Business Crime **Quarterly**

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Welcome

The level of global financial crime has never been higher, if two recent surveys are to be believed. From large scale public sector corruption to cybercrime, consumer fraud and misconduct committed by employees against their own businesses, financial wrongdoing continues to be a drain on corporate resources. Governments across the globe are attempting to stay one step ahead of the criminals with new measures to tackle corruption, such as unexplained wealth orders and the opening up of registers of beneficial ownership in the UK, new sanctions for companies found liable for financial wrongdoing in Germany and a significant tightening of anti-bribery legislation in Australia.

The introduction of deferred prosecution agreements in Singapore and the proposals for such a measure in Australia are aimed at encouraging self-reporting of wrongdoing and guiding internal policies and best practice. But companies must also help themselves. Nearly a quarter of businesses surveyed recently by accountants PwC said they had no formal business ethics and compliance programme in place, despite nearly half reporting that their business had suffered fraud in the previous two years.

In this edition of *Business Crime Quarterly* we consider Transparency International's latest Corruption Perceptions Index, which highlights the link between the lack of protection for civil society and corruption. We note the EU's agreement to a package of proposals to tackle money laundering and organised crime, report on the latest investigations and enforcement measures against both companies and individuals in Hong Kong and the UK, and consider changes to enforcement policy in the US.

Global news

Transparency International's Corruption Perceptions Index 2017 highlights link between lack of protection for journalistic freedom and civil society, and corruption

"countries with the lowest protection for press and non-governmental organisations… tend to have the worst rates of corruption."

Transparency International (**TI**) has published its Corruption Perceptions Index (**Index**) for 2017, ranking 180 countries and territories by their perceived levels of public sector corruption according to experts and businesspeople.

The Index uses a scale of 0 to 100, where 0 is highly corrupt and 100 is very clean. This year the Index found that, as has been the case in recent years, more than two-thirds of countries score below 50, with an average score of 43.

This year, New Zealand and Denmark rank highest with scores of 89 and 88 respectively. Both topped the table last year with a score of 90. As usual, four of the top seven spots are held by Scandinavian countries, (although Sweden dropped from 4th to joint 6th, with a fall of 4 points in its score to 84). Syria, South Sudan and Somalia rank lowest with scores of 14, 12 and 9 respectively.

The UK improved on its position from last year, ranking joint 8th in the table with Luxembourg and the Netherlands, with a score of 82. The US moved up to 16th place from 18th, with a score of 75. Australia retained its 13th position but dropped its score from 79 to 77.

While the majority of EU states score at least 50, Croatia, Greece, Romania, Hungary and Bulgaria all score less, with Bulgaria scoring only 43, on a par with South Africa and Vanuatu (albeit still in the top half of the table). EU candidate states, Serbia, Turkey, Albania and Macedonia all rank lower, scoring 41, 40, 38 and 35 respectively.

Russia retained its score of 35 but slipped to 135th position from 131st last year, while China moved up to 77th place with an improved score of 41. Brazil was the biggest faller, moving from 79th place with a score of 40 to 96th place and a score of 37 this year, possibly due to fallout from the Odebrecht corruption scandal.

As well as looking at the progress, or lack of it, made in tackling corruption across the world, the Index this year highlights the relationship between corruption levels, the protection of journalistic freedoms and engagement of civil society. It found that countries with the lowest protection for press and non-governmental organisations (**NGO**) also tend to have the worst rates of corruption. Shockingly the report notes that at least one journalist is killed every week in a country that is highly corrupt. In addition, one in five journalists that died were covering a story about corruption, with justice rarely being served in these cases. TI cites the example of Brazil, which scores 37 on the Index for 2017, where journalists are often targeted for their investigations into local-government corruption and drug-related crime and where 20 were killed in the last six years. In the Philippines, India and the Maldives, which also score highly for corruption and where press freedoms are low, 15 journalists working on corruption stories were murdered in the last six years alone.

TI also looked at the relationship between corruption levels and the freedom with which civic organisations are able to operate and influence public policy. Its analysis reports that, similarly, most countries that score low for civil liberties also tend to score highly for corruption. For example, recent draft legislation published in Hungary would restrict NGOs and revoke their charitable status. Over the past six years Hungary has seen a 10 point decrease in its Index score, slipping from 55th position in 2012 to 45th in 2017. It is now the second lowest-ranked EU state.

TI's recommendations to address these issues include:

> calling on governments and businesses around the world to do more to encourage free speech, independent media, political dissent and an open and engaged civil society, by minimising regulation on media and promoting laws that focus on access to information and the protection of fundamental freedoms;

> the disclosure by governments of relevant public interest information, such as government budgets, company ownership, public procurement and political party finances, in open data formats that would enable journalists, civil society and affected communities to identify patterns of corrupt conduct more efficiently.

To view the Index and read TI's full reports, visit: www.transparency.org/cpi2017

PwC finds that reported economic crime has reached record levels

PwC has published the results of its bi-annual Global economic crime and fraud survey, which found that reported economic crime is at its highest level since the survey began.

The survey questioned more than 7,200 respondents across 123 countries. Reported rates of economic crime have increased across all territories, with 49% of respondents saying their company suffered fraud in the last two years, up from 36% in 2016. Asset misappropriation, cybercrime, consumer fraud and business misconduct were the most commonly reported crimes.

Over half of economic crime (52%) was committed by internal actors, with a significant increase in the percentage of crimes attributed to senior management (up from 16% in 2016 to 24% in 2018). However, there are also considerable regional variations, with most reported crime being committed by external actors in Australia (64%), the UK (55%), Canada (58%), Argentina (44%) and the US (48%). Of these external actors, 68% were associates of the organisation, such as agents, vendors and customers.

Economic crime has many impacts beyond the immediate financial losses sustained by victims. Respondents reported that they were spending increasing amounts on combatting economic crime, with 51% saying they would maintain investment levels, while 44% will be increasing them. Resources were also spent on investigations and interventions and using artificial intelligence to combat and monitor fraud. In addition, employee morale, business relations, reputation and brand strength were also reported to be adversely affected by economic crime.

While PwC noted that it was unable to equate higher levels of reported crime with higher levels of actual crime, it commented that the survey does reveal a greater understanding of what fraud is and where it is taking place. This is particularly so with regard to cybercrime, which is predicted to become the most disruptive fraud for businesses in the next years. However, PwC added that the fact that just over half of respondents said they had not, or did not know if they had experienced fraud in the past two years, suggests that "blind spots still exist in many organisations." Surprisingly, the survey also found that the proportion of respondents who said they had a formal business ethics and compliance programme had fallen from 82% to 77%, meaning that nearly a quarter of businesses may have no such formal policy in place.

49%
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52%
share of economic crime committed by internal actors

Cybercrime is predicted to be the most disruptive fraud for organisations in the next years

New EU-wide penalties for money laundering

The European Union's Civil Liberties Committee has agreed new measures to step up the EU's fight against money laundering and narrow the scope for organised crime. The proposals are part of a larger legislative package which aims to tackle terrorism financing as well as other forms of organised crime. The European Commission estimates that €110 billion a year is generated by criminal activity in the EU, amounting to 1% of the EU's total GDP.

The proposals, first put forward by the EU Commission in December 2016, would establish EU-wide definitions of money laundering-related crimes across the EU and introduce an EU-wide minimum term of imprisonment of two years in cases such as organised crime, and a maximum national sentence of at least five years. Currently, inconsistent definitions and penalties mean that criminals can seek to "forum shop" to exploit differences to their advantage.

Additional penalties for those convicted of money laundering added into the proposals by MEPs include:

> barring individuals from running for elected office or holding public positions

> barring businesses from entering into public contracts

> confiscating property and other assets.

The proposals, which will take the form of a directive, must now be considered by member states, who will have one year to transpose it into their domestic law once it is finally approved.

Cases and investigations

Hong Kong: SFC and ICAC carry out first joint raid

On 7 December 2017, Hong Kong's Securities and Futures Commission (the **SFC**) and the Independent Commission against Corruption (**ICAC**) carried out their first joint raid searching eight premises and arresting three listed company senior executives for suspected corruption. The SFC regulates Hong Kong's stock market under the Securities and Futures Ordinance. ICAC investigates corruption under the Independent Commission Against Corruption Ordinance, the Prevention of Bribery Ordinance and the Elections (Corrupt and Illegal Conduct) Ordinance.

The joint operation was reportedly carried out in connection with investigations relating to the so-called "Enigma Network" of companies, a group of 50 listed businesses identified by the activist investor, David Webb. In May 2017 blog post, Webb identified a network of cross-shareholdings among these companies, which he alleged breached Listing Rules and resulted in inflated valuations. On 27 June, shares in a number of these companies plunged, some by up to 90%. Two of the companies identified by Webb, Convoy Global Holdings Limited and Lerado Financial Group Company Limited, confirmed that they were assisting investigators. The 7 December raid could pave the way for closer cooperation between ICAC and the SFC as the SFC increases its focus on tackling corporate fraud and malfeasance.

UK: Ex-Deutsche Bank trader pleads guilty to Euribor manipulation

Christian Bittar, one of the ex-Deutsche Bank traders charged by the Serious Fraud Office (**SFO**) with conspiracy to defraud in relation the manipulation of the Euro Interbank Offered Rate (**Euribor**), pleaded guilty on 2 March 2018. The trial of the remaining defendants – Achim Kraemer, Colin Bermingham, Carlo Palombo, Philippe Moryoussef and Sisse Bohart – is due to begin at Southwark Crown Court on 9 April 2018.

In 2015 Bittar brought an improper identification suit against the Financial Conduct Authority (**FCA**), alleging that the agency had improperly identified him in a notice of April that year announcing a £277 million fine imposed on Deutsche Bank for Libor and Euribor manipulation. Although Bittar won his case, he dropped his action after the Supreme Court found against JPMorgan executive Achilles Macris in similar circumstances.

> "The SFO is… prosecuting 11 individuals for conspiracy to defraud in relation to the setting of Euribor."

The SFO is in fact prosecuting 11 individuals for conspiracy to defraud in relation to the setting of Euribor, the six named above and five others, all of whom are currently overseas. As reported in the Spring 2017 edition of *Business Crime Quarterly*, European Arrest Warrants obtained by the SFO in respect of the men were dismissed by courts in Germany and France.

UK: SFO opens corruption investigation into Chemring Group plc

The SFO has opened an investigation into possible bribery, corruption and money laundering by defence group Chemring Group plc and one of its subsidiaries, Chemring Technology Solutions Limited (**CTSL**), including any officers, employees, agents and persons associated with them. According to the SFO's press statement released on 18 January 2018, CTSL self-reported suspected bribery, corruption and money laundering to the SFO, relating to two specific historic contracts.

In its results announcement for year ended 31 October 2017, the company said the investigation by the SFO involved concerns about "bribery, corruption and money laundering involving intermediaries who previously represented CTSL and its predecessor companies". There are no further details available at present.

UK: Court of Appeal further considers scope of litigation privilege in criminal proceedings

The recent decision of the Court of Appeal, Criminal Division in *R v Paul Jukes* [2018] further considered litigation privilege in the context of criminal proceedings. In particular, it endorsed the finding in the recent High Court decision in *SFO v ENRC* [2017], (considered in our client briefing here) that, in the context of criminal proceedings, "litigation" for the purposes of litigation privilege is the prosecution itself – not the preceding investigation by the prosecuting authority. The adoption of this position, in the criminal context at least, stands to narrow the available scope of litigation privilege.

SFO v ENRC is itself going to appeal on 3 July 2018. That case is proceeding in the Civil Division of the High Court but the court may well regard itself bound by *Jukes*, despite the lack of analysis of the point in *Jukes* beyond agreement with the judge in *ENRC* itself.

We have published a client note setting out the decision in *Jukes* and its implications in more detail, available here.

US: SCOTUS rules that whistleblowers must report to the SEC to be protected under Dodd-Frank anti-retaliation rules.

On 21 February 2018, the US Supreme Court ruled that the anti-retaliation protections of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the **Dodd-Frank Act**) do not apply to persons who only report securities law violations internally and not to the US Securities and Exchange Commission (the **SEC**), significantly narrowing the definition of "whistleblower" under the Dodd-Frank Act.

In the case, *Digital Realty Trust v. Somers* (available here), the respondent alleged that his employer terminated his employment shortly after he internally reported potential securities law violations. He subsequently brought a whistleblower retaliation claim under the Dodd-Frank Act in federal court.

The Dodd-Frank Act established new incentives and protections for individuals to report violations of the federal securities laws, including an award program, which provides that a whistleblower may be eligible for an award of up to 30% of the monetary sanctions obtained by the SEC in excess of US$1m in certain circumstances, as well as enhanced employment anti-retaliation protections. Prior to the February 21, 2018 decision, the SEC had determined that reporting to the SEC was not required in order for the anti-retaliation protections to apply.

The Court rejected the SEC's broader definition of whistleblower, holding that the text of the Dodd-Frank Act clearly defined the term "whistleblower" to cover only those persons who report securities law violations to the SEC. The Court also noted that a core objective of the whistleblower program is "to motivate people who know of securities law violations to tell the SEC."

The SEC will likely soon issue amendments to its whistleblower rules in the light of this decision.

Linklaters published a Client Alert about this decision, available here.

"The SEC will likely soon issue amendments to its whistleblower rules."

“As currently drafted, the offence is, in some respects, narrower than its UK equivalent… and in some respects broader.”

Australia: Proposed changes to foreign bribery laws and the introduction of deferred prosecution agreements

Following a consultation in May 2017, the Australian Federal Government has tabled the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (Cth) (**Bill**) in Parliament, which, if passed, will significantly amend Australia's foreign bribery laws and introduce a deferred prosecution agreement (**DPA**) regime.

Key aspects of the proposed legislation include:

> The introduction of a strict liability "failure to prevent bribery by associates" offence for Australian corporates with an "adequate procedures" defence. As currently drafted, the offence is, in some respects, narrower than its UK equivalent (applying only to bribery of foreign public officials) and in some respects broader (for example, the definition of "associates" will capture subsidiaries by default).

> A change to some of the aspects of the foreign bribery offence which, according to the Government, have proven difficult to establish. Most notably: (a) it will no longer be necessary for prosecutors to prove an intention on the part of the person bribing to obtain or retain a "particular" business or advantage; and (b) the Bill contains guidance to which a trier of fact may have regard when determining whether the intended influence of a foreign public official is "improper".

> The introduction of DPAs as an option for prosecutors for a range of corporate offences, including, but not limited to, foreign bribery. The Bill contains a number of mandatory requirements for a DPA, including a statements of facts (but not an admission of guilt).

> The responsibility for approval of DPAs being assigned to a "retired judge".

The Bill has been referred to a Senate Committee for review, which is due to report back on 20 April 2018.

These proposed changes form part of the Australian Government's broader consideration of options to facilitate a more effective response to corporate crime. Their significance to Australia's foreign bribery laws means that not only will the Bill, if passed, shape future foreign bribery prosecutions; it will also guide internal corporate frameworks and policies with respect to best practice in foreign bribery safeguards and compliance.

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Germany: Coalition agreement of the new Government – new law on sanctions for businesses and on internal investigations

On 14 March 2018, Angela Merkel was re-elected Chancellor of a renewed "grand coalition" after the longest Government-building consultation in modern Germany. Prior to this, and following lengthy negotiations between the parties forming last term's coalition, the coalition parties – Merkel's Conservative Party (CDU) and its Bavarian counterpart (CSU) as well as the Social Democrats (SPD) – agreed on a 179-page coalition agreement (available in German here). Pursuant to the agreement, the Government will, *inter alia*, introduce new regulations on sanctions for businesses and on internal investigations.

At present, companies cannot be held criminally liable under German law but only those individuals committing the crime can be held accountable, even if the crime benefits solely the company. However, it is possible to impose administrative fines on companies under the German Administrative Offences Act (*Ordnungswidrigkeitengesetz* (**OWiG**)), to disgorge profits and to order forfeiture against a company. An attempt by the Federal State of North-Rhine Westphalia to implement the concept of corporate criminal liability in the German legal system failed in the previous legislative period. Interestingly, the new coalition agreement also merely refers to "sanctions" or "monetary sanctions" and avoids terms like "criminal sanctions" or "penal law". However, the agreement does mention an "extension of the current sanctions instruments for undertakings".

The grand coalition is also attempting to remove the opportunity principle laid down in the OWiG, which currently leaves it to the discretion of the responsible authority to decide whether the company profiting from its employee's misconduct is also prosecuted. The coalition additionally suggests new clear procedural rules to increase legal security, as well as specific provisions on closing proceedings. Moreover, fines shall be based on the economic power of the respective business (up to 10% of the group turnover for larger companies), since the current upper limit for fines of 10 million euros is considered to be too high for smaller companies and too low for large corporations. Sanctions will be publicised in an appropriate way.

Furthermore, new legal regulations shall be introduced for internal investigations, in particular in respect of confiscated documents and the admissibility of searches. This proposal aims to address legal uncertainty resulting from recent court rulings and cases (particularly the Jones Day/Volkswagen case currently pending before the Federal Constitutional Court) in the absence of clear-cut regulations on internal investigations. The coalition agreement does not go into much detail, but merely states that the Government will create legal incentives for people who contribute to internal investigations and for the subsequent disclosure of the investigation results.

It remains to be seen which approach the new laws will pursue. In any event, companies are well advised to operate strong compliance systems, since German authorities have to take into account a functioning compliance management system when sentencing a company pursuant to recent case law, as reported in the Summer 2017 edition of *Business Crime Quarterly*

Luxembourg: Implementation of AMLD IV

On 6 February 2018, the Luxembourg Parliament adopted a new law implementing the main provisions of Directive (EU) 2015/849 of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (**AMLD IV**).

The new law enhances the obligations for professionals, whilst extending the scope of professionals to whom the law applies.

The modified anti-money laundering law now applies to a wider scope of financial institutions carrying out their activities in Luxembourg, (including certain non-EU professionals such as branches, whose registered office is located in a third country), to persons carrying out family office activities, as well as to providers of gambling services.

The law introduces new risk assessment obligations, thereby providing professionals with more detailed guidelines on how and under what circumstances a risk assessment must be performed, taking into account, for example, risk, geographical and sector-related factors. In addition, professionals must set-up appropriate policies, controls and procedures in order to mitigate and manage any AML/CTF risks.

The definition of "ultimate beneficial owner" has been broadened and enhanced in the case of trusts and other legal entities such as foundations, and other legal arrangements which are similar to trusts.

Finally, the law introduces a series of enhanced (administrative) sanctions together with a significant increase in criminal fines, ranging from EUR 12,000 to EUR 5,000,0000 (from the previous figures of EUR 1,250 to EUR 1,250,000.

We have previously published a note setting out the new rules on beneficial ownership, available here.

Singapore: Singapore introduces deferred prosecution agreements to deal with corporate offending

Newly-passed legislation in Singapore will introduce deferred prosecution agreements (**DPAs**) into Singapore's Criminal Procedure Code as a means of dealing more effectively with corporate offending.

The Criminal Justice Reform Act, approved by Parliament on 19 March 2018, makes a large number of changes to three main pillars of Singapore's criminal justice system: investigative processes, court procedures and sentencing powers. Included in the reforms is a framework for DPAs, suggested following a public consultation last year.

DPAs are agreements by which a prosecutor agrees not to prosecute a corporation for wrongdoing in exchange for strict compliance by the corporation with a series of conditions, such as admission of wrongdoing, compensating victims, payment of a fine and implementation of a programme for compliance reform. The DPA regime set out in the legislation closely mirrors that in the UK, providing that only corporates and not individuals may enter into a DPA. High Court approval will be required for all DPAs, which will only be granted if the judge is satisfied that the DPA is in the interests of justice and its terms are fair, reasonable and proportionate. The terms of the finalised DPA will be made public. In addition, under Singapore legislation, on-going cooperation may be required from the company in any future investigation relating to the alleged wrongdoing, something that is similar to DPA practice in the US rather than the UK.

DPAs will be available in Singapore for certain specified offences only, including corruption, money laundering and certain property offences, so will have a narrower application than in the UK. However, as in the UK, Singapore's law on corporate criminal liability still requires the involvement in the misconduct of someone who can be considered to be the company's "directing mind and will" in order to hold the company itself liable. This is a high bar for prosecutors to cross, which is not altered by the DPA regime. Given that there is no obligation on the Singapore government to publish guidance for companies on when a DPA would be appropriate, some commentators have already suggested that the benefits of a DPA may be unclear to companies, initially at least.

"On-going cooperation may be required from the company in any future investigation relating to the alleged wrongdoing."

UK: Government to establish public register of beneficial ownership for foreign companies owning UK property

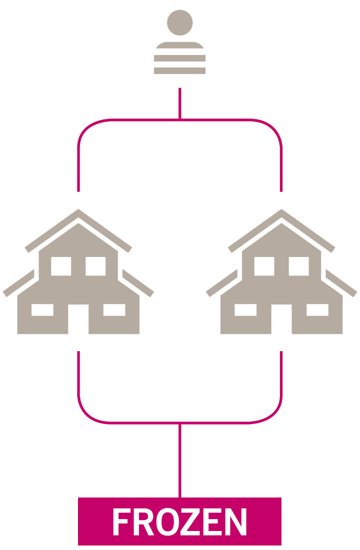
The Business Secretary, Greg Clark, confirmed in a written ministerial statement on 24 January 2018 that the government intends to make good on its commitment, made at the London Anti-corruption summit in May 2016, to establish a public register of the beneficial ownership of foreign companies owning property in the UK. The measure is intended to crack down on the use of the London property market, in particular, as a haven for illicitly-gained funds and money laundering but will also provide the government with greater transparency on overseas companies seeking public contracts.

Two earlier attempts by the Lords to introduce such legislation through amendments to other Bills (the Criminal Finances Bill in 2017 and more recently, the Sanctions and Anti-Money Laundering Bill) failed. However, the government's anti-corruption strategy published in December 2017 included express reference to the measure.

A draft Bill will be introduced to Parliament before this year's summer recess, with the Bill expected to become law by Summer 2019. It is anticipated that the register will become operational by early 2021. The Government's press release gives more details of the proposal.

The announcement comes at a time when the UK's system for registering companies has been criticised as a "gaping black hole" in the UK's defences against money laundering. Companies House, which maintains information on all companies registered in the UK, is exempt from new regulations brought in under the Fourth Money Laundering Directive (**MLD4**) requiring due diligence to be done on companies registered with trust and company service providers (**TCSPs**), as it is not considered a commercial business provider.

Research published by Transparency International (**TI**) in November 2017 (entitled "Hiding in Plain Sight", available here), identified hundreds of UK-registered companies that appeared to have had direct involvement in the laundering of up to £80 billion stolen money from at least 13 countries. Many of these companies were set up by TCSPs on behalf of clients. However, half of the 766 questionable companies identified by TI were registered to only eight separate addresses and it was by no means apparent that any meaningful business was occurring there. In addition, TCSPs have a poor track record of identifying and reporting money laundering, being responsible for only 77 of the 400,000 suspicious activity reports filed in 2016.



UK: Unexplained wealth orders come into operation

Unexplained wealth orders (**UWO**), a key new power in the fight against money laundering introduced in the Criminal Finances Act 2017, came into effect on 31 January 2018.

These new orders are available, on application to the court, to prosecutors including the SFO, to require a person suspected of involvement in or association with serious criminality to explain the origin of assets with a value of over £50,000 that appear to be disproportionate to their known income. The failure to provide a response will give rise to a presumption that the property is recoverable in any subsequent civil recovery action.

This power extends to politically exposed persons such as foreign politicians or officials or those associated to them, reflecting the concern that those involved in corruption overseas launder the proceeds of their crimes in the UK. It also goes some way to addressing the difficulties faced by law enforcement agencies in obtaining sufficient evidence to prosecute when all relevant information may be outside this jurisdiction. UWOs may be obtained in respect of overseas property, although the cooperation of foreign authorities will be needed to assist with enforcement in such cases.

On 28 February 2018 the National Crime Agency announced that it had secured the first two UWOs over assets totalling £22m. The UWOs relate to two properties, one in London and one in the South East of England, which are believed to be ultimately owned by a politically exposed person. Interim freezing orders were also obtained, preventing the assets from being transferred or dissipated while subject to the order.

US: For the first time under recent legislation, US President issues economic sanctions against parties for corruption and human rights violations

In December 2017, US sanctions were issued for the first time ever under the Global Magnitsky Human Rights Accountability Act via Executive Order 13818 for corruption and human rights violations. The Act was passed in December 2016 and is unique in allowing the designation of individuals and entities for list-based blocking sanctions outside of traditional national security concerns. These sanctioned entities have been placed on the US Department of the Treasury's Office of Foreign Assets Control (**OFAC**) list of Specially Designated Nationals and Blocked Persons (**SDN List**), and include a wide range of actors, such as high-ranking current and former government officials, various businesses and individuals, and associates of other sanctioned individuals.

As with most sanctions programs, US persons are prohibited from dealing in the property and property interests of blocked entities. However, non-US persons must also exercise caution, since dealing with these entities still presents significant risk. Executive Order 13818 contains a material assistance provision that allows OFAC to designate as an SDN (and thus make subject to blocking sanctions) any person that materially assists or provides support to an entity already on the SDN List. Persons may also be placed on the list for supporting Magnitsky-targeted activities, i.e., serious human rights abuses and corruption, or supporting any entity that has done so. Since the initial announcement, five additional individuals have been added to the SDN List for Magnitsky-related violations.[1]

Linklaters has published a Client Alert about the sanctions, available here.

1 Magnitsky-related Designations; Counter Terrorism Designations, January 9, 2017, Office of Foreign Assets Control, Specially Designated Nationals List Update, available at https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20170109.aspx

Policy and practice

“It remains to be seen how much of an impact the Guidelines will have on corporates’ appetite for self-reporting suspected foreign bribery.”

Australia: Best practice guidelines on self-reporting foreign bribery introduced

In late 2017, hot on the heels of the proposed legislative changes described on page 7 above, the Australian Federal Police (**AFP**) and Commonwealth Director of Public Prosecutions (**CDPP**) published Best Practice Guidelines on self-reporting foreign bribery and related offending by corporates (**Guidelines**).

The Guidelines have been introduced to encourage more self-reporting and cooperation by corporates in Australia. In particular, they:

> clarify that a ‘self-report’ can be made by a corporation without admitting criminal responsibility; and

> specify that self-reporting will be treated as a ‘significant’ public interest factor against prosecution when applying the second stage of the CDPP Prosecution Policy test (with further guidance as to what will be taken into account when assessing the public interest in prosecuting a self-reporting and cooperating corporate).

The Guidelines also cover a wide range of issues relevant to self-reporting of foreign bribery and ‘related offences’, including expectations for self-reporting, cooperation with the AFP investigations, legal professional privilege, confidentiality of information shared with the AFP, indemnity from prosecution and early guilty pleas.

Ultimately, however, the CDPP retains its broad discretion to prosecute a corporate that has self-reported and cooperated with the AFP’s investigation. The Guidelines also acknowledge that they will need to be updated if the proposed DPA regime reported on above is introduced. It therefore remains to be seen how much of an impact the Guidelines will have on corporates’ appetite for self-reporting suspected foreign bribery.

US: New internal policy instructs US DOJ lawyers to seek dismissal of meritless FCA *qui tam* actions

The US Department of Justice (**DOJ**) has implemented a new policy that requires DOJ lawyers to potentially seek dismissal of arguably meritless *qui tam* actions filed under the US False Claims Act (**FCA**). The new policy was announced on 10 January 2018 in a memorandum from Michael Granston, Director of the Fraud Section of the Commercial Litigation Branch at the DOJ (the **Granston Memo**).

Qui tam actions under the FCA are lawsuits initiated by private individuals on behalf of the government. The government may intervene and take over the case, or decline to intervene and permit the *qui tam* plaintiff to proceed on his or her own. Now, under the Granston Memo, when the government declines to intervene, prosecutors should also consider whether they should seek to dismiss the case by evaluating the following seven non-exclusive factors:

(i) curbing meritless *qui tam* claims;

(ii) preventing parasitic or opportunistic *qui tam* actions;

(iii) preventing interference with agency policies and programs;

(iv) controlling litigation brought on behalf of the US;

(v) safeguarding classified information and national security interests;

(vi) preserving government resources; and

(vii) addressing egregious procedural errors.

The Granston Memo emphasises that these factors are not mutually exclusive and that in many cases the government will rely on several grounds in seeking dismissal. The Memo also advises DOJ lawyers that they do not need to proceed on an "all or nothing" basis, recognising that in some cases "it may be appropriate to seek only partial dismissal of some defendants or claims."

Linklaters has published a Client Alert about the Granston Memo, available here.

US: DOJ extends leniency policy beyond FCPA

Officials from the US Department of Justice (**DOJ**) announced on 1 March 2018 that the DOJ would broaden a non-prosecution policy to laws other than the US Foreign Corrupt Practices Act (**FCPA**). Formalised last November, the FCPA policy establishes a presumption against prosecuting companies that self-disclose FCPA violations and ensures a 50% reduction in fines, absent any "aggravating circumstances." Now, the DOJ will grant similar leniency to entities that self-disclose violations of laws other than the FCPA. A non-US headquartered bank has been announced as the first beneficiary of this broadened policy, which was under investigation for allegedly defrauding its clients through manipulating the foreign exchange options market.

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Linklaters Business Crime Conference highlights cross-border nature of investigations and enforcement

We held our first Business Crime Conference on 1 February 2018. Over 60 clients joined us to consider key topics in financial crime enforcement, including the main challenges faced by legal and compliance personnel today and how best to address them.

A key theme of the conference was how best to handle simultaneous investigations by multiple authorities. The main differences in approach between US and UK regulators and prosecutors were examined, such as the extent of disclosure required by companies as part of an internal investigation and the requirement to self-report wrongdoing. Recent developments in each jurisdiction were noted, as well as what companies can expect going forward. While commercial organisations in the UK are under an increasing duty to self-regulate and step up the prevention of wrongdoing by their employees and associates, in the US there is a continuing focus on individual accountability.

We have published a client briefing considering the key topics of the conference in more detail, available here.

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8177_F/04.18