A Price Worth Paying?: Proactive Risk Management for Corporate Counsel

Vincent Cohen | Joni Jacobsen | Angela Liu

May 2021

Dechert LLP

Dechert Speakers

Vincent H. Cohen Jr.

Partner

Washington, D.C.

vincent.cohen@dechert.com

+1 202 261 3432

Joni S. Jacobsen

Partner

Chicago/New York

joni.jacobsen@dechert.com

+1 312 646 5813 Chicago

+1 212 698 3500 New York

Angela M. Liu

Partner

Chicago/New York

angela.liu@dechert.com

+1 312 646 5816 Chicago

+1 646 731 6140 New York

Criminal and Regulatory Investigations and Litigation

The impact of a criminal or regulatory investigation can be significant

- In the last several years, companies have paid more than US$7 billion dollars in corporate US criminal fines, penalties, and forfeiture to DOJ and more than US$16 billion dollars to US and foreign authorities as part of corporate resolutions.
- Notable examples include:
  - **Odebrecht (US$4.5 billion to US, Brazil, and Switzerland)**
  - **Takata (US$1 billion)**
  - **Volkswagen (US$4.3 billion)**
- DOJ has charged more than 300 individuals and convicted more than 200 individuals
- Companies have paid almost US$1 billion in fines to the SEC

Background

- Following the financial crisis, DOJ investigated major banks and recovered billions of dollars, but did not prosecute any senior Wall Street executives
- DOJ was heavily criticized in press, by Congress, and by public for failure to "punish the elites"
- Critics pointed to 1980s savings and loan prosecutions, which resulted in the imprisonment of 1,000+ bankers
- Criticism intensified with time, as statutes of limitations began to run out

Key points: “To be eligible for any cooperation credit”…

- “The company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position…and provide to the Department all facts relating to that misconduct”
- “Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals”
- Any such release of [individual] crime or civil liability…must be personally approved in writing by the relevant Assistant Attorney General or United States Attorney”

ABA Model Rules for Professional Responsibility: Ethical considerations in conducting internal investigations

- It is imperative that at the onset of the interview, witnesses be given Upjohn warnings in a straightforward manner
- The language of a warning might state:
  - **We represent the company. These conversations are privileged, but the privilege belongs to the company and the company decides whether to waive it. If there is a conflict, the attorney-client privilege belongs to the company.**

Ethical considerations in conducting internal investigations

- Attorneys' ability to search for facts is not unrestricted:
- For instance, Rule 4.4 prohibits violating individual legal rights when obtaining information
  - **"In representing a client, a lawyer shall not …use methods of obtaining evidence that violate the legal rights of such a person."**
- Rule 4.4(b) states:
  - **A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.**
- Rule 8.4(c) states:
  - **It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]**

Ethical considerations in conducting internal investigations

- An attorney should adequately disclose the identify of his client
- Rule 1.13(f) states:
  - **“In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.”**

Ethical considerations in conducting internal investigations

- Avoid inadvertent lawyer-client relationships
  - **Do not give legal advice**
  - **When investigation is in response to an employee's complaint, clarify your role to the employee.**
- Rule 4.3 imposes an affirmative duty on an investigating attorney to correct any misunderstanding regarding his role: "when the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter…"

Potential Liability

Potential liability of the company and individuals portrayed in the film

- Foreign Corrupt Practices Act (FCPA)
  - **Anti-bribery**
  - **Accounting provisions**
- Laws enforcing international trade sanctions
  - **International Emergency Economic Powers Act; 50 U.S.C. Section 1701-1707 (IEEPA)**
- Whistleblower suits
- Foreign anti-corruption laws
  - **UK Bribery Act**
- Other Consequences

Foreign Corrupt Practices Act (FCPA)

- The anti-bribery provisions of the FCPA make it unlawful for an issuer to provide a corrupt payment to a foreign official for the purpose of obtaining or retaining business or for directing business to any person
- The accounting provisions of the FCPA require companies to: (1) Make and keep books, records and accounts which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and (2) Devise and maintain a system of internal accounting controls
- Individual penalties
  - **Anti-bribery violations**
    - Fines – US$100,000 per violation or twice the gain sought to be obtained; Prison – 5 years imprisonment
  - **Accounting violations**
    - Fines – US$5 million or twice the gain sought to be obtained; Prison – 20 years imprisonment
- Corporate fines:
  - **Fines of up to US$2 million for each violation of the anti-bribery prohibition**
  - **Fines of up to US$25 million for each violation of accounting**

DOJ FCPA Unit

Source: United States Department of Justice, Fraud Section, Year in Review 2020

Laws enforcing international trade sanctions

- U.S. sanctions laws are enforced by the Treasury Department's Office of Foreign Assets Control (OFAC)
  - **International Emergency Economic Powers Act 50 U.S.C. Section 1701-1707 (IEEPA)**
    - Conspiracy to Defraud U.S. (Defraud Clause) "[I]f two or more persons conspire either to commit any offense against the United States or to defraud the United States, or any agency thereof in any manner or for any purpose…" 18 U.S.C. sec. 371
  - **Penalties for violations**
    - IEEPA
    - Civil penalty US$250,000 or twice the value of the transaction
    - Criminal penalty US$1 million or twice the value; Imprisonment

OFAC sanctions, penalties and enforcement

Enforcement responses – general factors considered

- **Willful or reckless violation**
- **Awareness of conduct**
- **Harm to sanctions objectives**
- **Individual characteristics:**
  - Commercial sophistication
  - Size of operations
  - Financial conditions
  - Volume of transactions
  - Sanctions history
- **Compliance program**
- **Remedial response**
- **Cooperation with OFAC**
- **Timing of apparent violation**
- **Other enforcement action**
- **Future compliance / deterrence effect**
- **Other relevant factors**
  - Totality of Circumstances

Source: 74 Fed Reg. 57593 (November 9, 2009)

Whistleblower suits

- The False Claims Act imposes liability on individuals and entities that defraud the U.S. government
  - **DOJ authorized to pay rewards**
  - **Individuals authorized to bring qui tam actions**
- Dodd-Frank Anti-Retaliation Provision:
  - **Protects employees who report securities law violations, including recordkeeping violations**
  - **May include internal reporting, not just to SEC. See 17 C.F.R. §240.21F-2(b)(1); *Murray v. UBS Sec. LLC*, 2013 WL 3190084, at *4-7 (S.D.N.Y. May 21, 2013)**

Violations of the Civil False Claims Act

- Prohibits knowingly presenting, or causing to be presented, a false or fraudulent claim for payment or making or using a false record or statement material to a false or fraudulent claim
- Amended in 2009 to cover not just claims made directly to the U.S. but also any claim made to a contractor, grantee or recipient of government funds where the government funds are used to pay some or all of the claim on the government's behalf or to advance a government program or interest
- Treble damages plus civil penalties

Foreign anti-corruption laws

- UK Bribery Act
  - **Broadly applies to companies with operations in the UK no matter where the offense occurs**
  - **Where bribery of foreign officials, no corrupt intent required**
  - **Strict liability for corporations whose employees or intermediaries bribe foreign officials – only defense is that company had adequate procedures in place to prevent bribes – i.e., an effective anti-corruption compliance program**
  - **Criminal penalties and civil recovery of sums wrongfully obtained**

Securities litigation

- Investigations become public
- Market reacts swiftly, and Maartel's stock price plummets
- Within days, several shareholders file putative securities class actions
  - **Lawsuits allege Maartel and certain directors and officers violated Sections 10(b) and 20(a) of the Securities and Exchange Act by:**
    - Failing to disclose significant risks associated with the acquisition
    - Failing to disclose inadequate internal controls at subsidiary and parent
    - Misrepresenting that operations were in compliance, when they were not
    - Misrepresenting accuracy of Maartel's financials

Derivative litigation

- Derivative claims:
  - **Brought by shareholder on behalf of corporation**
  - **Targets directors and officers (including general counsel)**
  - **Typically breach of fiduciary duty or failure of corporate oversight claims**
- May seek recovery of amounts paid by the corporation:
  - **Judgments, settlements, fines and penalties**
  - **Costs of investigations and defense of claims**

Other collateral consequences

- Revoked licenses
- Federal contract debarment
- Reputational risks
- Injunction to prevent future violations
- Disgorgement of proceeds associated with improper payments

Appendix One – Biographies

Dechert LLP

Vincent H. Cohen Jr.

Partner | Washington, D.C.

vincent.cohen@dechert.com

Washington, D.C. *1900 K Street, NW, Washington, DC, United States of America 20006-1110*

+1 202 261 3432

FAX +1 202 261 3333

Vincent H. Cohen, Jr., a white collar lawyer, focuses his practice on high-stakes litigation on behalf of individuals and corporations. He is also a member of the firm's Policy Committee, which consists of elected partners who oversee management of the firm worldwide. As an experienced trial lawyer and investigator, he represents clients in sensitive government and internal investigations, government enforcement matters, and complex civil and criminal litigation on a domestic and international scale.

Mr. Cohen is the former acting U.S. Attorney for the District of Columbia. Prior to leading the largest U.S. Attorney's Office in the nation, Mr. Cohen served as the Office's Principal Assistant United States Attorney for five years. During his tenure, he oversaw the investigation and prosecution of cases involving a wide variety of federal crimes, including terrorism, financial and health care fraud, homicide, public corruption, money laundering, and cyber-security. He helped establish and expand the U.S. Attorney's Office's Cyber Unit to prosecute cross border cyber-crimes such as cyber frauds committed against multinational corporations, and insider trading schemes that obtained confidential information through cyber breaches. Mr. Cohen's experience as a federal prosecutor also includes work on high-profile national security trials, leading an internal task force committed to prosecuting federal public corruption matters, and working in partnership with federal and local law enforcement agencies to reduce violent crime in the District of Columbia.

While serving as acting U.S. Attorney, Mr. Cohen was appointed by Attorney General Loretta Lynch as a member of the Attorney General's Advisory Committee, a small group of U.S. Attorneys from across the country who provide advice and counsel to the Attorney General on policy, management and operational issues.

Mr. Cohen joined the U.S. Attorney's Office in 1997 as an Assistant United States Attorney in the Criminal and Civil Divisions. Six years later, he joined a leading international law firm, where he advised clients on a broad range of complex legal issues. Before returning to the U.S. Attorney's Office in 2010, Mr. Cohen served as a partner at a boutique law firm specializing in high-stakes litigation for individuals and corporations.

Throughout his career, Mr. Cohen has been consistently recognized for his professional accomplishments. He is recognized by *Chambers USA* as a leading lawyer in the area of White-Collar Crime & Government Investigations for the District of Columbia and is listed by *Legal 500 US* for Corporate Investigations and White-Collar Criminal Defense. In 2020, he was named one of *Profiles in Diversity Journal's* first-ever Black Leaders Worth Watching, along with Working Dad of the Year by *Working Mother Magazine*. He was named a Rainmaker by MCCA in 2019 for being an exceptional diverse attorney whose business acumen, passion and dedication to proactive client development set him apart as a leader in the legal profession. Since 2018 he has been named one of the 500 Leading Lawyers in America by *Lawdragon.* In 2018 he was listed as one of *Savoy Magazine*'s Most Influential Black Lawyers. Mr. Cohen was honored with the 2018 Diversity Leader Award by *Profiles in Diversity Journal* for his commitment to diversity. The award series honors companies and individuals who create, develop and promote programs that support diversity and inclusion. Mr. Cohen, who leads Dechert's Black Affinity Group, has worked to promote and safeguard a comprehensive commitment to diversity since he joined Dechert.

In 2015, Mr. Cohen received the inaugural Syracuse Law Honors Award from the College of Law, for his distinguished achievement in the legal profession during his time as acting U.S. Attorney. That same year, he received the Director's Award from the United States Secret Service for his contribution and commitment to the principles of responsible law enforcement and Walker Memorial Baptist Church recognized him with the Public Service and Humanitarian Award for his work in ensuring equal justice for the people of Washington, D.C. through his selfless community involvement. In 2014, he received the Presidential Star Award from the National Bar Association for his contributions in the field of law and in 2010, he was identified as one of the "Nation's Best Advocate's: 40 Lawyers Under the Age of 40." In 2008, Mr. Cohen received the Chancellor's Citation for Distinguished Alumni Achievement from Syracuse University and as an AUSA from 1997 to 2003, Mr. Cohen received a number of special achievement awards for outstanding performance

including awards from the Attorney General of the United States, as well as from the Offices of Inspector General of the Department of State and the Smithsonian Institution.

Mr. Cohen serves as an instructor teaching trial advocacy at Harvard Law School's Trial Advocacy Workshop and is a frequent lecturer at Syracuse University, Georgetown University and Harvard law schools. He has served as General Counsel and remains an active member of 100 Black Men of America, Inc. (Greater Washington), an organization focused on improving the quality of life of minority youth in the Washington, D.C. metropolitan area through programs focusing on health and wellness, economic empowerment, education, and mentoring. Mr. Cohen recently spoke on the topic of combatting corruption to a contingent of Brazilian prosecutors through the State Department's International Visitors Leadership Program on Transnational Crime and Anti-Corruption.

Mr. Cohen's arrival to the firm was noted by many publications including *Law360*, *The National Association of Former United States Attorneys*, *Legal Bisnow*, *National Law Journal, New York Daily News, The Washington Post, Washington Business Journal,* and *JD Journal.*

Education

- Syracuse University, B.A., 1992
- Syracuse University College of Law, J.D., 1995

Admissions

- District of Columbia
- Maryland
- New Jersey
- Supreme Court of the United States

Memberships

- Board of Advisors, Syracuse College of Law
- Board of Governors, Washington Bar Association
- National Association of Former United States Attorneys
- Advisory Committee of the Attorney General for the District of Columbia

- The Innocence Project Lawyers Committee
- National Bar Association
- National Black Prosecutor's Association
- 100 Black Men of America, Inc.
- The Sidwell Friends School Alumni Committee
- Board Member, Syracuse University Chancellor's Advisory Board
- Member, Syracuse University Office of Multicultural Advancement Advisory Council
- Member, Syracuse University Board of Trustees

Rankings and Recognition

- Leading Lawyer, *Lawdragon 500* 2020

Speaking Engagements

- **The Conundrum of The Black Prosecutor** - National Black Prosecutors Association, Washington DC (October 23, 2019)
- **56 Black Men** — Panelist on Dechert's UK Black History Month event showcasing 56 Black Men, the photographic exhibition. (October 3, 2019)
- **The Embassy Law Series: Criminal Proceedings in the U.S.** — Washington, D.C. (June 25, 2019)
- **Anatomy of a Trial, The Rosenberg Spy Case** — American College of Trial Lawyers and the ABA Litigation Section (May 1, 2019)
- **Minority Corporate Counsel Association (MCCA)** — 2019 Rainmaker Award Recipient (March 2019)
- **National Bar Association 2018 Wiley Branton Symposium** — Facebook HQ, Menlo Park, CA (November 9, 2018)
- **Media, Artificial Intelligence and the Internet of Things Bloomberg Law Leadership Forum** — New York (May 23, 2018)

Defending FCPA Compliance Programs to the Agencies — ACI Annual Conference on the Foreign Corrupt Practices Act, National Harbor, MD (November 30, 2017)

- **Community Law: Attorneys Impacting Diverse Communities Through Law** — Syracuse University - Coming Back Together, Syracuse, NY (September 15, 2017)
- **2017 '40 Under 40' Nation's Best Advocate Awards Gala** — National Bar Association, Toronto (August 2, 2017)
- Keynote speaker, **Managing a Corporate Crisis: Strategies for Isolating a Crisis and Controlling the Public Narrative While Meeting Your Ethical Obligations and Maintaining Privilege** — In-House Toolkit: The Nuts and Bolts Presented by ACC of NYC, New York, NY (June 15, 2017)
- Keynote speaker, **The Perfect Storm: An Update on the Convergence of Criminal and Civil Litigation** — Greater Philadelphia ACC In-House Counsel Conference, Philadelphia, PA (April 27, 2017)
- **From the Boardroom to the Courtroom - A Price Worth Paying?** - Omaha, NE (March 22, 2017)
- Keynote speaker, **The State of Policing in Black America** — Washington Bar Association, Washington, DC (January 14, 2017)

FCPA Compliance Program Lab, 33rd International Conference on the Foreign Corrupt Practices Act — American Conference Institute, Washington, DC (November 29, 2016)

- **Regulation and Anti-Corruption – How to Manage Risk within Your Organisation** — FinanceAsia's 5th Compliance Summit Asia, Hong Kong (November 17, 2016)
- **4 Cs : Essentials for Corporate Compliance and Cooperation Credit** — The Canadian Chamber of Commerce in Hong Kong, Hong Kong (November 15, 2016)
- **Anti-Corruption and Investigations** — Compliance Summit Southeast Asia, Singapore (August 24, 2016)
- **Roundtable Discussion on Enforcement Trends** - Singapore (August 23, 2016)

Dechert LLP

Angela M. Liu

Partner | Chicago | New York

angela.liu@dechert.com

Chicago *35 West Wacker Drive, Suite 3400, Chicago, IL, United States of America 60601-1608*

+1 312 646 5816

FAX +1 312 646 5858

New York *Three Bryant Park, 1095 Avenue of the Americas, New York, NY, United States of America 10036-6797*

+1 646 731 6140

FAX +1 212 698 3599

Angela M. Liu is a partner in the firm's litigation practice group, where she focuses on the defense of publicly-traded companies and their directors and officers in securities class action litigation, derivative litigation, SEC investigations, merger litigation, corporate governance disputes, and other complex commercial litigation. Ms. Liu has successfully advised and defended public companies, as well as directors and officers in a wide range of matters arising from allegations of breaches of fiduciary duties, M&A litigation, accounting irregularities, and inadequate or misleading public disclosures.

In her pro bono practice, Ms. Liu has successfully represented plaintiffs at trial and in the Tenth Circuit in litigation challenging Kansas' voter registration laws, as well as represented certain plaintiffs at trial and in the Seventh Circuit in litigation challenging the constitutionality of Wisconsin' s voter identification laws with the American Civil Liberties Union. She was also lead counsel for certain plaintiffs in expedited proceedings in Tennessee that resulted in expanded access to mail-in voting in light of the COVID-19 pandemic. She has also recently addressed the Human Rights Council at the United Nations in Geneva with the Advocates for Human Rights. In addition, Ms. Liu

is co-chair of the Asian Affinity Group and sits on the firmwide Diversity and Inclusion, Hiring, and Innovation committees.

Prior to joining Dechert, Ms. Liu served as an associate in the litigation practice of an international law firm and clerked for the Honorable John R. Gibson of the United States Court of Appeals for the Eighth Circuit. She has also worked as an associate at a political fundraising firm in Washington, D.C.

Ms. Liu earned her JD from the University of North Carolina School of Law in 2009. Ms. Liu also earned her BA, phi beta kappa and with highest honors, from the University of North Carolina at Chapel Hill, where she was also a recipient of the Morehead Scholarship, the oldest merit scholarship program in the U.S.

Experience

- Representation of **board of directors of a credit card company** in defense of derivative litigation in the Northern District of Illinois.
- Representation of **bio-pharmaceutical companies and their officers and directors** in securities class action and derivative suits in the Southern District of New York and Southern District of Indiana.
- Representation of a **chemical product manufacturer and its officers and directors** in securities class action suit in the Southern District of New York.
- Representation of **renewable energy company and certain directors and officers** in securities class action and related derivative actions alleging misrepresentations regarding company's technology.
- Representation of **board of directors of Chinese-based company** in connection with a derivative action and merger litigation in the District of Delaware.
- Representation of **CEO of leading provider of cloud based HR solutions** in connection for breaches of fiduciary duty in Delaware Chancery Court.
- Representation of **former CFO of large shipping company** in defense in SEC investigation.
- Representation of **special litigation committee of large oil and gas company** in derivative litigation.

Education

- The University of North Carolina at Chapel Hill, B.A., 2004, Highest Honors, Phi Beta Kappa, Morehead Scholar
- University of North Carolina School of Law, J.D., 2009, Editor in Chief of the *North Carolina Journal of International Law & Commercial Regulation*

Admissions

- Illinois
- New York
- Supreme Court of the United States
- United States Court of Appeals for the Seventh Circuit
- United States Court of Appeals for the Eighth Circuit
- United States Court of Appeals for the Tenth Circuit
- United States District Court for the Eastern District of Wisconsin
- United States District Court for the Northern District of Illinois
- United States District Court for the Eastern District of New York
- United States District Court for the Southern District of New York

External Articles

- What Was Up With All the Securities Class Actions Targeting Non-U.S. Issuers Last Year? — *Law.com* (March 15, 2021)
- How I Made Partner: Dechert's Angela Liu — Law.com (February 20, 2020)
- **2020 Developments in Securities Fraud Class Actions Against Non-U.S. Issuers** — Harvard Law School Forum on Corporate Governance (March 23, 2021)

Clerkships

- United States Court of Appeals for the Eighth Circuit, Honorable John R. Gibson

Memberships

- Leadership Council on Legal Diversity – 2018 Fellow
- Law Alumni Association Board Member – UNC School of Law
- Alumni Engagement Committee - UNC School of Law (Co-Chair)
- Judicial Clerkship Committee - UNC School of Law
- National Asian Pacific American Bar Association
- Planning Committee, ABA Judicial Division Bench & Bar Academy
- *Law360*'s Securities Litigation Editorial Advisory Board

Speaking Engagements

- **The Ever Shifting Landscape of Special Purpose Acquisition Companies (SPAC)** – ACC NY Webinar (April 27, 2021)
- **Recent Developments: Securities Fraud Actions Against Life Sciences Companies** - Webinar (March 4, 2021)
- **NACD Advanced Director Professionalism** — A Price Worth Paying – Chicago, IL (June 18, 2019)
- **Risk Management and Recent Trends in Securities Fraud Litigation Against Life Sciences Companies** — Professional Liability Underwriting Society (April 2019)
- **A Term in Review: An Overview of Key Supreme Court Decisions from the 2015 Term & Thoughts about the Upcoming Term** (November 29, 2016)
- **Tipping the Scales: A Women in Law Symposium** — Women in Law, Chapel Hill, NC (March 22, 2016)

Dechert LLP

Joni S. Jacobsen

Partner | Chicago | New York

joni.jacobsen@dechert.com

Chicago *35 West Wacker Drive, Suite 3400, Chicago, IL, United States of America 60601-1608*

+1 312 646 5813

FAX +1 312 646 5858

New York *Three Bryant Park, 1095 Avenue of the Americas, New York, NY, United States of America 10036-6797*

+1 212 698 3500

FAX +1 212 698 3599

Joni S. Jacobsen defends publicly traded companies and their directors and officers when they become entangled in securities class action litigation, derivative litigation, SEC investigations and corporate governance disputes. Ranked in *The Legal 500* (U.S.) in four categories, Ms. Jacobsen was named Among the Most Influential Women Lawyers in Chicago by *Crain's Chicago Business* in 2017, and has been named to the Illinois *Super Lawyers* list every year since 2013, one of a select number of female attorneys recognized in the Securities Litigation section. She is currently a Lecturer in Law at the University of Chicago Law School, her alma mater, where she teaches a seminar in Strategic Considerations in Securities Litigation.

Ms. Jacobsen has litigated in federal and state courts throughout the country. She consistently succeeds in having the vast majority of her cases dismissed outright on motions to dismiss, thereby reducing the distraction and burden on her clients and resulting in significant savings for clients and insurance carriers alike. In the minority of cases that survive through motion practice, she takes a strategic approach in opposing motions for class certification or bringing motions for summary judgment in order to achieve the best possible resolution for her clients. Ms. Jacobsen's experience

makes her particularly adept at helping clients navigate an onslaught of simultaneous litigation from various fronts, including securities actions, derivative actions, government investigations and shareholder demand letters seeking books and records.

Prior to joining Dechert, Ms. Jacobsen was a partner in the litigation and dispute resolution practice of an international law firm.

Experience

- Represented numerous **life sciences companies** facing securities litigation and derivative litigation following the Food and Drug Administration's rejection of new drug applications; obtained outright dismissal of majority of complaints on motions to dismiss.
- Successfully litigated a large number of derivative and class actions challenging **M&A litigation** through the country, including successful enforcement of a forum selection clause through use of anti-suit injunction in Delaware Chancery Court. Convinced Michigan Court of Appeals and Illinois Court of Appeals to affirm dismissals of merger related litigation following oral arguments.
- Obtained dismissal of fraud claims against former **CFO of large shipping company**, successfully litigated related securities fraud claims and SEC investigation.
- Defeated securities fraud claims against former **CEO of large grocery store chain**.
- Obtained dismissal of a derivative action pending in federal court against a **prominent credit card company** based on alleged improper marketing practices.
- Obtained dismissal of derivative claims against **special litigation committee of large oil and gas company**.
- Successfully defeated derivative action alleging breaches of fiduciary duty brought against former **chair of an audit committee**.
- Obtained dismissal of fraud and misrepresentation claims against **large manufacturer** pending in New York state court.
- Successfully represented **prominent chemical company** in highly contested securities fraud litigation and employed strategic electronic discovery tactics to streamline discovery process.
- In conjunction with LAMBDA Legal, provided **pro bono representation** for individuals seeking to retroactively enforce effect of Obergefell decision on social security benefits. Reached favorable settlement.

- Represent numerous pro bono clients seeking **compassionate release** from federal prison as a result of risks posed by COVID-19 and underlying health conditions.

Education

- The University of Utah, B.A., 1991
- The University of Chicago Law School, J.D., 1997

Admissions

- Illinois
- New York
- Supreme Court of the United States
- United States Court of Appeals for the Second Circuit
- United States Court of Appeals for the Sixth Circuit
- United States Court of Appeals for the Seventh Circuit
- United States Court of Appeals for the Eighth Circuit
- United States Court of Appeals for the Ninth Circuit
- United States District Court for the Northern District of Illinois
- United States District Court for the Eastern District of Michigan
- United States District Court for the Eastern District of New York
- United States District Court for the Southern District of New York

External Articles

- **2020 Developments in Securities Fraud Class Actions Against Non-U.S. Issuers** — Harvard Law School Forum on Corporate Governance (March 23, 2021).

Memberships

- Chicago Bar Association

- National Women's Law Center, Leadership 35 Advisory Committee (2009-2013)

Speaking Engagements

- **The Ever Shifting Landscape of Special Purpose Acquisition Companies (SPAC)** – ACC NY Webinar (April 27, 2021)
- **Recent Developments: Securities Fraud Actions Against Life Sciences Companies** - Webinar (March 4, 2021)
- **COVID-19 Coronavirus Business Impact: Securities Litigation, SEC Guidance and Strategies to Minimize Risk** – Webinar (May 28, 2020)
- **Risk Management and Recent Trends in Securities Fraud Litigation Against Life Sciences Companies** - Webinar (April 17, 2019)
- **Securities Fraud Litigation Against Life Sciences Companies - Recent Trends** - Webinar (June 15, 2018)
- **Developments in Securities Fraud Class Actions Against US Life Sciences Companies** - Webinar (May 11, 2017)
- **From the Boardroom to the Courtroom - A Price Worth Paying?** - Omaha, NE (March 22, 2017)
- **From the Boardroom to the Courtroom - "A Price Worth Paying?"** - Louisville, KY (May 19, 2016)
- **Class Actions Face Challenges At the Supreme Court** - Chicago, IL (March 24, 2016)

Appendix Two – Securities and Derivative Litigation: Quarterly Update

Dechert LLP

Securities and Derivative Litigation: Quarterly Update

APRIL 14, 2021

For the first time in several years, securities fraud cases declined in 2020, largely due to the pandemic.[1] However, we don't expect this decrease to continue. Just three months into 2021, there are a number of issues trending in this practice area, including:

- Securities litigation against non-U.S.-based issuers;
- Securities and derivative litigation arising from SPACs and de-SPAC transactions;
- Securities and derivative litigation arising from COVID-19; and
- Derivative litigation raising issues relating to diversity.

Increase in Securities Fraud Class Actions Against Non-U.S. Issuers

As reported in Dechert's Annual Survey, securities class actions filed against non-U.S. issuers actually increased in 2020—going from 64 filed in 2019 to 88 filed in 2020, an increase of 37.5%, [2] and thus disrupting 2020's general trend of a decrease in securities litigation. Non-U.S. issuers based in China accounted for the largest percentage with twenty-eight complaints, followed by those based in Canada, with twelve.[3]

Many non-U.S. issuers mistakenly believe that they are immune from securities fraud class actions filed in the U.S. so long as the company does not sponsor its ADRs, but as *Stoyas v. Toshiba Corporation, et al.* has taught us, that it not necessarily the case.[4] Although Toshiba's common shares trade on the Tokyo Stock Exchange, and Toshiba's unsponsored Level I ADRs that trade in the U.S. were set up by a depositary bank without Toshiba's involvement, on remand from the Ninth Circuit, the Judge denied defendants' motion to dismiss finding that plaintiffs plausibly alleged that the parties incurred irrevocable liability within the U.S.[5] More recently, courts have side-stepped the question and dismissed the cases against non-U.S. issuers on the basis of *forum non-conveniens*.[6] However, given that these cases are based on courts' discretionary rulings, non-U.S. issuers should recognize the potential risk and prepare accordingly.

Securities Litigation Relating to SPACs Likely to Continue

Undoubtedly, Special Purpose Acquisition Companies ("SPAC") transactions have become a popular vehicle for transitioning a private company into a publicly traded one, and with the increase in these

types of transactions, securities litigation relating to SPACs and de-SPAC transactions are on the rise. SPACs are newly formed corporations that raise capital through IPOs and seek to use the proceeds to acquire an operating business.[7] Once an IPO is complete, there is a specified deadline (usually 18 to 24 months) to complete the initial business combination. The creation of SPACs has exploded during 2020 as the U.S. securities markets have seen an unprecedented surge in their popularity. In 2020, 244 SPACs raised US$78 billion across the year.[8] In the first quarter of 2021, SPAC IPOs surpassed the amount raised in 2020. [9]

On March 25, 2021, Reuters reported that the SEC has "opened an inquiry into Wall Street's black check acquisition frenzy" and is seeking information from Wall Street banks about the involvement with SPAC transactions, including deal fees, volumes, and internal controls and compliance measures in place to deal with transactions.[10] On March 31, 2021, the SEC's Division of Corporate Finance issued a statement to address certain accounting, financial reporting and governance issues that should be carefully considered before a private operating company undertakes a business combination with a SPAC. [11] On April 8, 2021, the Acting Director of the SEC's Division of Corporate Finance specifically addressed "SPACs, IPOs and Liability Risk under the Securities Laws." [12] Among other things, Acting Director Coates cautioned that statements made in a de-SPAC transaction are not subject to less risk of liability than those made in a traditional IPO, and questioned whether the PSLRA's exclusion from its safe harbor of "'initial public offerings,' may include de-SPAC transactions."[13] These developments may signal an increased risk of SEC inquiries, as well as securities and derivative litigation, arising out of de-SPAC transactions.

The risk of securities litigation arises at several stages of the SPAC life cycle. While at the IPO stage, the risk of litigation is relatively low, during the de-SPAC transaction phase, the risk of securities or derivative litigation is increasingly present. Allegedly unique risks inherent to these types of transactions, which give rise to securities litigation, should be considered.[14] For example, in *Amo v. Multiplan Corp. f/k/a Churchill Capital Corp., et al.*,[15] the plaintiff described the SPAC structure, as "conflict-laden and [a structure which] practically invites fiduciary misconduct." As a result of the alleged inherent conflicts of interests and allegedly "overriding" incentives "to get a deal done—any deal—without regard to whether it is truly in the best interest of the SPAC's outside investors," plaintiff alleged that the entire fairness standard (rather than the business judgment rule) should apply.

Plaintiffs may also allege that a specific time period to identify a target (e.g., 24-months) places pressure on the SPAC board, which may result in shortcuts, a poor choice of target or inadequate disclosures about the true risks and future financial prospects. Interestingly, many of the actions relating to the de-SPAC transactions arise following negative reports issued by short sellers.[16] As

recently reported, the "SPAC bubble" may be showing signs of weakening; in the last week of March, 93% of IPO prices of SPACs fell below their offering prices.[17] Indeed, unlike non-SPAC IPOs, SPACs often provide projections to investors because the companies are going public through a merger, not an IPO. If such projections fail to materialize, however, lawsuits are sure to follow. As the pool of potential attractive targets begins to dry up or operating companies fail to meet expectations, we anticipate an increased risk of securities and derivative litigation.

Securities Fraud Cases Arising from COVID-19 Continue to Be Filed

More than one year into the pandemic, securities fraud class actions arising from COVID-19 are still being filed—perhaps signaling that this wave of suits is far from over. As we previously reported, many litigators initially speculated that there would be a surge of securities cases arising from the pandemic, but during the first few months, most of the cases were fact specific and targeted the travel and healthcare industry.[18] The paucity of cases early on in the pandemic can be attributed to the stock market's remarkable rebound, as well as the difficulty for plaintiffs' firms to plead loss causation—a demonstration that the investors' loss was actually caused by the alleged misrepresentations rather than general market conditions.

As we predicted, however, enterprising plaintiffs have begun to file claims arising out of disclosures made relating to operations, financial condition and/or the impact of the pandemic, and we expect that trend to continue. Plaintiffs have targeted companies such as Forescout Technologies, Portland Electric and K12, Inc. alleging that they made false or misleading statements or omissions regarding the pandemic's potential impact on their businesses and industries.[19] Similarly, there has been a number of derivative cases filed alleging that directors breached their fiduciary duties during the pandemic, including, for example, Inovio Pharmaceuticals, SCWorx, Chembio Diagnostics, among others. As the first quarter of 2021 has demonstrated, COVID-19 related securities and derivative cases are far from over. [20]

While we are starting to see an increased availability of vaccines in the U.S. and possibly some relief from the pandemic, the potential economic impact is yet to be fully realized. As such, companies should continue to be vigilant in making accurate disclosures regarding not only their economic prospects, but the risks they continue to face as a result of the pandemic.

Derivative Cases Raising Issues of Board Diversity

As protests regarding racial injustice sweep the U.S. and more companies are taking steps to increase diversity, equity, and inclusion, plaintiffs' firms have attempted to expand theories of liability in shareholder litigation by filing derivative actions challenging the lack of diversity on corporate boards.

Similar to when shareholder litigation arose in the wake of the #MeToo movement relating to sexual harassment policies and board-level oversight, multiple shareholder lawsuits have been filed in courts across the country alleging boards of directors breached their fiduciary duties by purportedly falsely representing that a company is committed to racial diversity when, in fact, the company lacks Black directors.[21] Claims have likewise targeted allegedly false statements in proxy statements or codes of conduct about a "commitment to diversity" in violation of Section 14(a) of the Exchange Act.[22]

Nonetheless, where defendants are subject to a shareholder derivative suit relating to these issues, they have a number of strong dismissal arguments at their disposal. Thus, it is unclear whether such suits will ultimately gain traction. In *Ocegueda v. Zukerberg, et al.,* one of the few board diversity cases where a court has ruled on a motion to dismiss, the court granted the Facebook defendants' motion, holding that (i) plaintiff failed to plead demand futility, (ii) the company's forum selection clause required the derivative claims to be filed in Delaware, and (iii) plaintiff failed to plead a materially misleading statement under Section 14(a).[23] Interestingly, the court took note of the fact that plaintiff's allegations regarding the board composition and nominating process were factually wrong, but nevertheless, allowed plaintiff leave to amend her Section 14(a) claim as it related to broader allegations regarding diversity in the workforce. Given that many of the allegations in the complaint were demonstrably false, this case may be of limited value in determining how other courts will view defendants' arguments and it remains to be seen whether plaintiff will refile in Delaware Chancery Court. Regardless, arguments relating to demand futility and forum selection clauses will be important arguments for future cases. While there is not a one-size-fits-all solution in preventing these shareholder lawsuits, companies and their boards should consider carefully examining the diversity of their directors and officers, as well as individuals in management positions overseeing diversity efforts.

Footnotes

1) SECURITIES CLASS ACTION CLEARINGHOUSE, https://securities.stanford.edu/charts.html (see 2020 filings).

2) D. Kistenbroker, J. Jacobsen & A. Liu, 2*020 Developments in U.S. Securities Fraud Class Actions Against Non-U.S. Issuers*, DECHERT LLP (Mar. 8, 2021), https://www.dechert.com/knowledge/publication/2021/3/developments-in-u-s--securities-fraud-class-action-lawsuits-agai.html.

3) *Id.*

4) Kistenbroker, J. Jacobsen & A. Liu, *Global Securities Litigation Trends*, DECHERT LLP (Dec. 2020 Update), https://www.dechert.com/knowledge/onpoint/2017/11/developments-in-global-securities-

litigation.html?utm_source=vuture&utm_medium=email&utm_campaign=onpoint (citing *Stoyas v. Toshiba Corp. et al.*, 424 F. Supp. 3d 821 (C.D. Cal. 2020) (denying motion to dismiss)).

5) *Id.* Plaintiffs filed a motion to decertify the class on February 19, 2021.

6) *Id.* (*Church v. Glencore PLC*, Civ. No. 18-11477, 2020 WL 4382280 (D.N.J. July 31, 2020)).

7) More information regarding SPACs will be provided by Dechert's Corporate and Securities and Securities Litigation Practices SPAC Roundtable on April 21, 2021, 1 pm EDT.

8) Ortenca Aliaj, James Fontanella-Khan, and Aziza Kasumov, FINANCIAL TIMES, *Spac dealmaking sets new record* (Mar. 1, 2021), *available at* https://www.ft.com/content/abcf1dad-833d-4620-ab57-96ea01d918ed.

9) Joshua Franklin, *U.S. SPACs overtake 2020 haul in less than three months*, REUTERS (Mar. 17, 2021), *available at* https://www.reuters.com/article/us-spac-usa-ipo/u-s-spacs-overtake-2020-haul-in-less-than-three-months-idUSKBN2B919O .

10) Jody Godoy & Chris Prentice, *Exclusive: U.S. regulator opens inquiry into Wall Street's blank check IPO frenzy – sources*, REUTERS (MAR. 25, 2021), https://www.reuters.com/article/usa-sec-spacs-idINKBN2BH2QF. In September 2020, the then-Chairman of the SEC, Jay Clayton, said that the SEC will look to examine "incentives and compensation to SPAC sponsors" to ensure that investors had adequate information at the time of the SPAC IPO, as well as the de-SPAC transaction. *See SEC Chairman Jay Clayton on disclosure concerns surround going public through a SPAC*, CNBC (Sept. 24, 2020), https://www.cnbc.com/video/2020/09/24/sec-chairman-jay-clayton-on-disclosure-concerns-surround-going-public-through-a-spac.html .

11) Public Statement from SEC Division of Corporation Finance, Staff Statement on Select Issues Pertaining to Special Purpose Acquisition Companies, SEC (Mar. 31, 2021), https://www.sec.gov/news/public-statement/division-cf-spac-2021-03-31#_ftn1 .

12) John Coates, Public Statement from the SEC Division of Corporation Finance, SPACs, IPOs and Liability Risk under the Securities Laws (Apr. 8, 2021), https://www.sec.gov/news/public-statement/spacs-ipos-liability-risk-under-securities-laws .

13) *Id.*

14) Notably, plaintiffs have named directors and officers of both the SPAC and the operating company in many of these cases. *See. e.g.*, Am Compl., *Borteanu et al. v. Nikola Corp. et al.,* No. 2:

20-cv-01797 (D. Ariz. Sept. 21, 2020) (Section 10(b) and 20(a) Exchange Act claims arising out of SPAC's acquisition Nikola in a US$3.3B transaction; stock dropped 30% following a short seller's accusation of fraud).

15) Compl., *Amo v. MultiPlan Corp. f/k/a Churchill Capital Corp., et al.*, Case No. 2021-0258 (Del. Ch. Mar. 25, 2021) (breach of fiduciary duty and other claims arising from merger between SPAC and Churchill Capital, following negative report by Muddy Waters alleging omissions relating to its customer base and its deteriorating financials).

16) *See* Am. Compl., *Borteanu*, No. 2:20-cv-01797 (D. Ariz. Sept. 21, 2020); Compl, Amo, Case No. 2021-0258 (Del. Ch. Mar. 25, 2021).

17) See CNBC Interview with Bill Gates seen on Geekwire. John Cook, Bill Gates says there are too many low-quality SPACs, but he's firmly focused on the quality ones, GEEKWIRE (Apr. 2, 2021), https://www.geekwire.com/2021/bill-gates-says-many-low-quality-spacs-hes-firmly-focused-quality-ones/ (noting Gates will be avoiding "low quality" SPACs which are bringing companies into the public market too soon).

18) *See* D. Kistenbroker, J. Jacobsen & A. Liu, *COVID-19 Coronavirus Business Impact: Securities Litigation & Enforcement Update DECHERT LLP* (Dec. 2, 2020), https://www.dechert.com/knowledge/onpoint/2020/11/covid-19-coronavirus-business-impact--securities-litigation---en.html; D. Kistenbroker and J. Jacobsen, *COVID-19 and Securities and Derivative Litigation*, DECHERT LLP (June 19, 2020), https://www.dechert.com/knowledge/onpoint/2020/6/covid-19-and-securities-and-derivative-litigation.html

19) *See* D. Kistenbroker, J. Jacobsen & A. Liu, *COVID-19 Coronavirus Business Impact: Securities Litigation & Enforcement Update*, DECHERT LLP (Dec. 2, 2020), https://www.dechert.com/knowledge/onpoint/2020/11/covid-19-coronavirus-business-impact--securities-litigation---en.html. Thus far, plaintiffs have had varying degrees of success in surviving motions to dismiss. *See McDermid v. Inovio Pharmaceuticals, Inc.*, No. CV 20-01402, 2021 WL 601159 (E.D. Pa. Feb. 16, 2021) (denying the majority of defendants' motion to dismiss, but dismissing claims relating to two statements); *Sayce v. Forescout Technologies, Inc.*, No. 20-CV-00076-SI, 2021 WL 1146031 (N.D. Cal. Mar. 25, 2021) (alleging defendants improperly blamed financial issues on pandemic, court granted motion to dismiss without prejudice holding plaintiffs failed to allege statements were false or a strong inference of scienter).

20) *See, e.g., Compl., Monroe County Employees' Retirement Sys., v. Astrazeneca plc, et al.*, No. 1: 21-cv-00722 (S.D.N.Y. Jan. 26, 2021); Compl., *Leung v. Bluebird Bio, Inc. et al.*, No. 1:21-cv-

00777 (E.D.N.Y. Feb. 12, 2021); Compl., *Lewis v. CytoDyn et al.,* No. 3:21-cv-05190 (W.D. Wash. Mar. 17, 2021).

21) *See e.g.*, *Compl., Kiger v. Mollenkopf, et al.*, Nos. 3:20-cv-01355, (S.D. Cal. July 17, 2020) (alleging directors claimed to have a policy of "demanding" diversity and inclusion at the Company, but in reality, Qualcomm's board and senior executive officers remained "devoid of Blacks and other minorities"); Compl., *City of Pontiac Gen. Emps. Ret. Sys. v. Bush, et al.*, No. 4:20-cv-06651 (N.D. Cal. Sept. 23, 2020) (alleging despite Cisco's statements committing to "inclusion and diversity," at every level of the Company, Cisco "lacks and continues to lack diversity at the top").

22) *See, e.g.*, Compl., *City of Pontiac Gen. Emps. Ret. Sys. v. Bush, et al.*, No. 4:20-cv-06651 (N.D. Cal. Sept. 23, 2020).

23) *Ocegueda v. Zukerberg, et al.*, 3:20-cv-04444-LB, 2021 WL 1056611 (N.D. Cal Mar. 19, 2021).

Appendix Three – Developments in U.S. Securities Fraud Class Action Lawsuits Against Non-U.S. Issuers - 2020 Summary

2020 DEVELOPMENTS IN U.S. SECURITIES FRAUD CLASS ACTIONS AGAINST NON-U.S. ISSUERS

Dechert LLP


+11,00.00

Table of contents

Introduction

Notwithstanding a year of unprecedented economic and societal change amidst a global pandemic, non-U.S. issuers continued to be targets of securities class actions filed in the United States.[1] Indeed, despite widespread court closures due to the coronavirus pandemic, 2020 continued to see an uptick in the number of securities class action lawsuits brought against non-U.S. issuers. It is therefore imperative that, regardless of the economic climate, non-U.S. issuers stay vigilant of filing trends and take proactive measures to mitigate their risks.

In 2020, plaintiffs filed a total of 88 securities class action lawsuits[2] against non-U.S. issuers.

- As was the case in 2019, the Second Circuit continues to be the jurisdiction of choice for plaintiffs to bring securities claims against non-U.S. issuers. More than 50% of these 88 lawsuits (49)[3] were filed in courts in the Second Circuit. A clear majority (35) of these 49 lawsuits were filed in the Southern District of New York. The next most popular circuit was the Third Circuit, with 22 lawsuits initiated in courts there. The Ninth and Tenth Circuits followed with 15 and two complaints, respectively.

1 Unless otherwise noted, the figures in this white paper are based on information reported by the *Securities Class Action Clearinghouse* in collaboration with Cornerstone Research, Stanford Univ., Securities Class Action Clearinghouse: Filings Database, Securities Class Action Clearinghouse (last visited. Feb. 5, 2021). A company is considered a "non-U.S. issuer" if the company is headquartered and/or has a principal place of business outside of the United States. To the extent a company is listed as having both a non-U.S. headquarters/principal place of business and a U.S. headquarters/principal place of business, that filing was also included as a non-U.S. issuer.

2 In its 2020 report of non-U.S. issuer filings, Cornerstone excludes M&A filings and consolidates "multiple filings related to the same allegations against the same defendant(s)." *Securities Class Action Filings: 2020 Year in Review,* Cornerstone Research, Stanford University. The number of "securities class action lawsuits," on the other hand, includes M&A filings and counts every unique securities complaint brought in federal court against a non-U.S. issuer in 2020 that Dechert LLP ("Dechert") could locate. However, complaints that were subsequently consolidated into a single action and complaints that were transferred from one jurisdiction to another were only counted once.

3 This total includes four complaints that originated in courts in the Third, Ninth, and Tenth Circuits and were subsequently transferred to the Second Circuit.

- Of the 88 non-U.S. issuer lawsuits filed in 2020, 28 were filed against non-U.S. issuers with a headquarters and/or principal place of business in China, and 12 were filed against non-U.S. issuers with a headquarters and/or principal place of business in Canada.
- As was the case in 2018 and 2019, the Rosen Law Firm P.A. continued to be the most active plaintiff law firm in this space, leading with most first-in-court filings against non-U.S. issuers in 2020 (25). However, departing from the trend of the last several years, Pomerantz LLP was appointed lead counsel in the most cases in 2020 (14); the Rosen Law Firm closely followed with 13 appointments as lead counsel.
- Remarkably, the majority of the suits (28) were filed in the 2nd quarter, at the height of the coronavirus pandemic for most areas throughout the United States, particularly in the Southern District of New York.
- While the suits cover a diverse range of industries, the majority of the suits involved the biotechnology and medical equipment industry (14), followed by the software and programming industry (9), the consumer and financial services industry (7), and the communications services industry (7).
- Of the 22 lawsuits brought against European-headquartered companies, five were filed against firms headquartered in the United Kingdom and four were filed against firms headquartered in Germany.

An examination of the types of cases filed in 2020 reveals the following substantive trends:

- About 19% of the cases involved alleged misrepresentations regarding mergers and acquisitions (17).
- About 9% of the cases involved alleged misrepresentations in connection with regulatory requirements and/or approvals (8). This includes one case involving alleged misrepresentations in connection with a non-U.S. issuer's COVID-19 antigen test.
- About 8% of the cases involved alleged misrepresentations in connection with the solicitation and sale of blockchain assets pursuant to an Initial Coin Offering ("ICO") (7).

Compared to 2019, 2020 saw relatively no change in the number of dispositive decisions[4] issued in securities fraud cases against non-U.S. issuers. In 2020 (and early 2021), courts rendered nine dispositive decisions in cases filed in 2018 and 2019.[5] In addition, 20 filings in 2020 were voluntarily dismissed in their entirety.

Although it is hard to discern trends from nine dispositive decisions, courts' reasoning for dismissing cases is still instructive for non-U.S. issuers which find themselves the subject to a securities class action. In 2020 (and early 2021), courts dismissed complaints:

- relating to China-based, Cayman incorporated companies that went private and later relisted;
- for failing to allege a domestic transaction underlying a Section 10(b) claim;
- for failing to plead fraud relating to financial issues;
- for being time-barred, and
- for lacking personal jurisdiction.

4 A decision is considered "dispositive" if it is a decision that closed the case (*i.e.,* voluntary dismissals are not included), and there are no pending motions for reconsideration or pending appeals.

5 Courts rendered seven decisions in 2020 for cases filed in 2019. In addition, in early 2021, one dispositive decision was rendered with respect to a case filed in 2018. *Cavello Bay Reinsurance Ltd. v. Shubin Stein et al.,* No. 20-1371 (2d Cir. 2021). The authors also discuss an additional 2020 case that was filed in 2018, *ODS Cap. LLC v. JA Solar Holdings Co. Ltd.,* No. 18-cv-12083 (ALC), 2020 WL 7028639 (S.D.N.Y. Nov. 30, 2020), as well as an opinion on a motion for reconsideration also filed in 2018. *In re Shanda Games Ltd. Sec. Litig.,* No. 1:18-cv-02463 (ALC), 2020 WL 5813769 (S.D.N.Y. Sept. 30, 2020).

Non-U.S. Companies Remain Popular Targets for Securities Fraud Litigation

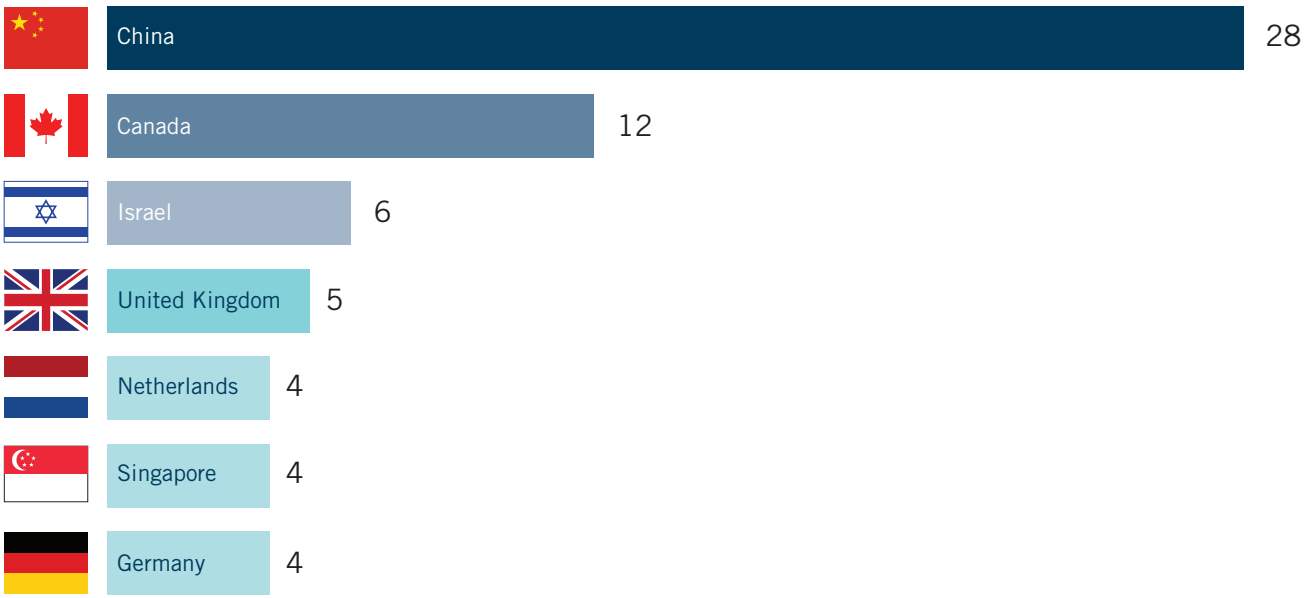
In recent years, non-U.S. issuers have become targets of securities fraud lawsuits, a trend which continued in 2020 despite unprecedented economic and societal changes. Indeed, 2020 saw an uptick in securities class actions filed against non-U.S. issuers. This survey is intended to give an overview of securities lawsuits against non-U.S. issuers in 2020. First, we analyze the number of cases filed, including trends relating to location filed, types of companies that were targeted, and underlying claims. Next, we analyze some dispositive decisions rendered in 2020 and early 2021 and how they impact the legal landscape of these types of claims. Finally, we set forth issues and best practices non-U.S. issuers should consider to reduce the risk of being subject to such suits.

Filing Trends

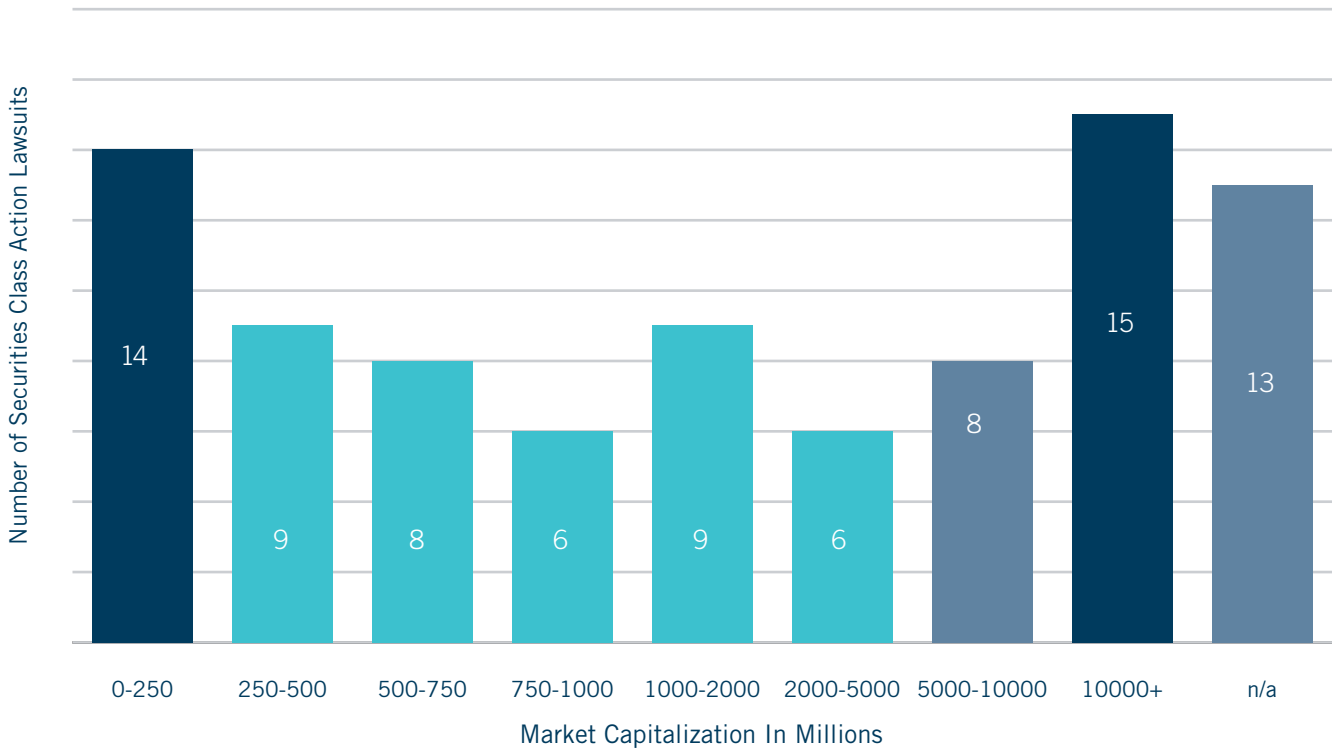
2020 predictably saw a decrease in the total number of federal securities class actions, with 324 cases filed. However, the number of cases filed against non-U.S. issuers increased significantly from the previous year, with just over 27% of lawsuits (88) filed against non-U.S. issuers, compared to 2019 in which 15% of the class actions were filed against non-U.S. issuers. As in years past, certain filing trends emerged:

- The Second Circuit, and particularly the Southern District of New York ("SDNY"), continued to see the most activity in 2020; with 31 filings, SDNY was the preferred court for 35% of all lawsuits brought against non-U.S. issuers in 2020. In addition to the 31 filings brought in SDNY, four suits that were initially brought in the Eastern District of New York, Central District of California and District of Oregon were subsequently transferred to SDNY. After the Second Circuit, the Third and Ninth Circuits had the most lawsuits with 22 and 15 filings respectively.
- The majority of suits were filed against companies headquartered in China (28) and Canada (12). Notably, a lawsuit was also filed against the nation of Ecuador.
- While the suits cover a diverse range of industries, the majority of the suits involved biotechnology and medical

Top Non-U.S. Issuers by Location of Headquarters and/or Principal Place of Business



Non-U.S. Issuers by Market Capitalization



equipment (14), four of which were against companies with headquarters in Canada. Of the 28 complaints filed against companies headquartered in China, 22 of these complaints were brought against companies incorporated in the Cayman Islands.

Substantive Trends

An examination of the 2020 cases reveals three general trends, with securities class actions brought against companies who were alleged to have:

- misrepresented their prospects of approval by or compliance with U.S. regulatory agencies;
- misrepresented or omitted material information from proxy or solicitation statements in connection with a merger or acquisition; and
- failed to register under applicable federal and state securities laws in connection with the sale of cryptocurrency tokens.

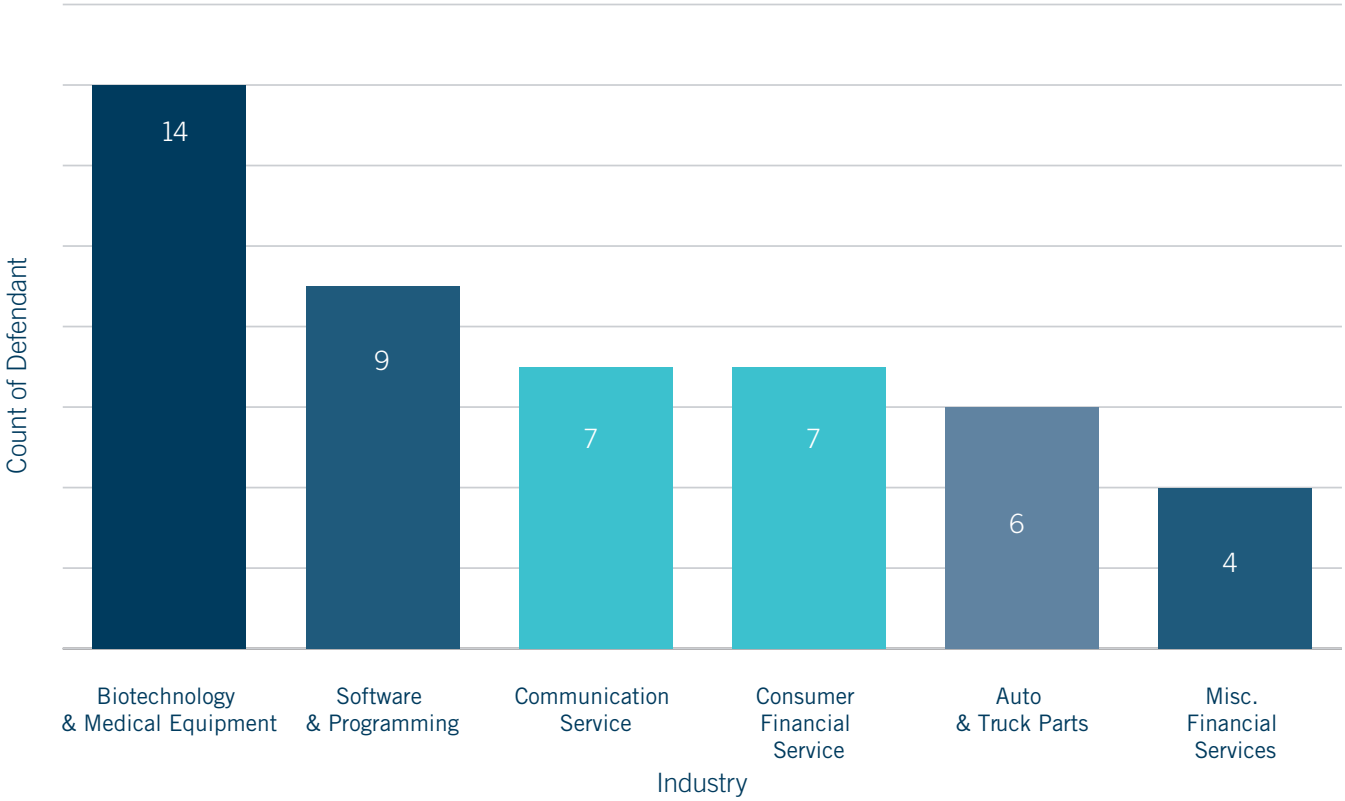
Misrepresentation of Regulatory Compliance

Continuing the trend from 2019, the largest number of 2020 cases were filed against companies in the biotechnology and medical equipment industries. A significant number of these suits were based on allegations relating to the non-U.S. issuer's approval by or compliance with U.S. regulatory agencies.

For example, several of the lawsuits alleged that defendants misrepresented their prospects of approval by the FDA. Two such complaints were brought against Canadian medical companies. In *Kevin Alperstein, et al. v. Sona Nanotech Inc., et al.,*[6] the plaintiffs alleged that the defendant, a Canadian medical supplier, made positive press statements about its COVID-19 rapid detection antigen test, which were unfounded as the FDA would deprioritize Emergency Use Authorization (EUA) approval of the test, finding it did not meet "the public health need" criterion. The statements also misrepresented that it was reasonable for Sona to believe that data gathered over such a short period of time would be sufficient for approval of its antigen test. As such, the plaintiffs alleged that the company violated Sections 10(b)

6 20-cv-11405 (C.D. Cal.).

Non-U.S. Issuers by Industry



and 20(a) of the Exchange Act when it failed to disclose that it would have to withdraw its submissions for Interim Order authorization from the Canadian government as they lacked sufficient clinical data to support approval. *Likewise, in In re Neovasc Inc. Securities Litigation,*[7] the plaintiffs alleged that the defendant, a Canadian medical device company, violated Sections 10(b) and 20(a) of the Exchange Act when it failed to disclose to investors that the results of its clinical study for a cardiovascular device contained imbalances in missing information present in the control group versus the treatment group. According to the plaintiffs, this meant that control subjects were aware of their treatment assignment (i.e., they were not blinded), and, as a result, the FDA was unlikely to approve the company's pre-market approval application for the device without additional clinical data.

Other regulatory-based lawsuits alleged that the non-U.S. issuer misrepresented their compliance with the FDA or other federal agencies. For example, in *Public Employees' Retirement System of Mississippi, et al. v. Mylan N.V.,et al.,*[8] the plaintiffs alleged that Dutch defendant Mylan, one of the largest generic drug manufacturers in the United States, violated Sections 14(a) and 20(a) of the Exchange Act by issuing multiple false and misleading public statements describing the company's robust and comprehensive quality control processes, when in reality, the defendant's chemists had manipulated quality control test data in order to achieve passing quality control results. Specifically, as alleged in the complaint, the FDA had investigated the company's largest manufacturing plant and found significant deficiencies in its cleaning processes, numerous instances of a lack of oversight, and multiple instances of chemists re-cleaning and re-swabbing quality control testing machines until passing results were obtained.

Outside of the FDA sphere, the plaintiffs in *Lee Wenzel, et al. v. Semiconductor Manufacturing International Corporation, et al.,*[9] alleged that the defendant, a Cayman semiconductor company, headquartered in China, failed to disclose in its public statements that there was an unacceptable risk that equipment supplied to the company would be used for military purposes and that the company was therefore foreseeably at risk of facing export restrictions by the U.S. Department of Commerce. The plaintiffs further alleged that the defendants violated Sections 10(b) and 20(a) of the Exchange Act by failing to disclose that, as a result of the aforementioned risk, certain of its suppliers would need

7 20-cv-09313 (S.D.N.Y.).

8 20-cv-00955 (W.D. Pa.).

9 20-cv-11219 (C.D. Cal.).

"difficult-to-obtain" individual export licenses. Similarly, in *Neil Darish, et al. v. Northern Dynasty Minerals Ltd., et al.,*[10] the plaintiffs alleged that the defendants, a Canadian mining company and certain officers, violated Sections 10(b) and 20(a) of the Exchange Act by allegedly issuing false and misleading financial reports filed with the Canadian Securities Exchange and relatedly false and misleading press releases in connection with a mineral property project. The plaintiffs alleged that such public statements were misleading in that they failed to disclose that the project was contrary to Clean Water Act guidelines as it would be larger in duration and scope than conveyed to the public. As a result, the plaintiffs alleged, the defendants failed to disclose that the company's permit application would be denied by the U.S. Army Corps of Engineers.

Misrepresentations in Connection with Mergers and Acquisitions

A significant percentage of the 2020 cases alleged violations of the securities laws based on a failure to disclose material information in connection with a non-U.S. issuer's proposed merger or acquisition. Notably, over half (11) of these lawsuits were later voluntarily dismissed.

Nearly a third of these lawsuits—all filed in the District of Delaware and all voluntarily dismissed before a lead plaintiff was appointed-involved allegations that the non-U.S. issuer failed to disclose whether the company entered into any NDAs containing standstill or "don't ask, don't waive" provisions that prevented counterparties from requesting submitting offers. That was the case in *Eric Sabatini, et al. v. Central European Media Enterprises Ltd., et al.,*[11] where the plaintiffs alleged that the defendants, a Bermudan media and entertainment company, filed a misleading proxy statement regarding a plan of merger between the defendants and another cable company in violation of Sections 14(a) and 20(a) of the Exchange Act. In *Sabatini*, the plaintiffs alleged the defendants omitted material information regarding the engagement of the company's additional financial advisor as well as the analyses performed by the company's initial financial adviser. They further alleged that the defendants failed to disclose whether the company entered into any nondisclosure agreements that contained standstill and/or "don't ask, don't waive" provisions that were preventing counterparties from submitting offers to acquire the company. Likewise, in *John Thompson, et al. v. Gilat Satellite Networks Ltd., et al.,*[12] the plaintiffs alleged, among other things, that the Israeli defendant Gilat, a satellite-based broadband communications company, filed a Registration Statement that omitted material information, including whether *Gilat* entered into any confidentiality agreements that contained standstill and/or "don't ask, don't waive" provisions that prevented counterparties from submitting offers to acquire the company, in violation of Sections 14(a) and 20(a) of the Exchange Act. Finally, in *John Thompson, et al. v. Qiagen N.V., et al.,*[13] brought by the same plaintiffs and law firm as in *Gilat*, the plaintiffs alleged that the Cayman defendants violated Sections 14(a) and 20(a) because their Registration Statement failed to disclose whether the confidentiality agreement executed during the go-shop period contained a standstill and/or "don't ask, don't waive" provision.

Other merger & acquisition-related suits alleged that non-U.S. issuers failed to disclose the existence of ongoing negotiations or proposals for subsequent transactions, which in turn caused investors to accept the pending buyout or acquisition at unfair prices. In *In re E-House Securities Litigation,*[14] the plaintiffs alleged that E-House, a Cayman real estate company with its principal place of business in China, failed to disclose that throughout the course of a pending merger, the company was also pitching higher transaction projections to private investors in order to solicit those investors to participate in a subsequent post-merger transaction. The plaintiffs alleged these private projections were made at the same time that E-House was soliciting public investors and that the private projections were far more favorable to the company, as they showed the company had outperformed and was projected to continue outperforming. Therefore, the plaintiffs alleged that E-House defrauded investors by deceiving them into accepting a management buyout at an unfairly low price, in violation of Sections 10(b) and 13(a) of the Exchange Act. Another Cayman defendant headquartered in China was sued in *Altimeo Asset Management, et al. v. Jumei International Holding Limited, et al.,*[15] where the plaintiffs alleged that during a buyout process for Jumei's outstanding shares, management failed to disclose in their offering and recommendation statements that Jumei was engaged in negotiations for the company to be acquired by one of its

10 20-cv-05917 (E.D.N.Y.).

11 20-cv-00087 (D. Del.).

12 20-cv-00339 (D. Del.).

13 20-cv-00728 (D. Del.).

14 20-cv-02943 (S.D.N.Y.).

15 20-cv-02751 (N.D. Cal.).

biggest competitors. The plaintiffs alleged that as a result, the defendants' statements in connection with the pending buyout that they were unable to raise sufficient financing to support operations (which supported its advisors' valuation of the company) were patently false and caused the company to be undervalued, in violation of Sections 10(b), 14(e) and 20(a) of the Exchange Act.

Misrepresentations Concerning the Sale of Blockchain Assets

Finally, while they did not constitute an exceedingly large number of the 2020 cases, the past year saw a relatively new development in lawsuits relating to non-U.S. issuers' sale of blockchain or "crypto" assets. Seven securities lawsuits—brought primarily against Swiss or Singaporean entities-alleged violations of the securities laws in connection with the solicitation and sale of cryptocurrency tokens through and subsequent to Initial Coin Offerings ("ICOs"). These lawsuits were generally premised on allegations that defendants:

- failed to disclose that the tokens sold in connection with an ICO were indeed securities;
- misrepresented the value and utility of such tokens; and
- failed to register such tokens under United States securities laws.

Importantly, the plaintiffs in these cases relied on the argument that investors would not have known that the tokens issued in these ICOs were not securities because the solicitations and sales were made before April 2019, when the SEC issued its detailed framework to investors on how to determine whether the offers and sales of digital assets are in fact securities transactions. Unsurprisingly, the Southern District of New York was the court of choice for these blockchain-related lawsuits.

For example, in *Timothy C. Holsworth, et al. v. BProtocol Foundation, et al.,*[16] the plaintiffs alleged that the defendant Bancor, a Swiss entity headquartered in Israel, made numerous false statements and omissions in violation of Sections 5 and 12(a) of the Securities Act, both in public interviews and in a series of white papers published in connection with the company's single-day ICO, which led investors to believe that the BNT tokens sold in connection with the ICO were not securities, but rather de-centralized and already functional crypto-assets. In *Corey Hardin, et al. v. Tron Foundation, et al.,*[17] the plaintiffs alleged that Singaporean defendant TRON also violated Sections 5 and 12(a) of the Securities Act when it misrepresented to investors that its TRX token was built on an independent blockchain and as such was subject to new voting mechanisms, when in reality, the TRX token was simply a smart contract built on the existing Ethereum block-chain and not part of an independent block-chain. Finally, in *Brett Messieh, et al. v. KayDex Pte. Ltd., et al.,*[18] the plaintiffs alleged that Singaporean software company Kyber Network violated Sections 5 and 12(a) of the Securities Act when it issued a whitepaper which misleadingly likened the company's "KNC token" to bitcoin and ether, and expressly stated that its protocol that relied on the KNC token would allow "instant exchange and conversion of digital assets (e.g., crypto tokens) and cryptocurrencies (e.g., Ether, Bitcoin, ZCash) with high liquidity." The plaintiffs pointed to the fact that the company failed to file an SEC registration statement for the KNC tokens as further proof that the company intended to convey to investors that the tokens were not securities.

16 20-cv-02810 (S.D.N.Y.).

17 20-cv-02804 (S.D.N.Y.).

18 20-cv-02812 (S.D.N.Y.).

Motion to Dismiss Decisions

Compared to 2019, 2020 saw relatively no change in the number of dispositive decisions issued in securities fraud cases against non-U.S. issuers. In 2020, courts rendered eight dispositive decisions on cases filed in 2018 and 2019, and, in early 2021, one dispositive decision was rendered with respect to a 2018 case.[19] Of the eight decisions rendered in 2020 with respect to 2018 and 2019 filings, six of the securities class actions were filed in the Southern District of New York.

While it is hard to discern trends from just nine dispositive decisions, the courts' reasoning for dismissing cases is still instructive for the non-U.S. issuers who find themselves the subject of class actions lawsuits. Courts generally dismissed complaints:

- relating to China-based, Cayman incorporated companies that went private and later relisted;
- for failing to allege a domestic transaction underlying a Section 10(b) claim;
- for failing to plead fraud relating to financial issues;
- for being time-barred, and
- for lacking personal jurisdiction.

Going-Private Transactions Relating to China-Based Companies

Another trend in 2020 was the dismissal of three cases involving China-based companies that went private and then subsequently relisted on another public exchange. For example, in *Altimeo Asset Management v. Qihoo 360 Technology Co. Ltd.,*[20] the court granted the defendants' motion to dismiss with prejudice.[21] In *Qihoo*, former ADS holders of the Cayman Island-incorporated, Chinese headquartered company filed claims under Sections 10(b), 20(a) and 20A of the Exchange Act, alleging that the proxies relating to a going-private transaction were false or misleading because they purportedly concealed a secret plan to relist the surviving company once the merger was completed despite the fact that the proxies disclosed the possibility of a future relisting. In granting the defendants' motion to dismiss, the court found that the plaintiffs did not adequately allege material misrepresentations or omissions by the defendants, a required element of a Section 10(b) claim. The court pointed out that each of the alleged misstatements and omissions were alleged to be false for the same reason: the statements failed to inform shareholders of Qihoo's alleged plan to relist on the Chinese stock exchange a year and a half after the merger. The court then focused its inquiry on whether the plaintiffs had adequately pleaded that such a plan existed at the time the statements were made. After analyzing the allegations relying on a confidential witness and various news articles, the court concluded that the plaintiffs failed to plead adequately particularized allegations to satisfy the PSLRA.

In addition to *Qihoo*, courts also ruled in favor of China-based Cayman Islands-incorporated companies in *ODS Cap. LLC v. JA Solar Holdings Co. Ltd.*[22] and *Altimeo Asset Mgmt. v. WuXi PharmaTech.*[23] In *ODS Cap. LLC v. JA Solar Holdings Co. Ltd.,*[24] the same lead plaintiffs, ODS Capital and Altimeo Asset Management, brought a suit against a Cayman Islands company that relisted on the Shenzhen Stock Exchange three days after going private in a merger transaction. The court dismissed the complaint. Similarly in *Altimeo Asset Mgmt. v. WuXi PharmaTech,*[25] a case the court described as "on all fours with *Qihoo*" with "nearly identical claims brought by [the same lead plaintiff]", a Cayman Islands company went private in a merger and, over a year and a half later, relisted the surviving entities on the Hong Kong and Shanghai Stock Exchanges at higher valuations. The court explained that the plaintiffs must plead particularized factual allegations

19 *Cavello Bay Reinsurance Ltd. v. Shubin Stein et al.,* No. 20-1371 (2d Cir. 2021).

20 19-cv-10067 (S.D.N.Y. Aug. 14, 2020), *appeal pending*, No. 20-3074 (2d Cir. 2020).

21 Dechert LLP represent defendants Qihoo 360 Technology Co. Ltd. and Eric Chen.

22 No. 18-cv-12083 (ALC), 2020 WL 7028639 (S.D.N.Y. Nov. 30, 2020).

23 No. 19-cv-1654 (AJN), 2020 WL 6063539 (S.D.N.Y. Oct. 14, 2020).

24 No. 18-cv-12083 (ALC), 2020 WL 7028639 (S.D.N.Y. Nov. 30, 2020).

25 No. 19-cv-1654 (AJN), 2020 WL 6063539 (S.D.N.Y. Oct. 14, 2020).

that are sufficient "to support a plausible inference that [the company] had concrete plans to relist before the merger."[26] Because they failed to do so, the court dismissed the claims.[27]

Failure to Allege a Domestic Transaction

Recently, the Second Circuit reaffirmed that the federal securities laws do not apply to "predominantly foreign" securities transactions, even if they might take place in the United States. As background, the Supreme Court's decision in *Morrison v. National Australia Bank Ltd.*[28] closed the door on plaintiffs bringing "F-cubed" cases-whereby foreign investors sue a foreign issuer in the United States based upon a security traded on a foreign exchange. Courts and litigants continue to grapple with the scope of *Morrison*.

In *Cavello Bay Reinsurance Ltd. v. Shubin Stein et al.,*[29] the plaintiff-appellant Cavello Bay Reinsurance Ltd. bought shares in a Bermudan holding company, Spencer Capital Ltd. ("Spencer Capital"), which operated out of New York and invested in U.S. insurance services. The plaintiff alleged that Spencer Capital's pitch deck for the offering represented that a management fee to a third party, a Delaware entity owned by the defendant-appellee Kenneth Shubin Stein, was tied to Spencer Capital's profits when in fact, the fee was tied to the company's book value. The district court dismissed the suit on two independent grounds:

- the parties' transaction was not "domestic" under *Absolute Activist Value Master Fund Ltd. v. Ficeto;*[30] and
- even if the transaction was domestic, the plaintiff's claims were impermissibly "predominantly foreign" under *Parkcentral Global HUB Ltd. v. Porsche Automobile Holdings SE.*[31]

The Second Circuit affirmed the lower court's dismissal of the plaintiff's claims of securities fraud for failure to plead a domestic application of the law. In its reasoning, the Second Circuit highlighted the fact that the claims were based on a private agreement for a private offering between both a Bermudan investor and a Bermudan issuer and that the plaintiff purchased restricted shares in Spencer Capital in a private offering. Notably, the shares reflected only an interest in Spencer Capital and were not listed on any U.S. exchange, nor were they otherwise traded in the United States. The court noted that the main link to the United States was the subscription agreement's restriction clause which would require the plaintiff to register the shares with the SEC, or meet an exemption, if the plaintiff wished to resell them. However, the court explained that the clause operated only as a contractual impediment to resale. Accordingly, the court found that the plaintiff failed to plead a domestic application of Section 10(b), and, since the plaintiff did not challenge the decision to dismiss its Section 29(b) and Section 20(a) claims, the court affirmed the entire judgment.

Failure to Plead Fraud Relating to Financial Issues

In 2020, courts dismissed claims that failed to allege fraud relating to company financial issues, including claims of alleged misstatements relating to financial performance and sustaining dividends, as well as alleged misstatements in company financial statements.

26 *Id.*

27 In addition to the above-mentioned cases, the court in *In re Shanda Games Ltd. Sec. Litig.*, No. 1:18-cv-02463 (ALC), 2020 WL 5813769 (S.D.N.Y. Sept. 30, 2020), upheld on reconsideration a 2019 dismissal also involving a China-based, Cayman-incorporated company that went private and later relisted.

28 561 U.S. 247 (2010).

29 No. 20-1371 (2d Cir. 2021).

30 677 F.3d 60 (2d Cir. 2012). Under *Absolute Activist*, transactions are considered domestic and fall within the scope of the Act "if irrevocable liability is incurred or title passes within the United States." *Id.* at 67. Thus, "in order to adequately allege the existence of a domestic transaction, it is sufficient for plaintiff to allege facts leading to the plausible inference that the parties incurred irrevocable liability within the United States: that is, that the purchaser incurred irrevocable liability within the United States to take and pay for a security, or that the seller incurred irrevocable liability within the United States to deliver a security." *Id.* at 68. The mere conclusory "assertion that transactions 'took place in the United States' is insufficient to adequately plead the existence of domestic transactions." *Id.* at 70.

31 763 F.3d 198 (2d Cir. 2014). In *Parkcentral*, the Second Circuit held that a domestic securities transaction is not alone sufficient to state a properly domestic claim under Section 10(b) of the Exchange Act. The *Parkcentral* court reasoned that if the domestic execution of the plaintiffs' agreements in that case could alone suffice to invoke Section 10(b) liability, it "would subject to U.S. securities laws conduct that occurred in a foreign country, concerning securities in a foreign company, traded entirely on foreign exchanges, in the absence of any congressional provision addressing the incompatibility of U.S. and foreign law nearly certain to arise." *Id.* at 215–16.

In *Jam-Wood Holdings LLC v. Ferroglobe PLC,*[32] the court granted the defendants' motion to dismiss in full because the complaint failed to plead the elements of falsity and scienter relating to allegations of violations of Section 10(b) and 20(a) of the Exchange Act. In *Ferroglobe*, the plaintiff alleged that the defendants, which included the company incorporated in the UK and its officers, made material misrepresentations or omissions from September 4, 2018 until November 26, 2018 regarding the health of Ferroglobe's silicon-metals business in an effort to conceal the company's poor financial results from that quarter. The court found that the plaintiff's complaint only alleged scienter in a conclusory fashion and was devoid of any allegations that the defendants acted with any motive to deceive the investing public. For example, the court noted that the plaintiff did not specify what information the defendants possessed, nor how or when they received such information. In addition, the court found "too speculative" the plaintiff's general allegation that the individual defendants, by virtue of their positions as officers of the company, must have known the true facts of the company's financial performance as reflected in the company's September 2018 and November 2018 statements.

In addition, in *In re Anheuser-Busch InBev SA/NV Securities Litigation*,[33] the plaintiff alleged that the defendants, who were incorporated in Belgium, committed fraud because they expressed the goal of sustaining their dividend and described how the company was on track to attain that goal, only to instead cut the dividend. The plaintiff alleged the material omissions included information about financial challenges that would restrict the dividend, such as currency volatility, credit rating pressure, input cost inflation, and cash flow. The court found the complaint insufficient to plead fraud because it failed to satisfy the heightened pleading requirements set forth in the PSLRA, as the defendants' statements fell under the PSLRA's safe harbor provision for certain "forward-looking statements." The court also noted that for the alleged misleading statements that arguably fell outside of the safe harbor, the plaintiff failed to allege how those statements were false or misleading.

The court further stated that even if the plaintiff had adequately plead actionable misstatements, their Section 10(b) and Rule 10b-5 claims would nevertheless fail due to insufficient pleading of scienter. The court found that the plaintiff failed to establish strong circumstantial evidence of conscious misbehavior or recklessness because the complaint's principal allegations were vague and insufficient, and noted that courts routinely reject pleadings of scienter that are based on allegations regarding defendants' board membership, executive managerial positions, and access to information regarding a company's financial outlook. Accordingly, the court dismissed the complaint.

Lastly, in *Danske,*[34] the court granted Danish defendant Danske Bank's ("DB") motion to dismiss with prejudice. The plaintiffs alleged that DB and its local banking branch in Estonia engaged in the largest money laundering scandals to date; specifically, between 2008 and 2016, they alleged that US$230 billion was illegally laundered through DB. The plaintiffs' claims concerned alleged misrepresentations about DB's financial condition given extensive breakdowns in anti-money laundering controls at DB's Estonian branch between approximately 2007 and 2015, as well as subsequent fallout from the discovery of the lapses.

The court found that the plaintiffs failed to plead fraud with particularity as required under Federal Rule of Civil Procedure 9(b) and the PSLRA, failed to plead a material misrepresentation or omission, and failed to plead a strong inference of scienter. In dismissing the plaintiffs' fraud claim for failing to meet the heightened pleading standards of Rule 9(b) and the PSLRA, the court reasoned that the plaintiffs' complaint used "two terse paragraphs generically to allege why 36 pages of quotations spanning 83 paragraphs contain false or misleading statements."[35] The court pointed out that the plaintiffs' theory of fraud in their opposition papers only advanced six claims, implicating less than a third of the complaint's alleged misstatements. Moreover, the plaintiffs pointed to a single paragraph with a specific allegation of fraud, which, "when read liberally, describes why the defendants' statements in the preceding four paragraphs are alleged to be false or misleading."[36] The court stated that this single paragraph did not rescue a vast majority of the alleged misstatements alleged in the complaint, but rather, revealed that the plaintiffs knew how to allege fraud with specificity but had chosen not to do so within the majority of the complaint. Thus, the court found the plaintiffs failed to allege a materially false or misleading statement that could sustain a securities fraud claim.

32 19-cv-02368 (S.D.N.Y. Nov. 10, 2020).

33 19-cv-05854 (S.D.N.Y. Sept. 29, 2010).

34 *Plumbers & Steamfitters Local 773 Pension Fund, et al. v. Danske Bank A/S, et al.,* 19-cv-00235 (S.D.N.Y. Aug. 24, 2020).

35 *Id.* at 6.

36 *Id.* at 7.

Finally, the court held that the plaintiffs failed to plead scienter because they did not identify any motive to deceive or defraud, nor did they raise a strong inference that the defendants acted recklessly or with conscious disregard of the truth. The court found that the plaintiffs alleged, in a conclusory manner, that the defendants and employees of DB received reports contradicting public statements, while failing to connect any of those reports to specific representations by specific persons during the relevant time periods.

Time-Barred Claims and Lack of Personal Jurisdiction

In *Fedance v. Harris et al.,*[37] the plaintiff alleged that the defendants engaged in sales of unregistered securities through an ICO and sale of their tokens. The court granted the defendants' motion to dismiss on the basis that the plaintiff's 12(a)(1) claims were time-barred by the one-year statute of limitations and were not subject to equitable tolling.

Finally, in *Amann v. Metro Bank PLC,*[38] the plaintiff alleged that the defendants, incorporated in the U.K., made false and/or material misstatements regarding the company's capital ratios. The court dismissed the case due to lack of personal jurisdiction, stating that both defendants were non-U.S. residents who were based in the United Kingdom, and that the plaintiff had not alleged any evidence establishing the defendants' contacts with the United States.

37 19-cv-02125 (N.D. Ga. May 4, 2020).

38 19-cv-04739 (C.D. Cal. Dec. 2, 2020).

Conclusion

There is no question that even during a global pandemic, non-U.S. issuers remain targets of securities class action suits regardless of whether the challenged conduct occurred abroad. A company does not need to be based in the United States to face potential securities class action liability in U.S. federal courts. As such, it is imperative that non-U.S. issuers take steps to mitigate their risks in not only their home jurisdictions but also in the United States.

Non-U.S. issuers should be particularly cognizant when making disclosures or statements to:

- speak truthfully and to disclose both positive and negative results;
- ensure that a disclosure regimen and processes are well-documented and consistently followed;
- work with counsel to ensure that a disclosure plan is adopted that covers disclosures made in press releases, SEC filings and by executives; and
- understand that companies are not immune to issues that may cut across all industries.

Non-U.S. issuers should work with the company's insurers and hire experienced counsel who specialize in and defend securities class action litigation on a full-time basis. Lastly, to the extent that a non-U.S. issuer finds itself the subject of a securities class action lawsuit, the bases upon which courts have dismissed similar complaints in the past can be instructive.

Contact Us

David H. Kistenbroker
Partner
+1 312 646 5811
david.kistenbroker@dechert.com

Joni S. Jacobsen
Partner
+1 312 646 5813
joni.jacobsen@dechert.com

Angela M. Liu
Partner
+1 312 646 5816
angela.liu@dechert.com

Christine Isaacs
Associate
+1 212 641 5675
christine.isaacs@dechert.com

Siobhan Namazi
Associate
+1 212 698 3883
siobhan.namazi@dechert.com

The authors would like to thank paralegal Austen Boer for his invaluable assistance in the preparation of this article.

03.08.21-R

dechert.com

Appendix Four – DOJ and SEC Release Second Edition of FCPA Resource Guide: Key Updates and Takeaways

Dechert LLP

DOJ and SEC Release Second Edition of FCPA Resource Guide: Key Updates and Takeaways

JULY 08, 2020

Key Takeaways

- On July 3, the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC") published the Second Edition of *A Resource Guide to the U.S. Foreign Corrupt Practices Act.* A link to the *Second Edition* is available here. The Resource Guide is considered the quintessential resource for the government's interpretation and position on various FCPA-related issues. It was first published in November 2012 to give companies, practitioners, and the public detailed information on the statutory requirements of the Foreign Corrupt Practices Act ("FCPA"), along with insight into DOJ and SEC enforcement practices. It was published to provide transparency and uniformity to a process that was often criticized as being opaque. For your convenience, we have run a redline comparison—available here—between the original *Resource Guide* and this new *Second Edition*.

- The Foreword to the *Second Edition* recognizes that although "many aspects" of the original *Guide* "continue to hold true today," the nearly eight years since its original publication have "brought new cases, new law, and new policies."

- Accordingly, the *Second Edition* contains updates on various aspects of the FCPA, including, among others, the meaning of the term "foreign official" under the FCPA's anti-bribery provisions; the jurisdictional reach of the FCPA; the application of the local law affirmative defense; clarified legal standards, including the *mens rea* requirement and statute of limitations for criminal violations of the FCPA's accounting provisions; and guidance on new DOJ and SEC policies, including, among others, the DOJ's FCPA Corporate Enforcement Policy and Anti-Piling On Policy.

- The *Second Edition* remains "non-binding, informal, and summary in nature." Nonetheless, it provides meaningful interpretative guidance directly from the enforcement authorities. Some of the most notable changes and updates to the *Second Edition* are summarized below by category.

Anti-Bribery Provisions of FCPA

Aiding and Abetting & Conspiracy: The *Second Edition* acknowledges limits on the scope of conspiracy and aiding and abetting liability under the FCPA's anti-bribery provisions. At its core, the FCPA establishes three categories of "persons" who are covered by its provisions, including (1) issuers of securities registered pursuant to 15 U.S.C. § 78; (2) American companies and American persons using interstate commerce in connection with the payment of bribes; and (3) foreign persons or businesses taking acts to further certain corrupt schemes, including ones causing the payment of bribes, while present in the United States. *See United States v. Hoskins*, 902 F.3d 69, 71 (2d Cir. 2018).

Citing *United States v. Hoskins*, the *Second Edition* acknowledges that, at least in the Second Circuit—which encompasses New York, Connecticut, and Vermont—an individual may be criminally prosecuted for conspiring to violate the FCPA's anti-bribery provisions or aiding and abetting such a violation *only if* he or she belongs to one of those three specifically enumerated categories. *Second Edition* at 36. Specifically, as the U.S. Court of Appeals for the Second Circuit reasoned in *Hoskins*, "the presumption against extraterritoriality bars the government from using the conspiracy and complicity statutes to charge [a defendant] with any offense that is not punishable under the FCPA itself because of the statute's territorial limitations." 902 F.3d at 97.

However, the *Second Edition* also recognizes conflicting authority on the question and that "[a]t least one district court from another circuit has rejected the reasoning in the *Hoskins* decision." *Second Edition* at 36 (citing *United States v. Firtash*, 392 F. Supp. 3d 872, 889–892 (N.D. Ill. 2019) (holding, in the face of an absence of "binding precedent on this issue," that a defendant may be charged under the conspiracy and complicity statutes even when he does not "belong to the class of individuals capable of committing a substantive FCPA violation")).

This firm recently published an OnPoint on the *Hoskins* decision, available here.

Definition of "Instrumentality": The FCPA's anti-bribery provisions proscribe corrupt payments to any "foreign official," a term defined to include "any officer or employee of a foreign government or any department, agency, or *instrumentality thereof*." Although the *Second Edition* reiterates that the term "instrumentality" "is broad and can include state-owned or state-controlled entities," it incorporates the holding from the U.S. Court of Appeals for the Eleventh Circuit on what qualifies as an "instrumentality" of a foreign government. In *United States v. Esquenazi*, a decision from 2014, the Eleventh Circuit held that an "instrumentality" under the FCPA is "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own." 752 F.3d 912, 925 (11th Cir. 2014). The Second Edition refers to the list of five non-exhaustive factors described in *Esquenazi* that inform whether an entity is "controlled by" a foreign

government and four non-exhaustive factors that bear on whether the entity "performs a function the controlling government treats as its own." *Second Edition* at 20 (citing *Esquenazi*, 752 F.3d at 925–26).

Accounting Provisions of FCPA

Criminal Liability for Accounting Violations: Citing 15 U.S.C. § 78ff(a), which proscribes "willful violations" of the FCPA's accounting provisions, the *Second Edition* makes clear that criminal liability may be imposed on companies and individuals for violations of the FCPA's books and records and internal controls provisions that are knowing *and* willful, and not merely knowing. *Second Edition* at 45.

The *Second Edition* acknowledges that "[t]he term 'willfully' is not defined in the FCPA, but it has generally been construed by courts to connote an act committed voluntarily and purposefully, and with a bad purpose, *i.e.*, with 'knowledge that [a defendant] was doing a 'bad' act under the general rules of law." Id. at 13 (quoting, *inter alia, United States v. Kay*, 513 F.3d 432, 448 (5th Cir. 2007)). As the Supreme Court explained in *Bryan v. United States*, "in order to establish a 'willful' violation of a statute, the Government must prove that the defendant acted with knowledge that his conduct was unlawful." *Id.* (quoting *Bryan v. United States*, 524 U.S. 184, 191–92 (1998)).

The *Second Edition* provides two new examples of U.S. entities—a hedge fund in 2016 and an electronics company in 2018—that entered into deferred prosecution agreements with the DOJ after knowing *and* willful books and records violations. *Id.* at 45–46.

Internal Accounting Controls: Commonly termed the FCPA's "internal controls" provision, 15 U.S.C. § 78m(b)(2)(B) provides that issuers must "devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions are executed in accordance with management's general or specific authorization," that the issuer's financial statements are "in conformity with generally accepted accounting principles," and that management "maintain[s] accountability for assets." The *Second Edition* makes explicit that this provision refers to "internal *accounting* controls." *Second Edition* at 40 (emphasis added).

The *Second Edition* offers some additional commentary on the interplay between an issuer's internal accounting controls and its compliance program, noting that "[a]lthough a company's internal accounting controls are not synonymous with a company's compliance program, an effective compliance program contains a number of components that may overlap with a critical component of an issuer's internal accounting controls." *Id.* As in the original *Resource Guide*, it reiterates that

"the design of a company's internal controls must take into account the operational realities and risks attendant to the company's business," but also adds that "[j]ust as a company's internal accounting controls are tailored to its operations, its compliance program needs to be tailored to the risks specific to its operations." *Id.* at 41.

Affirmative Defenses

The Local Law Defense: The *Second Edition* includes additional case law that clarifies the FCPA's local law affirmative defense. Under the FCPA's local law affirmative defense, "if a defendant can establish that conduct that otherwise falls within the scope of the FCPA's anti-bribery provisions was lawful under written, local law, he or she would have a defense to prosecution." *Second Edition* at 24; *see* 15 U.S. Code § 78dd–1(c)(1) ("It shall be an affirmative defense . . . that . . . the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country.").

The *Second Edition* discusses the 2017 decision in the Southern District of New York in *United States v. Ng Lap Seng*, a case in which the defendant, a Chinese national and real estate developer, allegedly bribed two United Nations ambassadors to use one of his properties for an annual U.N. conference. Specifically, in *Ng Lap Seng*, the defendant requested a jury instruction that the payments at issue were not unlawful under the written laws and regulations of Antigua and the Dominican Republic. *Second Edition* at 24. At trial, the district court denied his request, finding that the proposed instruction was "inconsistent with the plain meaning of the language of the written laws and regulations affirmative defense contained in the FCPA." *Id.* (citing Trial Transcript 715–18, *United States v. Ng Lap Seng*, No. 15-cr-706 (S.D.N.Y. July 26, 2017)).

Following a five-week jury trial, the defendant was found guilty on all counts, sentenced to 48 months' imprisonment, and fined US$1 million. He appealed his conviction on grounds unrelated to the law local defense, and the U.S. Court of Appeals for the Second Circuit affirmed his conviction on all counts. *See United States v. Ng Lap Seng*, 934 F.3d 110, 116 (2d Cir. 2019).

Limitations Periods for FCPA Violations: The *Second Edition* also clarifies that substantive violations of the FCPA's anti-bribery provisions have a five-year limitations period under 18 U.S.C. § 3282, whereas violations of the FCPA's accounting provisions, which are defined as "securities fraud offense [s]" under 18 U.S.C. § 3301, have a six-year statute of limitations. *Second Edition* at 36.

DOJ and SEC Policies and Remedies

Corporate Enforcement Policy (CEP): The *Second Edition*'s updated chapter on the DOJ's "Guiding Principles of Enforcement" includes a discussion of the DOJ's FCPA Corporate Enforcement Policy—contained in the Justice Manual and updated in March 2019—and how it informs the DOJ's declination decisions. The *Second Edition* describes that enforcement policy as providing that "where a company voluntarily self-discloses misconduct, fully cooperates, and timely and appropriately remediates, there will be a presumption that DOJ will decline prosecution of the company absent aggravating circumstances." *Second Edition* at 51. Some of the aggravating circumstances that "may warrant a criminal resolution instead of a declination" include "involvement by executive management of the company in the misconduct; a significant profit to the company from the misconduct; pervasiveness of the misconduct within the company; and criminal recidivism." *Id.* at 51. The *Second Edition* describes three specific cases in which the DOJ announced declinations under its FCPA Corporate Enforcement Policy. *Id.* at 52–54.

Coordinated Resolutions and Avoiding "Piling On": The *Second Edition* includes a separate discussion of the DOJ and SEC's approach to coordinated resolutions to avoid "piling on" or imposing duplicative penalties, forfeiture, and disgorgement for the same conduct. It recognizes that the "DOJ has coordinated resolutions with foreign authorities in more than 10 cases, and [the] SEC has coordinated resolutions with foreign authorities in at least five." *Second Edition* at 71.

Forfeiture and Disgorgement: The *Second Edition* includes a discussion of the forfeiture and disgorgement remedies available to the DOJ and SEC and recognizes that "[i]n addition to criminal and civil penalties, companies may also be required to forfeit the proceeds of their crimes, or disgorge the profits generated from the crimes." *Second Edition* at 70. It highlights the holdings in the Supreme Court's recent decisions in *Kokesh v. SEC* and *Liu v. SEC* on the application and limits of the civil disgorgement remedy. *Id.* at 71. In *Kokesh*, the Supreme Court held that the civil disgorgement remedy is subject to a five-year statute of limitations as a "penalty" under 28 U.S.C. § 2462. 137 S. Ct. 1635, 1639 (2017). In *Liu*, the Court held this June that "a disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is equitable relief permissible under § 78u(d)(5)." 2020 WL 3405845, at *2 (June 22, 2020).

Successor Liability: The *Second Edition* includes additional commentary on the DOJ and SEC's approach to successor liability. Although reiterating that successor liability "prevents companies from avoiding liability by reorganizing," in an important development, it adds that "[a]t the same time, DOJ and SEC recognize the potential benefits of corporate mergers and acquisitions, particularly when the acquiring entity has a robust compliance program in place and implements that program as quickly as practicable at the merged or acquired entity." *Second Edition* at 29. Further, "DOJ and SEC also recognize that, in certain instances, robust pre-acquisition due diligence may not

be possible. In such instances, DOJ and SEC will look to the timeliness and thoroughness of the acquiring company's post-acquisition due diligence and compliance integration efforts." *Id.*

Corporate Compliance

Compliance: The *Second Edition* includes a fuller discussion of best practices for any compliance program, including how to approach confidential reporting and internal investigations; periodic testing and review; pre-acquisition due diligence and post-acquisition integration; and the investigation, analysis, and remediation of misconduct. *Second Edition* at 66-67. Among other observations, the *Second Edition* notes that "a good compliance program should constantly evolve" and that "[t]he truest measure of an effective compliance program is how it responds to misconduct." *Id.* at 67.

The *Second Edition* also points to recent guidance published by the DOJ on the Evaluation of Corporate Compliance Programs. That guidance is intended to explain how effective compliance programs work, and what factors make them effective. It also provides important insights into what prosecutors evaluate when deciding whether a company's compliance program should factor for or against criminal prosecution when employees commit serious violations. This firm recently analyzed the DOJ's guidance and a link to that OnPoint is available here.

Key Contacts:

Chicago

Andrew Boutros, David Kistenbroker, Jay Schleppenbach

Hong Kong

Maria Sit

London

Roger Burlingame, Matthew Mazur

New York

Jeff Brown, Mauricio España, Michael Gilbert, Hector Gonzalez, Shriram Harid, David Kelley, Andrew Levander, Benjamin Rosenberg, Jonathan Streeter

Paris

Karen Coppens

Philadelphia

Benjamin Barnett, Michael McGinley, Sozi Pedro Tulante

Washington, D.C.

Vincent Cohen, Jr., Amanda DeBusk, Darshak Dholakia, Melissa Duffy, Christina Guerola Sarchio, Jeremy Zucker, Dennis Lawson

Appendix Five – The Fierce Urgency for GCs to Promote Diversity, Equity, and Inclusion in Response to the Biden Administration & Compliance Best Practices

Dechert LLP

The Fierce Urgency for GCs to Promote Diversity, Equity, and Inclusion in Response to the Biden Administration & Compliance Best Practices

JANUARY 25, 2021

This article explores:

- President Biden's rescission of former President Trump's Executive Order 13950, which had limited the parameters for diversity, equity, and inclusion ("DEI") programming for federal agencies and those receiving federal funds
- The Biden Administration's plan for advancing racial equity in federal programs as a road map for equity efforts by other organizations
- Why General Counsels ("GCs") should be focused on ramping up DEI efforts and linking them to compliance programs
- How an equity audit can help a business conduct an invaluable self-assessment
- The benefits of hiring impartial outside counsel to structure an equity audit to help build a better workplace and robust compliance program

The Biden Administration's Commitment to DEI

Joe Biden has now been sworn in as the 46th President of the United States of America. Within a few hours of taking office, on January 20, 2021, the Biden Administration rescinded former President Trump's Executive Order 13950, which was issued on September 22, 2020. The aim of EO 13950 was to limit the type and range of DEI programming federal agencies, contractors, subcontractors, and federal grantees could implement. Many companies, federal contractors, higher institutions, and legal advocacy groups criticized the order for chilling speech and undermining uncontroversial diversity programs and trainings. Indeed, in response to the order, many federal grant recipients abandoned DEI trainings and seminar efforts.

President Biden's Executive Order, titled Advancing Racial Equity and Support for Underserved Communities Through the Federal Government ("Racial Equity EO"), not only completely repeals EO 13950 but also lays out a robust plan for federal agencies to ensure that all federal programs and policies are equitable for all Americans. The Racial Equity EO calls for each federal agency to assess

whether "its programs and policies perpetuate systemic barriers to opportunities and benefits for people of color and other underserved groups" with the aim of better equipping "agencies to develop policies and programs that deliver resources and benefits equitably to all." It also embraces the notion that "advancing equity requires a systematic approach to embedding fairness in decision-making processes." To implement some of its objectives, the Racial Equity EO includes a plan for assessing equity and calls for the Director of the Office of Management and Budget to work with federal agencies to report to the President on best practices to assess equity within six months, while also providing for an audit of selected federal programs to take place within 200 days from the date of the Racial Equity EO.

The Biden Administration's commitment to DEI is far from symbolic; it is action oriented. President Biden has already also disbanded Trump's 1776 Commission, which recently published a report criticizing the portrayal of slavery in the United States by historians, and signed an executive order reinforcing Title VII of the Civil Rights Act of 1964, to prevent discrimination on the basis of sexual orientation or gender identity. President Biden's cabinet will also be the most diverse by race and gender in American history. Kamala D. Harris is the first African American, Asian American, and woman to be Vice President. Upon confirmation, Deb Haaland will be the first Native American Secretary of the Interior and Alejandro Mayorkas will be the first immigrant and Latino Secretary of Homeland Security. General Lloyd Austin, recently confirmed, is the first African American Secretary of Defense. These are a few of the representative "firsts" that we will see in the Biden Administration in line with the proclamation in the Racial Equity EO that "[e]qual opportunity is the bedrock of American democracy" and that "diversity is one of [America's] greatest strengths."

The Tangible Benefits of DEI

The Biden Administration's commitment to DEI will create political, shareholder, employee, and public pressure on companies to openly and meaningfully embrace diversity in their organizations with concrete actions and self-evaluation. There is an expectation that companies, especially GCs, can and should capitalize on the benefits of DEI. President Biden's Racial Equity EO pointed to research finding that "closing racial gaps in wages, housing credit, lending opportunities, and access to higher education would amount to an additional $5 trillion in gross domestic product in the American economy over the next 5 years." McKinsey & Co. ("McKinsey") has also predicted that we can expect to see "$12 trillion in additional GDP if the gender gap is narrowed by 2025" and "$2 billion in potential revenue if financial inclusion efforts broaden services for black Americans." The benefits of DEI can also be tangible for businesses. A 2020 study conducted by McKinsey found

that "[i]n the case of ethnic and cultural diversity…top-quartile companies outperformed those in the fourth one by 36 percent in profitability" in the prior year. This is some of the expansive and well-documented empirical research that support the notion that DEI is good for the bottom line.

How to Strengthen Your Compliance Program Through DEI

Beyond embracing DEI to improve business outcomes, GCs and corporations should also promote DEI because a strong, inclusive culture is a vital part of effective compliance programs. In turn, a robust compliance program is more likely to eradicate wrongdoing before it develops into a more serious and expensive problem and is also more likely to result in cooperation credit from regulators. To lay the foundation for a robust compliance program, a company must first foster an inclusive culture. This is easier said than done. Substantial research confirms that employees who feel marginalized and sidelined because of structural barriers and other obstacles, such as those linked to implicit or unconscious bias, are less motivated to protect and advocate for their employers. Some threshold questions that can be used to assess whether a company fosters an inclusive and equitable environment include:

- Do company policies protect and promote all employees, on paper as well as in practice?

- Are minorities and underrepresented groups found in various ranks of the company, including at senior levels and in critical compliance roles?

- Does the company create an environment that makes certain employees feel more comfortable than others at work?

- Are employees reluctant to confide in their supervisors?

GCs, as senior members of the company's management, are perfectly positioned to shape DEI programs because of their first-hand knowledge about the benefits of a robust compliance program and the litigation risks associated with poor workplace culture. Companies that have compliance officers leading this role should task that person to work with the GC in this effort. Collaboration with other functions of the business, including HR and dedicated DEI professionals, can strengthen business outcomes all around the company. Regulators, such as the Department of Justice, have emphasized that the culture of a company and the tone from the top, including senior management, is a key component in evaluating a company's culpability in enforcement actions. Notably, a company with a culture of trust is more likely to have employees committed to helping the company detect unlawful behavior and comply with the policies on paper.

How Equity Audits Can Lead to Robust Compliance Programs

Similar to President Biden's mandate for federal agencies, companies should also evaluate what structural processes could be impacting their culture and compliance programs. An equity audit is a compelling and now more popular vehicle for doing this. An equity audit allows a company to detect problems and barriers to inclusion from the front end, rather than after a serious problem has occurred. The audit should review a broad category of company processes, including:

- Policies and procedures and whether their implementation is adequate to foster DEI;
- The company's strategy for engagement on DEI issues to determine its effectiveness;
- Existing structures to understand whether they are addressing key deficiencies and areas of concern relating to company culture; and
- The collaboration, if any, between DEI initiatives and compliance efforts to assess areas for improvement.

To ensure that such a review is deemed independent and credible by stakeholders, companies should engage outside counsel to lead the review to identify barriers to an equitable workplace and to outline specific steps that the company should undertake to strive toward equality in the workplace. Another benefit of involving outside counsel is that with their involvement the audit and its findings can be protected by the attorney-client privilege.

To be executed effectively, an audit with various phases should be developed by outside counsel in partnership with a core group of company personnel, including in-house counsel, compliance officers, DEI coordinators, and HR leadership. The phased approach allows the company to remain apprised of the progress of the review and to start thinking about remedial measures even before the conclusion of the review. As an example, the early phases of the audit could focus on targeted fact gathering through document review and employee interviews. At each phase, oral recommendations and updates can be provided to allow for intermediate implementation, discussion, and phase iteration. The final phase can include a formal written or oral report outlining recommendations and an action plan complete with mechanisms for continual monitoring to ensure success in achieving audit goals. The final phase of the review can also be tailored to the company's needs, including preparing to share the results of the audit with a specific target audience, such as company management, shareholders, board members, regulators, or the U.S. government.

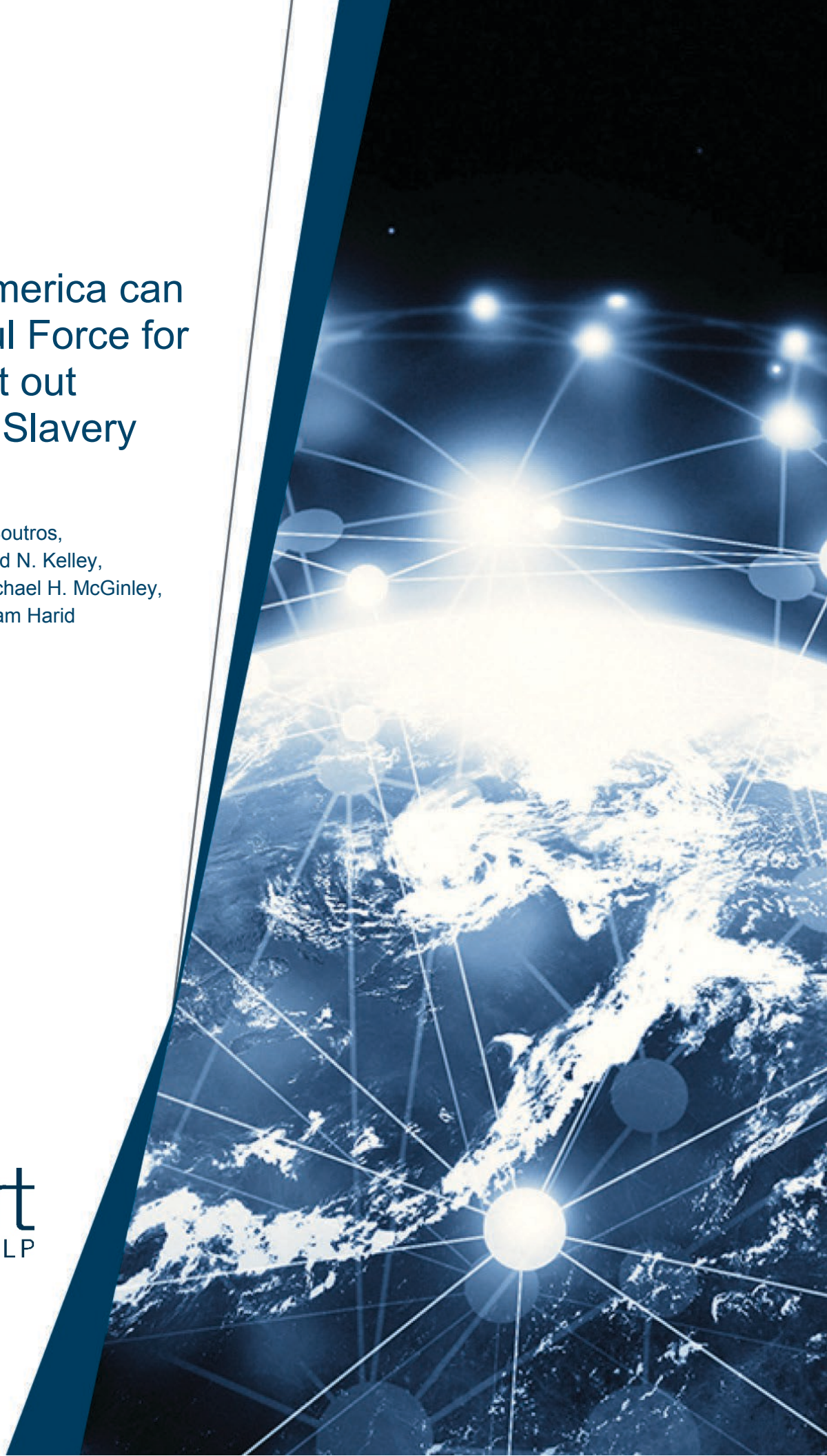
Going into 2021, GCs should evaluate whether their company's compliance programs are robust and whether they are capturing the invaluable benefits of having complementary DEI and compliance programs. If not, an equity audit can provide a clear roadmap to do so. In a world where the President's cabinet comes close to reflecting the makeup of America, there will be a similar expectation for companies. GCs should not hesitate to drive DEI initiatives within their companies, especially where the benefits of a diverse and equitable workplace can lead to a better and more robust compliance environment.

Appendix Six – Corporate America Can Be a Powerful Force for Good to Root Out Modern-Day Slavery

Corporate America can be a Powerful Force for Good to Root out Modern-Day Slavery

Authored by: Andrew S. Boutros, Andrew J. Levander, David N. Kelley, Vincent H. Cohen, Jr., Michael H. McGinley, Sozi P. Tulante and Shriram Harid

August 2020



Dechert LLP

Corporate America can be a Powerful Force for Good to Root out Modern-Day Slavery

August 2020

Dechert LLP's White Collar, Litigation, and Labor and Employment practices have been active in providing pro bono representation to victims of forced labor and human trafficking for many years. We have represented victims in a range of issues from litigation in federal and state court to assisting them to obtain lawful status in the United States through the nation's immigration laws. Dechert's lawyers are committed to working with their clients and other organizations to help eradicate slave, forced, and child labor through our counseling and investigations work for companies and their executives, pro bono matters, thought leadership, and other firm initiatives and partnerships. With a diverse, high-impact team of former federal prosecutors and other firm litigators, our cross-disciplinary team ensures efficient, accurate, speedy results that courts, regulators, and victims can trust and have confidence in.

Key Takeaways

- Slave, forced, and child labor is a modern-day reality impacting some 40 million people throughout the world, by some estimates. Such practices are—and have always been—repugnant, and certainly have no place in the 21st century.

- Companies and their executives can and should do more to help eliminate the practice and to ensure that their global supply chains are not tainted by such conduct.

- The time for companies, their leaders, and their partners to act is now. A focused, sustained effort can have a huge impact on wiping out slave, forced, and child labor. Acting proactively is the right thing to do. Failure to act also carries serious civil, regulatory, criminal, reputational, and consumer risks at the federal, state, and foreign level, including the potential for inter-agency, federal-state, and cross-border collaborations and "carbon copy" prosecutions.

Although the United States outlawed slavery more than 150 years ago, the abhorrent practice remains a modern-day reality in many parts of the world. According to the United Nations' International Labour Organization's latest estimates, around 40.3 million people are captive to modern slavery, including 24.9 million in forced labor.[1] And one out of every four victims of modern slavery is a child.[2] The scale of this global problem is staggering. According to the U.S. Department of Labor's latest estimates, at least 148 different goods in 76 countries are the products of forced labor or child labor.[3] In a combined 25 countries, consumer staples as basic as coffee and sugar are the products of forced labor or child labor; an estimated 2 million children work in the cocoa sector in West Africa alone; workers

---

1 International Labour Organization, "Forced labour, modern slavery, and human trafficking".

2 *Id.*

3 United States Department of Labor, "U.S. Department of Labor's 2018 List of Goods Produced by Child Labor or Forced Labor," at 16.

across sectors are frequently trafficked, trapped in debt bondage, forced to work without critical protective equipment, or worse.[4]

The United States is not insulated from the reach or effects of this immoral human rights plague. For example, just last month, on July 2, 2020, the U.S. Supreme Court granted certiorari in *Cargill, Inc. v. Doe I and Nestle USA, Inc. v. Doe I,* to address whether domestic corporations can be held liable under the Alien Tort Statute based on allegations of forced labor and related abuses that occurred abroad.[5] The Respondents are former Malian child slaves who allege that they were enslaved by Ivorian cocoa farmers and that U.S. corporations aided and abetted those violations. One of the legal questions at issue is whether claims under the Alien Tort Statute (28 U.S.C. § 1350), which provides that "district courts shall have original jurisdiction of any civil action by an alien for a tort . . . committed in violation of the law of nations or a treaty of the United States," can overcome the presumption against extraterritoriality where a U.S. corporation is alleged to have overseen its foreign operations from its U.S. headquarters, but the wrongful acts were committed and the injuries were sustained abroad.[6] It is a must-watch case in its own right and because of its implications for other statutes with potential extraterritorial application.

Race, inalienable rights, and corporate social responsibility are now firmly and vividly in the public psyche in the United States. Social media companies, professional sports teams, and other corporations have recently faced advertising boycotts and pressure from corporate sponsors to take a stand on social justice issues.

However, the COVID-19 pandemic has also disrupted global supply chains in an unprecedented way and created new economic pressures on businesses with a global footprint. The temptation to choose the expedient over the moral is real: As some of the Partners on this OnPoint wrote elsewhere, "[i]n times of tremendous stress and financial turmoil, sometimes criminal wrongdoing and other malfeasance surfaces. . . . History teaches that extreme pressures sometimes cause people (and companies) to do things that they otherwise might not do." A link to the article is available **here**.

Such short-termism is errant, ill-advised, and bad for business. A number of statutes, both inside and outside the United States, impose affirmative obligations on covered businesses to disclose their various efforts to combat the use of forced labor in their supply chains. Other statutes carry the consequence of potential criminal enforcement. But, in this day and age, civil, regulatory or criminal enforcement should not be the only—or even principal—stick to motivate companies to do the right thing in the area of slave, forced, or child labor. The legal imperative to "know better, do better" is as strong as ever. Corporate America can be a powerful force for good in this important area—where companies can be proactive on their own not because of the threat of litigation, investigation, or enforcement.

This article spotlights anti-slavery and anti-trafficking statutes that should be on the radar of every manufacturer, retailer, and company (for that matter) with a global supply chain, especially now. Indeed, the enforcement of these statutes should be consistent with any Administration's enforcement priorities: For instance, on March 31, 2017, President Trump signed two executive orders directing "[t]he Attorney General, in consultation with the Department of Homeland Security, [to] develop recommended prosecution practices and allocate appropriate resources to ensure that Federal prosecutors accord a **high priority** to prosecuting significant offenses related to violations of trade

---

4 *Id.* at 20.

5 *See Cargill, Inc. v. Doe* I, No. 19-453.

6 *Cargill v. Doe I,* Question Presented; *Nestle USA v. Doe I,* Question Presented.

laws"[7][8] and ensuring that "our Nation's trade laws" are "vigorously" enforced.[9] Additionally, U.S. Immigration and Customs Enforcement (ICE) last year announced a partnership between its Homeland Security Investigations (HSI) arm and the non-government organization Liberty Shared to combat forced labor in global commerce.[10] All this is consistent with the federal government's stated "zero-tolerance policy" (announced by the Obama Administration) when it comes to "trafficking in persons, the procurement of commercial sex acts, or the use of forced labor" in federal government contracting.[11] Given that the federal government is the single largest purchaser of consumer goods and services in the world at $550 billion dollars annually,[12] the federal government is uniquely positioned to mandate and enforce supply chain integrity compliance through its policies, government contracts, and enforcement tools.

If these issues and statutes present unfamiliar terrain, it is not too late. Companies should promptly implement compliance policies and procedures that organically and seamlessly integrate these legal mandates into existing systems that exist within a company's internal controls framework to comply with the Foreign Corrupt Practices Act (FCPA), other anticorruption laws, and supply chain integrity programs, among others. Under the existing statutory and regulatory framework, the Department of Justice (regardless of Administration or political party), the Securities and Exchange Commission (SEC), and other government agencies could pursue prosecutions related to slave, forced, and child labor, and do so without resorting to extraterritorial reach. The time to act is now, especially for those who have not acted already.

The California Transparency in Supply Chains Act

Effective January 1, 2012, the California Transparency in Supply Chains Act (the "California Act") imposes the obligation on certain covered businesses to *disclose* their efforts to eradicate slavery and human trafficking from their global supply chains.

The California Act applies to businesses that (1) identify as retail sellers or manufacturers in their tax returns; (2) qualify as "doing business" in California; and (3) have annual worldwide gross revenues in excess of US$100 million.[13] Covered businesses are required to disclose on their websites, with "a conspicuous and easily understood link to the required information," their efforts in five specific areas:

1. Verification: Verifying that they have evaluated whether their product supply chains address the "risks of human trafficking and slavery";

---

7 On this issue, see Andrew S. Boutros and John R. Schleppenbach, "The New Face of White Collar Enforcement: President Trump Signs Executive Orders Directing DOJ to Make Trade, Customs Fraud Enforcement a 'High Priority'," White Collar Crime Report.

8 Executive Order 13785, "Establishing Enhanced Collection and Enforcement of Antidumping and Countervailing Duties and Violations of Trade and Customs Laws," 82 Fed. Reg. 16719 (Mar. 31, 2017).

9 Executive Order 13786, "Omnibus Report on Significant Trade Deficits," 82 Fed. Reg. 16721 (Mar. 31, 2017).

10 "ICE HSI Global Trade Investigations Division partners with Liberty Shared to combat forced labor," ICE Newsroom (July 31, 2019).

11 Executive Order 13627, "Strengthening Protections Against Trafficking In Persons In Federal Contracts," (Sept. 5, 2012).

12 *See, e.g.,* United States Environmental Protection Agency, "Selling Greener Products and Services to the Federal Government".

13 *See* State of California Department of Justice, "The California Transparency in Supply Chains Act."

2. Audits: Auditing suppliers to evaluate supplier compliance with the company's anti-trafficking and anti-slavery standards;

3. Certification: Requiring direct suppliers to certify that any materials incorporated into the company's products comply with the slavery and human trafficking laws of the country or countries in which they do business;

4. Internal Accountability: Maintaining internal "accountability standards and procedures" for employees or contractors who fail to meet the company's anti-slavery and anti-trafficking policies; and

5. Training: Training employees and management with direct responsibility over the supply chain on human trafficking and slavery, with a particular focus on mitigating risks within the supply chain.[14]

The California Act—and its disclosure regime—is enforced by the California Attorney General, but violations of the Act are also accompanied by the risk of private litigation, including potential class actions.

The U.K. Modern Slavery Act

The U.K. Modern Slavery Act of 2015 (the "U.K. Act"), another disclosure statute, is wider in scope and substance than the California Act.

It applies to a broader range of businesses than the California Act, including any company that (1) operates a business, or part of a business, in any part of the United Kingdom; (2) has total annual revenues of at least £36 million or approximately US$46 million (compared to the California Act's US$100 million threshold); and (3) supplies goods or services (in contrast to the California Act's more limited application to retail sellers and manufacturers only).[15]

Unlike the California Act, which requires disclosures on five discrete topics, the U.K. Act obligates companies to disseminate publicly a disclosure statement that is entirely accurate; is approved by the company's board of directors, members, or partners; and addresses the company's efforts "to ensure that slavery and human trafficking is not taking place . . . in any of its supply chains, and . . . in any part of its own business."[16]

The U.K. Act is enforced by the U.K. Secretary of State, who is empowered to bring civil proceedings for injunctive relief against companies that fail to comply with the Act's disclosure requirements.[17] In addition, as with the California Act, there remains the risk of private litigation—including class actions—by shareholders, advocacy groups, and consumer groups, among others.

Government Contractor Anti-Trafficking Provisions (Federal Acquisition Regulations)

On January 29, 2015, the Federal Acquisition Regulatory Council, together with other agencies, promulgated rules to implement President Obama's 2012 Executive Order mandating that all federal contractors take steps to combat

---

[14] *See id.; see also* "The California Transparency in Supply Chains Act: A Resource Guide."

[15] *See* Section 54, Modern Slavery Act 2015.

[16] *Id.*

[17] *Id.*

slavery and human trafficking in their supply chains.[18] The Federal Acquisition Regulations (FAR), codified at 48 CFR § 52.222–50, apply to *all* contractors and subcontractors to the U.S. government, irrespective of their size and the services they render.

Specifically, and in relevant part, the FAR provisions prohibit contractors, subcontractors, their employees, and their agents from "us[ing] forced labor in the performance of [a] contract." And beyond that straightforward prohibition, the FAR also bars other human trafficking-related activities, including, among other things, "engag[ing] in severe forms of trafficking" including "sex trafficking;" "procur[ing] commercial sex acts during the period of performance of [a] contract"; and other practices that create the conditions for slave labor or forced labor, including "destroy[ing], conceal[ing], confiscat[ing], or otherwise deny[ing]" an employee access to identity or immigration documents; "us[ing] misleading or fraudulent practices during the recruitment of employees"; and "fail[ing] to provide return transportation or pay for the cost of return transportation" for employees at the end of their employment.[19]

Further, contractors and subcontractors are required to cooperate fully with, and provide reasonable access to, "contracting agencies and other responsible Federal agencies" investigating potential violations of the FAR provisions.[20] Critically, they are also required to self-report "immediately" to contracting officers and the agency Inspector General "[a]ny credible information" of violations of the FAR provisions by their employees and agents.[21] After all, as is well established in corporate criminal law, companies do not enjoy a Fifth Amendment right against self-incrimination.[22]

The provisions impose additional requirements on a certain class of contractors and subcontractors, specifically, those rendering "services to be performed outside the United States" or supplying goods "other than commercially available off-the-shelf items," whose value exceeds US$500,000.[23] Contractors and subcontractors who belong to this category are required to create and post a formal compliance plan that meets various minimum requirements, and to certify the implementation of such a plan and necessary "due diligence" and "remedial and referral actions" in response to identified employee misconduct.[24]

The consequences for non-compliance with the FAR regime include, among other possibilities, suspension of a contract or contract payments; termination of a contract; and debarment.[25] As with the California Act and the U.K. Act, offending contractors and subcontractors face the possibility of private litigation—including class actions—by shareholders, advocacy groups, and consumer groups, among others.

---

18 *See* Executive Order 13627, "Strengthening Protections Against Trafficking In Persons In Federal Contracts," (Sept. 5, 2012).

19 48 C.F.R. § 52.222–50(b).

20 *Id.* at 52.222–50(g).

21 *Id.* at 52.222–50(d).

22 *See, e.g., United States v. White*, 322 U.S. 694, 699–700 (1944) ("Since the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation.").

23 *Id*. at 52.222–50(h).

24 *Id.*

25 *Id.* at 52.222–50(e).

Section 307 of the Tariff Act of 1930 (19 U.S.C. § 1307)

In its current form, 19 U.S.C. § 1307 (Section 307 of the Tariff Act of 1930) proscribes the "entry at any of the ports of the United States, and the importation" of any merchandise "mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor."[26] The statute, enforced by U.S. Customs and Border Protection (CBP), allows for the exclusion and seizure of such merchandise at the border.[27]

From 1930 until 2016, however, the statute's potency was dramatically undercut by a carve-out: the "consumptive demand" clause in 19 U.S.C. § 1307 exempted goods from the statute's reach even if they were the products of forced labor or indentured labor if they were not produced "in such quantities in the United States as to meet the consumptive demands of the United States."[28] For that reason, until 2016, if domestic demand in the United States exceeded domestic supply for a certain good, it was not subject to the statute's importation prohibitions, a loophole that limited the statute's practical effectiveness and significance.

That changed on February 24, 2016 with the enactment of the Trade Facilitation and Trade Enforcement Act (TFTEA), which repealed the statute's "consumptive demand" exception, reinvigorated the statute, and revived the CBP's enforcement efforts.[29]

The two principal enforcement tools in the CBP's arsenal are (1) the issuance of withhold release or detention orders that prevent the release of banned merchandise from the border;[30] and (2) the issuance of formal findings of fact in the Customs Bulletin and the Federal Register if the CBP Commissioner determines, after an investigation, that certain merchandise is the product of forced labor or indentured labor and therefore subject to the statute's restrictions.[31] In addition to exclusion and seizure of disqualifying merchandise, the reputational and consumer damage from such public announcements can be significant to companies and others whose supply chains are tainted by these practices. Indeed, under the TFTEA, the CBP must now also report every year to the House Ways and Means Committee and the Senate Finance Committee on the number of Section 1307 enforcement actions in the previous year and describe all merchandise denied entry at the border during that reporting period.[32]

Since 2016, the CBP's enforcement efforts have seen a marked uptick: although the CBP had not issued a single detention order in the 16 years before the TFTEA's passage, the CBP issued four in 2016 alone, and has issued multiple more since then.[33] Given this Administration's stated aim of ensuring that "our Nation's trade laws" are "vigorously" enforced,[34] corporate America should plan for the continued enforcement of 19 U.S.C. § 1307.

---

26 19 U.S.C. § 1307.

27 *See* U.S. Customs and Border Protection, "Forced Labor".

28 *See Id.*

29 *See* Trade Facilitation and Trade Enforcement Act, Pub. L. 14-125, 130 Stat. 122, §910(a).

30 *See* 19 C.F.R. § 12.42(e).

31 *See id.* at § 12.42(f).

32 *See* Trade Facilitation and Trade Enforcement Act, Pub. L. 14-125, 130 Stat. 122, § 910(b).

33 *See* U.S. Customs and Border Protection, "Withhold Release Orders and Findings."

34 Executive Order 13786, "Omnibus Report on Significant Trade Deficits," 82 Fed. Reg. 16721 (Mar. 31, 2017).

Federal Criminal Statutes: 18 U.S.C. § 1589 (Forced Labor) and 18 U.S.C. § 545 (Smuggling)

Moreover, certain federal statutes in the United States present the risk of potential criminal liability. Notably, 18 U.S.C. § 1589 proscribes the direct and indirect use of forced labor. In relevant part, it provides that "[w]hoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services by," among other things, "means of force, threats of force, physical restraint, or threats of physical restraint" commits a felony punishable by up to 20 years' imprisonment.[35] If the violation results in death to the victim, or includes "kidnapping, an attempt to kidnap, aggravated sexual abuse, or an attempt to kill," a term of imprisonment up to and including life imprisonment may be imposed.[36]

In addition, 18 U.S.C. § 545, which was adopted in 1948 and amended several times since, is the nation's most powerful criminal enforcement statute as it relates to merchandise entering the United States "contrary to law."[37] As a federal prosecutor, one of the authors of this article relied on Section 545 to prosecute what *Bloomberg Businessweek* described as "the largest food fraud in U.S. history" in a series of cases that involved illegally-entered food products from China, which had netted losses to the United States of some US$260 million.

In relevant part, the second paragraph of Section 545 provides:

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or ***receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise*** after importation, knowing the same to have been imported or brought into the United States contrary to law— commits a felony punishable by up to 20 years in prison.[38]

Section 545's potency rests with its flexibility. It explicitly criminalizes the entire supply chain, once merchandise enters (or attempts to enter) the United States illegally, so long as those who handle the merchandise at the point of entry or thereafter *know* that it entered the country "contrary to law."[39] At the corporate level, "[c]orporations 'know' what their employees who are responsible for an aspect of the business know."[40] Indeed, as the Seventh Circuit has observed, "[m]ost federal statutes that make anything of corporate knowledge also require the knowledge to be possessed by persons authorized to do something about what they know."[41] And, prosecutors can choose which "law" they want to allege as the qualifying predicate. Indeed, some prosecutors might even go so far as to charge based on an alleged violation of a regulation—as opposed to criminal statute—that has the force and effect of law. That is because there is a circuit split "on the key question as to what 'law' must be violated for importation to be 'contrary to law.'"[42]

---

35 18 U.S.C. § 1589(b), (d) (emphases added).

36 *Id.* at § 1589(d).

37 Of course, there are a variety of federal statutes that criminalize a wide variety of conduct that involves the importation and exportation of goods to and from the United States. *See* 18 U.S.C. §§ 541–555.

38 18 U.S.C. § 545 (emphases added).

39 *Id.*

40 *United States v. Ladish Malting Co.,* 135 F.3d 484, 492 (7th Cir. 1998).

41 *Id.* at 492–93.

42 *United States v. Izuerieta*, 710 F.3d 1176, 1179 (11th Cir. 2013).

The Ninth Circuit has narrowly construed the phrase "contrary to law" to require the underlying "law" to be either a criminal statute or regulation that "specifies that violation of that regulation is a crime."[43] The Fourth Circuit has adopted a more expansive reading of the phrase and held that "18 U.S.C. § 545 criminalizes importation in violation of any regulation having the force and effect of law."[44] And the Eleventh Circuit has adopted a hybrid approach that turns on the rule of lenity.[45] Regardless of which charging theory federal prosecutors deploy—and even assuming they follow the Ninth Circuit's more restrictive view on Section 545's eligible predicates—there is no shortage of criminal statutes that prosecutors can deploy as qualifying predicates in a Section 545 prosecution. Indeed, estimates suggest that there are more than 300,000 federal crimes on the books, of which 5,000 are statutes enacted by Congress and signed into law by the President, while the remainder are criminally enforceable regulations.[46] This "over criminalization," as some may say, helped lead to the passage of the "Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act" or the "FIRST STEP Act", a bipartisan piece of legislation that was years in the making and was signed into law by President Trump at least in part to address mass incarceration and over-criminalization.[47] This much is clear: Whether in the thousands or hundreds of thousands, there is a seemingly limitless number of crimes that federal prosecutors can charge as qualifying Section 545 predicates, however they are defined.

Elsewhere, the statute criminalizes "attempts" just as it does completed offenses, at least as it relates to the entry of merchandise illegally. And one important feature of the statute is its criminal forfeiture provision: "Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States."[48] Indeed, the statute itself even contemplates that, "[p]roof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section,"[49] a controversial provision that raises significant constitutional concerns, given its burden-shifting features.

The mens rea standard under Section 545 is the familiar general intent "knowledge" standard. Courts have held that knowledge can include "willful ignorance," "willful blindness," "deliberate ignorance" or "conscious avoidance" of certain "red flags." Meaning, as the U.S. Court of Appeals for the Second Circuit observed in *United States v. Ferguson*, "[r]ed flags about the legitimacy of a transaction can be used to show both actual knowledge and conscious avoidance."[50]

---

43 *United States v. Alghazouli,* 517 F.3d 1179, 1187 (9th Cir. 2008).

44 *United States v. Mitchell*, 39 F.3d 465, 470 (4th Cir. 1994).

45 *Izuerieta*, 710 F.3d at 1181–1182.

46 *See, e.g.,* Gary Fields and John R. Emshwiller, "Many Failed Efforts to Count Nation's Federal Criminal Laws," The Wall Street Journal (July 23, 2011); Rafael A. Mangual, "The next step after the First Step Act: Purge the US criminal code," New York Post (Jan. 1, 2019); Neil M. Gorsuch, Law's Irony, 37 Harv. J.L. & Pub. Pol'y743, 747 (2014) ("But today we have about 5000 federal criminal statutes on the books, most added in the last few decades. And the spigot keeps pouring, with hundreds of new statutory crimes inked every few years. Neither does that begin to count the thousands of additional regulatory crimes buried in the federal register.").

47 *See* FIRST STEP Act, H.R. 5682, 115th Cong. (2018).

48 18 U.S.C. § 545.

49 *Id.*

50 676 F.3d 260, 278 (2d Cir. 2011).

Picking the Seventh Circuit's pattern criminal jury instructions on knowledge as an example, a jury "may find that the defendant acted knowingly if [it] find[s] beyond a reasonable doubt that [the defendant] believed it was highly probable that" the relevant fact or facts were present and that the defendant "took deliberate action to avoid learning" those facts.[51] Thus, the Seventh Circuit has vividly articulated the following categories of evidence for the willful blindness jury instruction: "evidence of 'overt physical acts,' and evidence of 'purely psychological avoidance, a cutting off of one's normal curiosity by an effort of will.'"[52] In other words, in the latter case, intentionally not wanting to know something "by cutting off [ ] one's normal curiosity by an effort of will" is the same as actually knowing it. That is because, as many other federal appellate courts have recognized, the law does not distinguish between actual knowledge and willful blindness.[53]

The Department Of Justice Can Use Section 545 to Combat Slave Labor Under Section 1589

Because of its breadth, Section 545 can be a highly effective tool for combatting slave, forced, and child labor—not because Section 545 can reach the actual execution of these repugnant labor practices, but because it can attach to the very products that result from such abhorrent conduct when those products enter (or attempt to enter) the American marketplace. In the same way that federal law has proscriptions against allowing certain U.S. technology from being *exported* to certain countries, such as Cuba, Iran, and North Korea,[54] the United States also has a variety of laws that prohibit products from being imported into the country when those products do not reflect our nation's values, such as products made with slave, forced, or child labor; counterfeit products; and adulterated or misbranded products under the Food, Drug, and Cosmetic Act (and its implementing regulations), among others.

Recall, Section 545 applies to "merchandise" that enters "contrary to law" or that passes through the supply chain with a defendant's knowledge that it made entry "contrary to law." That means Section 545 can work in tandem with anti-slave labor laws such as Section 1589 to result in the criminal prosecution of anyone—whether a company or person—who knowingly imports or brings into the United States, any merchandise made from labor or services that are the result of "force, threats of force, physical restraint, or threats of physical restraint" *anywhere in the world*. And, the government can take the position that those who transact in such goods at various points in the supply chain are

---

51 Pattern Criminal Jury Instructions of the Seventh Circuit, 2012 Edition (plus 2015-2019 changes).

52 *United States v. Carrillo*, 435 F. 3d 767, 780 (7th Cir. 2006) (internal citations and quotations omitted).

53 *See, e.g.*, *United States v. Perez-Melendez*, 599F.3d 31, 41 (1st Cir. 2010) ("Willful blindness serves as an alternate theory on which the government may prove knowledge."); *United States v. Caraballo-Rodriguez*, 726 F.3d 418, 420 n.2 (3d Cir. 2013) ("[T]he government could satisfy the 'knowledge' requirement by demonstrating actual knowledge or willful blindness, which is 'a subjective state of mind that is deemed to satisfy a scienter requirement of knowledge.'") (quoting *United States v. Wert–Ruiz*, 228 F.3d 250, 255 (3d Cir. 2000)); *United States v. Antzoulatos*, 962 F.2d 720, 724 (7th Cir. 1992) ("It is well settled that willful blindness or conscious avoidance is the legal equivalent to knowledge."); *United States v. Hiland*, 909 F.2d 1114, 1130 (8th Cir. 1990) ("In essence, a willful blindness instruction 'allows the jury to impute knowledge to [the defendant] of what should be obvious to him, if it found, beyond a reasonable doubt, a conscious purpose to avoid enlightenment.'") (quoting *United States v. Zimmerman,* 832 F.2d 454, 458 (8th Cir. 1987)); *United States v. Jewell,* 532 F.2d 697, 700 (9th Cir. 1976) (upholding jury instruction that a defendant "knowingly" possessed marijuana even if he was not actually aware that it was in his car if "his ignorance in that regard was solely and entirely a result of his having made a conscious purpose to disregard the nature of that which was in the vehicle, with a conscious purpose to avoid learning the truth."); *United States v. Gallo*, 543 F.2d 361, 367 (D.C. Cir. 1976) (recognizing that "[i]t may be true in a given case, such as where the notice was clear and was wilfully ignored, that evidence of such facts may be considered by the jury as part of the proof that an accused possessed the requisite knowledge").

54 *See* 15 CFR § 746.

not beyond the reach of federal prosecutors either. That's because the law applies equally to those who "receive[], conceal[], buy[], sell[], or in any manner facilitate[] the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States" in violation of anti-slave labor laws.[55]

Section 1589 Has Been Enforced in its Own Right and the Potential For Continued Enforcement as a Predicate or Freestanding Crime is Real—Regardless of Politics

Separately, the Department of Justice (DOJ) has also been charging freestanding violations of Section 1589. Section 1589, the federal forced labor statute, criminalizes knowingly providing or obtaining forced labor, as well as knowingly benefitting financially from forced labor. In 2019, a total of 28 defendants were charged with 48 counts of violating Section 1589: 24 of those counts alleged that the defendant engaged in the trafficking of forced labor; three alleged that the defendant benefited financially from forced labor; and the remaining 21 alleged both.[56] As with the Foreign Corrupt Practices Act (FCPA), which took roughly three decades to become a top prosecutorial priority, there is no reason to think that the DOJ might not similarly ramp up its investigation and prosecution of Section 1589 cases against individuals or companies—either independently or in tandem with violations of Section 545. Indeed, other agencies may follow suit: for example, query whether the SEC might also take the position that inaccurate books and records and/or ineffective (or absent) policies with respect to slave-, forced-, or child-labor can give rise to an enforcement action—in the same way that the agency enforces the 1934 Securities Exchange Act's accounting provisions in FCPA cases.[57]

Indeed, such prosecutions and enforcement actions should be consistent with any Administration's priorities—regardless of political party. The current Administration has already stated that the enforcement of the country's trade and customs laws is a "high priority."[58] And, although it is often difficult to predict where the DOJ might invest its prosecutorial resources, regardless of who might win the presidential election, it would seem that combatting modern-day slave, forced, and child labor—and using the nation's importation and other statutes to do so—is one area where everyone should be able to agree.

Inter-Agency, Federal-State, Cross-Border Collaborations & "Carbon Copy" Prosecutions

The confluence of a global problem (demanding a global focus) and the varied jurisdiction-specific approaches described above—including civil enforcement under the California Act, the U.K. Act, 19 U.S.C. § 307, and the FAR provisions, and criminal enforcement under Sections 545 and 1589—creates a multi-dimensional threat to corporate compliance regimes. These overlapping regimes are likely to lead to domestic and cross-border collaboration among the DOJ, the SEC, state and foreign authorities, as well as serial (or simultaneous) prosecutions in multiple jurisdictions. Indeed, as to this latter point, the DOJ and SEC acknowledged in their 2020 edition of the FCPA *Resource Guide* that they have coordinated resolutions with foreign authorities in numerous FCPA cases, a practice

---

55 18 U.S.C. § 545.

56 The Human Trafficking Institute, "2019 Human Trafficking Report" at 51, 84.

57 *See* 15 U.S.C. § 78m(b)(2)(A) (books and records provision); 15 U.S.C. § 78m(b)(2)(B) (internal accounting controls provision); *see also* A Resource Guide to the U.S. Foreign Corrupt Practices Act, Second Edition, at 38–47.

58 *See* Executive Order 13785; *see also* Executive Order 13786.

that is consistent with the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. TREATY DOC. NO. 105-43 (1998).[59]

The prospect of inter-agency, federal-state, and cross-border collaborations is all the more real because of the DOJ's recently implemented anti-"piling on" policy, which directs DOJ attorneys to "endeavor, as appropriate, to coordinate with and consider the amount of fines, penalties, and/or forfeiture paid to other ***federal, state, local, or foreign enforcement authorities*** that are seeking to resolve a case with a company for the same misconduct."[60] A link to this firm's commentary on the 2020 edition of the FCPA *Resource Guide* is available **here**.

At the same time, this potential for collaboration does not mitigate the threat of "carbon copy prosecutions," a term one of the authors of this OnPoint coined years ago to describe "successive, duplicative prosecutions by multiple sovereigns for conduct transgressing the laws of several nations, but arising out of the same common nucleus of operative facts."[61] In fact, in the United States, unlike the United Kingdom or Canada, for example, an individual or company convicted in a foreign country of being involved in the use of slave, forced, or child labor overseas may also be convicted for the same underlying conduct in the United States without offending the Double Jeopardy Clause, or so the DOJ may argue.[62] In fact, in the United States, as the U.S. Supreme Court recently recognized in *Gamble v. United States,* the "dual-sovereignty doctrine" permits successive prosecutions by separate sovereigns—including successive state and federal prosecutions—without violating the Double Jeopardy Clause because "a crime under one sovereign's laws is not 'the same offence' as a crime under the laws of another sovereign."[63] This reasoning extends to the international arena because, as the *Gamble* court recognized, the United States has an interest in prosecuting crimes committed abroad against U.S. nationals, even if a foreign sovereign has already prosecuted the underlying conduct.[64]

In contrast, as legal commentators have observed, in Britain and Canada, "courts tend to view verdicts by foreign courts relating to the same crime or conduct as a categorical bar to any further proceedings by domestic prosecutors."[65] Indeed, "[a]s early as 1726, it was recognized under British law that 'where a foreign court has jurisdiction, and the persons are within it, the sentence of that Court must bind.'"[66]

---

[59] *See* FCPA *Resource Guide,* Second Edition, at 71; *see also United States v. Jeong*, 624 F.3d 706, 710-12 (5th Cir. 2010) ("Article 4.3 states that two signatories with concurrent jurisdiction over a relevant offense must, 'at the request of one of them,' consult on jurisdiction.").

[60] Justice Manual at § 1-12.100, (emphasis added).

[61] Andrew S. Boutros and T. Markus Funk, "'Carbon Copy' Prosecutions: A Growing Anticorruption Phenomenon in a Shrinking World," The University of Chicago Legal Forum, Vol. 2012.

[62] *United States v. Villanueva*, 408 F.3d 193, 201 (5th Cir. 2005).

[63] *Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019).

[64] *Id.* at 1967; *see also Jeong*, 624 F.3d at 712 ("The Constitution of the United States has not adopted the doctrine of international double jeopardy."); *United States v. Martin*, 574 F.2d 1359, 1360 (5th Cir. 1978); *see also Bartkus v. Illinois*, 359 U.S. 121, 128 n.9 (1959); *Chua Han Mow v. United States*, 730 F.2d 1308, 1313 (9th Cir. 1984) (describing a contrary argument as "frivolous").

[65] Tyler Hodgson, *Limiting Liability for Crimes Committed Abroad: "Double jeopardy" has no standard international meaning*, Litigation Journal (Winter 2013).

[66] *Id.* (citation omitted).

Thus, as with FCPA violations, an initial tip from an informant or whistleblower may well expose ongoing slave, forced, or child labor practices contained in a company's supply chain. If so, any enforcement action taken in a foreign jurisdiction generally would not prevent U.S. law enforcement authorities from taking successive action—or perhaps even multiple sovereigns from taking an even broader coordinated enforcement response across jurisdictions. Indeed, not surprisingly, the DOJ and SEC report that other common catalysts for an investigation include "information developed in other investigations; self-reports or public disclosures by companies; referrals from other offices or agencies; public sources, such as media reports and trade publications; and proactive investigative techniques, including risk-based initiatives."[67] When dealing with a repugnant practice such as slave, forced, or child labor, the willingness of whistleblowers or other actors to come forward and report such conduct may be as strong—if not stronger—than that of any other motivation.

Conclusion

Federal, state, and foreign statutes, whether civil, regulatory, or criminal, all underscore that companies should be implementing compliance protocols to detect and root out slave, forced, or child labor in their supply chains. The scourge of modern slavery and forced labor is real—especially to the more than 40 million people who currently suffer from the unconscionable practice. That is unacceptable. In the 21st century, there is simply no excuse for slavery of any kind to exist anywhere in the world. To be sure, it will take a considerable and collective global effort to make slavery a thing of the permanent past. But, companies—big and small, public and private, American and foreign—can step up and play their part to make that long overdue goal a reality. And companies may do so both because it is the right thing to do and because they face the very real threat of reputational damage and civil, administrative, and consumer actions, including those brought under the California Act, the U.K. Act, 19 U.S.C. § 307, and the FAR; potential criminal liability under Section 545 and Section 1589; and potential inter-agency, federal-state, and cross-border collaborations and "carbon copy" prosecutions.

[67] FCPA Resource Guide, Second Edition at 54.

This update was authored by:

Andrew S. Boutros
Partner
Chicago | Washington, D.C.
+1 312 646 5803
+1 202 261 3300
andrew.boutros@dechert.com

Andrew J. Levander
Partner
New York
+1 212 698 3683
andrew.levander@dechert.com

David N. Kelley
Partner
New York
+1 212 698 3580
david.kelley@dechert.com

Vincent H. Cohen Jr.
Partner
Washington D.C.
+1 202 261 3432
vincent.cohen@dechert.com

Michael H. McGinley
Partner
Philadelphia | Washington D.C.
+1 215 994 2463
+1 202 261 3378
michael.mcginley@dechert.com

Sozi Pedro Tulante
Partner
Philadelphia
+1 215 994 2450
sozi.tulante@dechert.com

Shriram Harid
Associate
New York
+1 212 649 8744
shriram.harid@dechert.com

Dechert

LLP

Dechert lawyers acted on the matters listed in this presentation either at Dechert or prior to joining the firm

For further information, visit our website at **dechert.com**

Dechert practices as a limited liability partnership or limited liability company other than in Dublin and Hong Kong