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Judicial Scrutiny of Deferred Prosecution Agreements: The Latest Chapter

In a strongly-worded decision issued on February 5, 2015, Judge Richard J. Leon of the United States District Court for the District of Columbia rejected a proposed Deferred Prosecution Agreement ("DPA") reached between the U.S. Department of Justice ("DOJ") and Fokker Services B.V. ("Fokker Services"), a Dutch aerospace services company, arising out of violations of U.S. sanctions laws. Judge Leon held that the DPA was "grossly disproportionate to the gravity of Fokker Services' conduct in a post-9/11 world."[1]

Although arising in a non-FCPA context, the decision highlights a continued trend by certain federal judges to exercise heightened judicial scrutiny of DPAs and other settlement agreements, despite last year's Second Circuit ruling cautioning

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1. *United States v. Fokker Servs. B.V.*, No. 14-cr-121 (RJL), at 12 (D.D.C. Feb. 5, 2015) (hereinafter "Fokker Opinion").

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against judicial intervention pertaining to a civil SEC enforcement settlement.[2] Judge Leon's ruling could affect the way the government structures future settlements, particularly in criminal cases brought in the District of Columbia.

I. Background

The government alleged that between 2005 and 2010, Fokker Services conspired to evade U.S. export laws by illegally shipping aircraft parts, components, and technology to Iran, Sudan, and Burma.[3] The criminal information charged that Fokker Services engaged in more than 1,100 separate illegal shipments subject to export controls and then acted to evade detection, including by falsifying tail numbers, concealing product end-users, and directing business to companies that lacked strong compliance practices to avoid detection of the violations. The information further alleged that senior corporate managers knew and approved of the misconduct. The gross revenues from the shipments in violation of U.S. export laws totaled approximately $21 million.

In June 2010, Fokker Services self-reported to the U.S. Department of Commerce's Bureau of Industry and Security ("BIS") and the U.S. Treasury's Office of Foreign Assets Control ("OFAC") and began cooperating with the government's investigation. Fokker Services also hired outside counsel to conduct an internal investigation.

In June 2014, the DOJ filed the DPA with the court along with a joint consent motion for exclusion of time under the Speedy Trial Act.[4] Under the terms of the DPA, Fokker Services accepted and acknowledged responsibility for its conduct in violation of U.S. export laws, and agreed to pay $10.5 million in fines,[5] to continue its cooperation with the government's investigation, to implement more robust compliance policies and procedures, and to comply with U.S. export laws going forward. The DPA provided that if Fokker Services successfully complied with the terms of the DPA for a period of eighteen months, the DOJ would agree to dismiss the charges against the company.

On February 5, 2015, after several briefs had been submitted on the motion and hearings held before Judge Leon in which he voiced his skepticism about the DPA's terms, Judge Leon issued his opinion rejecting the DPA and denying the joint consent motion for exclusion of time under the Speedy Trial Act.

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2. *See SEC v. Citigroup Global Mkts., Inc.*, 752 F.3d 285 (2d Cir. 2014). For additional background, see Paul R. Berger, Andrew M. Levine, Colby A. Smith, Jonathan R. Tuttle, Bruce E. Yannett, and Ada Fernández Johnson, "Second Circuit Defers to the SEC in Overturning a District Court's Rejection of Settlement with 'Neither Admit or Deny' Language," *FCPA Update*, Vol. 5, No. 11 (June 2014), http://www.debevoise.com/~/media/files/insights/publications/2014/06/fcpa%20update/files/view%20fcpa%20update/fileattachment/fcpa_update_june2014.pdf.

3. Fokker Opinion at 1.

4. The Speedy Trial Act requires trial to begin within seventy days of the filing of an information or indictment. 18 U.S.C. § 3161(c)(1).

5. Fokker Services is also required to pay $10.5 million to resolve investigations from BIS and OFAC investigations, for a total of $21 million related to the underlying conduct. DOJ Press Rel. 14-130, Fokker Services B.V. Agrees to Forfeit $10.5 Million for Illegal Transactions with Iranian, Sudanese, and Burmese Entities (June 5, 2014), http://www.justice.gov/usao/dc/news/2014/jun/14-130.html.

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II. The District Court's Opinion

Judge Leon based his authority to review and reject the proposed settlement on the plain language of the Speedy Trial Act, which provides for the court to approve periods of delay "during which prosecution is deferred . . . pursuant to a written agreement with defendant, *with the approval of the court*, for the purpose of allowing the defendant to demonstrate his good conduct."[6] Judge Leon also cited Judge John Gleeson's decision for the United States District Court for the Eastern District of New York in *United States v. HSBC Bank USA, N.A.*,[7] for the proposition that the authority to approve or reject the DPA stems from the court's inherent supervisory power to "supervise the administration of criminal justice among the parties before the bar" and to "protect the integrity of the judicial process."[8]

"[B]y charging Fokker Services with criminal activity and pursuing a DPA under which the case would remain on the court's docket for the duration of the agreement, the parties were asking the court to 'lend its judicial imprimatur to their DPA' and serve as 'leverage over the head of the company.'"

Judge Leon was quick to note that the government has clear authority *not* to prosecute a case, including by means of a non-prosecution agreement. In such circumstances, the court would have no supervisory authority over the settlement and no role to play. But by charging Fokker Services with criminal activity and pursuing a DPA under which the case would remain on the court's docket for the duration of the agreement, the parties were asking the court to "lend its judicial imprimatur to their DPA" and serve as "leverage over the head of the company."[9] As a result, the court had the duty to review the settlement in order not to provide its "stamp of approval to either overly-lenient prosecutorial action, or overly zealous prosecutorial conduct."[10]

Noting that he did not "undertake th[e] review lightly" and that the court's supervisory powers were to be "exercised 'sparingly,'" Judge Leon proceeded to pick apart the terms of the proposed DPA.[11] He first focused on what he perceived as

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6. 18 U.S.C. § 3161 (h)(2) (emphasis added).
7. 2013 WL 3306161 (E.D.N.Y. July 1, 2013).
8. Fokker Opinion at 8–9 (quoting *United States v. Payner*, 447 U.S. 727, 735 n.7 & n.8 (1980)).
9. *Id.* at 10.
10. *Id.*
11. *Id.* (quoting *United States v. Jones*, 433 F.2d 1176, 1181–82 (D.C. Cir. 1970)).

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the egregiousness of the conduct, highlighting that Fokker Services engaged in a conspiracy to aid Iran when the United States was engaged in a "two-front War against terror in the Middle East."[12] In addition, the numerous stipulated violations over a five-year period, coupled with the fact that the conduct was concededly known to and orchestrated by executives at the highest levels of the company, added to the seriousness of the conduct described. Judge Leon also took issue with the penalty, noting that Fokker Services was not being required to pay "a penny more than the $21 million in revenue it collected from its illegal transactions."[13]

Judge Leon also raised concerns that no individuals were being prosecuted for their conduct and that a number of employees involved in the conduct have been allowed to remain at the company. In addition, Judge Leon suggested that (1) the duration of the DPA (eighteen months) was too limited and (2) an independent monitor should have been appointed. The Judge observed that the court was being left to rely on Fokker Services – "a company with such a long track record of deceit and illegal behavior" – to self-report any issues in the future.[14] Judge Leon expressed his surprise that the government would agree to such terms.[15]

In rejecting the DPA, the court concluded that it was "grossly disproportionate" in terms of its leniency in light of the conduct at issue.[16] Judge Leon expressed his concern that approving the DPA would "undermine the public's confidence in the administration of justice and promote disrespect for the law" in a case in which the defendant was "prosecuted so anemically" for conduct over an extended period of time that benefited one of the U.S.'s "worst enemies."[17] Judge Leon stated that by rejecting the proposed DPA, he was not "ordering or advising" the parties to "undertake or refrain from undertaking any particular action" and that he remained open to a modified agreement.[18] In so doing, the court articulated a rather specific roadmap of the revisions that might salvage a future proposed settlement that would receive judicial approval, including a larger fine, a probationary period longer

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12. *Id.* at 11.
13. *Id.*
14. *Id.* at 12.
15. Judge Leon gave little credence to the government's argument that the terms of the DPA reflected the government's weighing of several factors, including *(i)* that it did not believe there was sufficient proof to prosecute individuals, *(ii)* that the government had entered into similar DPAs without monitors over similar time-frames, and *(iii)* that the company had provided substantial assistance to prosecutors by appearing before a Dutch court to obtain authorization to produce un-redacted documents in response to the government's Mutual Legal Assistance Treaty request. *See generally* Gov't's Memorandum in Support of Deferred Prosecution Agreement Reached with Fokker Servs. B.V., *United States v. Fokker Servs. B.V.*, No. 14-cr-121 (RJL) (D.D.C. July 7, 2014).
16. Fokker Opinion at 12.
17. *Id.* at 13.
18. *Id.*

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than eighteen months, and the imposition of an independent monitor who could be trusted to verify that the company was in compliance with the relevant laws.

On February 18, 2015, Fokker Services filed a notice of appeal of Judge Leon's denial of the motion for exclusion of time under the Speedy Trial Act and the refusal to approval the DPA. Many will be watching how the D.C. Circuit decides the case and, if a conflict materializes with the Second Circuit's decision in *SEC v. Citigroup Global Mkts., Inc.*,[19] which overturned a District Court refusal to approve a settlement in an SEC matter, whether the Supreme Court will weigh in on the scope of a court's role in scrutinizing and ultimately approving DPAs and other settlements of regulatory actions.

III. Analysis

In the FCPA context and beyond, the *Fokker Services* decision is a reminder that increased judicial scrutiny of proposed settlement agreements with law enforcement agencies may be the "new normal." Although the outcome of Fokker Services' appeal remains to be seen, Judge Leon's decision may entice prosecutors in future cases to seek harsher terms in DPAs out of concern for heightened judicial scrutiny of proposed DPAs, or instead shy away from DPAs entirely and attempt to achieve sufficient punishment and deterrence through Non-Prosecution Agreements ("NPAs"). In addition, Judge Leon's concern that no individuals were charged in *Fokker Services* may further embolden prosecutors to demand individual accountability as part of proposed settlements or in the lead-up to such settlements.

Finally, it is worth noting that the increasing tendency of some judges to take a more active role in connection with approving negotiated settlements has not gone completely unchecked. In its decision last year in *Citigroup*,[20] the Second Circuit held that courts should approve settlements that are fair, reasonable, and do not actively disserve the public interest. The Second Circuit pointedly cautioned lower courts to respect the SEC's "discretionary authority" to decide the terms of its settlements.[21]

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19. 752 F.3d 285 (2d Cir. 2014).
20. *Id.*
21. *Id.* at 295.

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Although there are differences between civil settlements involving the SEC and criminal settlements such as the the one at issue in the Fokker Services matter, the reality of judicial review of proposed settlement agreements is of potential concern for companies, as it only adds to the uncertainty surrounding the resolution of cases and the possibility that the government will feel compelled to take more aggressive positions in negotiating resolutions. These developments suggest that companies and their counsel should be well-prepared to demonstrate how the terms of a proposed settlement are appropriate and commensurate with the conduct at issue.

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Attorney-Client Privilege and Work Product Protection in Internal Investigations: Recent Rulings in the Southern District of New York

Internal investigations are a critical part of an effective anti-corruption compliance program, and challenges to the application of the attorney-client privilege to such investigations have featured prominently in recent cases. Attorneys often supervise and conduct internal investigations, gathering facts relevant to providing valuable legal advice. In conducting investigations, counsel can draw on knowledge of applicable laws and distinguish actual legal or compliance concerns from lesser issues. Communications as part of such investigations are properly shielded from compelled disclosure by the attorney-client privilege, the fundamental purpose of which involves encouraging the seeking and obtaining of legal advice. Of course, there are many reasons to conduct internal investigations, and not all business-related reviews warrant attorney involvement.

Recent decisions illustrate important issues that arise in connection with, if not limits to, the attorney-client privilege in the internal investigations context. In 2014, companies received welcome news from the D.C. Circuit in its landmark ruling in the *KBR* litigation. The court of appeals rejected a narrow view of the attorney-client privilege applicable to communications in the course of internal investigations and overturned a lower court ruling that had rejected claims of privilege over certain matters in such investigations.[1]

More recently, in a January 21, 2015 order, Magistrate Judge Gabriel Gorenstein of the United States District Court for the Southern District of New York required Bank of China Ltd. ("BOC") to produce documents relating to its internal investigation into allegations that the bank assisted a terrorist operative responsible for a 2006 suicide bombing in Tel Aviv, Israel. The order in *Wultz v. Bank of China Ltd.*[2] concluded that these documents were not protected under either attorney-client privilege or work product doctrine. The ruling emphasized that BOC produced no evidence that its initial investigation was conducted at the direction of counsel and did not show that it would not have conducted the investigation absent the threat of litigation.

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1. *In re Kellogg Brown & Root, Inc.,* 756 F.3d 754 (D.C. Cir. 2014). For additional background, see Helen V. Cantwell, Andrew M. Levine, Colby A. Smith, Bruce E. Yannett, Steven S. Michaels, and Blair R. Albom, "D.C. Circuit Upholds Privilege Protections in Compliance Investigations," *FCPA Update*, Vol. 5, No. 12 (July 2014), http://www.debevoise.com/~/media/files/insights/publications/2014/07/fcpa%20update/files/view%20fcpa%20update/fileattachment/fcpa_update_july2014.pdf.

2. *Wultz v. Bank of China Ltd.*, 11 Civ. 1266 (SAS) (GWG) (S.D.N.Y. Jan. 21, 2015) (hereinafter the "Bank of China Order").

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The BOC decision stands in contrast to another recent decision in the same judicial district. In *In re General Motors LLC Ignition Switch Litigation,*[3] Judge Jesse Furman issued an order that shielded under attorney-client privilege and the work product doctrine interview notes and memoranda from an internal investigation conducted for General Motors ("GM") in connection with the GM ignition switch matter. In its general tone, Judge Furman's order denying discovery stands in apparent tension with Magistrate Judge Gorenstein's analysis, although the two cases are on several fronts distinguishable.

The recent pair of decisions warrants review by in-house counsel, personnel in compliance functions, and outside counsel alike, as they seek to calibrate, according to risk, cost, and other factors, which investigations and related activity should proceed under counsel's direction. For companies whose compliance, internal audit, human resources, accounting, and related functions act independently within the organization and not always at the direction of counsel – and this includes almost all such internal groups as to at least parts of their respective remits – the rulings reinforce the need to consider carefully how best to staff internal investigations and related monitoring activities. Especially for companies with significant overseas operations in which non-lawyers perform investigative, audit, or other quasi-legal functions, the BOC decision, if it stands, could have important ramifications. These decisions also underscore the importance of establishing a clear record of attorney supervision of investigative tasks.

I. The Bank of China Matter

A. Factual Background

In April 2006, eleven people were killed in a Tel Aviv bombing, including teenager Daniel Wultz. On behalf of his family, attorney Robert Tolchin sent a letter (the "Demand Letter") to BOC's New York branch in January 2008, alleging that a bank customer, Said al-Shurafa ("Shurafa"), was a senior operative of the terrorist group responsible for the bombing and that BOC provided material assistance by executing wire transfers totaling several million dollars on Shurafa's behalf.[4] The Demand Letter indicated that the plaintiffs would file a civil action in federal court within a few weeks.

The New York branch informed its head office in Beijing and offered to recommend outside U.S. counsel to advise the bank. Instead, Wang Qi, General Manager of the Legal Compliance Department, directed Chief Compliance Officer

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3. *In re Gen. Motors LLC Ignition Switch Litig.*, 14-MD-2543 (JMF) (S.D.N.Y. Jan. 15, 2015) (hereinafter the "GM Order").
4. Bank of China Order at 1.

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Geng Wei to investigate the allegations and prepare a report. Neither Wang nor Geng were attorneys.[5] Concurrently, the bank's New York office's Chief Compliance Officer, John Beauchemin, who was not a lawyer, contacted the bank's outside U.S. counsel and proceeded to conduct a local investigation into the allegations.

By this time, Geng was overseeing investigations in both New York and Beijing, directing employees to continue investigating Shurafa's accounts. Geng also sent Legal and Compliance employees to Guangzhou, where they interviewed employees at local bank offices where Shurafa opened accounts and even spoke with Shurafa himself.[6] Significantly, Geng later stated that his "expectation" in collecting this information was that "external counsel would use and analyze the findings for the purposes of assessing the merits of the allegations . . . and developing a litigation strategy if necessary."[7]

"Magistrate Judge Gorenstein rejected the notion that 'a person's collection of information is protected merely because the person harbors a plan to provide the information later to an attorney – particularly where there is no proof that the attorney sought to have the individual collect the information at issue.'"

The head office also initiated a third investigation through its Guangdong branch. As in New York and Beijing, the investigative efforts were led not by an attorney, but rather by a member of the local Legal and Compliance Department.[8] According to Geng, this employee followed instructions from the head office and never spoke with the bank's outside U.S. counsel until September 2008. After reporting its preliminary findings to the Beijing office of BOC, the Guangdong branch staff requested legal advice and recommended that BOC retain external counsel. The Beijing office staff concurred and eventually retained a U.S. law firm, although the start date of its work in the investigation remained unclear.[9] The plaintiffs filed a complaint in the district court in August 2008.

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5. In the Chinese legal system – and unlike as in the United States – in-house counsel need not be admitted to the country's bar. Although BOC argued that these individuals represented the "functional equivalent" of lawyers, a prior ruling in the case held that their unlicensed status rendered them non-attorneys for purposes of attorney-client privilege analysis. *See Wultz v. Bank of China Ltd.*, 979 F. Supp. 2d 479, 493-95 (2013); *see also* Joe Palazzolo, "Foreign Firms Often Lose Out on Attorney-Client Privilege," *Wall Street Journal* (Feb. 17, 2015), http://www.wsj.com/articles/foreign-firms-often-lose-out-on-attorney-client-privilege-1424138372.
6. Bank of China Order at 7.
7. *Id.* at 5.
8. *Id.*
9. *Id.* at 6-7.

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The *Wultz* plaintiffs sought documents generated in BOC's investigation that did not reflect communications involving a U.S. lawyer. The court held that these documents were not protected under either attorney-client privilege or the work product doctrine.

B. The Court's Decision

Under federal common law,[10] attorney-client privilege protects "communications (1) between a client and his or her attorney (2) that are intended to be, and in fact were, kept confidential (3) for the purpose of obtaining or providing legal advice."[11] BOC argued that its investigation was privileged because it was conducted "with the expectation" that U.S. counsel would use the information to provide legal advice.

However, Magistrate Judge Gorenstein rejected the notion that "a person's collection of information is protected merely because the person harbors a plan to provide the information later to an attorney – particularly where there is no proof that the attorney sought to have the individual collect the information at issue."[12]

The court noted that communications in the course of investigations in which an attorney directs a client to gather information for the purpose of rendering legal advice are typically privileged. The bank argued that its non-lawyer compliance officer, Beauchemin, had "engaged" external regulatory counsel after receiving the Demand Letter in order to guide the office's investigation.[13] But the court disagreed, noting that Beauchemin merely "contacted" outside counsel, and the investigation bore no proof of attorney guidance.[14] The court held that "the actual evidence supplied by BOC nowhere refers to an attorney directing that any particular steps be taken by anyone . . . ."[15]

The court also rejected BOC's claim to work product protection. The federal work product doctrine in civil litigation is governed by Rule 26(b)(3) of the Federal Rules of Civil Procedure, which provides that a party is generally not entitled to obtain

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10. In federal question cases, under Federal Rule of Evidence 501 questions of privilege are governed by common law principles, which include a "choice of law" analysis. This analysis is particularly meaningful in cases involving foreign firms and documents, as illustrated by the BOC matter. A prior decision in the case found that the privileged status *vel non* of certain documents was governed by Chinese law – which recognizes neither attorney-client privilege nor work product doctrine – and as a result the documents were required to be produced. *Wultz*, 979 F. Supp. 2d at 493.
11. *United States v. Mejia*, 655 F.3d 126, 132 (2d Cir. 2011) (citing *In re Cnty. of Erie*, 473 F.3d 413, 419 (2d Cir. 2007)).
12. Bank of China Order at 11-12.
13. *Id.* at 4 n.4.
14. *Id.*
15. *Id.* at 16 n.7.

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discovery of materials "prepared in anticipation of litigation . . . ."[16] In addressing work product claims, some courts have framed the issue as concerning "not merely whether [the party invoking the privilege] contemplated litigation when it generated the materials at issue, but rather whether these materials would have been prepared in essentially similar form irrespective of litigation."[17] In the BOC case, this logic proved decisive.

Although Magistrate Judge Gorenstein accepted that the bank anticipated litigation as a result of receipt of the Demand Letter, he held that the bank's argument seeking work product protection ignored the key issue – namely, what would BOC have done had it *not* anticipated litigation? The court contemplated a scenario in which BOC had learned of the allegations independently of any threat of actual litigation – such as through the bank's internal mechanisms or a newspaper reporter[18] – and surmised that BOC would have reacted the same way. In order to protect its reputation or comply with regulatory obligations, BOC "presumably would have [evaluated] whether to close the Shurafa accounts and . . . report to the relevant regulatory agencies."[19] The bank would have sent teams to Guangdong and New York to analyze relevant transactions, reviewed Shurafa's account opening documents, and educated employees on compliance risks. In its actual investigation, the bank adopted each of these measures, which led the court to conclude that the materials would have been prepared in essentially the same way whether litigation was anticipated or not and that therefore work product protection did not apply. Critically, even if BOC would have still conducted an investigation for business or other regulatory reasons, the absence of attorney involvement seemed to persuade Magistrate Judge Gorenstein that the investigation materials would not have been generated any differently, and for that reason work product protection was inapt.

The court's analysis of work product doctrine imposed upon the bank a demanding burden that has subsequently been challenged, both in this case as well as in other litigation. The bank has filed an objection under Rule 72(a) of the Federal Rules of Civil Procedure and requested reconsideration by an Article III judge, arguing that Magistrate Judge Gorenstein erroneously employed a "counterfactual" analysis to assess whether the materials would have been created differently if no

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16. Fed. R. Civ. P. 26(b)(3).
17. *Allied Irish Banks v. Bank of Am., N.A.*, 240 F.R.D. 96, 106 (S.D.N.Y. 2007) (internal quotation marks omitted).
18. Bank of China Order at 20-21.
19. *Id.* at 22.

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litigation had been anticipated.[20] BOC also noted that Magistrate Judge Gorenstein's work product analysis is presently before the Second Circuit in another, unrelated case, in which he similarly identified a lack of evidence supporting a counterfactual result.[21] If Magistrate Judge Gorenstein's analytical framework withstands scrutiny in these cases, it may signal a need for companies – at least those that may be haled before courts subject to the authority of the Second Circuit – to not only document more clearly what steps they took in connection with internal investigations, but also why the steps taken were different from steps they *would* have taken (or not taken) in the absence of threatened litigation.

II. In re General Motors LLC Ignition Switch Litigation

The ruling in the BOC matter can be contrasted with another recent ruling in the Southern District of New York, in which Judge Furman found that internal investigation materials were protected by both attorney-client privilege and work product doctrine.

Although both decisions remain subject to appeal, the contrast between the two investigations – and the subsequent rulings – is instructive for companies faced with allegations of misconduct.

A. Factual Background

In 2014, General Motors ("GM") issued a series of highly publicized recalls. In light of a DOJ investigation – and subsequent anticipated civil litigation – the company retained Jenner & Block ("Jenner") to investigate the circumstances preceding the recall.

Jenner lawyers interviewed more than 200 witnesses, informing each one that the interview was intended to assist in the provision of legal advice to GM and that it was privileged and confidential.[22] Once Jenner finished its report (the "Valukas Report"), GM provided copies to Congress, the DOJ, and other regulators. In a subsequent action, plaintiffs moved to compel GM to produce materials underlying the Valukas Report, particularly notes and memoranda relating to the witness interviews.

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20. Rule 72(a) Objection to the Jan. 21, 2015 Order of the Hon. Gabriel W. Gorenstein Regarding Plaintiffs' Requests for Documents Withheld as Protected by the Attorney-Client Privilege and Work Product Doctrine, *Wultz v. Bank of China Ltd.*, 11 Civ. 1266 (SAS) (GWG), at 16-17 (Jan. 30, 2015).

21. *See Schaeffler v. United States*, 22 F.Supp. 3d 319 (S.D.N.Y. 2014).

22. GM Order at 3.

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B. The Court's Decision

Judge Furman concluded that the documents at issue were privileged. He looked to the *Upjohn* decision, in which the Supreme Court shielded interview materials prepared by in-house counsel as part of a factual investigation intended to facilitate the provision of legal advice.[23] The court concluded that GM's internal investigation and accompanying interviews similarly stemmed from a request for legal advice.

Although this investigation was conducted by outside, rather than in-house, counsel, the court believed this strengthened GM's claim to privilege because outside counsel are not typically asked to serve in mixed business and legal capacities.[24]

"While acknowledging that privilege attaches only if the 'predominant purpose of the communication is to render or solicit legal advice,' the court stated that legal advice need not be the 'sole purpose[.]'"

Notably, Judge Furman's articulation of the "primary purpose" test for invoking privilege accounted for the "multiple and often-overlapping purposes" of internal investigations.[25] While acknowledging that privilege attaches only if the "predominant purpose of the communication is to render or solicit legal advice," the court stated that legal advice need not be the "*sole* purpose . . . ."[26] In fact, the court continued, "rare is the case that a troubled corporation will initiate an internal investigation solely for legal, rather than business, purposes; indeed the very prospect of legal action against a company necessarily implicates larger concerns about the company's internal procedures and controls, not to mention its bottom line."[27] Therefore, though GM's purposes in retaining Jenner and producing the Valukas Report were not exclusively legal – and despite the Report's focus on business processes, policies, and training – the company demonstrated that the provision of legal advice was a "primary purpose" of the investigation.

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23. *See Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981).
24. GM Order at 9.
25. *Id.* at 13.
26. *Id.* at 12.
27. *Id.* at 13.

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Because GM had promised to share the Valukas Report, the plaintiffs alternatively argued that GM had no expectation that the report or the investigation leading up to it would be kept confidential. But although GM ultimately disclosed the *facts* contained in the Valukas Report, Judge Furman asserted that the company never intended to disclose – nor did disclose – the *communications* reflected in the materials underlying the report, thereby preserving the privilege.[28] The court found that this decision to withhold the interview materials also barred a judicial finding of waiver.[29]

The court also protected from discovery Jenner's interview notes and memoranda under the work product doctrine because they were generated "in a situation far from the 'ordinary course of business.'"[30] Because the interviews themselves were heavily shaped by a "virtually certain" possibility of litigation – all witnesses were informed that the interviews were intended to gather information to assist in providing legal advice – the court characterized the materials as classic protected attorney work product.

Significantly, Judge Furman appeared to impose a far lighter burden on GM than did Magistrate Judge Gorenstein on BOC. Whereas Magistrate Judge Gorenstein listed a variety of business and regulatory motivations for BOC to conduct effectively the same kind of internal investigation, Judge Furman reasoned that distinguishing between "anticipation of litigation" and "business purposes" was ultimately unrealistic given the "inevitability" of lawsuits.[31] Although Magistrate Judge Gorenstein acknowledged that attorneys need not be present in order for work product protection to apply, the GM decision suggests that a record of counsel involvement can be a compelling way to demonstrate that an investigation – even if conducted for other, non-legal purposes – was inherently conducted differently because of the prospect of litigation.

III. Conclusion

Further litigation, and the possibility of additional judicial guidance in these matters, particularly with respect to the possibility of work product protection, remains a distinct possibility. Yet, taken together, these decisions serve as reminders that the purposes underlying investigations – both legal and otherwise – should not necessarily compromise a company's claim to privilege, but the absence of attorney direction might.

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28. *Id.* at 10-12.
29. *Id.* at 19-20.
30. *Id.* at 17.
31. *Id.* at 17.

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This lesson is particularly salient given the routine reliance by many companies on internal audit functions, compliance, human resources departments, and, in certain jurisdictions, non-lawyer staff in company legal departments to conduct this work.[32]

For large-scale organizations that must prioritize competing compliance efforts, this approach can reduce costs and may well be warranted depending on the scope and risks associated with an investigation. In certain cases, however, these savings can be undercut or even offset completely by legal consequences in the future. To avoid such outcomes, companies should carefully weigh the implications of having non-lawyers unilaterally direct certain types of investigations. At minimum, companies should seek counsel's recommendation as to whether the issues raised in specific matters, or in various types of cases, can be appropriately handled by non-lawyers. Ultimately, companies will continue to face complex choices when confronted with allegations of misconduct. Although looking to internal audit, compliance, and other non-lawyer staff is often a convenient and appropriate strategy, consideration should be given to the significant legal consequences of conducting an internal investigation absent a record of meaningful attorney direction.

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32. Doug Small, "Internal Fraud Investigations: The Risk and Reward of Third Party Involvement," *Corporate Compliance Insights* (Nov. 11, 2009), http://www.corporatecomplianceinsights.com/internal-fraud-investigations-risk-reward-third-party-involvement/.

Compliance in a Hot Zone: Ukraine Enacts New Anti-Corruption Laws

Global companies know all too well that operating in jurisdictions with security issues poses special risks, not only to employee safety, but also to investments that may be wiped out or severely devalued by political unrest and civil strife. Corruption risks in these hot spots, which in the past 20 years have included countries in Latin America, Eastern Europe, Africa, and the Middle East, tend to be magnified. In fact, the majority of the countries at the bottom of Transparency International's 2014 Corruption Perceptions Index ("CPI") have experienced unrest – or an all-out war – in recent years.

As one of the most populous countries in Europe with a GDP of over $337 billion,[1] Ukraine stands in contrast to many smaller and less strategically located jurisdictions experiencing civil strife and violence. In 2013, Ukraine's total foreign trade was approximately $140 billion, €37.8 billion of which was with the European Union.[2] With the new Ukrainian government throwing its support behind closer ties to the West, Ukraine is an important test case for the implementation of anti-corruption laws in a security hot zone and a country literally under fire.

Ukraine faces two formidable challenges – the ongoing conflict in the Eastern part of the country and a faltering economy. The international community has provided political and economic assistance to Ukraine, including $35 billion in loans and loan guarantees pledged by the G7 countries and the International Monetary Fund in the past year.[3] The loans, dubbed by some a "Marshall Plan for Ukraine,"[4] will come with strings attached. One of the main strings would inevitably be Ukraine's commitment to overcome widespread corruption.[5]

The principal question is whether new laws recently enacted by Ukraine can provide an effective legal framework for reducing corruption and enhancing the risk

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1. "The World Factbook: Ukraine," *Central Intelligence Agency* (June 23, 2014), https://www.cia.gov/library/publications/the-world-factbook/geos/up.html. That number does not include the country's "shadow economy," which has been estimated to be up to 50% of its GDP, indicating that the country's true economic potential is far beyond the official data.
2. *See* "Ukraine's Foreign Trade in Goods, January-November 2014," *State Statistics Service of Ukraine* (Nov. 2014); "European Union: Trade in Goods with Ukraine," *European Commission* (Aug. 27, 2014), http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113459.pdf; "2014 : U.S. Trade in Goods with Ukraine," *U.S. Census Bureau* (Feb. 5, 2015), http://www.census.gov/foreign-trade/balance/c4623.html.
3. Robin Emmott, "Donors Plan Ukraine Conference in April to Raise $15 Billion," *Reuters* (Feb. 9, 2015), http://www.reuters.com/article/2015/02/09/us-ukraine-crisis-donors-idUSKBN0LD1NR20150209.
4. Bernard-Henri Lévy, "A Marshall Plan for Ukraine," *The World Post* (Oct. 13, 2014), http://www.huffingtonpost.com/bernardhenri-levy/a-marshall-plan-for-ukrai_b_5978240.html.
5. Eradicating corruption is also a key requirement of the EU-Ukraine Association Agreement signed on March 21, 2014. *See* "The EU's Relations with Ukraine," *European Union External Action Service*, http://eeas. europa.eu/ukraine/index_en.htm; "Information on the EU-Ukraine Association Agreement," *European Union External Action Service* (Sept. 14, 2012), http://eeas.europa.eu/top_stories/2012/140912_ukraine_en.htm.

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that corrupt conduct will be prosecuted, or whether they will fail to take root, as reform efforts often do in countries where larger conflicts cannot be put to rest.

Ukraine, perceived by some as "the most corrupt country in Europe,"[6] was ranked in 142nd place (tied with Uganda and the Comoros) out of 175 countries on the 2014 CPI.[7] In fact, pervasive corruption was among the key reasons prompting the uprising that brought down former president Victor Yanukovich in early 2014. Not surprisingly, Petro Poroshenko, Ukraine's new President, declared eradicating corruption as one of his foremost objectives.[8]

As a key step forward, on October 14, 2014, the Ukrainian Parliament passed four anti-corruption laws: *On the Strategy to Combat Corruption in Ukraine in 2014-2017, Prevention of Corruption, Amendments to Certain Legislative Acts on Year-End Reporting and Public Dealings,* and *National Anti-Corruption Bureau of Ukraine* (collectively, "Anti-Corruption Legislation"). The laws are designed to prohibit corruption, as well as money-laundering and terrorist financing.

The Anti-Corruption Legislation defines corruption as an act enabling an individual to obtain an "undue advantage or benefit" from an official who may be induced to use his or her powers unlawfully.[9] Officials are barred from using their authority or position to solicit an undue advantage for themselves or others.[10] Like the 2011 *Principles of Prevention and Combating Corruption Act* it replaced, the Anti-Corruption Legislation contains a broad definition of "undue advantage or benefit," encompassing money or other property, advantages, benefits, services, or intangible assets that are provided for free or at a below-minimum market price.[11] The new law, however, quantifies "undue advantage or benefit" with respect to gift-giving. Gifts that fit "generally accepted notions of hospitality" are exempted so long as their value does not exceed the minimum wage, and the aggregate value of such gifts received from the same source during the year "does not exceed twice the subsistence minimum."[12]

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6. "A Year After Maidan, Ukraine Is Still the Most Corrupt Country in Europe," *Transparency International* (Dec. 3, 2014), http://www.transparency.org/news/pressrelease/a_year_after_maidan_ukraine_is_still_the_most_corrupt_country_in_europe; *see also* Sean Hecker, Andrew M. Levine, Steven S. Michaels, Alexander Dmitrenko, and Neal S. Shechter, "Transparency International's 2014 Corruption Perceptions Index," *FCPA Update,* Vol. 6, No. 5 (Dec. 2014), http://www.debevoise.com/~/media/files/publications/2014/12/fcpa_update_dec_2014_final.pdf.
7. *See* "A Year After Maidan, Ukraine Is Still the Most Corrupt Country in Europe," note 6, *supra.*
8. "Ukraine Should Work on Eradication of Corruption and Strengthening of Armed Forces – Poroshenko," *UNIAN* (Apr. 22, 2014), http://www.unian.info/politics/910373-ukraine-should-work-on-eradication-of-corruption-and-strengthening-of-armed-forces-poroshenko.html.
9. Verkhovna Rada, Про запобігання корупції [hereinafter "Prevention of Corruption"] (1700-VII) (Oct. 14, 2014), Art. IV, § 22.1.
10. *Id.* Art. 1.1.
11. *Id.*
12. *Id.* Art. IV, § 23.2.

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With respect to the obligations of private entities, the Anti-Corruption Legislation requires companies doing business in Ukraine to regularly update their accounts of revenues and to maintain the information for presentation to the State Registrar if requested.[13] Substantial changes in the ownership of a legal entity also must be reported.[14]

Not surprisingly, given the role that frustration with rampant corruption played in the Maidan uprising a year ago, the legislation gives the public broad rights of participation in the fight against corruption, including the rights to receive information about the government's anticorruption efforts, to lodge complaints, and to participate in parliamentary hearings.[15]

"The law specifically guarantees independence of the Bureau through the special selection process for Directors, safety measures for Bureau employees, and the prohibition of interference from other government bodies."

Most significant, however, is the establishment of the National Anti-Corruption Bureau: a new governmental agency tasked with monitoring and enforcing Ukraine's national anti-corruption agenda. The Bureau is charged with the enforcement of the Anti-Corruption Legislation.[16] The law specifically guarantees independence of the Bureau through the special selection process for Directors, safety measures for Bureau employees, and the prohibition of interference from other government bodies.[17]

The Director of the Bureau is given general powers to initiate investigations, approve operational plans, appoint deputy directors, protect restricted information, and formulate guidance for encouraging citizens to assist in preventing and detecting corruption.[18] The Director is also given the right to attend all Parliamentary meetings and to directly advise the Cabinet of Ministers of Ukraine on corruption-related matters.[19]

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13. Verkhovna Rada, Про внесення змін до деяких законодавчих актів України щодо визначення кінцевих вигодоодержувачів юридичних осіб та публічних діячів [hereinafter "Amendments to Certain Legislative Acts on Year-End Reporting and Public Dealings"] (1701-VII) (Oct. 14, 2014), § 641.1.
14. *Id.* § 641.3.3.
15. *Id.* Art. I, § 21.
16. Verkhovna Rada, Про Національне антикорупційне бюро України, [hereinafter "National Anti-Corruption Bureau of Ukraine"] (1698-VII) (Oct. 14, 2014).
17. *Id.* § 4.
18. *Id.* § 8.
19. *Id.* § 8.14.

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Three finalists for the position of the Bureau's Director are to be selected through a public search by a special Evaluation Commission composed of nine members. The President, Parliament, and the Cabinet of Ministers each appoint three members.[20] The President selects the winner of the search, who must be confirmed by the Parliament.[21] The Director will be appointed for a term of seven years, and cannot serve more than two consecutive terms.[22] Besides the Director, the Bureau will include central and regional offices, with a staff of 700.[23]

Poroshenko has requested that the Bureau be fully staffed and operational by August 24th, the anniversary of Ukrainian independence.[24] Although the current version of the law requires the Director to be a Ukrainian citizen without any other nationality, there has been a strong push to appoint an outsider with "clean hands" and lack of local connections, which would correspond to the spirit of the reform.

In mid-February, sources reported that David Sakvarelidze, a former Assistant Attorney General of the Republic of Georgia and a current Assistant Attorney General of Ukraine, was a potential candidate for this post.[25] Sakvarelidze filed a petition for Ukrainian citizenship and alluded to the history of comradery between Ukraine and Georgia in struggling to overcome "common problems."[26] Georgia stands as a model of reform for Ukraine, as it currently ranks 50th on the 2014 CPI.[27] Sakvarelidze believes that successfully combating corruption in Ukraine will "give a new impetus to all countries fighting for freedom to conduct new, more ambitious reforms."[28]

The recently elected Ukrainian government has been put on notice that if it does not work to eradicate corruption, it will face a number of hurdles to the receipt of much-needed financial assistance and investment from the

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20. *Id.* § 7.3.
21. *Id.* § 7.10.
22. *Id.* § 6.3.
23. *Id.* § 3.
24. Galina Korba, "Анти¬коррупционное бюро поставили выше закона," *Apostrophe* (Jan. 11, 2015), http://apostrophe.com.ua/article/politics/government/2015-01-11/antikorruptsionnoe-byuro-postavili-vyishe-zakona/1063.
25. "Замгенпрокурора Давид Сакварелидзе: Буду заниматься очисткой прокуратуры," *Focus* (Feb. 16, 2015), http://focus.ua/country/325018/.
26. "Давид Сакварелидзе назначен главой антикоррупционного бюро Украины," *Antikor* (Feb. 13, 2015), http://antikor.com.ua/articles/27731-david_sakvarelidze_naznachen_glavoj_antikorruptsionnogo_bjuro_ukrainy.
27. "Corruption Perceptions Index 2014: Results," *Transparency International*, http://www.transparency.org/cpi2014/results.
28. *Antikor*, note 27, *supra.*

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West. Furthermore, the government's own fate might well depend on how effectively and efficiently it tackles the widespread corruption.

Thus far, Ukraine seems to be taking this reality seriously. Indeed, at the end of January, the Parliament debated amending the October 2014 legislation to furnish the Anti-Corruption Bureau with broader tools to combat corruption. For example, some amendments suggested a procedure for reduced sentencing in exchange for testimony regarding corruption.[29]

It remains to be seen how the new Anti-Corruption Legislation will be enforced and if it will succeed. As Oleksii Khmara, Executive Director of Transparency International Ukraine, points out, the laws, on their own, "will not change anything."[30] They provide a necessary framework for reform, but need to be followed up with practical steps and vigorous enforcement. If Ukraine's anti-corruption effort succeeds, it could inspire change in other former Soviet countries with high levels of corruption, as well as in countries in other "hot zones" that may believe that tackling corruption is too daunting a task under the current circumstances.

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29. Giorgi Vashadze, "Борьба с украинской коррупцией: быстро но правильно," *Ukrainian Pravda* (Feb. 1, 2015), http://www.pravda.com.ua/rus/columns/2015/02/1/7057069/.

30. "Пакет антикоррупционных законов: за что проголосовал парламент," *Liga News* (Oct. 14, 2014), http://news.liga.net/articles/politics/3666695-led_tronulsya_rada_odobrila_antikorruptsionnyy_paket_zakonov.htm.

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