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FCPA Update

A Global Anti-Corruption Newsletter

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Beyond "Sons and Daughters": JPMorgan Resolves Hiring Practices Probe

On November 17, 2016, JPMorgan resolved the long-running investigations of its hiring practices in Asia. JPMorgan Securities (Asia Pacific) Limited ("JPMorgan-APAC") entered into a non-prosecution agreement with the US Department of Justice ("DOJ") relating to alleged violations of the anti-bribery provisions of the Foreign Corrupt Practices Act ("FCPA") ("JPMorgan-APAC NPA").[1] On the same day, its parent company, JPMorgan Chase & Co ("JPMorgan"), an investment bank headquartered in New York and listed on the New York Stock Exchange, was the subject of a cease-and-desist order by the Securities and Exchange Commission ("SEC") related to alleged violations of the anti-bribery, books and records, and

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1. Letter from Andrew Weissman to Mark F. Mendelsohn, "JPMorgan Securities (Asia Pacific) Limited Criminal Investigation," November 17, 2016, https://www.justice.gov/criminal-fraud/fcpa/cases/in-re-jpmorgan-securities-asia-pacific-2016.

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internal controls provisions of the FCPA in connection with the same hiring activity ("SEC Order").[2] In addition, JPMorgan consented to an order by the Federal Reserve Board of Governors under the Federal Deposit Insurance Act for the same conduct ("Fed Order").[3] As part of these resolutions, JPMorgan APAC and JPMorgan agreed to pay just over $264,500,000 in penalties and disgorgement: a $72,000,000 monetary penalty paid by JPMorgan-APAC to the DOJ;[4] disgorgement and pre-judgment interest of $130,591,405 paid by JPMorgan to the SEC;[5] and a $61,932,500 civil monetary penalty paid by JPMorgan to the Federal Reserve.[6]

The JPMorgan resolutions were eagerly awaited by practitioners and compliance personnel, including by those seeking greater clarity as to how the US enforcement agencies would seek to apply the FCPA to a company's hiring practices. As we noted in connection with the SEC's first foray into this area in the Bank of New York Mellon enforcement action,[7] there are significant legal and practical questions surrounding such regulation (including whether it is consistent with the statutory text of the FCPA), particularly absent an explicit *quid pro quo*. The allegations in the JPMorgan enforcement actions, though, relate to employment decisions made on an explicit *quid pro quo* basis for underwriting mandates, complete with internal emails among investment bankers using the actual term "quid pro quo." The JPMorgan enforcement actions provide little guidance as to what kinds of hiring practices are acceptable absent a *quid pro quo*, thereby doing little to answer questions raised by the SEC's earlier enforcement actions against Bank of New York Mellon and Qualcomm.[8]

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2. In the Matter of JP Morgan Chase & Co., Securities Exchange Act of 1934 Rel. No. 79335, Order Instituting Cease-and Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Ceast-and-Desist Order, Accounting and Auditing Enforcement Rel. No. 3824, Administrative Proceedings File No. 3-17684 (November 17, 2016), https://www.sec.gov/news/pressrelease/2016-241.html.
3. In the Matter of J.P. Morgan Chase & Co, Order to Cease and Desist and Order of Assessment of Civil Money Penalty Upon Consent Pursuant to the Federal Deposit Insurance Act, as Amended, Docket No. 16-22-B-HC, 16-22-CMP-HC (Board of Governors of the Federal Reserve System, November 17, 2016).
4. JPMorgan-APAC NPA at 4.
5. SEC Order at 25.
6. Fed Order at ¶ 4.
7. Sean Hecker, Bruce E. Yannett, Philip Rohlik and David Sarratt, "The SEC Announces First FCPA Enforcement Action Based on Allegedly Improper Hiring of Relatives of Foreign Officials," FCPA Update, Vol. 7, No. 1 (August 2015), http://www.debevoise.com/insights/publications/2015/08/fcpa-update-august-2015.
8. In the Matter of Qualcomm Incorporated, Order Instituting Cease-and Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Ceast-and-Desist Order, Securities and Exchange Act Rel. No. 77261, Accounting and Auditing Enforcement Rel. No. 3761, Administrative Proceedings File No. 3-17145 (March 1, 2016); *see also* Andrew M. Levine, Bruce E. Yannett and Philip Rohlik, "SEC Expands Its Aggressive Approach to Connected Hires in Qualcomm Enforcement Action," FCPA Update, Vol. 7, No. 8 (March 2016), http://www.debevoise.com/insights/publications/2016/03/fcpa-update-march-2016.

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The JPMorgan Enforcement Actions

The SEC Order and the Statement of Facts attached to the JPMorgan-APAC NPA are largely based on the same underlying facts, with the SEC providing more detail. Both deal entirely with the actions of certain JPMorgan-APAC investment bankers repeatedly contravening explicit JPMorgan policy prohibiting hiring relatives of foreign officials in order to obtain or retain business.[9] According to the SEC, 200 candidates referred by clients or prospective clients – half of whom were referred by state-owned enterprises or government entities – were hired or accepted into internship programs between 2006 and 2013.[10] These candidates were not limited to relatives of the referring officials. In doing so, the JPMorgan-APAC bankers took steps to falsify compliance questionnaires and hide the practice.[11] Although such hires took place on an *ad hoc* basis prior to 2009,[12] starting in that year the bankers systemized the client referral program to focus on "deal conversion or revenue attribution and relationship," with a criterion for hiring being "[d]irectly attributable linkage to a business opportunity."[13]

> "The JPMorgan enforcement actions provide little guidance as to what kinds of hiring practices are acceptable absent a *quid pro quo,* thereby doing little to answer questions raised by the SEC's earlier enforcement actions against Bank of New York Mellon and Qualcomm."

By 2011, JPMorgan-APAC revenue attributable to specific hires was tracked on a spreadsheet.[14] Hires were generally connected to a specific piece of business, but in at least one case a candidate was hired because he was the son of a deputy minister in a Chinese government agency. Although initial internal correspondence suggests that the candidate was identified by a banker as someone who maintains good relationships with potential clients as a general matter, it is clear from later

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9. JPMorgan-APAC NPA, Attachment A at ¶¶ 14-17; SEC Order at ¶¶ 9-11.
10. SEC Order at ¶ 3.
11. JPMorgan-APAC NPA, Attachment A at ¶ 18; SEC Order at ¶¶ 5, 21-26.
12. JPMorgan-APAC NPA, Attachment A at ¶ 24.
13. JPMorgan-APAC NPA, Attachment A at ¶¶ 19-23; SEC Order at ¶¶ 33-40.
14. *Id.*

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correspondence that this hire was also a *quid pro quo*, with a banker writing in an email "[t]he father indicated to me repeatedly that he is willing to go extra miles to help JPM in whatever way we think he can…."[15]

Moreover, and against JPMorgan policy, the referred candidates allegedly were hired completely outside the normal competitive hiring process, were generally provided only one year positions, and were explicitly described as "employees referred by [] key clients who may not meet [] regular hiring standard[s]."[16] The referred hires were referred to internally as "photocopiers,"[17] designating the type of work expected of them. One referral described in the JPMorgan-APAC NPA was described by an interviewer as "the worst … candidate they had ever see[n]."[18] Another referral hire actually resigned his position because of a lack of meaningful work.[19] After being hired, the referral candidates described in the enforcement actions appear to have exhibited poor performance on the job, even in relation to the low expectations at hiring.[20] JPMorgan-APAC also created a special unpaid summer internship program for client referrals.[21]

The description of the referral candidates is based on a relatively small number of examples, which interestingly include referrals from both private parties and government entities, including state-owned enterprises. The JPMorgan-APAC NPA provides examples of referrals from four clients, two of which are private entities, and one Chinese official. The SEC Order also includes examples of both private and public referrals. Although the private referrals are associated with some of the most colorful internal documents showing the *quid pro quo* nature of hiring, it is unclear why else the DOJ would include them. It is impossible to violate the anti-bribery provisions of the FCPA by providing a benefit to a non-"foreign official," unless the recipient gives all or part of that benefit to a "foreign official," which is not alleged in the JPMorgan-APAC NPA. While it is theoretically possible to violate the books and records and internal controls provisions of the FCPA based on conduct related to private entities, it is unclear if the SEC's inclusion of private referrals suggests a desire to expand its enforcement powers in this direction.[22]

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15. JPMorgan-APAC NPA, Attachment A at ¶¶ 43-49.
16. JPMorgan-APAC NPA, Attachment A at ¶¶ 21-22; SEC Order at ¶¶ 29-30.
17. JPMorgan-APAC NPA, Attachment A at ¶ 25; SEC Order at ¶¶ 15.
18. JPMorgan-APAC NPA, Attachment A at ¶ 44.
19. SEC Order at ¶ 32.
20. *See, e.g.,* JPMorgan-APAC NPA, Attachment A at ¶¶ 47-48.
21. SEC Order at ¶¶ 45-47.
22. *See* Andrew Ross Sorkin, "Hiring the Well-Connected Isn't Always a Scandal," New York Times (Aug. 9, 2013).

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In addition to the inclusion of private referrals, it is noteworthy that very few of the candidates discussed in the resolutions had a connection to New York. The SEC Order lists two examples (out of approximately 100) of "foreign official" referred candidates being placed in New York,[23] and the JPMorgan-APAC NPA lists the same two,[24] one of which was funded by JPMorgan-APAC,[25] and an additional private referral from Taiwan, which appears also to have involved a mandate for JPMorgan.[26]

In order to disguise the true extent of the program, JPMorgan-APAC bankers allegedly misused "Sons and Daughters" hiring questionnaires, originally designed as a control to prevent improper hires, by providing false information such as that the candidate had been through a competitive hiring process or that there was no expected benefit from the hire.[27] When a questionnaire that did indicate an expected benefit was questioned by compliance or human resources personnel, the responsible banker simply changed the answers to appear more compliant.[28] Referral hires were also given special contracts running from January 15 to December 15, so that they would not appear on headcount at year-end,[29] and JPMorgan-APAC bankers did not inform human resources directors elsewhere of a candidate's referral status when positions were sought outside of Hong Kong.[30]

Lessons from the JPMorgan Enforcement Actions

The hiring practices described in the JPMorgan enforcement actions involved explicit *quid pro quo* hiring of generally under-qualified candidates, with internal communications suggesting that the *quid pro quo* was well understood both by the JPMorgan-APAC banker and the person making the referral. As a result, the behavior described is at one end of a spectrum of potentially impermissible hiring practices and builds upon the somewhat less clear cases in Bank of New York Mellon and Qualcomm. That said, the JPMorgan-APAC NPA and SEC Order yield some reminders for compliance professions:

- "Princelings" and "Sons and Daughters" are not helpful terms. Liability can attach to any hire referred by a "foreign official" client or prospective client, even if the candidate has no blood relation to the referring person;

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23. SEC Order at ¶¶ 49-66.
24. JPMorgan-APAC NPA, Attachment A at ¶¶ 43-49, 50-67.
25. *Id.* at ¶¶ 61-62.
26. *Id.* at ¶¶ 35-42.
27. SEC Order at ¶¶ 21-25.
28. SEC Order at ¶ 23; JPMorgan-APAC NPA, Attachment A at ¶¶ 29-30.
29. SEC Order at ¶ 26.
30. *Id.* at ¶ 25.

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- It does not matter whether the position provided to the referred candidate is paid or unpaid;
- A candidate should not be hired as an explicit *quid pro quo* (or in the case of Bank of New York Mellon and Qualcomm, in any situation that might be seen to imply such a *quid pro quo*);
- Any hire should take place through the "standard hiring program;"[31]
- Referred candidates should be subject to the same standards required of all hires;
- Special positions should not be created for referred candidates;
- Referred candidates should be expected to perform the same tasks as other employees of the same rank; and
- Compliance should carry out substantive reviews of hiring decisions relating to referred candidates (something more than reviewing a questionnaire).

The earlier SEC decisions in Bank of New York Mellon and Qualcomm also suggest that companies should:

- Create a specific policy (or part of a policy) dealing with such hiring;
- Conduct specific training on that policy for relevant employees;
- Require every application to go through centralized human resources processes;
- Require annual certification of compliance with the hiring policy; and
- Require disclosure by candidates of connections with "foreign officials."

The JPMorgan-APAC NPA and SEC Order do not answer questions as to whether under the FCPA companies hiring candidates referred by "foreign officials" can ever take the identity of the referrer into account. For example, in parallel with the "standard hiring program," can a company provide extra hand-holding to a candidate? Can a long-term relationship with a referring person be taken into account at all (and, if so, how)? Are a candidate's own connections, including by relation, ever a permissible criteria to include in the hiring process? Companies doing business in countries, like China, where relationships are considered important for business will have to await further guidance, while proceeding extremely cautiously in the interim.

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31. JPMorgan-APAC NPA, Attachment A at ¶ 21.

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The Pilot Program and the Meaning of Profit

The investigation into JPMorgan-APAC began long before the commencement of the DOJ's FCPA enforcement "Pilot Program" in April 2016. However, the JPMorgan-APAC NPA appears to apply the pilot program's approach in determining the DOJ's decision to enter into the NPA and the assessment of the monetary penalty. Specifically, the JPMorgan-APAC NPA states that JPMorgan-APAC did not receive credit for voluntary self-disclosure, but received full credit for cooperation and remediation, entitling it to a 25% downward departure from the lower end of the sentencing guidelines range.[32] Cooperation credit included "voluntarily making foreign-based employees available for interviews in the United States" and "provid[ing] all relevant facts … including information about individuals involved in the misconduct." Included in the remediation was the separation or disciplining of several employees, including the imposition of "more than $18.3 million in financial sanctions on former or current employees."[33] It is also noted that JPMorgan-APAC and JPMorgan have "more than doubl[ed] their resources devoted to compliance, particularly in the Asia-Pacific region,"[34] though it is unclear if this increase in resources is solely related to the hiring practices investigation or also related to other regulatory issues facing JPMorgan and JPMorgan-APAC.

"Are a candidate's own connections, including by relation, ever a permissible criteria to include in the hiring process? Companies doing business in countries, like China, where relationships are considered important for business will have to await further guidance, while proceeding extremely cautiously in the interim."

Disgorgement of profits is also required by the Pilot Program. A comparison between the JPMorgan-APAC NPA and the SEC Order raises the question of what "profit" means in this context. While there should be a textbook answer, this does not appear to be the case. The JPMorgan-APAC NPA is explicit that JPMorgan-APAC "earned at least $35 million in profits" from mandates associated with the hires.[35] That said, a separate entity, JPMorgan (the parent) paid $105,507,668 in

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32. JPMorgan-APAC NPA at 1-2.
33. *Id.* at 2.
34. *Id.* at 2.
35. JPMorgan-APAC NPA, Attachment A at ¶ 13.

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disgorgement pursuant to the SEC Order.[36] Given all the operative facts in the SEC Order involved JPMorgan-APAC, it is difficult to see why the SEC demanded disgorgement three times higher than the amount of profits described in the JPMorgan-APAC NPA. It could be that the SEC is using a different underlying figure, perhaps including profits made in connection with private referrals. However, the SEC Order's statement of fact contains the following sentence: "The referring SOEs entered into transactions totaling more than $100,000,000 *in revenue* for JPMorgan APAC or its affiliates during this period."[37] It would seem, therefore, that the SEC defines "profits" to be disgorged to be "revenue."

Jurisdictional Issues

Both enforcement actions focus on actions of employees at JPMorgan-APAC, with only two or three cases involving a placement in New York. The JPMorgan-APAC NPA does set forth allegations relating to jurisdiction under 15 U.S.C. §78dd-3, specifically that "JPMorgan-APAC, though its employees or agents, took acts in furtherance of the corrupt scheme while in the territory of the United States, including sending e-mails while in the United States in furtherance of hiring the referred candidates … and placing certain of the referred candidates in New York."[38] However, the NPA also asserts jurisdiction under 15 U.S.C. §78dd-1 based on the fact that "JPMorgan-APAC was a Hong Kong registered company and wholly owned subsidiary of JPMorgan Chase & Co. JPMorgan-APAC … principally carried out investment banking under the 'JPMorgan' brand for the Asia-Pacific region." Because of this, "JPMorgan-APAC was an 'agent' of an issuer within the meaning of the FCPA."[39] Without providing a similar explanation, the SEC does not distinguish between JPMorgan-APAC and JPMorgan.

NPAs and other consensual resolutions of FCPA cases are negotiated documents, and there is a benefit to issuers and US-based companies to having their foreign subsidiaries, rather than the parent company, enter into the agreement with the government. For this reason, the company may consciously not pay too much attention to jurisdictional niceties. However, because there is a dearth of FCPA caselaw and negotiated resolutions act as soft law, it is worth noting that the DOJ's assertion of agency jurisdiction appears to be incorrect as a matter of agency and corporate law. For at least 90 years, it has been black letter law that a wholly owned

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36. SEC Order at 25.
37. *Id.* at ¶ 3 (emphasis added).
38. JPMorgan-APAC NPA, Attachment A at ¶ 27.
39. *Id.* at ¶ 3.

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subsidiary is not an agent merely by virtue of ownership, and agency between a parent and subsidiary is seldom a basis for ignoring the corporate form as agency is a consensual relationship.[40] Instead, the corporate distinction between a parent and subsidiary can be disregarded only when the parent "authoriz[es]" the activity (as provided for in the FCPA itself) or where the parent has ignored the corporate formalities such that the distinction between the companies is mere form.[41] Neither of these circumstances is alleged in the JPMorgan-APAC NPA. There is no basis for suggesting that the term "agent" in the FCPA should be interpreted to differ from the common law meaning.[42]

While the JPMorgan resolutions illustrate how authorities can apply the FCPA to hiring involving explicit *quid pro quo* arrangements, the resolutions do little to clarify the possible breadth of the FCPA's application in other hiring contexts. As such, companies should continue to exercise care when receiving a job referral from a foreign official.

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40. *See Kingston Dry Dock Co. v. Lake Champlain Transp. Co.*, 31 F.2d 265, 267 (2d Cir. 1929) (L. Hand, J.).

41. *See United States v. Johns–Manville Corp.*, 231 F. Supp. 690, 698 (E.D. Pa. 1963).

42. *See NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981) ("[w]here Congress uses terms that have accumulated settled meaning under … the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.").

France's New Anti-Corruption Framework: Potential Impact for Businesses in a Multijurisdictional World

Long criticized for ineffective enforcement of their anti-corruption legislation, French authorities are taking steps to enhance their efforts. On November 8, 2016, France finally passed a "Proposed Law Regarding Transparency, the Fight Against Corruption and the Modernization of Economic Life,"[1] known as the *Loi Sapin II*.[2] The French Constitutional Council currently is examining the law,[3] which is likely to be adopted before the end of the year in the form endorsed by the French National Assembly, subject to minor amendments. The *Loi Sapin II* provides for some significant changes in the current French anti-corruption legal and regulatory administrative structure, as well as some specific amendments to the general French criminal law and procedures.

This article provides an update on the changes introduced by the *Loi Sapin II*, and preliminarily assesses the risks, challenges, and potential advantages that these changes may create for companies doing business in France. Although the new law risks being less effective than its backers may hope, some of these changes are significant and could affect companies doing business in or with France. In all likelihood, the *Loi Sapin II* represents partial but meaningful progress in French anti-corruption efforts, and adds to the complexity of multijurisdictional investigations potentially faced by international companies.

1. Changes Introduced by the *Loi Sapin II*

The principal aspects of the *Loi Sapin II* are: (i) establishing a new French Anti-corruption Agency ("AFA"); (ii) expanding extraterritorial application of French law in relation to certain corruption-related offenses; (iii) introducing obligatory compliance programs; (iv) enhancing the status and protection of whistleblowers; and (v) adopting a deferred prosecution agreement ("DPA") procedure. Notably,

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1. Quoted texts from the *Loi Sapin II* are translations by the authors.
2. *Assemblée Nationale, Session Ordinaire de 2016-2017, Texte Adopté n° 830 (8 novembre 2016)*, http://www.assemblee-nationale.fr/14/ta/ta0830.asp (hereinafter "*Loi Sapin II*"). *See also* Frederick T. Davis, Sean Hecker and Charlotte Gunka, "France Takes Steps to Implement Its Anti-Corruption Laws – or Does It?", FCPA Update, Vol. 7, No. 10 (May 2016), http://www.debevoise.com/insights/publications/2016/05/fcpa-update-may-2016.
3. *Assemblée Nationale, Travaux préparatoires, Saisine du Conseil Constitutionnel*, http://www.assemblee-nationale.fr/14/dossiers/transparence_lutte_corruption_economie.asp. The Constitutional Council is the highest constitutional authority in France. It is the ultimate authority interpreting the French constitution, constitutional principles, legislation, and treaties concluded by France. It can declare provisions in proposed or current legislation to be contrary to any of the above mentioned norms. Such a declaration renders the disposition invalid, and its decision is binding.

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the *Loi Sapin II* does not seek to alter the French law of corporate responsibility and therefore, unlike the UK Bribery Act, does not create a strict liability corporate offense.

Establishment of the French Anti-corruption Agency

The AFA will replace the current inter-ministerial agency known as the Central Service for the Prevention of Corruption ("SCPC"). Under the authority of the Ministries of Justice and Budget,[4] the AFA will be empowered to: (i) assist and encourage relevant public and private entities in preventing and detecting acts of corruption; (ii) report identified potential offenses to the prosecutor; (iii) monitor the implementation of the French "Blocking Statute" ("FBS")[5] in the context of compliance programs imposed by foreign authorities on companies incorporated in France; (iv) ensure that companies required to adopt compliance programs under the new law have introduced such programs; (v) monitor corporate implementation of compliance programs imposed as a penalty; and (vi) issue an annual public report of its activities.[6]

The AFA is not limited to bribery, but also will be responsible for a broad range of corruption-related offenses, notably influence peddling, unlawful taking of an interest, embezzlement and misappropriation of public funds, and favoritism.[7]

Although it has no investigative or enforcement power, the AFA will include a Sanctions Commission empowered to impose administrative sanctions on companies that fail to implement a required compliance program.[8]

The SCPC was widely viewed as toothless and ineffective, and the new AFA is clearly intended to have a greater impact. Its ability to do so, of course, will depend on its full independence,[9] eventual staffing, and the resources made available to it.

Expansion of the Extraterritorial Application of French Law

The *Loi Sapin II* removes a number of requirements that limited the power of French prosecutors to pursue acts of public corruption committed abroad.[10] Unlike under current law, in such cases there will be no longer any "dual criminality"

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4. *Loi Sapin II*, art. 1.
5. French law No. 68-678 of 26 July 1968, as amended, is the somewhat notorious "French Blocking Statute," or FBS, that prohibits a person or company in France from providing certain kinds of information to a non-French authority for the use in a judicial or administrative proceeding without going through an internationally approved procedure such as under The Hague Convention. *See infra*, n. 52.
6. *Loi Sapin II*, art. 3.
7. *Id.* at art. 1.
8. *Id.*, at art. 2 & 3.
9. *See* Transparency International, "New Anti-corruption Law in France Shows Progress but Does Not Go Far Enough", November 23, 2016, http://www.transparency.org/news/pressrelease/new_anti_corruption_bill_in_france_shows_progress_but_does_not_go_far_enoug.
10. *Loi Sapin II*, art. 21 (adding to *Code pénal* [hereinafter "C. PEN."] art. 435-6-2(Fr.), and art. 435-11-2(Fr.)).

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requirement (i.e., that the conduct represents an offense under laws of both France and the country where it occurred),[11] and prosecutors will be entitled to pursue the wrongdoer even in the absence of complaint filed by either the victim or the relevant foreign authority.[12]

French criminal laws will now be applicable to acts of public corruption if committed outside of France by a French citizen, *or* by a person who has his/her habitual residence in France, *or* by a person – including legal entities – "carrying out all or part of his/her/its economic activity on the French territory."[13] This last provision, which did not exist under the current law and was presumably drafted in intentionally broad language, may signal aggressive extraterritorial application of French anti-corruption laws.

"In all likelihood, the *Loi Sapin II* represents partial but meaningful progress in French anti-corruption efforts, and adds to the complexity of multijurisdictional investigations potentially faced by international companies. . . . Notably, the *Loi Sapin II* does not seek to alter the French law of corporate responsibility and therefore, unlike the UK Bribery Act, does not create a strict liability corporate offense."

Mandatory Compliance Programs

Six months after the law's adoption,[14] all medium and large companies will be required to have a compliance program meeting certain specifications. This requirement will apply to companies or public entities of an industrial or commercial nature, including their presidents, directors, and managers, with (i) an annual turnover *or* annual consolidated turnover exceeding €100 million and (ii) over 500 employees *or* being part of a corporate group whose parent company is headquartered in France and employs more than 500 people.[15]

Under the supervision of the AFA,[16] the relevant companies will be required to adopt measures sufficient to identify and prevent acts of corruption or

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11. *Id.*, at art. 21(1) and (2) (amending C. PEN. art. 113-6,§2(Fr.)).
12. *See* C. PEN. art. 113-8(Fr.).
13. *Loi Sapin II*, art. 21(1) and (2).
14. *Id.*, at art. 17(VIII).
15. *Id.*, at art. 17(I).
16. *Id.*, at art. 17(III).

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influence peddling,[17] occurring in France or abroad.[18] Compliance programs must include:[19] (i) a code of conduct; (ii) an internal whistleblowing mechanism; (iii) a regular corruption risk mapping exercise; (iv) a risk assessment process; (v) third-party due diligence procedures; (vi) accounting controls; (vii) training programs for employees exposed to high risks of corruption and influence peddling; (viii) disciplinary procedure; and (ix) an audit mechanism to assess the effectiveness of the compliance program.

Companies and their directors, presidents, and managers may be sanctioned by the AFA for not implementing compliance procedures meeting these requirements. AFA's Sanctions Commission will be able to impose administrative – but not criminal – sanctions, including: (i) warnings; (ii) injunctions, ordering the improvement of the compliance program within a period of up to three years; and (iii) financial penalties, which cannot exceed €200,000 for individuals and €1 million for legal entities. A decision ordering an injunction or a financial penalty may be published by the AFA.[20]

In addition, the *Loi Sapin II* permits courts imposing sanctions on entities found guilty of an offense related to public probity (*e.g.*, bribery and influence peddling of public officials) to compel the implementation of a compliance program. The AFA will be in charge of monitoring the implementation of such program for a period that can last up to five years, with assistance from approved third parties as deemed necessary.[21] It will report annually to the prosecutor on the effective implementation of the program.[22] Failure to comply with the measures requested in the context of this penalty may result in a new penalty of two years of imprisonment and a fine of €50,000.[23]

Enhancement of Whistleblower Protection

The *Loi Sapin II* enhances the status of whistleblowers in accordance with international standards.[24] Whistleblower protection will not be limited to violations

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17. Article 432-2 of the French Penal Code defines "influence peddling" as promising or giving anything of value to someone with real or supposed influence with a government or administrative authority in order to obtain a favorable action. The law also criminalizes accepting or proposing payments or gifts for the exercise of real or supposed influence. *See* C. PEN. art. 432-2(Fr.).

18. *Loi Sapin II*, art. 17(I).

19. *Id.*, at art. 17(II).

20. *Id.*, at art. 17(III-V).

21. *Id.*, at art. 18(I) (adding to C. PEN. art. 131-39-2(Fr.)).

22. *Id.*, at art. 18(II) (adding to *Code de procédure pénale* [hereinafter C. PR. PEN.] art. 764-44(Fr.)).

23. *Id.*, at art. 18(I) (adding to C. PEN. art. 434-43-1(Fr.)).

24. In particular, Transparency International declared publicly that the status and protection of whistleblowers are now in line with Transparency France's guiding principles and a petition signed by seventeen Non-Governmental Organizations. *See* Transparency International, "New Anti-corruption Law in France Shows Progress but Does Not Go Far Enough", *supra* n. 9.

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of laws or regulations. A whistleblower is defined broadly as "an individual who reveals or signals, in a disinterested manner and in good faith, a crime or a misdemeanor, a serious and clear violation of an international convention ratified or approved by France, of an unilateral act by an international organization derived from such an engagement, of a law or regulation, or a threat or a serious damage to public interest of which he/she has personal knowledge."[25] There are exceptions for facts, information, and documents classified for national security purposes, or covered by medical confidentiality or attorney-client privilege.[26]

The new law introduces measures to ensure the anonymity and non-liability of whistleblowers. Companies must implement procedures that: (i) enable whistleblowers' reporting to direct or indirect supervisors, and, in the absence of actions taken by the designated supervisor or in case of an imminent danger, directly to judicial or administrative authorities;[27] (ii) ensure that whistleblowers' identities are kept secret;[28] and (iii) prohibit retaliation against whistleblowers, especially in employment.[29]

Individuals who do not respect these provisions may be punished by (i) one year's imprisonment and a fine up to €15,000 for those who retaliate against a whistleblower or attempt to prevent the latter from making a report,[30] and (ii) two years' imprisonment and a fine up to €30,000 for those who reveal a whistleblower's identity.[31]

Adoption of a DPA Procedure

Perhaps the most noteworthy feature of the new legislation is a procedure that to some degree emulates DPAs as practiced in the United States and, especially, the United Kingdom. This provision – which was initially rejected by the Council of State, which advises on proposed legislation – was clearly adopted in response to the perceived threat of U.S. prosecutions of French companies in the area of overseas corruption, of which there have been several,[32] and in particular to give prosecuting authorities in France better tools with which to pursue such matters.

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25. *Loi Sapin II*, art. 6.
26. *Id.*
27. *Id.*, at art. 8.
28. *Id.*, at art. 9(I).
29. *Id.*, at art. 10.
30. *Id.*, at art. 13(I).
31. *Id.*, at art. 9(II).
32. *See* Frederick T. Davis, "The Fight Against Overseas Bribery – Does France Lag?" Ethic Intelligence (Jan. 2015), http://www.ethic-intelligence.com/experts/7546-fight-overseas-bribery-france-lag/ (describing US DPAs signed by French companies).

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The *Loi Sapin II* introduces into the French Code of Criminal Procedure a procedure to be known as Judicial Convention of Public Interest ("JCPI"), which permits a negotiated outcome for legal entities – but not individuals – without a criminal conviction.[33] Under it, a company may conclude a JCPI with a French prosecutor either (i) prior to the commencement of the "public action"[34] (*i.e.*, before initiation of criminal prosecution), if proposed by the prosecutor,[35] *or* (ii) after criminal investigation has commenced and an investigating magistrate has concluded that the facts constitute the commission of a crime, if proposed by the prosecutor or the investigating magistrate *and* agreed by the prosecutor.[36] This second option essentially mirrors the process that was introduced in 2011 in the context of the French guilty plea procedure, known as a "CRPC," which has been very sparingly used by corporations and which under its current version results in a criminal conviction.[37] In both instances, the corporation must acknowledge facts sufficient to demonstrate the commission of a relevant crime.

Under the JCPI, the corporate defendant will agree to (i) the payment of a fine proportionate to the benefit secured through the illicit activity, up to 30% of the company's average annual turnover over the previous three years; and (ii) a compliance program under a monitorship overseen by the AFA for an agreed-upon period up to three years (for which cost of implementation will be assumed by the company).[38] At the end of this period, the agreement will be complete, and the "public action" will be "extinguished," thereby prohibiting any future prosecution of the matter.[39]

The JCPI appears to be much more similar to the British DPA than to US version, since any JCPI will have to be first approved by the president of the regional court after a public hearing, at which any victims, as well as corporate representatives,

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33. *Loi Sapin II*, art. 22.

34. In our May 2016 issue, *supra* n. 2, we described the notion of "public action" (called "*action publique*" in French) as referring to the stage of the French criminal procedure when an act or a defendant (author of the act and/or his accomplices) are referred to the competent judicial authority, in order to (i) establish whether the act constitutes an offense under French criminal law (*i.e.*, matter referred *in rem* to the investigating magistrate); (ii) determine whether the defendant is guilty; and (iii) impose an appropriate sanction on the defendant. The *action publique* is generally initiated by the French Public Prosecutor on behalf of the society, but can also be triggered by any person who claims being the victim of an offense. Under French law, once the *action publique* is "extinguished" as to specific defendants (e.g. due to death, *res judicata*, expiration of the statute of limitation, amnesty), they cannot be prosecuted for the acts in question. *See* C. PR. PEN. art. 6(Fr.).

35. *Loi Sapin II*, art. 22(I) (adding to C. PR. PEN. art. 41-1-2(Fr.)).

36. *Id.*, at art. 22(V) (adding to C. PR. PEN. art. 181-2(Fr.)).

37. *See* Frederick T. Davis, Sean Hecker and Charlotte Gunka, "In France's First Corporate Plea Agreement, Swiss Bank Resolves Money Laundering Investigation," FCPA Update, Vol. 7, No. 2 (February 2016), http://www.debevoise.com/insights/publications/2016/02/fcpa-update-february-2016.

38. *Loi Sapin II*, art. 22(I).

39. *Id.*, at art. 22 (IV).

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will be heard.[40] If victims are identified and can demonstrate their standing and damages caused by the offense, the JCPI will require compensating them within a year for the losses resulting from the punished wrongdoing.[41] Once approved, the JCPI will be published on the AFA's website and will be the subject of a press release by the prosecutor.[42] The judge will rely on the following criteria for validating or dismissing the JCPI: (i) merits of the JCPI, (ii) regularity of the process, (iii) compliance of the financial penalty with the authorized threshold (up to 30% of the company's average annual turnover over the previous three years), and (iv) proportionality of the measures with the advantages gains from the wrongdoing.[43] The President of the Paris regional court (*Tribunal de Grande Instance*) also indicated publicly, although somewhat vaguely, in October 2016 that it will rely on a number of different considerations, including whether the background of the matter has been sufficiently explained, the intended goal of the agreement, the expected corporate profit, and whether the corporation had a compliance program.[44]

"Six months after the law's adoption, all medium and large companies will be required to have a compliance program meeting certain specifications. . . . Companies and their directors, presidents, and managers may be sanctioned by the [new French Anti-corruption Agency] for not implementing compliance procedures meeting these requirements."

The new JCPI procedure will only be available to corporate entities accused of offenses related to public and private corruption, whether domestic or foreign, as well as of laundering of the proceeds of tax crimes (but not for tax crimes themselves).[45]

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40. *Id.*, at art. 22 (II).
41. *Id.*
42. *Id.*
43. *Id.*
44. Public address by Jean-Michel Hayat, President of the *Tribunal de Grande Instance de Paris*, during the second edition of the French Annual Lawyers Congress at *La Défense*, Paris, October 14, 2016.
45. *Loi Sapin II*, art. 22(I).

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2. Potential Impact of the *Loi Sapin II*

The *Loi Sapin II* offers French authorities some useful tools that could make headway in the worldwide fight against corruption. The efficacy of these tools will depend on the capacity of the French authorities to implement them effectively, both in terms of investing resources and by giving corporate decision-makers sufficient incentives to use the newly adopted framework.

How the authorities implement the JCPI will be particularly important. At present, no French company has taken advantage of the CRPC guilty plea procedure, preferring to follow the strategy of pursuing the criminal process to its conclusion. As the criminal process often takes up to ten years to reach a resolution, only to result in relatively minor corporate fines, this "don't negotiate" strategy has made sense. This is particularly true because companies in the French judicial system have defenses not available to their U.S. counterparts that they would forego by concluding a DPA-style agreement.

French Corporate Liability Principles

Corporate criminal responsibility principles under article 121-2 of the French Penal Code are likely to represent a major disincentive for corporate decision makers to resort to a negotiated outcome provided by the JCPI. Unlike U.S. laws and precedent that allow for near-automatic corporate liability for the actions of employees or agents, article 121-2 provides that a corporation or other corporate entity may be criminally responsible only for the acts committed "on its behalf " by an "organ or representative" of the corporation. While not entirely consistent, a number of decisions have suggested that corporations may, under circumstances that would clearly result in corporate responsibility in the United States, have a successful defense under article 121-2.

As described previously,[46] in the *Continental Airlines* case,[47] for example, the airline was originally convicted of criminal negligence with respect to the July 25, 2000 crash of the Concorde. But the Court of Appeals reversed the decision in 2012, on the basis that because there was no recognizable "work contract" in the United States between Continental and the employee in question who had committed the criminal act, it could not find the airline responsible for its employee's acts. More recently in 2015, the public prosecutor in the *Safran* case – the only corporation yet convicted in France for overseas bribery – publicly took the position on appeal that the

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46. *See* Davis et al., "France Takes Steps to Implement Its Anti-Corruption Laws – or Does It?," *supra n.* 2.

47. Versailles Court of Appeals, chamber 8, B, November 29, 2012, *Continental Airlines Inc – Ford Stanley – Frantzen Claude – Taylor Jonh – Perrier Henri – Herubel Jacques c/ parties civiles et autres*, RG n° 11/00332.

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corporation should be acquitted, even though two of its officers had been convicted, because it had not been demonstrated that they could "bind" the corporation.[48]

This jurisprudence fundamentally influences corporate strategy in dealing with criminal investigations. And the *Loi Sapin II*, which does not adopt a corporate offense such as under Section 7 of the U.K. Bribery Act, does not alter these incentives. A company facing prosecution in the United States, knowing that it is virtually certain to be criminally responsible for wrongdoing by an employee, as well as a company subject to British law that could be found criminally responsible for the the so-called corporate offense of failing to prevent bribery by an associated person (absent a compliance program satisfying the adequate procedures defense),[49] has every incentive to cooperate with prosecutors in order to ensure an efficient investigative process and obtain a swift and definitive negotiated solution. In parallel circumstances, cooperation with French authorities would mean giving up a promising corporate defense.

In addition, further factors such as (i) the length of the investigations, which often last ten years or more, and (ii) the relatively small maximum criminal penalties that could be imposed after trial, also diminish any incentive to negotiate. The *Loi Sapin II* does little to alter these incentives as the financial penalty under a JCPI is based on a percentage of annual turnover, which may even be greater than the maximum penalty established for corruption under the French Penal Code (up to €5 million for legal entities) and applicable after a trial.

As a result, the *Loi Sapin II* may fall short of its aims if corporate decision-makers find that the advantages of negotiating a non-criminal outcome do not outweigh the existing advantages of a long investigation coupled with a low "worst case" risk and the distinct possibility of a corporate acquittal.

Cooperation with Enforcement Authorities

Current U.S. policy applicable to the FCPA heavily emphasizes that corporations seeking full cooperation credit in connection with resolving criminal charges must provide "total cooperation," especially in the form of providing evidence, including relating to individuals involved in the misconduct to prosecutors.[50]

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48. *See* Frederick T. Davis, "The Fight Against Overseas Bribery – Does France Lag?" Ethic Intelligence (Jan. 2015), http://www.ethic-intelligence.com/experts/7546-fight-overseas-bribery-france-lag/; and Frederick T. Davis, "Corporate Criminal Responsibility in France – Is It Out of Step?" Ethic Intelligence (April 2015), http://www.ethic-intelligence.com/experts/8344-corporate-criminal-responsibility/. On appeal, the Court of Appeals ultimately acquitted Safran on other grounds, and thus did not reach the issue of its responsibility for the acts of its employees.

49. The French legislators chose not to emulate the British experiment with Section 7 of the UK Bribery Act, which provides for a virtually strict-liability corporate conviction, subject to the adequate procedures defense. As noted above, the *Loi Sapin II* provides a relatively modest administrative, but not criminal, penalty for failure to have a sufficient compliance program.

50. See Paul R. Berger, Andrew M. Levine, Bruce E. Yannett, and Philip Rohlik, "U.S. Department of Justice Issues New FCPA Guidance and Launches Pilot Enforcement Program," FCPA Update, Vol. 7, No. 9 (April 2016), http://www.debevoise.com/insights/publications/2016/04/fcpa-update-april-2016.

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In contrast, the *Loi Sapin II*, as well as existing French practice and procedures, is silent on the issues of cooperation and self-disclosure, which are foreign to French judicial and prosecutorial culture. Neither French companies nor French prosecutors or investigating magistrates have real experience with such extensive cooperation. Any agreement based on such a commitment certainly could raise a host of workplace and labor issues, concerns for privacy, and difficulties in doing an "internal investigation" in France.[51] As a result, under current French law (unaltered by the *Loi Sapin II*) a corporate resolution reached with French authorities might not fully identify the individuals responsible for the relevant conduct and therefore may not satisfy U.S. authorities.

"The efficacy of [the new anti-corruption tools] will depend on the capacity of the French authorities to implement them effectively, both in terms of investing resources and by giving corporate decision-makers sufficient incentives to use the newly adopted framework."

French Blocking Statute

While the FBS has been in effect for more than 30 years, its relatively infrequent enforcement in France has convinced many judges in the United States that it is not to be taken seriously and is generally disregarded.[52] Its appearance in the *Loi Sapin II*, as well as references to it during legislative debates,[53] may well be a signal to French prosecutors and judges to step up their enforcement of the law, particularly with respect to U.S. investigations in France. This is particularly true in light of increased commentary in the French press that U.S. prosecutions of

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51. In March 2016, the Paris Bar issued an opinion clearly stating for the first time that Paris lawyers can in fact conduct internal investigations for corporate clients. The opinion notes, however, that a number of important issues remain to be addressed, including the extent of "warnings" that must be given to corporate employees being interviewed. *See* Paris Bar Internal Regulation, Appendix 23, http://dl.avocatparis.org/reglement_interieur/RIBP.htm#_Toc462309382.

52. *See*, e.g., Motorola Corporation, et al v. Uzan, et al, No. 1:2002cv00666 - Document 1048 (S.D.N.Y. 2014), reported in http://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2002cv00666/33407/1048/ . *See generally* P. Grosdidier, "The French Blocking Statute, The Hague Evidence Convention and the Case Law: Lessons for French Parties Responding to American Discovery", 50 Tex. Int' L. J. F. 11 (2014), http://www.haynesboone.com/~/media/files/attorney%20publications/2014/the%20french%20blocking%20statute%20%20the%20hague%20convention%20%20and%20the%20case%20lawsixth%20version%20v5.ashx.

53. The June 7, 2016 parliamentary debates on the *Loi Sapin II* revealed that the French government is willing to amend the 1968 law on the FBS in the future, and strengthen the sanctions for violation of the FBS. *See* Minutes from the second session at the *Assemblée Nationale* discussing the *Loi Sapin II*, June 7, 2016, http://www.assemblee-nationale.fr/14/cri/2015-2016/20160206.asp#P800563. Those measures were initially mentioned in the context of the draft bill on economic growth and activity (*Loi "Macron"* of August 2015) but finally rejected.

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French companies reflect an attempt to protect U.S. economic interests rather than pursuing a "level playing field" in the fight against overseas corruption.[54]

As a consequence, companies subject to an investigation by the U.S. authorities are likely to face an increasingly serious dilemma. This may result in the company losing cooperation credits granted by the U.S. authorities, or facing a criminal and/or civil trial in France for violation of the FBS.

International Double Jeopardy

A further concern that French corporate decision-makers may face is to evaluate the effect that a negotiated outcome will have on prosecutions elsewhere in the world, notably in the United States. As reported in a previous issue,[55] a relatively recent decision in France provides that companies that reach a DPA or Non-Prosecution Agreement with U.S. authorities cannot be prosecuted in France because of the double jeopardy (or, more correctly, the civil law Latin term *ne bis in idem*) provisions of the International Covenant on Civil and Political Rights (ICCPR). However, since the ICCPR does not create individual rights in the United States, U.S. authorities will not recognize as preclusive a French criminal judgment – whether based on a negotiated outcome or even a conviction after trial.[56]

Corporate decision-makers contemplating a negotiated outcome in France will thus have to grapple with the risk of a subsequent U.S. prosecution, and if they are subject to U.S. law may well decide to negotiate first, or even exclusively, with U.S. prosecutors.[57]

3. Conclusion

Analysis of the potential impact of the *Loi Sapin II* depends on the current enforcement environment, one in which the United States almost invariably takes the lead in aggressively pursuing international bribery. This environment is evolving into a more complicated multijurisdictional (or, as the French are fond of saying, "multi-polar") world for two reasons. First, more countries are

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54. A recent decision in the popular French weekly *L'Express*, entitled (in informal English translation) "The Big Racket of Economic Sanctions," reports that two members of the French National Assembly are proposing legislation to rein in U.S. prosecution of French companies, including by taking retaliatory measures. "*Le Racket Géant des Amendes Economiques*", L'Express, No. 3410, November 9, 2016.

55. Frederick T. Davis and Antoine F. Kirry, "A Recent Decision in France Applies 'International Double Jeopardy' Principles to U.S. DPAs," FCPA Update, Vol. 7, No. 2 (September 2015), http://www.debevoise.com/insights/publications/2015/09/fcpa-update-september-2015. For a fuller and updated discussion *see* Davis, "International Double Jeopardy: US Prosecutions and the Developing Law in Europe," 31 Int'l Law Review 58 (2016).

56. *See* Davis, Does International Law Require a Double Jeopardy Bar?, https://globalanticorruptionblog.com/2016/10/18/guest-post-does-international-law-require-an-international-double-jeopardy-bar/.

57. *See* Davis, The US Needs to Show More Respect for Foreign Prosecutions, https://globalanticorruptionblog.com/2016/11/03/guest-post-the-us-needs-to-show-more-respect-for-foreign-prosecutions/.

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asserting extraterritorial jurisdiction with laws such as the UK Bribery Act and the *Loi Sapin II*. Second, even without extraterritorial laws, more countries are aggressively investigating their own companies and companies whose activities have strong connections to their territory, as was the case in the Siemens (German company) and VimpelCom (Dutch company) enforcement actions, and is the case in several ongoing investigations including Brazil's "Operation Car Wash" and the 1MDB investigations in Switzerland and Singapore.

In the multijurisdictional and cross-border world, corporations simultaneously investigated for corruption by more than one country must evaluate whether and how to engage with different enforcement authorities. U.S. Department of Justice officials have recently emphasized that it puts a high priority on cooperation with non-U.S. authorities and it could, on some occasions, defer to other countries' investigations.[58] Its recent track record, including the VimpelCom[59] and Embraer[60] settlements, suggest that such cooperation results in sharing of the penalties with other countries, often the country of the corporate defendant's incorporation – roughly 50/50 in the case of VimpelCom and roughly 80/20 in favor of the U.S. in the case of Embraer. The *Loi Sapin II* creates a mechanism by which French authorities can participate in this process. Depending on the efficacy of its implementation, it may result in the possibility of other countries deferring to a French investigation of French companies. French authorities will certainly push for such outcomes when appropriate, and may well emphasize France's blocking statute and data protection rules to encourage them.

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58. U.S. Department of Justice, "Assistant Attorney General Leslie R. Caldwell Delivers Remarks Highlighting Foreign Corrupt Practices Act Enforcement at The George Washington University Law School", Washington, D.C., November 3, 2016, https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-highlighting-foreign. *See also* Veronica Glick and Jonathan Tuttle, "Assistant Attorney General Caldwell's Q&A Regarding FCPA Enforcement", FCPA Professor, November 4, 2016, http://fcpaprofessor.com/assistant-attorney-general-caldwells-qa-regarding-fcpa-enforcement/.

59. *See* https://www.justice.gov/criminal-fraud/fcpa/cases/vimpelcom.

60. *See* https://www.justice.gov/opa/pr/embraer-agrees-pay-more-107-million-resolve-foreign-corrupt-practices-act-charges.

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