regulation and enforcement has become a priority for numerous sovereigns around the world. Since the leak in early April 2016 of more than 11.5 million financial and legal documents relating to more than 200,000 offshore entities, thousands of news stories have been published based on information contained in the data leak. The Panama Papers, as the documents were termed, contained confidential and privileged information from the Mossack Fonseca law firm in Panama, and included information about various world leaders and politically connected individuals, among others.[53] The DOJ and the European Union have indicated that they are investigating the disclosures, but the full set of leaked documents has not yet been made available to international law enforcement and tax authorities. The International Consortium of Investigative Journalists (ICIJ) has said that it will not presently cooperate with investigators, leaving law enforcement agencies to review only the documents that the ICIJ has made publicly available.

However, on May 6, 2016, the unknown source behind the leak issued a manifesto calling on Congress and global lawmakers to increase whistleblower protections and seemingly offered his/her cooperation. While acknowledging that the ICIJ "have rightly stated that they will not provide them to law enforcement agencies," the source also stated that he/she "would be willing to cooperate with law enforcement to the extent that I am able." It is not yet publicly known whether any law enforcement agency has received any assistance from the source of the leak. Nor is it known how far any investigations have progressed to date.

The Panama Papers revealed how for decades a single law firm located in Panama was able to create shell companies for thousands of individuals located around the world and utilize the secrecy laws of various jurisdictions potentially to allow individuals to hide assets and evade taxes. Immediately, regulators throughout the world began examinations of the regulatory blind spots that allowed for this activity to occur on such a large scale. The United States, for its part, has already taken action in the wake of the Panama Papers, even without having full access to the leaked documents. On May 11, 2016, the Financial Crimes Enforcement Network (FinCen) – a bureau of the U.S. Department of the Treasury – took the first significant step to close a regulatory gap when it announced a long-awaited final rule on customer due diligence. The new rule requires banks, broker-dealers and other covered financial institutions to (i) identify and verify the identity of customers, (ii) identify and verify the identity of "beneficial owners" of the legal entity customers, (iii) understand the nature and purpose of customer relationships, and (iv) monitor suspicious transactions, on a risk basis, and maintain and update customer information.[54] The new rule differs from its predecessor in that it requires financial institutions to now determine who is a "beneficial owner" of an account, using both an ownership test and a control test. The new rule also adds a new pillar to FinCen's existing anti-money laundering program requirements: covered financial institutions must now ensure that they "understand the nature and purpose of customer relationships for the purpose of developing a customer risk profile," especially as it pertains to beneficial owner information.[55]

The key takeaway is that, for the first time, covered financial institutions must now also monitor the beneficial owners of the legal entity account holders, not just the account holders themselves. "As Treasury Secretary Jacob Lew said in a letter to U.S. House of Representatives Speaker Paul Ryan, the new rule is a critical step in our efforts to prevent criminals from using companies to hide their identity and launder criminal proceeds."[56] Nevertheless, U.S. authorities believe that regulators need additional tools to obtain information about beneficial owners. In that vein, the DOJ has asked Congress to consider legislation that would make it easier for regulators and criminal prosecutors to obtain evidence in corruption and money laundering investigations.[57] These proposals include expanding the

53 *See The Panama Papers: Here's What We Know*, The New York Times, April 4, 2014, available at http://www.nytimes.com/2016/04/05/world/panama-papers-explainer.html.

54 31 C.F.R. §1010.230(a) (2016).

55 *Id.* at §1020.210(b)(5).

56 Jacob Lew, Letter to U.S. House of Representatives Speaker Paul Ryan, May 5, 2016, available at https://www.treasury.gov/press-center/press-releases/Documents/Lew%20to%20Ryan%20on%20CDD.PDF.

57 *Id.*

foreign money laundering predicates to include any violation of foreign law that would be a predicate if committed in the United States, allowing administrative subpoenas for money laundering investigations, and enhancing law enforcement's ability to access foreign bank records by serving branches located in the United States.[58] Specifically, the DOJ asked Congress to pass "meaningful beneficial ownership legislation that requires companies to monitor and disclose the real person behind the customer company," and asked the U.S. Senate to approve pending tax treaties "to ensure full and fair enforcement of our tax laws."[59]

In the meantime, broker-dealers should expect increased scrutiny from FINRA with respect to suspected money laundering activity. On May 18, 2016, J. Bradley Bennett, the executive vice president of enforcement at FINRA, said that FINRA is seeking to ramp up its money laundering enforcement and that the public should expect more enforcement actions on this matter.[60] This announcement came after FINRA announced that it had suspended Raymond James & Associates Inc. (RJA) and Raymond James Financial Services Inc. and fined them a total of $17 million for systematic failures related to their anti-money laundering programs.[61] FINRA also announced that it had fined RJA's anti-money laundering compliance officer, Linda L. Busby, $25,000 and suspended her for three months for her part in these failures.[62] However, Bennett noted that punishing compliance officers like Busby will be the exception rather than the rule, stating that FINRA is "looking for reasons not to name the compliance officers."[63]

European firms should also expect increased regulation and legislation in the wake of the Panama Papers release. On June 8, 2016, the European Parliament announced that it had created a 65-member parliamentary task force that will investigate the leaked papers and report on whether member states and the European Commission failed to adequately regulate and enforce anti-money laundering rules and legislation.[64] On June 17, 2016, the European Union's finance ministers proposed new rules that are aimed at curbing tax evasion practices.[65] And on July 5, 2016, the European Commission published a new directive draft proposing to extend strict anti-money laundering regulation to both virtual currency exchange services and custodial wallet providers.[66] This proposed legislation is still subject to approval, but could be enforced as soon as Jan. 1, 2017.

It should also be noted that the U.K.'s expected departure from the European Union should not affect its adoption of European anti-money laundering regulation. The European Union's money laundering directives stem from the recommendations of the Financial Action Task Force. Because the U.K. is a member of this task force, it will likely recognize this regulation or adopt similar U.K.-specific regulations when the U.K.'s exit from the European Union becomes final.

### B. Criminal Enforcement

A years-long corruption investigation in Malaysia involving 1Malaysia Development Berhard (1MDB), which became multinational after a retired Swiss banker leaked thousands of documents to a British journalist and was later arrested by Thai authorities and charged with blackmail,[67] culminated with the DOJ filing civil forfeiture complaints in July against 1MDB.[68] 1MDB allegedly misappropriated more than $3.5 billion in funds, $1 billion of which were laundered through

58 Justice Department Proposes Legislation to Advance Anti-Corruption Efforts, May 5, 2016, available at https://www.justice.gov/opa/pr/justice-department-proposes-legislation-advance-anti-corruption-efforts.

59 *Id.*

60 FINRA, "FINRA Fines Raymond James $17 Million for Systemic Anti-Money Laundering Compliance Failures," News Release, May 18, 2016, available at https://www.finra.org/newsroom/2016/finra-fines-raymond-james-17-million-systemic-anti-money-laundering-compliance.

61 *Id.*

62 *Id.*

63 *Id.*

64 European Parliament, "Parliament sets up "Panama Papers" inquiry committee," Press Release, June 8, 2016, available at http://www.europarl.europa.eu/news/en/news-room/20160603IPR30203/Parliament-sets-up-%E2%80%9CPanama-Papers%E2%80%9D-inquiry-committee.

65 European Council, "Economic and Financial Affairs Council," Report, June 17, 2016, available at http://www.consilium.europa.eu/en/meetings/ecofin/2016/06/17/.

66 European Commission, "Commission strengthens transparency rules to tackle terrorism financing, tax avoidance and money laundering," Press Release, July 5, 2016, available at http://europa.eu/rapid/press-release_IP-16-2380_en.htm.

67 Randeep Ramesh, *1MDB: The inside story of the world's biggest financial scandal*, The Guardian, July 28, 2016, available at https://www.theguardian.com/world/2016/jul/28/1mdb-inside-story-worlds-biggest-financial-scandal-malaysia.

68 Press Release, Department of Justice, United States Seeks to Recover More Than $1 Billion Obtained from Corruption Involving Malaysian Sovereign Wealth Fund (July 20, 2016), available at https://www.justice.gov/opa/pr/united-states-seeks-recover-more-1-billion-obtained-corruption-involving-malaysian-sovereign.

the U.S.[69] The funds, which were set aside by the Malaysian government for the purpose of promoting economic development in Malaysia, were allegedly laundered by 1MDB officials and associates through a series of fraudulent transactions and shell companies with bank accounts in Singapore, Switzerland, Luxembourg and the U.S. The transactions were processed through U.S. financial institutions and then used to invest in assets in the U.S., including high-end real estate, artwork by Van Gogh and Monet, and the production of *The Wolf of Wall Street*.[70]

Meanwhile, the global investigation into Liberty Reserve over its alleged role as one of the principal money transfer agents used by cybercriminals around the world to distribute, store and launder the proceeds of illegal activity continues in 2016. Liberty Reserve co-founder Arthur Budovsky was sentenced to 20 years in prison in May 2016,[71] and that sentencing was followed by the imposition of a 10-year sentence on fellow co-founder Vladamir Kats seven days later.[72] Budovsky's uncommonly severe sentence was based on a previous fraud conviction and involvement in at least two other frauds, as well as the judge's desire to take a harsher stance against cybercrime.[73] The money laundering investigation and prosecution of Liberty Reserve touched multiple countries – the U.S., Costa Rica, the Netherlands, Spain, Sweden and Switzerland, among others – and involved cooperation among various regulators. Many U.S. agencies – including the U.S. Secret Service, the Internal Revenue Service-Criminal Investigation division and the U.S. Immigration and Customs Enforcement's Homeland Security Investigations division – took part in the Liberty Reserve investigation. In addition, Costa Rican officials were integral to the investigation and recovery of assets, seizing about $20 million of Liberty Reserve funds.

69 *Id.*
70 *Id.*
71 Pete Brush, Liberty Reserve Boss Gets 20 Years For $8B Cybercrime Haven, Law 360 (May 6, 2016), available at http://www.law360.com/articles/793427/liberty-reserve-boss-gets-20-years-for-8b-cybercrime-haven.
72 Nate Raymond and Brendan Pierson, Digital Currency Firm Co-Founder Gets 10 Years in Prison in U.S. Case, Reuters (May 13, 2016), available at http://www.reuters.com/article/us-usa-cyber-libertyreserve-idUSKCN0Y42A2.
73 Nicole Hong, Liberty Reserve Head Sentenced to 20 Years in Prison, The Wall Street Journal (May 6, 2016), available at http://www.wsj.com/articles/liberty-reserve-head-sentenced-to-20-years-in-prison-1462578957.

# III. Investigations of Corruption in International Sports

### A. FIFA

The DOJ and Office of the Attorney General of Switzerland (OAG) continue to investigate high-ranking officials of the Fédération Internationale de Football Association (FIFA), the organization responsible for regulating and promoting soccer worldwide, in connection with their probe into the circumstances surrounding the bidding process for the 2018 and 2022 World Cup tournaments.[74] Last year, more than 40 people connected to FIFA, including FIFA executive committee members, were indicted in the United States in connection with a massive conspiracy that involved the receipt of more than $200 million in bribes and kickbacks for the sale of broadcasting rights for past and future FIFA tournaments.[75]

In June 2016, the OAG searched FIFA headquarters and seized documents and electronic data related to its ongoing investigations of Sepp Blatter, former FIFA president, and Jerome Valcke, former FIFA secretary general.[76] The OAG opened criminal proceedings against Blatter and Valcke in 2015 based on allegations that they criminally mismanaged FIFA money.[77] Blatter and Valcke, who deny wrongdoing, were banned by FIFA's ethics committee in connection with the accusations.[78]

On June 20, 2016, Switzerland's Federal Audit Oversight Authority announced that it was looking into auditing firm KPMG's work for FIFA during the time the scandal occurred.[79] The Federal Audit Oversight Authority noted that while it has selected for evaluation aspects of KPMG's work in connection with the auditing of FIFA's financial statements, the evaluation does not constitute a formal investigation, which would be initiated only if breaches of duty are identified.[80]

### B. Russian Doping Investigation

In May 2016, the DOJ opened an investigation into state-sponsored doping by dozens of Russia's top athletes.[81] The investigation, which is being conducted out of the U.S. Attorney's Office for the Eastern District of New York, concerns Russian government officials, coaches and antidoping authorities and whether anyone benefited unfairly from a doping regimen.[82] The DOJ's investigation comes after a report published in November 2015 by the World Anti-Doping Agency accused Russia of systematic state-sponsored doping.[83] Central to the investigation is the former head of the Russian anti-doping laboratory, Dr. Grigory Rodchenkov, who admitted to *The New York Times* that he helped Russian athletes use banned performance-enhancing substances at the direction of the Russian government.[84] Dr. Rodchenkov is purportedly one of the individuals under investigation by the U.S. government.[85]

Members of the Russian government have responded to news of the investigation negatively, criticizing the United States for inappropriately asserting its jurisdiction abroad and accusing the United States of using the doping investigation as an instrument of a "new Cold War" against the country.[86] The Russian Sports Ministry, however, has acknowledged the existence of doping problems in a statement after Dr. Rodchenkov's claims were published, but it did not specify what those problems are.[87]

In its investigation, the DOJ is expected to determine whether anyone facilitated unfair competition in the U.S. through doping or used the United States banking system to conduct a doping operation.[88]

74 ESPN Staff, Swiss Attorney General Confirms at FIFA HQ, ESPN (June 3, 2016), available at http://www.espnfc.com/blog/fifa/243/post/2885579/swiss-attorney-general-confirms-search-at-fifa-hq.

75 Ian Bremmer, These Are the 5 Facts That Explain the FIFA Scandal, Time (June 4, 2015), available at http://time.com/3910054/fifa-scandal-sepp-blatter/.

76 Independent, FIFA Headquarters Raided: Swiss Investigators Seize Documents and Electronic Data in Criminal Probe (June 3, 2016), available at http://www.independent.co.uk/sport/football/news-and-comment/fifa-headquarters-raided-swiss-investigators-seize-documents-regarding-world-cup-bidding-scandal-a7063776.html.

77 *Supra*, note 74.

78 *Id.*

79 *Id.*

80 *Id.*

81 Rebecca R. Ruiz, Justice Department Opens Investigation into Russian Doping Scandal, The New York Times (May 17, 2016), available at http://www.nytimes.com/2016/05/18/sports/olympics/justice-department-russia-doping-investigation.html?_r=0.

82 *Id.*

83 *Id.*

84 *Id.*

85 Euan McKirdy, Federal investigation opened into alleged Russian Doping, CNN (May 19, 2016), available at http://edition.cnn.com/2016/05/18/sport/u-s-investigation-russia-doping/.

86 *Id.*

87 *Id.*

88 *Id.*

# IV. Trade Sanctions and Export Controls

In the first half of 2016, the United States Office of Foreign Assets Control (OFAC) has continued to levy significant fines against foreign individuals, banks and other corporations for violating a bevy of U.S. sanctions programs. OFAC has already reached settlements regarding four civil penalties and issued one Finding of Violation since the start of 2016. The four settlements total more than $3.5 million and include:

1. A $140,500 settlement with WATG Holding Inc. regarding apparent violations of the Cuban Assets Control Regulations.[89]
2. A more than $2.5 million settlement with Barclays Bank Plc in response to apparent violations of the Zimbabwe Sanctions Regulations.[90]
3. A $614,250 settlement with CGG Services S.A. regarding alleged violations of the CACR.[91]
4. A $304,706 settlement with Halliburton Atlantic Ltd. regarding alleged violations of the CACR.[92]

Even as the United States' foreign policy on Cuba continues to develop and evolve,[93] companies must be vigilant when looking at their worldwide operations as they relate to Cuba. Though all three Cuban-related OFAC sanctions were deemed "nonegregious," companies can receive a valuable reduction in any assessed base penalty through voluntary self-disclosure.[94]

After the passage of the Iran Nuclear Deal, economic sanctions were lifted against Iran on Implementation Day, Jan. 16, 2016. Although leaving the American trade embargo in place, the U.S. government will no longer impose sanctions on foreign individuals or firms that buy oil and gas from Iran, and permits limited business activity with Iran.[95] The U.S. Treasury Department issued FAQs to provide guidance on permissible economic activity with Iran, including activities under General License H, which allows foreign units of U.S. companies to conduct business with Iran.[96] The U.S. government continues to enforce the International Emergency Economic Powers Act (IEEPA), which authorizes the president to declare the existence of a threat and take certain actions to block transactions and freeze assets to deal with that threat, specifically with respect to threats that are foreign in nature, and the Iranian Transactions and Sanctions Regulations (ITSR) against individuals and companies that violate the prohibitions still in place with the Iran Deal. Additional sanctions against Iran persist on a state level as well.[97]

Enforcement in 2016 against conducting business in Iran includes:

1. In May 2016, Ali Reza Parsa, a Canadian-Iranian dual citizen and Canadian resident, was sentenced to three years for violating IEEPA and ITSR by using his Canadian company, Metal PM, to order high-tech electronic components from American companies, which then were shipped to Canada or the United Arab Emirates, for eventual delivery to Iran.[98] The electronic components had both possible commercial and military uses, and were known as dual-use devices, which are still subject to sanctions.[99] Parsa's arrest was the result of a joint investigation by the FBI and the U.S. Department of Commerce, Bureau of Industry and Security.

89 Enforcement Action for January 20, 2016, OFAC, available at https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20160120.pdf.

90 Enforcement Action for February 8, 2016, OFAC, available at https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20160208_barclays.pdf.

91 Enforcement Action for February 22, 2016, OFAC, available at https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20160222_CGG.pdf.

92 Enforcement Action for February 25, 2016, OFAC, available at https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20160225_Halliburton.pdf.

93 Charting a New Course on Cuba, The White House, available at https://www.whitehouse.gov/issues/foreign-policy/cuba.

94 Economic Sanctions Enforcement Guidelines, 31 C.F.R. § 501 (2009).

95 David E. Sanger, Iran Complies With Nuclear Deal; Sanctions Are Lifted, The New York Times (Jan. 16, 2016), available at http://www.nytimes.com/2016/01/17/world/middleeast/iran-sanctions-lifted-nuclear-deal.html?_r=0.

96 Samuel Rubenfeld, U.S. Treasury Guidance Aids Iran Deal Compliance, Lawyers Say, The Wall Street Journal (June 13, 2016), available at http://blogs.wsj.com/riskandcompliance/2016/06/13/u-s-treasury-guidance-aids-iran-deal-compliance-lawyers-say/; see also https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa_faqs.pdf.

97 Jo-Anne Hart and Sue Eckert, Most U.S. States Have Sanctions Against Iran. Here's Why That's a Problem, The Washington Post (June 1, 2016), available at https://www.washingtonpost.com/news/monkey-cage/wp/2016/06/01/most-u-s-states-have-sanctions-against-iran-heres-why-thats-a-problem-2/.

98 Press Release, Department of Justice, Canadian-Iranian Citizen Sentenced in Manhattan Federal Court to Three Years in Prison for Conspiring to Violate Iran Sanctions (May 23, 2016), available at https://www.justice.gov/usao-sdny/pr/canadian-iranian-citizen-sentenced-manhattan-federal-court-three-years-prison.

99 Colin Freeze, Canadian Sentenced in U.S. for Breaking Iran Export Sanctions, The Globe and Mail (May 23, 2016), available at http://www.theglobeandmail.com/news/national/canadian-sentenced-in-us-for-breaking-iran-export-sanctions/article30123222/.

5. On March 7, 2016, the United States District Court for the District of Columbia reaffirmed a $4.073 million civil penalty imposed by OFAC on Epsilon Electronics for violating ITSR.[100] Epsilon, a California-based car audio and video equipment manufacturer, exported $3.4 million worth of equipment to Dubai-based Asra International Corporation LLC, knowing that the equipment was to be re-exported to Iran. Although no direct evidence was found linking Epsilon directly to Asra, or any transactions or end users in Iran, statements and images on Asra's website that indicated the sale of Epsilon products in Iran were found by the court to be sufficient evidence that Epsilon reasonably knew the equipment was being re-exported to Iran. The court also rejected Epsilon's argument that the $4.073 million penalty was egregious.

On Feb. 11, 2016, Congress passed the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA), which grants U.S. Customs and Border Protection (CBP) the right to enforce against the importation of goods produced with slave or forced labor. The TFTEA was put into action in June, when CBP seized shipments of stevia, a zero-calorie sweetener, imported from China by PureCircle Ltd. PureCircle allegedly violated the TFTEA by obtaining stevia allegedly produced by Inner Mongolia Hengzheng Group Baoanzhao Agricultural and Trade LLC, which is accused of using convict labor. PureCircle was given three months to prove that Inner Mongolia did not supply its stevia shipments. CBP has made two other major seizures under the new law, against two Chinese companies, Tangshan Sanyou Group and Tangshan Sunfar Silicon Industries, the latter of which also allegedly used prison labor to produce its wares. After CBP issues a seizure order under the act, the purchaser must provide detailed proof that the product was not produced with forced labor, with sufficiency of proof to be determined by CBP on a case-by-case basis.

100 Lexology, Federal District Court Sides with OFAC in Rare Judicial Challenge of Sanctions Violations Penalty (May 24, 2016), available at http://www.lexology.com/library/detail.aspx?g=fc8fed09-8c5e-42f6-804f-c90bf2842a71.

# V. Executive Accountability

In the U.K., Prime Minister Theresa May has indicated the government needs to get "tough on irresponsible behavior in big businesses."[101] May's predecessor, Prime Minister David Cameron, announced earlier in the year the U.K. government's initiative to create new corporate offenses to fight corruption, including an extension of the offense of "failure to prevent" to other economic crimes such as fraud and money laundering.[102] Cameron had also indicated that legislation for the creation of a new offense of "failure to prevent the facilitation of tax evasion" would be introduced this year. The expansion of the "failure to prevent" offenses is modeled on the "failure to prevent bribery" offense under Section 7 of the U.K. Bribery Act of 2010, which makes it a strict liability offense for companies whose employees, associated companies or other associated third parties pay bribes for the company's benefit, with a "compliance" defense considering the company's established procedures for preventing corrupt activity. With the prospective expansion of "failure to prevent" offenses, companies conducting business in the U.K. might need to reevaluate their fraud and corruption prevention measures in the near future to avail themselves of any "compliance" defenses.

The announcement came after the FCA implemented the Senior Managers Regime (SMR) on March 7, 2016,[103] which requires certain managers at banks to file a "statement of responsibilities." The statement will allow the FCA to pinpoint the responsible individual or individuals when regulations are violated. Although the "presumption of responsibility rule" (which required management to prove, when wrongdoing took place, that it did everything possible to stop it) was reversed in an amendment passed in early May, under the SMR executives can face up to seven years in jail if a decision they made caused their company to fail, or if they knew of the risk of failure at the time the decision was made.[104] New remuneration rules also allow the FCA to claw back senior manager bonuses for up to 10 years.[105] As part of the years-long process of planning by and communications from the FCA concerning the SMR, the FCA issued a policy statement in December 2015 providing guidance on the phrase "dealing with a client in the United Kingdom" used in the SMR, which expands the regime extraterritorially to any contact with a client who is in the U.K. at the time. The FCA clarified that only individuals performing "significant harm functions" (i.e., employees in positions where they could pose risks of significant harm to customers or the firm), based in U.K. branches would need to be certified, but the issue would be revisited after the SMR's implementation in March 2016. The FCA to date has yet to provide additional guidance on the extraterritorial application of the SMR.[106] As a result of the implementation of the SMR and the FCA's subsequent heightened focus on individuals, the total value of fines imposed by the FCA has dropped by a third from the 2014-2015 financial year, while individual penalties imposed by the FCA have doubled over the same period.[107]

101 Law 360, New UK Chief Must Balance Biz Needs With Brexit Goals (July 12, 2016), available at http://www.law360.com/internationaltrade/articles/816440/new-uk-chief-must-balance-biz-needs-with-brexit-goals.

102 Susannah Cogman and James Bewley, New Corporate Offenses in UK: What US Cos. Should Know, Law 360 (May 23, 2016), available at http://www.law360.com/whitecollar/articles/799266?nl_pk=82503858-21e4-4460-8f7f-81f7947f2c5b&utm_source=newsletter&utm_medium=email&utm_campaign=whitecollar.

103 Bank of England, Senior Managers Regime – Forms, available at http://www.bankofengland.co.uk/pra/Pages/authorisations/smr/default.aspx (last visited Feb. 11, 2016).

104 Alex Davis, "New FCA Head Comes Out Swinging Against Bank Culture," Law 360 (May 9, 2016), available at http://www.law360.com/articles/793839/new-fca-head-comes-out-swinging-against-bank-culture.

105 *Id.*

106 Matt Hancock, "The Certification Regime in UK Branches of Overseas Banks: Calm Before the Consultation," Mishcon de Reya LLP (June 13, 2016), available at http://www.lexology.com/library/detail.aspx?g=eb5ba050-e85d-46ab-9398-7edd0f57437c.

107 Matthew Field, "FCA Fines to Companies Drop by a Third as Banking Scandals Pass, While Individual Penalties Rocket," Legal Business (June 20, 2016), available at http://www.legalbusiness.co.uk/index.php/lb-blog-view/6709-fca-fines-to-companies-drop-by-a-third-as-banking-scandals-pass-while-individual-penalties-rocket.

# VI. U.S. Government's Authority to Seize Data Stored Overseas

### A. Proposed Amendments to Federal Rule of Criminal Procedure 41

In the first half of 2016, the United States Supreme Court approved a change to Rule 41 of the Federal Rules of Criminal Procedure, which would allow the government to execute search warrants via remote access when the physical location of the place to be searched is unknown – potentially expanding the extraterritorial reach of government search warrants.

The rule change facilitates the government's ability to obtain a remote search warrant in situations where criminals use sophisticated anonymizing technologies to obscure a user's IP address or use multiple computers in many districts simultaneously as part of complex criminal schemes.[108] The amendment would authorize a court in a district where "activities related to a crime" have occurred to issue a warrant to use remote access to search electronic storage media, and to seize or copy electronically stored information located within or outside that district, (A) "[where] the district where the media or information is located has been concealed through technological means," or (B) "in an investigation of a violation of 18 U.S.C. § 1030(a)(5) [concerning computer fraud and related activity], the media are protected computers that have been damaged without authorization and are located in five or more districts."[109]

The rule change is being met with strong bipartisan resistance from Washington, with U.S. Sen. Ron Wyden, D-Ore., calling for Congress to reject the new rule as an impermissible expansion of the government's surveillance and hacking powers.[110] He, along with Sen. Rand Paul, R-Ky., have introduced the Stopping Mass Hacking Act to prevent the rules from taking effect.[111] The changes are set to take effect on December 1, 2016, unless Congress acts.

### B. International Communications Privacy Act

In May 2016, U.S. lawmakers took another stab at clarifying the limits of the government's ability to obtain access to user data stored abroad by introducing the International Communications Privacy Act (ICPA). The ICPA, which would amend the antiquated Electronic Communications Privacy Act, seeks to enhance protections for private electronic communications of U.S. citizens stored abroad by requiring the government to obtain a warrant before accessing the content of those communications and reforming the process for cooperating with foreign governments on such demands.[112] The ICPA requires U.S. law enforcement to obtain a warrant in order to access U.S. citizens' electronic data stored in servers abroad, and seeks to reform and streamline the process by which the U.S. government can request a foreign government's assistance in obtaining such data through a mutual legal assistance treaty (MLAT) – an agreement between two or more countries that facilitates cross-governmental collaboration in criminal investigations and prosecutions. For example, the ICPA requires the attorney general to create an online docketing system for MLAT requests and to publish new statistics on the number of such requests. The bill also limits law enforcement's ability to access data of foreign nationals to situations where the country has a law enforcement cooperation agreement (such as an MLAT) with the United States, and only where the country does not object to the disclosure.

The ICPA is the latest in a series of attempts by Congress within the past year to address the tension surrounding law enforcement requests for U.S. citizens' electronic communications stored abroad. In 2015, lawmakers introduced the Law Enforcement Access to Data Stored Abroad (LEADS) Act,[113] which garnered broad support from technology companies, business organizations, and privacy and civil liberties advocacy groups, but ultimately stalled at the committee level. Like the ICPA, the LEADS Act was designed to both clarify the scope of the U.S. government's authority to search and seize electronically stored information outside the

108 Letter from the Department of Justice (Sept. 18, 2013), available at https://www.justsecurity.org/wp-content/uploads/2014/09/Raman-letter-to-committee-.pdf.

109 Fed. R. Crim. P. 41(b)(6), 10-11 (Preliminary Draft 2014), available at https://www.justsecurity.org/wp-content/uploads/2014/09/preliminary-draft-proposed-amendments.pdf.

110 Press Release, Rob Wyden, D-Ore. (April 28, 2016), available at https://www.wyden.senate.gov/news/press-releases/wyden-congress-must-reject-sprawling-expansion-of-government-surveillance.

111 H.R.5321 - Stopping Mass Hacking Act114th Congress (2015-2016), available at https://www.congress.gov/bill/114th-congress/house-bill/5321/text.

112 S.2986 - International Communications Privacy Act, 114th Congress (2015-2016), available at https://www.congress.gov/bill/114th-congress/senate-bill/2986?resultIndex=164/.

113 Law Enforcement Access to Data Stored Abroad Act, H.R. 1174 – 114th Congress (Feb. 27, 2015).

United States and to strengthen and enhance the MLAT process. However, the ICPA departs from the LEADS Act in that it allows law enforcement to obtain electronic communications relating to foreign nationals in certain circumstances.

# VII. 2016 and Beyond

Readers should stay tuned for BakerHostetler's next Cross-Border Government Investigations and Regulatory Enforcement Review, which will highlight key cross-border legislative, regulatory and enforcement developments for the year-end 2016. In that issue, readers can expect an analysis of the increasingly international character of whistleblower tips to the SEC, discussion of the global trend targeting top executives for corporate wrongdoing, the potential fallout from Brexit and any investigations arising from the Panama Papers release – as well as any legislation that follows. As always, we encourage companies to consult with their counsel to understand the regulatory and policy agendas of U.S. and foreign authorities and to develop adequate procedures to ensure compliance with any foreign laws to which a company might be subject.

For more information about cross-border government investigations and regulatory enforcement law, or if you have questions about how these matters may impact your business, please contact the following BakerHostetler attorneys or visit our website.


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