INDIVIDUAL AND COORDINATED PROSECUTIONS ACCELERATE—ALONG WITH THE CHALLENGES

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For years, federal and state prosecutors have touted their willingness to charge individuals as an essential deterrent to white-collar criminal action, often responding to criticism of prosecutions of corporate entities without any accompanying prosecution of related executives. And for years, those statements in large part remained just statements, without significant numbers of individual prosecutions backing them up. Despite ongoing criticism of the Department of Justice (DOJ) for its failure to prosecute major bank executives for their alleged role in the financial crisis, individual prosecutions have recently begun an inexorable rise, finally matching the rhetoric, particularly in the insider trading and foreign bribery spaces. While not all high-profile individual prosecutions have been successful, the increased risk of individual prosecution is undeniable.

At the same time, as the interconnected global economy magnifies the effects of corporate actions around the world, US prosecutors are not the only ones facing pressure to bring enforcement actions against perceived multinational wrongdoers. Increasingly, US prosecutors are working in coordination with their foreign counterparts, sharing information and even, in certain cases, deferring to the enforcement actions of foreign prosecutors without an accompanying US action.

Below we examine both of these trends, each of which amplifies the risks for a company or individual facing investigation and complicates the task of defending against those enforcement actions.

Prosecutions of Individuals Rise to Match the Rhetoric

Over the past five years, the Justice Department has been aggressive in both practice and rhetoric in pursuing charges against individual employees and executives accused of corporate misconduct. Between 2009 and 2013, DOJ charged more white-collar defendants than during any previous five-year period going back to at least 1994. (Eric Holder, Former Attorney Gen., Remarks on Financial Fraud Prosecutions at NYU School of Law (Sept. 17, 2014), http://tinyurl.com/k6jrcas [hereinafter Holder NYU Remarks].)

The most visible example of this trend is the long string of insider trading cases brought by the US Attorney's Office in the Southern District of New York. Since 2009, US Attorney Preet Bharara and his team have secured

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convictions of more than 80 individuals, including senior executives of prominent hedge funds, for insider trading and related charges. It is true that the Second Circuit's recent ruling in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), may put some of those convictions at risk, given that the ruling vacated two insider trading convictions on the basis that the government failed to provide sufficient evidence to show that the defendants knew that an insider disclosed confidential information in exchange for a personal benefit. However, nearly all of the convictions remain intact thus far.

Moreover, DOJ has pursued individual defendants with increasing frequency in cases alleging antitrust violations and violations of the Foreign Corrupt Practices Act (FCPA). Since 2008, DOJ has charged nearly 90 individuals in FCPA and FCPA-related cases and has convicted more than 50 of them. (Leslie R. Caldwell, Assistant Attorney Gen., Speech at American Conference Institute's 31st International Conference on the Foreign Corrupt Practices Act (Nov. 19, 2014), http://tinyurl.com/njfnztr [hereinafter Caldwell ACI Remarks]; Mike Koehler, *A Focus on DOJ FCPA Individual Prosecutions*, FCPA Professor (Jan. 20, 2014), http://tinyurl.com/o2e7aqr.) In the antitrust space, DOJ's crackdown on price fixing by auto parts supply cartels has netted charges against nearly 50 executives. (Press Release, DOJ, Former Mitsuba Executive Agrees to Plead Guilty to Bid Rigging and Price Fixing on Automobile Parts Installed in U.S. Cars (Dec. 1, 2014), http://tinyurl.com/lvs28hr.)

And the DOJ investigation of manipulations of the London Interbank Offered Rate (Libor) has led to charges against nearly a dozen individuals, including senior executives of banks involved in calculating Libor. (Aruna Viswanatha, *Two Ex-Rabobank Traders Charged in U.S. with Manipulating Libor*, Reuters (Oct. 16, 2014), http://tinyurl.com/o6xm9ju.)

Matching the increased rise in individual prosecutions, senior DOJ officials have continued their now well-worn rhetoric about DOJ's interest in prosecuting individuals involved in financial fraud and other types of corporate misconduct. For instance, former Attorney General Eric Holder recently gave a speech at the New York University School of Law in which he discussed the importance of prosecutions of individuals:

> [W]hen it comes to financial fraud, the department recognizes the inherent value of bringing enforcement actions against individuals, as opposed to simply the companies that employ them. We believe that doing so is both important—and appropriate—for several reasons:
>
> First, it enhances accountability. Despite the growing jurisprudence that seeks to equate corporations with people, corporate misconduct must necessarily be committed by flesh-and-blood human beings. So wherever misconduct occurs within a company, it is essential that we seek to identify the decision-makers at the company who ought to be held responsible.
>
> Second, it promotes fairness—because, when misconduct is the work of a known bad actor, or a handful of known bad actors, it's not right for punishment to be borne *exclusively* by the company, its employees, and its innocent shareholders.
>
> And finally, it has a powerful deterrent effect. All other things being equal, few things discourage criminal activity at a firm—or incentivize changes in corporate behavior—like the prospect of individual decision-makers being held accountable. A corporation may enter a guilty plea and still see its stock price rise the next day. But an individual who is found guilty of a serious fraud crime is most likely going to prison.

(Holder NYU Remarks, *supra*.)

In a speech at the American Conference Institute's (ACI's) 31st International Conference on the FCPA, Assistant Attorney General Leslie Caldwell similarly emphasized the importance of the deterrent effect of prosecutions of individuals: "[O]ur record of success in [FCPA] prosecutions [of individuals] has allowed us to show—rather than just tell—corporate executives that if they participate in a scheme to improperly influence a foreign official, they will personally risk the very real prospect of going to prison." (Caldwell ACI Remarks, *supra*.)

Civil enforcement agencies have also recently emphasized that if they see criminal activity by individuals, they will refer those individuals to DOJ for criminal prosecution. For example, Richard Cordray, director of the Consumer Financial Protection Bureau (CFPB), noted in a 2014 television appearance that "[t]here's always officials and people in the company that make the decisions. . . . [R]eferring them criminally if that is appropriate, that's part of what we're doing." (*The Daily Show: Richard Cordray Extended Interview* (Comedy Central television broadcast Jan. 8, 2014), *available at* http://tinyurl.com/m37s9y8.)

Indeed, the CFPB's first publicly announced criminal referral resulted in an executive of a debt settlement company pleading guilty to charges of mail and wire fraud in April 2014. (Joseph Ax & Nate Raymond, *Debt Settlement Firm Pleads Guilty in First CFPB Referral*, Reuters (Apr. 8, 2014), http://tinyurl.com/q4g59yh.) The Treasury Department has also expressed an interest in providing criminal referrals to DOJ when warranted. Under a new enforcement priority announced in March 2013, Treasury

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Department officials stated that "[i]n the future . . . [i]f warranted [the Treasury Department] will refer to the Justice Department for possible prosecution cases involving individual bankers." (Brett Wolf, *U.S. to Hold Bankers Responsible for Sanctions Violations*, Reuters (Mar. 22, 2013), http://tinyurl.com/lv86g6m.) And the Treasury Department has already made more than 100 criminal referrals of bank executives through the Office of the Special Inspector General for the Troubled Asset Relief Program. (Danielle Douglas, *SIGTARP Proves that Some Bankers Aren't Too Big to Jail*, Wash. Post, Dec. 6, 2013, http://tinyurl.com/lsn9l4a.)

Political Climate

Why has DOJ in recent years ramped up its prosecutorial focus on individuals to more than just words?

One reason has to be the political climate. Since the financial crisis of 2008, politicians and government officials have pressured DOJ to hold individual executives of financial companies, and not just companies themselves, responsible for the events leading to the crisis. Lawmakers such as Senator Elizabeth Warren have long criticized government agencies for failing to prosecute any senior executives for actions allegedly leading to the crisis, citing the hundreds of individuals, including senior executives, who were prosecuted after the savings and loan crisis in the 1980s. The criticisms persist even as government agencies have obtained record-high settlements from many of the banks allegedly involved in the conduct that led to the crisis. Senator Richard Shelby recently remarked that "it seems like the Justice Department seems bent on money rather than justice and that's a mistake." (Ryan Tracy & Victoria McGrane, *Warren Faults Banking Regulators for Lack of Criminal Prosecutions*, Wall St. J., Sept. 9, 2014, http://tinyurl.com/lbjr7h8.)

Beyond cases related to the financial crisis, Congress also recently criticized senior Treasury Department officials about the lack of individual prosecutions, and the heavy focus on obtaining monetary fines from companies, for sanctions and Bank Secrecy Act and anti-money laundering violations. (*Patterns of Abuse: Assessing Bank Secrecy Act Compliance and Enforcement: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 113th Cong. (2013).)

Judge Jed Rakoff of the US District Court for the Southern District of New York expressed similar criticisms in an article published early last year, writing that "if . . . the Great Recession was in material part the product of intentional fraud, the failure to prosecute those responsible must be judged one of the more egregious failures of the criminal justice system in many years." As with Senator Warren, Judge Rakoff drew a contrast to the plethora of individual prosecutions that resulted from the savings and loan crisis as well the prosecution of senior executives in other major financial frauds such as the "junk bond" bubble in the 1970s and the accounting frauds involving companies such as Enron and WorldCom in the 1990s. Judge Rakoff remarked that "[j]ust going after the company is also both technically and morally suspect." (Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. Rev. of Books, Jan. 9, 2014, http://tinyurl.com/momhxcj.)

Some of this political pressure may be undeserved insofar as it rejects the positive effects, deterrent and otherwise, of the significant settlements the Justice Department and other regulators have reached in financial fraud cases, and the individual enforcement efforts of enforcement agencies beyond the Justice Department.

DOJ, for example, has extracted multi-billion-dollar settlements from many banks for alleged misconduct related to the sale of mortgage-backed securities, including a $16 billion civil settlement with Bank of America over packaging and sale of residential mortgage-backed securities, collateralized debt obligations, and mortgage loans—the largest settlement ever reached with a single company. J.P. Morgan paid $13 billion to settle similar claims, and Citigroup paid $7 billion. Many of the settlements included significant sums set aside for consumer relief, with independent monitors appointed to ensure that the money was appropriately distributed to those consumers it was meant to benefit.

Even beyond the mortgage space, DOJ last year obtained a settlement of nearly $9 billion as well as a guilty plea from French banking giant BNP Paribas for providing financial services to individuals and entities in Sudan, Iran, and Cuba in violation of US sanctions laws. The Justice Department also obtained a guilty plea and a $2.6 billion fine from Credit Suisse for assisting US taxpayers in evading US taxes. Until these convictions, DOJ had acquiesced to the refusal of banks to acknowledge criminal wrongdoing because of the potential loss of federal and state licenses critical to conduct their business at all.

State regulators, too, have actively pursued financial companies for alleged misconduct, including the action initiated by the New York Department of Financial Services (NYDFS) against Standard Chartered Bank over alleged compliance failures related to the anti-money laundering controls necessary to prevent sanctions violations, which resulted in more than $600 million in penalties. And recently, NYDFS forced the chairman and founder of Ocwen Financial Corporation to step down due to allegedly "serious conflict of interest issues" between Ocwen and companies with which it did business—a move that significantly affected the company's stock price. (Press Release, NYDFS, NYDFS Announces Ocwen Chairman to Resign from Firm and Related Companies; Ocwen to Provide Direct Homeowner Relief and Undertake Significant Operational Reforms (Dec. 22, 2014), http://tinyurl.com/oeys6ne.)

Critics of DOJ's perceived lack of individual prosecutions also seem to be working from the premise that DOJ is the only enforcement game in town. Yet the Securities and Exchange Commission (SEC) and other federal and state agencies have also pursued numerous civil enforcement actions against individuals, including for misconduct allegedly related to the financial crisis and to financial fraud more generally. The SEC's successful civil enforcement action last year against Fabrice Tourre, a Goldman Sachs

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trader involved in packaging and selling mortgage-backed securities, broke a string of high-profile and embarrassing defeats for the SEC in litigated enforcement actions against individuals. And recently, the Financial Crimes Enforcement Network (FinCEN), acting with the US Attorney's Office for the Southern District of New York, fined the chief compliance officer of money transmitter MoneyGram International $1 million and barred him from the financial industry because of his alleged responsibility for compliance failures related to money laundering controls.

Nevertheless, there remains the perception that individual employees and executives—not corporations—commit crimes, and that the individuals responsible for corporate crimes and the conduct that led to the financial crisis should be held criminally accountable. And this perception and the attendant political pressure is likely one reason DOJ has increased its attention to prosecuting individuals.

Experienced Prosecutors

Another potential factor in the rise of individual prosecutions is structural. Certain sections at Main Justice are increasingly hiring their staff from US attorney's offices, bringing in prosecutors who already have extensive experience instead of more junior enforcement attorneys who expect to gain that experience on the job. As the longest-tenured head of DOJ's Criminal Division in modern times, Lanny Breuer promised to make DOJ's Fraud Section a destination for top prosecutors around the country. Judging by the substantial experience of new recruits to the Fraud Section gained during tenures in numerous US attorney's offices around the country, Breuer made good on his promise. Moreover, one former head of the FCPA unit at the Justice Department made no secret of his plan to recruit assistant US attorneys specifically in order to increase prosecutions of individual corporate executives. (Aruna Viswanatha, *Next for Corporate America: Body Wires and Wire Taps?*, Reuters (Sept. 12, 2014), http://tinyurl.com/oetf3k5.) These prosecutors arrive with both the goal of building cases against individuals and the experience to make it happen.

Ramifications for Companies and Defense Counsel

What does the rise in individual prosecutions ultimately mean for companies and defense counsel? While defense counsel have been warning for years of the actual or impending threat of more executive prosecutions, that threat is finally materializing, bringing many challenges.

First, while companies always feel pressure to blame individual employees or executives for misconduct, that pressure is more likely to come with the implicit understanding that the employees or executives will themselves be facing prosecution. Recent remarks by senior Justice Department personnel suggest that in order to receive cooperation credit, companies will be encouraged to identify specific wrongdoers; or at least that a company that seeks to delay or thwart the identification of culpable employees likely will not receive cooperation credit. For instance, Assistant Attorney General Caldwell noted in a recent speech:

> The sooner you disclose the conduct to us, the more avenues we have to investigate culpable individuals. And, the more open you are with us about the facts you learned about that conduct during your investigation, the more credit you will receive for cooperation.
>
> But, if you delay notifying us about an executive's conduct or attempt to whitewash the facts about an individual's involvement, you risk [not] receiving any credit for your "cooperation."

(Caldwell ACI Remarks, *supra*.)

Principal Deputy Assistant Attorney General Marshall Miller made similar remarks in a speech at the Advanced Compliance and Ethics Workshop late last year, noting that "[a] compliance program's ability to uncover wrongdoing and the responsible individuals, coupled with a corporation's decision to disclose that information to the government, is significant in our evaluation of the compliance program and the company's overall posture with the government." He further remarked that the penalties the Justice Department imposed on BNP Paribas and Credit Suisse were so tremendous not only because of the underlying conduct but also because those companies "insulat[ed] culpable corporate employees." (Marshall L. Miller, Principal Deputy Assistant Attorney Gen. for the Criminal Div., Remarks at the Advanced Compliance and Ethics Workshop (Oct. 7, 2014), http://tinyurl.com/m6fg6eb.)

Moreover, these comments are all consistent with the policy stated in DOJ's Principles of Federal Prosecution of Business Organizations, which encourages prosecutors to bring charges against individual executives even in the face of a corporate guilty plea: "Only rarely should provable individual culpability not 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." (DOJ, U.S. Attorney's Manual (USAM) § 9-28.200, *available at* http://tinyurl.com/qcsxh4v.)

Because the Justice Department's posture will pit the interests of company employees and executives directly against the interests of the corporate employer, this posture may strain relationships among defense counsel for companies and for individuals. Indeed, in connection with its settlement of FCPA and related charges against Alstom, DOJ remarked favorably that Alstom had assisted in its prosecution of individuals. (Press Release, DOJ, Alstom Pleads Guilty and Agrees to Pay $772 Million Criminal Penalty to Resolve Foreign Bribery Charges (Dec. 22, 2014), http://tinyurl.com/m9hmtpa.) It would not be surprising if companies begin to feel pressure, for example, from their boards of directors, to lodge accusations against minor individuals based upon minimal evidence in an attempt to get cooperation credit by serving up scapegoats to the government.

Second, companies can also expect that going forward, DOJ will rely less on corporate disclosures to build cases

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and will resort to investigative techniques more commonly associated with prosecutions of individuals, such as informants, body wires, and wire taps. In its investigation of potential manipulation of the foreign currency markets, federal investigators turned several bank employees into informants and were able to use them to gather information against their colleagues. (Arnab Sen, *Investigators Turn Bankers into Informants in Forex Probe*, Reuters (Sept. 15, 2014), http://tinyurl.com/mlk4j2m.) Also, in its investigation into potential FCPA-related violations of oil and gas company PetroTiger, the Justice Department was able to bring charges against the founder of the company through evidence obtained from a body wire attached to the founder's business partner. (Viswanatha, *Next for Corporate America*, *supra*.)

The Justice Department is also focused on "thinking creatively about ways to incentivize witness cooperation and encourage whistleblowers at financial firms to come forward" because to successfully prosecute individuals, prosecutors often needs evidence "that can *only* be attained from a cooperating witness." (Holder NYU Remarks, *supra*.) As one example, Holder has asked Congress to increase the size of potential recovery to whistleblowers under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 to mirror that of whistleblower recovery provisions in the False Claims Act, which allow a whistleblower to recover up to one-third of funds obtained by the government as a result of the whistleblower's information.

The well-known impacts of the government's renewed emphasis on whistleblowing will be amplified by the increased threat of individual prosecution. Company employees with any information about potential wrongdoing now face the possibility of being personally prosecuted if they fail to come forward as an informant or whistleblower. Even if employees might previously have preferred to report potential misconduct through internal company channels, they face much greater rewards by going outside the company, whether by avoiding prosecution through acting as an informant or by potentially recovering millions as a whistleblower.

While these changes raise new concerns for individual employees and executives, we should not expect the Justice Department to be wholly successful in its increased attempts to prosecute individuals. Companies and individuals assess the costs and benefits of litigating against the government differently; some individuals may take on the government and hold it to its burden of proof at trial, at times exposing the expansive and sometimes tenuous nature of the government's claims. The most recent example is the Second Circuit's ruling vacating two insider trading convictions. We also cannot forget that DOJ lost the first case related to the financial crisis that it brought to verdict when a jury in the Eastern District of New York found Bear Stearns traders not guilty of securities fraud. And DOJ and the SEC have lost or settled FCPA-related actions against individuals on the eve of trial, including the SEC's action against the former CEO of Noble Corporation, even when the companies that employed those individuals settled the government's actions for significant sums. It is virtually unheard of for a corporation to take on the government at a criminal trial. The only corporation to do so in recent memory was W.R. Grace, the chemical company charged with environmental crimes in connection with asbestos pollution from a mining operation in Libby, Montana. In 2009, W.R. Grace and five senior executives were acquitted of all charges.

Coordinated Prosecutions

Along with the rise in individual prosecutions, another trend is increased cooperation among regulatory and law enforcement authorities across the globe. The Justice Department and other federal agencies have increasingly been working collaboratively with their counterparts in the United Kingdom, Europe, Asia, and elsewhere in investigating leads, gathering evidence, and building cases—and even in dividing up cases so that an individual prosecution will be brought in the most favorable forum.

FCPA. International cooperation has been extremely important in the FCPA context, where many of the documents and witnesses sought by the government reside overseas. The SEC's Director of Enforcement Andrew Ceresney recently remarked that there had been a "tremendous increase in cooperation" from other governments when tackling corruption, noting that over the "past five years, [the United States has] experienced a transformation in [its] ability to get meaningful and timely assistance from [its] international partners." (Andrew Ceresney, Co-Director, SEC Div. of Enforcement, Keynote Address at the International Conference on the Foreign Corrupt Practices Act (Nov. 19, 2013), http://tinyurl.com/mpjt6w9.)

Much of this cooperation can be attributed to the United States' efforts in international forums such as the Organisation for Economic Co-operation and Development (OECD) Working Group on Bribery, which is made up of representatives from 41 member countries. While one goal of the working group is to pass anti-bribery legislation in member countries, the working group also serves as a vehicle to develop relationships between law enforcement in member countries and coordinate efforts to investigate and prosecute foreign corruption. (Mythili Raman, Acting Assistant Attorney Gen., Keynote Address at the Global Anti-Corruption Congress (June 17, 2013), http://tinyurl.com/kaw7ram.) In addition to the OECD Working Group, regulators and law enforcement from around the world have also met in training forums regarding anti-corruption laws to build relationships and exchange ideas regarding best practices in targeting foreign corruption. For example, in the fall of 2014, DOJ and the SEC hosted approximately 200 judges, prosecutors, investigators, and regulators in Washington, D.C., in such a forum. (Caldwell ACI Remarks, *supra*.)

The Justice Department clearly benefited from these efforts to build international relationships in its recent prosecution of Marubeni Corporation, a Japanese trading company, and Alstom S.A., a French power and transportation company. Both companies were charged with

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violating the FCPA for bribing Indonesian government officials in a scheme that allegedly spanned Indonesia, the United States, Japan, Singapore, Switzerland, France, the United Kingdom, and elsewhere. In announcing its settlements, DOJ noted that it was aided by significant cooperation from law enforcement authorities in many of those countries. Following the convictions, Assistant Attorney General Caldwell emphasized that it was through international cooperation that US prosecutors were able to gain access to evidence and individuals located overseas. And notably, as a consequence of the Marubeni/Alstom investigations, the Indonesian government also initiated a parallel prosecution of the government officials who were implicated in the bribes. (*Id.*) Accordingly, through international collaboration, prosecutors targeted both the individuals who paid bribes and those who received bribes.

Another recent example of international collaboration in the FCPA context is the Justice Department's prosecution of former executives of PetroTiger. DOJ charged two former executives with participating in a scheme to bribe government officials in Colombia in exchange for a lucrative oil services contract. The Justice Department worked closely with Colombian law enforcement in building its case, and Colombian authorities initiated a parallel prosecution against a PetroTiger employee in Colombia. (*Id.*)

The SEC's recent settlement with the clinical diagnostic and life science research company Bio-Rad Laboratories is another example of international collaboration on anti-corruption matters. In announcing the settlement for Bio-Rad's improper payments to foreign government officials, the SEC noted the assistance of the Bank of Lithuania, the Financial and Capital Market Commission of Latvia, and the British Virgin Islands Financial Services Commission. (Press Release, SEC, SEC Charges California-Based Bio-Rad Laboratories with FCPA Violations (Nov. 3, 2014), http://tinyurl.com/nhd4pvt.)

In some instances, US prosecutors have been willing to accept a multinational company's resolution with a foreign law enforcement agency, suggesting their awareness of the need to avoid the perception of imposing "double jeopardy" on global corporations. Such was the case with Dutch oilfield company SBM Offshore N.V., which agreed to pay $240 million to the Dutch Public Prosecutor's Office to resolve an investigation into payments it allegedly made to win contracts in several countries around the world. DOJ jointly investigated this case with Dutch authorities but declined to prosecute the company after the announcement of the settlement, building goodwill with foreign law enforcement.

Libor. Collaboration by international law enforcement has not been limited to the FCPA context, but is also apparent in the investigations into manipulations of Libor. DOJ and the Commodity Futures Trading Commission have worked closely with the UK Financial Conduct Authority and Serious Fraud Office (SFO), the German Federal Financial Supervisory Authority, the Swiss Financial Market Supervisory Authority, and other law enforcement agencies to investigate and prosecute banks and individuals charged with manipulating the global benchmark interest rate. Since the Libor scandal began, nine banks have been fined by US or European regulators and enforcement authorities, resulting in billions of dollars in fines.

As in the FCPA context, the various international authorities involved in the Libor investigation have collaborated in gathering information and evidence. But in the Libor context, there has also been a concerted effort to divide prosecutions of individuals by jurisdiction based on the forum believed to be the most friendly to the government's case. Indeed, US and UK prosecutors at times appear to be tackling the investigation as if they were one large global enforcement agency. According to reporting by the *New York Times*, as part of this effort, the Justice Department charged Rabobank trader Paul Robson, a British citizen, in federal court in Manhattan for wire fraud and related charges, while the SFO handled the prosecution of three former Barclays traders—two of whom are US citizens—because of prosecutors' assessments of the evidence and the government's burden in the different forums. (Matthew Goldstein & Ben Protess, *U.S. and Britain Join Forces in Bank Misbehavior Cases*, N.Y. Times, Feb. 24, 2014, http://tinyurl.com/nxdbhgu.)

To be sure, attempts at collaboration between international law enforcement have not always been smooth sailing in recent years. The Justice Department and the SFO clashed over their mutual pursuit of Tom Hayes, a former UBS trader, who is viewed by prosecutors in both countries as being involved in manipulating the yen Libor. In December 2012, the UK government blocked a Justice Department request to interview Hayes, a British citizen residing in England. Then, without notifying its US counterparts, the British authorities arrested Hayes despite being on notice that the US prosecutors had intended to file a sealed complaint in US district court against him. Amid high tensions, at least one senior official in the Justice Department's Criminal Division made several trips to London to repair the fractured relationship between the two agencies. More recently, UK authorities criminally charged a former Barclays employee despite being aware that the employee had been given immunity by US authorities in exchange for cooperation. However, despite these occasional clashes, US and UK authorities continue to work together on the Libor investigations. (*Id.*; David Enrich & Evan Perez, *U.S. and U.K. in Tussle over Trader*, Wall St. J., Mar. 14, 2013, http://tinyurl.com/p2alz6s.)

Ramifications for Companies and Defense Counsel

What lessons does this increased multijurisdictional cooperation hold for companies and defense counsel?

First, companies may increasingly face difficulties in withholding documents and evidence located overseas on the basis that such evidence is outside the Justice Department's jurisdiction. If the Justice Department continues to leverage relationships with foreign law enforcement, as it did in the Marubeni/Alstom and PetroTiger investigations,

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we can expect that it may have an easier time accessing foreign-located documents and evidence through requests made directly to foreign sovereigns. Companies may need to recalibrate their assessment of the likelihood that DOJ will be able to obtain that evidence through alternate means.

Similarly, increased collaboration with foreign law enforcement means that the Justice Department may have an easier time accessing foreign-located documents that are protected by foreign data privacy laws. Where companies often face difficulty in transferring overseas documents to US counsel due to strict data privacy regimes, law enforcement in other countries may not face such restrictions. Companies should be aware that documents produced to a foreign regulator may be shared with the Justice Department regardless of otherwise strict data privacy regimes.

We can expect that documents will indeed be shared if collaboration between international law enforcement keeps increasing. Companies should be aware that increased cooperation among global law enforcement agencies means the playing field increasingly is tilted—DOJ's access to documents may be unencumbered by jurisdictional issues or data privacy laws, while company counsel must be prepared to find ways to quickly review documents and develop relevant facts despite limitations on access.

Second, if the US and UK authorities see successful results from dividing up prosecutions, we can expect to see more of this type of forum shopping in the future. When companies are involved in multiagency, multijurisdictional investigations, employees and executives at risk of prosecution may need to engage foreign criminal counsel earlier in every jurisdiction investigating. If they are prosecuted, there is no guarantee that it will be by law enforcement in the country in which they reside.

Conclusion

Ultimately, the trends discussed in this article are here to stay. DOJ will continue to focus on prosecuting individuals for financial fraud and other white-collar crimes, especially if the political climate remains the same. DOJ will also continue to increase its collaboration with foreign law enforcement to pursue individuals and companies overseas. We can expect that DOJ will combine these initiatives to achieve its goal to reach and prosecute foreign executives to the fullest extent possible. ■

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