THE REVIEW OF
SECURITIES & COMMODITIES REGULATION
AN ANALYSIS OF CURRENT LAWS AND REGULATIONS AFFECTING THE SECURITIES AND FUTURES INDUSTRIES

Vol. 54 No. 18 October 20, 2021

# CROSS-BORDER INVESTIGATIONS IN A "FLAT" INVESTIGATION WORLD

*In this article, the authors begin by describing the growth of global multi-enforcement actions, including "follow-on" prosecutions. They then turn to factors responsible for this growth: expansive extraterritorial enforcement by U.S. authorities, the rise in international cooperation, and new local laws and agencies. In the last section they outline strategies for companies to mitigate and deal with global risks as they arise.*

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Cross-border investigations are now truly global events. As recently as a decade ago, a cross-border matter largely only involved the enforcement authorities of one or two countries and often resulted in a single settlement. Today, cross-border investigations are rarely so limited. The involvement of multiple enforcement authorities has become the rule rather than the exception, and settlements of cross-border issues now often involve payments to various foreign authorities. In short, the investigation world has become flat — that is, enforcement authorities across the globe may each assert themselves in cross-border matters triggering potential risk of multiplied payments in resolutions.

This article analyzes this new flat cross-border investigation world. It first analyzes the risks of this new reality and discusses the factors that created a flat enforcement world; factors that will continue to flatten it. Finally, it proposes some best-practice approaches to improve cross-border investigations and to mitigate the new risks. Ideally, companies should adopt a global compliance focus when crossing country borders before a red flag generates a full blown investigation. Once an investigation arises, counsel can implement other strategies to mitigate global risk. A number of such strategies are discussed below in Section III of this article.

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***FORTHCOMING***

- ***A DIVIDED SEC (FINALLY) ADOPTS SWEEPING RULE GOVERNING FUND USE OF DERIVATIVES***

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## I. THE INVESTIGATION WORLD HAS BECOME FLAT

In an interconnected investigation world, cross-border investigations carry global risk. A violation of law in one country may result in legal liability in another, giving each country's enforcement agency a chance to collect the often lucrative penalties that result from such violations. This reality has increased the stakes of cross-border investigations tremendously.

This is readily apparent in the growth of the breadth, cost, and frequency of global multi-enforcement actions. For example, in the last two years alone, there have been multiple global settlements totaling over one billion dollars. In the last few years, settlements involving Goldman Sachs,[1] Airbus,[2] and Ericsson[3] each totaled at least a billion dollars in total penalties, fines, and disgorgement with U.S. and foreign enforcement authorities, not counting the associated legal fees. In contrast, a decade ago, such actions were rare.

A lesser-reported risk in a flattened investigation world is the increase in "follow-on" or parallel prosecutions. Enforcement agencies often draft settlements and accompanying press releases to frame misconduct unequivocally, without nuance, and with little if any input from counsel. And if not disclosed by law enforcement authorities, a global media prone to sensationalism highlights the worst rumors of nefarious conduct when enforcers publicly release resolution information. These public disclosures can attract the attention of other enforcers and prompt them to open investigations. Often their first impression is hard to change.

There are a host of examples highlighting the risk of follow-on prosecutions. For instance, in December 2016, U.S. authorities settled an enforcement action with the Israeli pharmaceutical company Teva Pharmaceutical Industries Limited in which Teva agreed to pay $520 million in connection with alleged bribery schemes in Russia, Ukraine, and Mexico.[4] In February 2017, the company announced that the Israeli authorities also opened a probe into the same underlying conduct.[5] In January 2018, the Israeli Justice Ministry announced that Teva agreed to pay approximately $22 million in penalties to resolve allegations of bribery in Russia, Ukraine, and Mexico.[6]

One of the most well-known examples of cross-border follow-on prosecutions involved the Brazilian construction conglomerate Odebrecht S.A. (since renamed Novonor). In December 2016, Odebrecht settled bribery charges with American, Brazilian, and Swiss enforcement authorities to pay a combined $3.5 billion in connection with alleged bribery schemes in 12 countries.[7] The settlement, however, prompted numerous

[1] Press Release, U.S. Dep't of Just., Goldman Sachs Charged in Foreign Bribery Case and Agrees to Pay Over $2.9 Billion (Oct. 22, 2020), https://www.justice.gov/opa/pr/goldman-sachs-charged-foreign-bribery-case-and-agrees-pay-over-29-billion.

[2] Press Release, U.S. Dep't of Just., Airbus Agrees to Pay over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case (Jan. 31, 2020), https://www.justice.gov/opa/pr/airbus-agrees-pay-over-39-billion-global-penalties-resolve-foreign-bribery-and-itar-case.

[3] Press Release, U.S. Dep't of Just., Ericsson Agrees to Pay Over $1 Billion to Resolve FCPA Case (Dec. 6, 2019), https://www.justice.gov/opa/pr/ericsson-agrees-pay-over-1-billion-resolve-fcpa-case.

[4] Press Release, U.S. Dep't of Just., Teva Pharmaceutical Industries Ltd. Agrees to Pay More Than $283 Million to Resolve Foreign Corrupt Practices Act Charges (Dec. 22, 2016), https://www.justice.gov/opa/pr/teva-pharmaceutical-industries-ltd-agrees-pay-more-283-million-resolve-foreign-corrupt.

[5] Toi Staff & Shoshanna Solomon, *Israeli authorities investigating Teva over bribe allegations*, THE TIMES OF ISRAEL (Feb. 8, 2017), https://www.timesofisrael.com/israeli-authorities-investigating-teva-over-bribe-allegations.

[6] Shoshanna Solomon, *Teva to pay NIS 75 million to Israel authorities to settle foreign bribe claims*, THE TIMES OF ISRAEL (Jan. 15, 2018), https://www.timesofisrael.com/teva-to-pay-nis-75-million-to-israel-authorities-to-settle-foreign-bribe-claims.

[7] Press Release, U.S. Dep't of Just., Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History (Dec. 21, 2016), https://www.justice.gov/opa/pr/odebrecht-and-

follow-on prosecutions. Ecuador, Colombia, the Dominican Republic, Panama, and Guatemala all subsequently opened investigations into the same underlying conduct. Some of these investigations resulted in significant financial cost to Odebrecht. For example, the company agreed to pay $220 million in fines to the Panamanian authorities related to the same underlying conduct.[8] The number of follow-on prosecutions and the significant costs of these investigations contributed to Odebrecht filing for bankruptcy in both Brazil and the US in the summer of 2019.[9]

Non-US bribery settlements have also prompted follow-on prosecutions by U.S. enforcement authorities. For example, in May 2017, Brazil-based investment firm J&F Investimentos agreed to pay a $3.2 billion fine to Brazilian prosecutors to settle bribery charges.[10] Both the U.S. Department of Justice and U.S. Securities and Exchange Commission opened subsequent investigations into the same underlying conduct,[11] resulting in the payment of a $256 million criminal penalty to the DOJ[12] and around $27 million in disgorgement to the SEC in October 2020.[13]

In sum, in a flattened investigation world, there is an increased risk that enforcement authorities from different jurisdictions will pursue companies for violations underpinning cross-border investigations. Serial or multiple investigations by different enforcement agencies present a significant challenge for counsel, and often results in exponential growth in the costs of the investigation and resolution payments. Local customs and practices thus have much more significance because what formerly was a local or regional risk now carries global risk. Counsel handling cross-border matters must now account for these added risks.

## II. THE CROSS-BORDER WORLD WILL CONTINUE TO FLATTEN

This re-shaping of cross-border investigations has been largely driven by expansive extraterritorial enforcement by U.S. authorities, historically the *de facto* world leader in prosecuting cross-border matters, as well as increased international cooperation among enforcement authorities. These trends are expected to continue. New local criminal laws and agencies to prosecute cross-border matters are likely to continue to lead to the flattening of the cross-border investigation world.

### *A. Expansive Extraterritorial Enforcement by U.S. Authorities*

U.S. authorities have adopted a broad approach to extraterritorial enforcement. Although criminal law is typically territorial,[14] U.S. law enforcement has taken the position that even limited contact with the territorial United States, such as the use of the financial system or even U.S.-based servers, may afford jurisdiction over conduct outside the country. U.S. authorities, self-endowed by their viewpoint, pursue matters involving wholly foreign entities, investigating conduct occurring entirely outside the U.S. with only a tenuous connection to the U.S.

Nowhere is this more apparent than U.S. enforcement authorities' expansive interpretation of the Foreign

*footnote continued from previous page…*

braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve.

[8] *Odebrecht agrees to pay $220 million fine, aid Panama probe*, REUTERS (Aug. 1, 2017), https://www.reuters.com/article/us-panama-odebrecht-idUSKBN1AH57C.

[9] *Brazil's Odebrecht files for bankruptcy protection after years of graft probes,* REUTERS (June 17, 2019), https://www.reuters.com/article/us-odebrecht-bankruptcy/brazils-odebrecht-files-for-bankruptcy-protection-after-years-of-graft-probes-idUSKCN1TI2QM.

[10] Ricardo Brito &Tatiana Bautzer, Brazil's J&F agrees to pay record $3.2 billion fine in leniency deal," REUTERS (May 31, 2017), https://www.reuters.com/article/us-brazil-corruption-jbs/brazils-jf-agrees-to-pay-record-3-2-billion-fine-in-leniency-deal-idUSKBN18R1HE.

[11] Luciana Magalhaes & Paul Kiernan, *JBS Parent to Pay $3.2 Billion to Settle Corruption Investigations in Brazil*, WALL STREET JOURNAL (May 31, 2017), https://www.wsj.com/articles/jbs-parent-to-pay-3-16-billion-to-settle-corruption-charges-in-brazil-1496232139.

[12] Press Release, U.S. Dep't of Just., J&F Investimentos S.A. Pleads Guilty and Agrees to Pay Over $256 Million to Resolve Criminal Foreign Bribery Case (Oct. 14, 2020), https://www.justice.gov/opa/pr/jf-investimentos-sa-pleads-guilty-and-agrees-pay-over-256-million-resolve-criminal-foreign.

[13] Press Release, U.S. Sec. & Exchange Comm'n, SEC Charges Brazilian Meat Producers with FCPA Violations (Oct. 14, 2020), https://www.sec.gov/news/press-release/2020-254.

[14] Charles Doyle, Cong. Research Serv., 91-166, Extraterritorial Application of American Criminal Law (Oct. 31, 2016), https://fas.org/sgp/crs/misc/94-166.pdf.

Corrupt Practices Act ("FCPA"). The Second Edition of the Resource Guide to the U.S. Foreign Corrupt Practices Act ("Resource Guide"), published by the DOJ and SEC in July 2020, illustrates the U.S. authorities' broad extraterritorial interpretation of the FCPA. The statute requires that U.S. authorities establish that a violation "make use of the mails or any means or instrumentality of interstate commerce." Echoing the position that U.S. authorities have adopted in their prosecutions involving wire fraud and money laundering, among others, the Resource Guide states that "sending a wire transfer from or to a U.S. bank or otherwise using the U.S. banking system" involves interstate commerce.[15] Because of the United States' central role in the global banking system, this position grants U.S. authorities nearly unlimited extraterritorial reach.

U.S. authorities, however, have expanded their authority under the FCPA even farther. The Resource Guide also states that merely "placing a telephone call or sending an e-mail, text message, or fax from, to, or through the United States involves interstate commerce."[16] Under this approach, actions entirely outside the U.S. involving individuals based abroad could be prosecuted by U.S. authorities if any kind of electronic communication was routed "through" a U.S. server. This approach captures a huge swath of extraterritorial conduct and is a possible overreach of the U.S. enforcement agencies' authority.[17] Unsurprisingly, it has generated much criticism and skepticism of U.S. motives abroad.[18]

Despite this criticism, however, the extraterritorial powers of U.S. authorities will likely continue to expand in the immediate term. New investigation tools have already enlarged or are anticipated to further enlarge U.S. authorities' already expansive powers. One notable example is the U.S. Clarifying Lawful Overseas Use of Data Act ("U.S. CLOUD Act"), which expanded the application of the U.S. Stored Communications Act ("SCA") extraterritorially.[19] The SCA permits U.S. authorities to request data from service providers of electronic communication services (e.g., e-mail) and remote computing services (e.g., cloud computing).[20] Prior to the CLOUD Act, it was unsettled whether the SCA permitted U.S. authorities to obtain information stored on servers located abroad. The U.S. CLOUD Act now requires service providers to disclose all requested records within the provider's "possession, custody, or control" whether or not the information sought is "located within or outside of the United States."[21] As courts have interpreted "possession, custody, or control" relatively broadly in other contexts, the U.S. CLOUD Act has substantially expanded the power of U.S. enforcement agencies to enforce SCA requests abroad.

Another example of a new law expanding the powers of U.S. authorities is the Anti-Money Laundering Act of 2020 ("AML Act"). Incorporated in the National Defense Authorization Act for Fiscal Year 2021, the law encompasses a broad set of new tools for U.S. authorities to fight money laundering. Notably, the AML Act expanded the DOJ's authority to subpoena documents. Prior to the act, the DOJ or the U.S. Treasury Department could issue subpoenas to any foreign bank maintaining a "correspondent account" in the U.S. for "records related to such correspondent account[s]." The AML Act expanded this authority to allow U.S. authorities to request records from these foreign banks relating to "any account at the foreign bank" and not just those related to a U.S. correspondent account.[22] The AML Act further empowers U.S. authorities with various methods to compel compliance, including seeking a contempt order or civil penalties, the latter of which can be enforced through the seizure of funds held in the foreign bank's correspondent account.[23] The AML Act thus grants U.S. authorities broad new enforcement powers.

[15] U.S. Dep't of Just. & U.S. Sec. & Exchange Comm'n, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, at 10 (2d ed. 2020), https://www.justice.gov/criminal-fraud/file/1292051/download.

[16] *Id.*

[17] *See*, *e.g.*, Maxwell Carr-Howard & Matthew A. Lafferman, *How the FCPA's Interstate Commerce Requirement Should Apply to Free Email Services*, THE ANTI-CORRUPTION REPORT (Apr. 18, 2018), https://www.anti-corruption.com/2723626/how-the-fcpa-s-interstate-commerce-requirement-should-apply-to-free-email-services.thtml.

[18] *Uncle Sam's game: America's legal forays against foreign firms vex other countries*, THE ECONOMIST (Jan. 19, 2019), https://www.economist.com/business/2019/01/19/americas-legal-forays-against-foreign-firms-vex-other-countries.

[19] Maxwell Carr-Howard & Matthew A. Lafferman, *The CLOUD Act: Potential thunderstorms on the data privacy frontier*, Dentons client alert (Apr. 19, 2018), https://www.dentons.com/en/insights/alerts/2018/april/19/the-cloud-act-potential-thunderstorms-on-the-data-privacy-frontier.

[20] 18 U.S.C. § 2701 *et seq.*

[21] 18 U.S.C. § 2713.

[22] 31 U.S.C. § 5318(k)(3)(A).

[23] *Id.* § 5318(k)(3)(D)–(F).

### *B. Rise in International Cooperation*

The increase in international cooperation among enforcement authorities has taken several forms. For instance, there has been an increase in formal processes for sharing information. International enforcement authorities have entered new agreements or memoranda of understanding to bypass the historically cumbersome process of sharing information via mutual legal assistance treaties. One notable example is the executive agreements authorized by the U.S. CLOUD Act, which provide alternative avenues for requesting certain data from foreign entities.[24] Other less known examples include information sharing agreements between specific law enforcement agencies, like the updated memorandum of understanding entered between the SEC and the U.K. Financial Conduct Authority in March 2019 that ensures the continuance of information sharing after the U.K.'s exit from the European Union.[25]

In conjunction with this expansion of international legal processes, there has also been an increase in more informal cooperation measures. Embedding and assigning counsel or investigators from enforcement authorities in foreign capitals is one notable feature of this cooperation. However, cooperation has also resulted from formal agreements. For example, in a settlement entered by Airbus with the DOJ, the U.K.'s Serious Fraud Office ("SFO"), and the French enforcement authority Parquet National Financier ("PNF"), the SFO and PNF entered a joint investigation agreement to coordinate investigation strategy, facilitate the collection of evidence, and share collected evidence.[26] The investigation team was formed under authority granted by the EU and mainly prompted by the presence of a French blocking statute that prohibits the transfer of investigative material abroad. Nonetheless, the DOJ's later involvement in the investigation team and the size and scope of the resulting investigation are new aspects of cross-border investigations which will grow in in the coming years.

Nowhere, however, is international cooperation among enforcement authorities more apparent than during resolution. In the last several years, cooperation between U.S. and foreign enforcement authorities at settlement has exploded. In some cases, the amount paid to foreign agencies dwarfs the amount paid to U.S. authorities. One notable example is the 2016 settlement between U.S. authorities and the Brazilian petrochemical company Braskem S.A. Although the total criminal penalty amounted to approximately $632 million, only $94 million of that was paid to the DOJ, while Brazilian authorities collected around $442 million. Another $94 million went to Switzerland.[27] Disgorgement was similarly split — with $260 million of the $325 million going to Brazilian authorities and $65 million paid to the SEC.

This international cooperation in investigation and settlement of cross-border matters is likely to continue. As such, counsel should expect and prepare for international cooperation among enforcement authorities to persist and expand.

### *C. Increase in New Local Laws and Agencies*

Local laws targeting local conduct implicating cross-border matters have multiplied. New anti-bribery laws demonstrate this increase. In December 2020, China amended its bribery law to increase penalties for "non-state functionaries" (i.e., private entities) involved in bribery.[28] Saudi Arabia enacted a new anti-bribery law in March 2019 (effective September 2019) that criminalized bribery in the private sector and expanded the definition of a public official.[29] In January 2019, Italy enacted a "bribe-destroyer" law that increased penalties and expanded definitions in its bribery laws to capture a broader range of conduct.[30] In July 2018, India

[24] Maxwell Carr-Howard & Matthew A. Lafferman, *The CLOUD Act: Potential thunderstorms on the data privacy frontier*, Dentons client alert (Apr. 19, 2018), https://www.dentons.com/en/insights/alerts/2018/april/19/the-cloud-act-potential-thunderstorms-on-the-data-privacy-frontier.

[25] U.S. Sec. & Exchange Comm'n, & U.K. Fin. Conduct Auth., *Amended and Restated Memorandum of Understanding* (Mar. 29, 2019), https://www.sec.gov/about/offices/oia/oia_multilateral/ukfca_mou_2019.pdf.

[26] Judicial Public Interest Agreement between French National Prosecutor's Office and Airbus SE (Jan. 29, 2020), https://www.agence-francaise-anticorruption.gouv.fr/files/files/CJIP%20AIRBUS_English%20version.pdf.

[27] Press Release, U.S. Dep't of Just., Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History (Dec. 21, 2016), https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve.

[28] *Amendments to the Criminal Law of the People's Republic of China*, XINHUA NEWS AGENCY (Dec. 27, 2020), http://www.xinhuanet.com/legal/2020-12/27/c_1126911651.htm?baike.

[29] Royal Decree 4 of 1440 Approving the Anti-Bribery Law.

[30] Maxwell Carr-Howard et al., *Managing corruption risk: A global approach for a global problem*, Dentons client alert

passed the Prevention of Corruption (Amendment) Act, 2018, which expanded liability against companies engaged in public bribery and those acting on their behalf, and mirrored the UK Bribery Act by providing a new defense for companies with "adequate" compliance procedures.[31] These laws are just a few examples of those enacted in the last few years by foreign jurisdictions to combat bribery.

Relatedly, governments have also created altogether new enforcement agencies. For example, in June 2021, the European Union launched an independent prosecutor's office, the European Public Prosecutor's Office, with authority to investigate and prosecute crimes related to the EU budget, such as fraud and corruption.[32] Korea enacted a law in January 2021 establishing a new independent agency, the Corruption Investigation Office for High-Ranking Officials, authorized to investigate and prosecute corruption.[33] And in April 2020, Lebanon enacted a new anti-corruption law creating the National Anti-Corruption Commission, which is tasked with investigating public-sector corruption.[34]

These new laws and enforcement agencies increase the global risk of a cross-border investigation. As more agencies develop and new laws are passed to address the conduct of multi-nationals in the global economy, multiple-enforcement agency actions will also grow.

## III. WHAT APPROACHES BEST MITIGATE NEW GLOBAL RISK?

Counsel must adapt to these new circumstances and risk when conducting cross-border investigations. Tried and true methods of investigatory work still apply. Counsel must investigate thoroughly — understand what happened, where it happened, and who was involved. However, there are several approaches and strategies that counsel can utilize to limit the rising global risk in cross-border matters.

### A. Adopt a Global, Risk-Based Compliance Program

The ideal solution to limit heightened global risk in a flattened investigation world is to implement a global compliance program. An effective compliance program is designed to prevent, detect, and remediate problems before and as they arise. A program must be risk-based, meaning in this context that it must account for the additional enforcement risk that misconduct in some jurisdictions carries over others. Companies should periodically update this program based on developments that warrant a risk review. Examples include the acquisition of a new business, the introduction of a new distribution model or new product line, as well as the passage of time. Importantly, a global compliance program should address and frame issues to better position companies if an investigation were to arise later.

A notable recent example of a potential issue that is best addressed by a compliance policy and controls implemented prior to an investigation is personal messaging applications. These applications are increasingly used by businesses including in foreign markets, even applications not widely used in the U.S. For example, WhatsApp is used widely in conducting international business.[35] WhatsApp is the most popular messaging app in the world, even though its usage in the U.S. is relatively small. As of 2020, WhatsApp reported having approximately two billion worldwide monthly active users, but only 75 million are located in the United States,[36] in which it has only 20 percent market penetration according to some accounts.[37] In comparison, Brazil has 108 million active monthly users[38] which reportedly positions WhatsApp's market

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(May 7, 2019), https://www.dentons.com/en/insights/alerts/2019/may/7/managing-corruption-risk-a-global-approach-for-a-global-problem.

[31] *Id.*

[32] European Commission, EUROPEAN PUBLIC PROSECUTOR'S OFFICE (THE EPPO), (last accessed June 13, 2021), https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/networks-and-bodies-supporting-judicial-cooperation/european-public-prosecutors-office_en.

[33] Bae Ji-hyun, *Constitutional Court rules CIO Act is not unconstitutional*, HANKYOREH (Jan. 29, 2021), http://english.hani.co.kr/arti/english_edition/e_national/981054.html.

[34] Anti-Corruption Law, https://bit.ly/3gzcbB6.

[35] *Most popular global mobile messenger apps as of January 2021, based on number of monthly active users,* STATISTA (Jan. 2021), https://www.statista.com/statistics/258749/most-popular-global-mobile-messenger-apps.

[36] Mansoor Iqbal, *WhatsApp Revenue and Usage* Statistics (2021), BUSINESS OF APPS (May 13, 2021), https://www.businessofapps.com/data/whatsapp-statistics.

[37] *WhatsApp Statistics: Revenue, Usage, and History,* FORTUNLY (Mar. 4, 2021), https://fortunly.com/statistics/whatsapp-statistics/#gref.

[38] Iqbal, *supra* note 36.

penetration at over 80 percent.[39] WhatsApp is similarly popular in South Africa, Argentina, Turkey, Spain, and Indonesia.[40] The widespread use of WhatsApp in these and other countries makes the application a near necessity for those conducting local business. As these applications continue to proliferate in international markets, they are becoming an inevitable issue in cross-border investigations.

The use of these messaging applications is often accompanied by document retention challenges. Many of these applications only allow storage of messages on a user's phone — making collection challenging and subject to potential spoliation. Further, the applications often have ephemeral features, in which messages are automatically deleted after a certain period of time, making retention practically impossible. These challenges have prompted U.S. authorities to be skeptical of the business use of these applications. For example, in a 2018 discussion of the use of these applications, the then-Chief of the FCPA Unit stated "Don't expect full cooperation if there are no records of the misconduct."[41] Although the DOJ's approach towards these applications has since somewhat softened,[42] this viewpoint poses significant challenges for cross-border investigations.

In light of spoliation risk, companies may be well-served by adopting compliance policies that dictate the use and preservation of personal messaging applications when used for business. Of course, determining the compliance approach is a case-by-case consideration and should take into account a variety of factors, including the type of business, the size of the business, the purpose for which the communications are used, and where the business operates. In many foreign locales, permitting the use of personal messaging applications may be seen as essential to do business there. Whatever the approach, implementing a global risk strategy prior to a cross-border investigation can help avoid a chaotic rush to collect the relevant messages at the outset of an investigation and avoid spoliation.

A flat investigation world thus reinforces the need to build and maintain a strong compliance system that thoroughly anticipates and prevents, promptly identifies allegations, and mitigates any identified misconduct.

### *B. Implement a Global Risk Strategy but Emphasize Local Risk and Solutions*

From the outset of a cross-border investigation, counsel should map the investigation to adopt a global risk strategy that analyzes the locales and countries with the greatest risk and focuses investigation resources appropriately. Risk identification should examine the type of conduct, the laws implicated, the legal defenses potentially available, and the relevant availability and benefits of disclosure as well as the potential impact of disclosure in other jurisdictions. This often requires comparing the legal regimes of different jurisdictions.

Counsel should also consider other factors related to the business. For example, investigators considering different locales should examine the profitability of each business operation, as high profitability may carry a risk of heightened penalties or fines. It is not unusual for enforcement authorities to calculate damages based on this measure — after all, some measure of profits causally connected to the misconduct is the starting point in calculating disgorgement and criminal penalties under the U.S. Sentencing Guidelines.

Additionally, counsel should be open to changing the scope of the investigation if new facts change the risk calculus and be nimble enough to react. Clients often resist changing direction mid-investigation but it may be essential in a constantly evolving cross-border investigation with significant global risk. To reduce possible resistance, counsel should consider these issues at the outset.

While counsel needs a global plan to address the relevant risk, the examination inherently requires a focus on issues that are local in nature. Examining the local

[39] Harry Rollason, *What Countries are the Biggest WhatsApp Users?*, CONVERSOCIAL (Mar. 2, 2021), https://www.conversocial.com/blog/what-countries-are-the-biggest-whatsapp-users.

[40] *Id.*

[41] Victoria Graham, *WhatsApp, Wickr Seen by Justice Dept. as Tools to Erase Evidence*, BLOOMBERG LAW (May 16, 2018), https://news.bloomberglaw.com/business-and-practice/whatsapp-wickr-seen-by-justice-dept-as-tools-to-erase-evidence.

[42] Consider, for example, the U.S. DOJ's modifications to the FCPA Corporate Enforcement Policy. When the policy was initially implemented, in the requirements in the context of "timely and appropriate remediation," the DOJ adopted an outright prohibition on the use of these applications. In March 2019, the DOJ removed this outright prohibition on ephemeral or device-based personal messaging and now requires the implementation of "appropriate guidance and controls on the use of personal communications and ephemeral messaging platforms." U.S. Dep't of Just., Just. Manual § 9-47.129 (2018), https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977#9-47.120.

laws, defenses, and conduct may implicate local issues, providing opportunity as well as risk. One massive and common local issue is data privacy. The data of multinational companies is usually scattered across the globe and stored in various jurisdictions. Adding to the challenge of preserving and collecting this data is that outside the European Union, many local jurisdictions have their own data privacy regimes.[43] Those regimes may recognize different personal data or may have data localization laws that require the local storage of personal data. Another issue that is not often thought of as local is privilege. Privilege is inherently local. Different locales recognize different degrees of privilege (or professional secrecy) and many jurisdictions do not have the same protection for privileged materials as the more robust American-style attorney-client and other privileges.

The centrality of local issues in any cross-border investigation underscores the importance of retaining and aligning with local practitioners that are in and of the community. Locals better understand the language, culture, and context, which are at the heart of an effective investigation. Local attorneys are familiar with local business practices and can often more quickly identify abnormal or unusual practices. Further, local terminology for corruption or bribes is often missed by even very good non-native speakers. Native speakers can help identify these terms and also help analyze documents — cutting through the context of a document to more quickly identify aspects that a non-native speaker may flag as false positives or negatives. This additional background on a document or phrase may help demonstrate that it is benign or unrelated to any misconduct, and may become vital to persuading enforcement authorities if they are involved.

Local practitioners can also assist in addressing other local issues that arise in investigations. Take, for instance, preserving privilege. Local practitioners should play a key role in implementing a global strategy to preserve privilege. Local counsel are best suited to identify the parameters of privilege under local law. They can assist lead counsel with crafting a strategy for preserving privilege and protections in jurisdictions where enforcement authorities are inclined to seize privileged materials in dawn raids.

Where privileged materials are stored is critical. The seizure of privileged communications by enforcement authorities in one jurisdiction could lead to the waiver of privilege in other jurisdictions. Seizure can have disastrous consequences for the client and can sometimes implicate ethical issues. Where possible, privileged materials should be generated and stored in a jurisdiction with robust privilege protections.

Another area where local counsel plays an important role in developing a global strategy is data privacy. In cross-border cases, analysis of the relevant data privacy laws is best conducted at the outset of an investigation. Sometimes transferring the data to a law firm's servers in another jurisdiction can violate data protection laws, exposing the client and the firm to unintended consequences. Local counsel again is best positioned to identify the ins and outs of the privacy laws and identify the best solution. A solution may involve storing data on severs local to the source of the data. Other times, the best solution is to obtain consents from data custodians as soon as possible to collect and review the data. However, local counsel can provide valuable input on the best strategy to resolve these situations.

Local practitioners with knowledge of customs and practices can also assist with the document retention challenges that arise with the use of personal messaging applications. Understanding the local market can assist in alerting counsel that these messaging applications are in use and can help identify the primary application or set of applications used by the local business community. This knowledge, in turn, can help ascertain the specific set of risks presented by the use of these applications (e.g., whether it has ephemeral features) and if its software is conducive to remote collection or retention methods that will alleviate the concerns of U.S. authorities.

In sum, a global risk strategy should focus resources on the appropriate risk areas, and incorporate the advice and solutions of local counsel. This approach is vital to resolving issues that commonly create additional risk in a flattened investigation world in cross-border investigations.

### *C. Learn the Relevant Limitations in Each Locality*

As different enforcement authorities have pressed their extraterritorial jurisdiction, governments have moved to recognize limits on this jurisdiction. Counsel conducting cross-border investigations should know the

[43] *See*, *e.g.*, Brian O'Bleness et al., *China implements groundbreaking privacy and personal information protections with the landmark Civil Code*, Dentons client alert (July 8, 2020), https://www.dentons.com/en/insights/articles/2020/july/8/chinas-implements-groundbreaking-privacy-and-personal-information-protections.

relevant limitations and basis for challenging the authority of enforcement agencies at the outset of the investigation.

Courts have issued decisions recognizing limitations of key enforcement agencies to act extraterritorially. For example, the February 2021 ruling by the Supreme Court of the United Kingdom in *R* (*on the application of KBR, Inc*) *v Director of the Serious Fraud Office* (*February 2021*) placed significant constraints on the SFO. There, the U.K. Supreme Court considered whether the SFO's authority extended to compel the production of material stored extraterritorially. The Court limited the SFO's extraterritorial reach, reasoning that Parliament had intended for the SFO to use mutual legal assistance schemes.[44]

A notable limitation on U.S. enforcement agencies was recognized in *United States v. Hoskins*.[45] There, the court considered whether the DOJ could use conspiracy or accomplice liability to bring FCPA charges against non-resident foreign nationals acting outside the U.S. Relying upon a tenet of U.S. law known as the "presumption against extraterritoriality," as well as the specific legislative intent of the FCPA, the court narrowly construed the statute to prohibit U.S. enforcement agencies from relying on these theories of secondary liability.[46]

When seeking to challenge the extraterritorial application of a U.S. statute, counsel should keep in mind the legal principle relied upon in *Hoskins* — the presumption against extraterritoriality — as a significant limitation. This presumption mandates that a U.S. statute is presumed not to apply outside the borders of the U.S. unless rebutted through a clear, affirmative indication that the statute applies extraterritorially.[47] Since 2010, U.S. courts have applied this principle to narrowly construe the application of several federal statutes abroad, like the Alien Tort Statute and Torture Victim Protection Act. As U.S. authorities continue to push the outer limits of their extraterritorial reach, this principle may serve as a valuable defense for limiting this reach.

Although the limitations for other localities are numerous and beyond the scope of this article, determining these limitations is another area in which local practitioners add important value. Local counsel in the relevant community is often best positioned to know the defenses recognized by the legal framework, and which defenses local courts or authorities are likely to respect.

Another source of potential limitations is local blocking statutes. Various jurisdictions have enacted statutes to limit the authority of foreign enforcement authorities to interfere in the affairs of domestic companies and nationals. France's blocking statute is one well known example. Another more recent and less known example is the new blocking statute in China, which establishes the first sanctions blocking regime in China to counteract the impact of foreign sanctions on Chinese persons.[48] As more and more countries encounter the expansion of the extraterritorial reach of foreign enforcement authorities into what they see as unfair encroachment on their sovereignty, the number of these statutes may indeed increase.

### *D. Know the Risks of Voluntary Disclosure and Develop a Strategy Where Appropriate*

The decision to voluntarily disclose is vital in a flat cross-border investigation world. With the heightened risk of follow-on or parallel prosecutions, or simply large multi-national settlements, the decision to disclose in one prosecution is likely a decision to disclose to the world.

Clients and their counsel must evaluate the strategic benefits before voluntarily disclosing. If the benefits

[44] Judgment, *R (on the application of KBR, Inc) (Appellant) v Director of the Serious Fraud Office (Respondent)* (Feb. 5, 2021), https://www.supremecourt.uk/cases/docs/uksc-2018-0215-judgment.pdf ("It is to my mind inherently improbable that Parliament should have refined this machinery as it did, while intending to leave in place a parallel system for obtaining evidence from abroad which could operate on the unilateral demand of the SFO, without any recourse to the courts or authorities of the State where the evidence was located and without the protection of any of the safeguards put in place under the scheme of mutual legal assistance.").

[45] 902 F.3d 69 (2d Cir. 2018).

[46] Maxwell Carr-Howard & Matthew A. Lafferman, *Down but not out: Second Circuit's Hoskins decision narrows but does not eliminate FCPA liability for non-resident foreign nationals acting outside US*, Dentons client alert (Sept. 13, 2018), https://www.dentons.com/en/insights/alerts/2018/september/13/second-circuits-hoskins-decision-does-not-eliminate-fcpa-liability-for-foreign-nationals.

[47] *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010).

[48] Ken (Jianmin) Dai et al., *The new Blocking Regulation in China*, Dentons client alert (Feb. 5, 2021, https://www.dentons.com/en/insights/articles/2021/february/5/the-new-blocking-regulation-in-china.

warrant disclosure in one jurisdiction over another, counsel should adopt a strategy for potential follow-on or parallel prosecutions. Keep in mind that enforcement authorities do not usually credit voluntarily disclosures to authorities in other jurisdictions. For example, although the DOJ and the SEC have agreed to divide penalties with authorities from other jurisdictions, neither agency provides for any express or formal "credit" when a voluntary disclosure is made to a foreign agency.

In determining whether to disclose, counsel should undertake a thorough evaluation of the benefits and costs of a single disclosure, a joint disclosure, or a staged disclosure. Before any disclosure is made, counsel should first determine which agencies have jurisdiction and potentially could be involved. Counsel should also examine the local laws and the relevant policies that grant credit for such disclosure, if any, and how they are consistent or potentially conflict with other applicable laws or disclosure regimes. Consider the difference between the UK Bribery Act and the FCPA. These laws treat facilitation payments differently, with the FCPA recognizing a defense for such payments — albeit a narrow one — not recognized by the UK Bribery Act. In comparison, the UK Bribery Act recognizes an affirmative defense for "adequate procedures," which is not recognized by the FCPA. These small but significant differences between the laws could impact the decision of where to voluntarily disclose. After all, a public declination or closure of an investigation by an enforcement agency is less likely to result in follow-on prosecutions.

Additionally, counsel should consider how the order of disclosure and the resulting follow-on prosecutions could impact a settlement strategy. For instance, U.S. authorities have often credited amounts paid as part of monetary settlements with foreign enforcement authorities.[49] Nonetheless, DOJ leadership has indicated that it may not credit settlements where foreign authorities do not cooperate or a company is seen as trying to "game" the system.[50] In some circumstances, there can be a fine line between developing a coherent strategy and being seen as "gaming" the system. Counsel should be very conscious of avoiding the latter.

## IV. CONCLUSION

In a flat cross-border world, cross-border investigations are truly a global affair. Enforcement actions are no longer driven solely by U.S. authorities and will continue to proliferate. However, companies can mitigate risk by adopting a risk-tailored global compliance program before it turns into a full-blown investigation. Once an investigation arises, however, counsel should consider implementing a global risk strategy that emphasizes local risks and solutions, learning the relevant limitations in each locality, and if voluntary disclosure is considered, adopting a robust strategy for it. ■

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[49] U.S. Dep't of Just., Just. Manual §1-12.100 (2018), https://www.justice.gov/jm/jm-1-12000-coordination-parallel-criminal-civil-regulatory-and-administrative-proceedings.

[50] *Deputy Attorney General Rod Rosenstein Delivers Remarks to the New York City Bar White Collar Crime Institute,* U.S. Dep't of Just. (May 9, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar ("Cooperating with a different agency or a foreign government is not a substitute for cooperating with the Department of Justice. And we will not look kindly on companies that come to the Department of Justice only after making inadequate disclosures to secure lenient penalties with other agencies or foreign governments. In those instances, the Department will act without hesitation to fully vindicate the interests of the United States.").

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