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A COLLECTION OF COMMENTARIES ON THE CRITICAL LEGAL ISSUES IN THE YEAR AHEAD

Government Enforcement: Aggressive Efforts Continue Around the Globe

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Government enforcement efforts in 2013 produced major settlements of matters relating to the global financial crisis, high-profile insider trading convictions, near-record amounts of FCPA settlements, and new pledges of robust and aggressive SEC enforcement activity. We expect these trends to continue in 2014.

US Enforcement Trends

Major Monetary Penalties and a Push to Prosecute

Since the financial crisis began to subside, politicians and commentators repeatedly have criticized federal and state prosecutors for failing to bring charges against banks and executives that they contend bear responsibility for the crisis. In the past year, prosecutors reached a significant number of settlements, with multimillion- and, occasionally, billion-dollar price tags. Yet, the critics persist in their calls for more enforcement activity in the new year, and we believe federal and state authorities will continue to take increasingly harsh positions when investigating perceived wrongdoing by financial institutions and their executives. This includes seeking substantial penalties, acknowledgments of wrongdoing and the imposition of criminal sanctions where extraordinary facts exist.

Aggressive Use of FIRREA

Last year the DOJ began aggressive use of the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) to investigate and prosecute cases arising from the recent financial crisis. FIRREA was enacted in 1989 in response to the savings and loan crisis, but the DOJ has rarely used it in the ensuing two decades. The law's structure explains why the DOJ has turned to it: FIRREA provides the government with a very broad scope without the limitations of other statutory schemes (most especially, the federal securities laws), a reduced burden of proof (preponderance of evidence rather than beyond a reasonable doubt), tough civil penalty provisions, broad investigative authority, incentivizing whistleblower provisions and a generous 10-year statute of limitations.

We expect the DOJ to continue leaning heavily upon FIRREA as part of its final push to bring even more headline-grabbing cases related to the financial crisis. Defining sensible outer limits on FIRREA's reach in terms of liability and penalties will be a challenge. We expect many answers will develop this year, including in public FIRREA litigation rather than behind the closed doors, where financial institutions and other organizations often feel pressure to negotiate resolutions of criminal investigations to avoid the damaging consequences that often accompany a criminal indictment.

Cross-Border Tax Investigations in Switzerland and Beyond

Approximately five years ago, a major global investment bank entered into a deferred prosecution agreement (DPA) with the DOJ and agreed to pay $780 million in fines to the DOJ and SEC to resolve allegations that the bank had conspired with U.S. taxpayers to evade their tax obligations and for having engaged in unregistered broker-dealer

and investment advisor activities in the United States. Since that time, the DOJ and IRS have continued their aggressive pursuit of financial institutions and tax professionals for purportedly conspiring with U.S. taxpayers to defraud the IRS by maintaining undeclared accounts in Switzerland and elsewhere. For example, Wegelin & Co., a Swiss private bank, pled guilty to felony tax charges in 2013 and paid nearly $74 million in fines, after which it announced it would be closing permanently, and public reports have identified more than a dozen other Swiss banks currently under criminal investigation for facilitating tax evasion by U.S. taxpayers. The government's efforts in this area have been significant: Since 2009, the DOJ has brought criminal charges against more than 30 banking professionals and nearly 70 U.S. account holders for violations concerning their offshore banking activities. In addition, more than 50 U.S. taxpayers and four bankers and financial advisors have pled guilty, and five taxpayers have been convicted at trial. Recognizing the risk of prosecution, approximately 40,000 U.S. taxpayers have participated in the IRS's offshore voluntary disclosure program. Most, if not all, of these individuals have likely provided potentially damaging evidence against their former banks, bankers and service providers.

Despite these successes, DOJ officials appear frustrated with the pace of their investigation of the offshore banking industry and inability to obtain client and other information from non-U.S. financial institutions, particularly in Switzerland. To address these issues — and to further its long-standing investigation of the Swiss banking industry — the DOJ announced a voluntary disclosure program for Swiss banks in August 2013.

Generally speaking, the program provides Swiss banks that have reason to believe they may have committed a tax- or monetary-related offense under U.S. law with an opportunity to obtain a nonprosecution agreement (NPA) in exchange for (i) paying a substantial fine based on the value of undeclared accounts that it maintained or opened after August 2008 and (ii) disclosing a significant amount of information about its historical activities and relationships with undeclared U.S. account holders. With respect to the latter obligation, banks must disclose how their cross-border business was structured, the names and functions of employees, and service providers involved in the cross-border business, how undeclared account holders were serviced, and the number and value of undeclared accounts that existed at various points in time after the investigation that led to the DPA became public in August 2008. Banks also must provide nonpersonalized data concerning "leavers" — *i.e.*, undeclared accountholders who moved their account(s) to other banks after August 2008 — including the names of the institutions where any such funds were sent.

Swiss banks are not legally required to participate in the program, but estimates suggest that a significant percentage of the Swiss banking industry will seek an NPA. Many others likely will request a nontarget letter under the program by providing the DOJ with an internal investigation report and other information purportedly establishing that they did not commit a tax or monetary offense. Banks that don't pursue either option and later become targets of DOJ investigations should expect to be aggressively pursued. The DOJ may treat these banks more harshly if it determines they violated U.S. law. While it is impossible to predict outcomes in the abstract, the DOJ may be more likely to indict such banks (as well as culpable employees and managers) and seek financial penalties greater than what the voluntary disclosure program suggests.

While the program is aimed at the Swiss banking industry, it also presents substantial risks to financial institutions in other jurisdictions that maintained or serviced undeclared accounts for U.S. taxpayers. The DOJ and IRS have stated that their enforcement efforts extend beyond Switzerland, and they plan to follow the trail of undeclared money around the world. These threats must be taken seriously since the authorities have and will continue to obtain substantial amounts of potentially incriminating evidence against financial institutions through the Swiss program, the IRS's offshore voluntary disclosure program, cooperating witnesses, whistleblowers and investigations of other banks. Financial institutions with U.S. cross-border private banking operations, particularly those in known private banking centers, should move quickly to evaluate their situations and take appropriate steps.

> "While prosecutors will closely scrutinize the securities industry in 2014, the current flood of traditional insider trading prosecutions may be cresting."

US: Insider Trading and Securities Regulation

Federal prosecutors have pursued insider trading relentlessly in recent years. The U.S. Attorney for the Southern District of New York, Preet Bharara, has been particularly active in this arena, with an unbroken string of nearly 80 convictions since 2009. These include the high-profile corporate guilty plea and payment of a $1.2 billion fine by SAC Capital Advisors in November 2013. While prosecutors will still closely scrutinize the securities industry in 2014, the current flood of traditional insider trading prosecutions may be cresting. In its place, we expect the SEC and other regulators to focus more attention on other hot-button issues, such as high-frequency trading. In addition, New York Attorney General Eric Schneiderman and other state prosecutors may use broadly worded blue sky laws, such as New York's Martin Act, to push beyond the traditional bounds of insider trading law into what Schneiderman has coined "Insider Trading 2.0." While he has yet to define this catchphrase, early indications suggest Schneiderman's office will focus on perceived "unfairness" in the marketplace, including potential informational and timing disparities within the securities industry.

We also expect robust SEC enforcement activity throughout 2014. In Chairwoman Mary Jo White's first year, she minced few words on this point, stating that the SEC "will be in more places than ever before" on the enforcement front. The commission's aim, Ms. White underscored, is "to create an environment where you think we are everywhere — using collaborative efforts, whistleblowers and computer technology to expand our reach; focusing on gatekeepers to make them think twice about shirking responsibilities; and ensuring that even the small violations face consequences."[1] Ms. White's reference to gatekeepers is in connection with the SEC's newly minted focus on auditors as part of an initiative dubbed Operation Broken Gate, which "probes the quality of audits and determines whether the auditors missed or ignored red flags; whether they have proper documentation; and whether they followed their professional standards."

Global Anti-Corruption Enforcement

Multijurisdictional enforcement and international cooperation continue as rising trends in anti-corruption matters. While the sheer number of announced settlements by U.S. authorities under the Foreign Corrupt Practices Act may have slowed in 2013, the dollar

[1] Securities Enforcement Forum, (speech, Washington, D.C., Oct. 9, 2013), *available at* http://www.sec.gov/News/Speech/Detail/Speech/1370539872100#.UqB6cmTk9eE.

> All indications are that DOJ and SEC investigation pipelines remain full, with both agencies continuing to devote significant resources to robust FCPA enforcement.

amounts of those settlements are not waning. Early reports show that at least a dozen companies paid a total of $731 million to resolve FCPA cases, up from the $259 million paid by 12 companies in 2012. All indications are that DOJ and SEC investigation pipelines remain full, with both agencies continuing to devote significant resources to robust FCPA enforcement.

Outside the United States, China has made the most headlines, with a series of investigations in the pharmaceutical sector; several high-profile prosecutions of public officials; and a very public campaign to reduce hospitality, entertainment and gift-giving involving public officials and state-owned enterprises. China's State Administration for Industry and Commerce (SAIC) announced that it would look for "bribery, fraud and anti-competitive practices" in a wide range of industries and initiated numerous regulatory visits and investigations in 2013. China's National Development and Reform Commission also announced it would review pricing practices in a range of sectors, including automotive, energy and telecommunications.

Although China's efforts have dominated public attention, significant legal and enforcement developments have occurred in other countries. For example:

- In 2013, Brazil enacted a new anti-corruption law (effective January 28, 2014), called the "Clean Company Act" (CCA), which specifically prohibits bribery of foreign government officials and prohibits fraud, manipulation and bribery in connection with public tenders. The act applies to corporate entities that operate in Brazil, including an entity's directors, officers, employees and agents. If an entity is determined to be a Brazilian company, the CCA applies to that entity's business operations around the world. The act does not appear to require proof of intent or knowledge on the part of an entity and provides for civil money penalties rather than criminal liability.
- Canadian authorities levied the largest-ever corporate fine (CDN 10.35 million) in an anti-corruption investigation, reaching a plea agreement with Griffiths Energy International in 2013 in relation to payments to intermediary consultants to secure oil production exploration rights in Chad. In addition, Canadian authorities achieved their first conviction of an individual under the Corruption of Foreign Public Officials Act (CFPOA), against an individual who conspired to bribe officials of Air India to secure business for a Canadian security company. In 2013, Canada reported to the OECD Convention Against Corruption that it had more than 30 ongoing foreign bribery investigations, and the OECD Convention views Canada has having continued enforcement momentum. Canada has amended its CFPOA to add a books and records provision, expand nationality-based jurisdiction, increase penalties and provide for an eventual prohibition of facilitating payments.
- French authorities worked closely with U.S. prosecutors in an investigation of Total S.A., and the DOJ announced in May 2013 that Total had agreed to pay a $398 million monetary penalty to resolve charges related to violations of the FCPA in connection with illegal payments made through third parties to a government official in Iran to obtain valuable oil and gas concessions. On the same day, French authorities initiated criminal proceedings against Total's chairman and CEO and two other individuals for alleged violations of France's anti-bribery law and other statutes.
- German state prosecutors also continue to actively pursue anti-corruption matters. In August 2013, Volvo's CEO struck a deal with German prosecutors and his former employer, truck maker MAN SE, to settle an investigation into corruption during his time with the German company. In connection with an ongoing investigation of Atlas

Elektronic (a joint venture of EADS and ThyssenKrupp), German police raided the offices of Atlas Elektronic and the Rheinmetall in August 2013 on suspicion that the companies were paying bribes of €18 million related to an order of submarine equipment from Greece. (EADS and ThyssenKrupp confirmed the raid on Atlas Elektronic; Rheinmetall has denied any involvement in the alleged bribery scheme.)

UK Enforcement Trends

Administrative and Legislative Changes

U.K. regulators showed an increased appetite for criminal investigations and enforcement proceedings in 2013, even while in the midst of agency reorganization and renewal. On April 1, 2013, the enforcement functions of the financial regulator, the Financial Services Authority (FSA), were transferred to the Financial Conduct Authority (FCA). Additionally, the Serious Organised Crime Agency was replaced by the National Crime Agency (NCA), which became operational in October 2013 and is tasked with investigating economic crime, among other forms of organized crime. How the NCA will work with enforcement authorities, including the FCA, Serious Fraud Office (SFO) and other prosecution authorities with a remit for economic crimes, remains to be seen. What is clear from the NCA's and FCA's creation alongside the retention of the SFO as a standalone prosecutor is the U.K. government's continued political commitment to fight financial crime. The FCA and SFO have brought an increased number of prosecutions and investigations in 2013, and the two agencies increasingly have worked together on cross-border investigations with U.S. regulators and other international enforcement entities.

In April 2013, the Crime and Courts Act 2013 established a mechanism for the use of DPAs in U.K. enforcement actions. DPAs likely will be brought into force in the course of 2014, and once effective, the U.K. will have a sentencing option that will enable prosecutors to set aside criminal charges in exchange for a company's admission of wrongdoing and an agreement to comply with other requirements set out in the DPA (*e.g.*, a financial penalty, disgorgement of profits, reparations to victims, individual or organizational remediation and monitoring of compliance obligations). The U.K. model for DPAs has many similarities to U.S. law and practice but — crucially — it involves earlier and greater judicial oversight. The DPA approval process begins with a nonpublic first appearance before the "sentencing" judge for an assessment as to whether a potential DPA would be "in the interests of justice" and "fair, reasonable and proportionate." The government hopes that DPAs will incentivize discretionary self-reporting and encourage cooperation with government investigations in fraud, corruption and other economic crimes.

Serious Fraud Office — Notable Enforcement Proceedings

The SFO conducted a number of important investigations and prosecutions in 2013, enjoying relative success at trial. For example:

- The SFO is partnering with the FSA in criminal and regulatory investigations into the rigging of LIBOR benchmarks. These investigations, brought in tandem with U.S. regulators, have resulted in fines and other enforcement outcomes against a number of financial institutions, as well as criminal charges against a number of individuals.

- In January 2013, Achilleas Michaelis Kallakis and Alexander Williams were found guilty of conspiracy to defraud banks. The two individuals had obtained a £100 million bridging loan facility from the Allied Irish Bank and the Bank of Scotland through deception and forgery to obtain financing for a property portfolio and a super-yacht conversion. After a prosecution appeal following imprisonment sentences for both individuals, the Court of Appeal increased the Kallakis and Williams sentences to 11 and eight years' imprisonment, respectively.
- In August 2013, the SFO charged three individuals associated with Sustainable AgroEnergy plc with "making and accepting a financial advantage" as part of a wider investigation into an alleged £23 million "bio fuel" investment fraud, for which four individuals have been charged with false representation and conspiracy to furnish false information in promoting and selling bio fuel investment products to U.K. investors.
- Following a government audit into contracts for electronic tagging of criminals between the U.K. Ministry of Justice and security companies Serco and G4S, the government referred allegations pertaining to overcharging to the SFO in September 2013. The inquiry revealed that the Ministry of Justice had been charged for tagging people who were found to be dead, in prison or overseas. In December 2013, the government referred to the SFO further allegations regarding overcharging on separate public sector contracts worth £3.9 billion. On December 20, Serco agreed to refund the U.K. government £68.5 million for its tagging contracts.
- In April 2013, the SFO launched an investigation into Eurasian Natural Resources Corporation over fraud, bribery and corruption claims relating to certain of its mining operations, including in Kazakhstan. The SFO announced its own investigation despite the company having previously conducted its own internal investigation and cooperated with the SFO. The investigation is ongoing.
- In October 2013, the SFO charged Smith & Ouzman Limited, a specialty papers and printing company, as well as two of its directors, an employee and one agent, with corruptly agreeing to make payments totalling £400,000 to influence the award of contracts in Mauritania, Ghana, Somaliland and Kenya.
- In December 2013, the SFO launched a criminal probe into Rolls-Royce following bribery and corruption allegations by a purported whistleblower relating to the company's sale of engines in Indonesia and China. Rolls-Royce has conducted an internal investigation into the practices of its overseas intermediaries in those two countries and other markets where concerns were identified.

Financial Conduct Authority

Organizational and Policy Changes. After opening its doors in April 2013, the FCA commenced several investigations under its new head, Martin Wheatley, and its head of enforcement, Tracey McDermott. The FCA inherited the FSA's civil and criminal powers relating to market abuse and insider trading, and both the FCA and the Prudential Regulatory Authority (PRA) have disciplinary and enforcement powers.

The Financial Services Act of 2012 introduced three new criminal offenses relating to the making of false or misleading statements and a discreet offense of creating a false or misleading impression in relation to a specified benchmark. The only benchmark to which the new offense applies is LIBOR, and only for conduct post-dating

the introduction of the Financial Services Act in April 2013. The thoroughness of this legislative effort might come under scrutiny in 2014 as evidence emerges of traders' manipulation of other benchmarks.

> "The FCA's review of the asset management sector indicated that most firms failed to demonstrate adequate anti-bribery systems and controls."

In October 2013, the FCA published the results of its "thematic review" into asset management and platform firms' anti-money laundering and corruption systems and controls, following visits to 22 firms within the sector. The review assessed whether such firms are taking adequate steps to mitigate money laundering and bribery and corruption risks. Failure by a firm to heed the regulator's warnings as set out in the thematic review can lead to the FCA initiating enforcement action. The FCA's review of the asset management sector indicated that most firms failed to demonstrate adequate anti-bribery systems and controls. Specifically, the report showed that the firms' anti-bribery and corruption policies and procedures are unduly focused on gift and entertainment spending limits while neglecting significant risk areas, such as monitoring relationships with agents, introducers and other third parties.

Notable Enforcement Proceedings. Like the SFO, the FCA pursued a number of important investigations and prosecutions in 2013. The FCA continues to successfully bring complex insider dealing cases and is increasingly working with the SEC and CFTC, as well as other European regulators, to investigate cross-border regulatory offenses. For example:

- In September 2013, the FCA fined ICAP Europe Limited £14 million for colluding with traders to manipulate the Yen LIBOR rate. The FCA also announced that it is carrying out an inquiry into the potential manipulation of ISDAFIX, the leading benchmark for annual swap rates for swap transactions globally.
- As part of a global probe regarding price manipulation in currency markets, the FCA opened an investigation into suspected price-fixing in the foreign exchange market in the United Kingdom. The FCA is cooperating with Asian, U.S. and European authorities in a joint investigation into whether currency traders at certain investment banks colluded with counterparts to manipulate the FX market. Switzerland's financial markets regulator, FINMA, is investigating several Swiss banks, the Hong Kong Monetary Authority is investigating banks in Hong Kong, and multiple U.S. regulators have initiated their own investigations.
- The FCA has continued its focus on insider dealing, with 14 arrests in 2013. "Operation Tabernula," an investigation into multiple, interlinked insider dealing rings, has produced its most complex insider dealing prosecution to date. It is widely believed that the FCA will bring at least three trials arising from Operation Tabernula, with multiple defendants in each trial. Eight people have been charged in the probe, including individuals from Legal & General Plc, Schroders Plc and GLG Partners Inc. One of the eight, former Legal & General Group Plc equities trader Paul Milsom, pled guilty and was sentenced in March 2013 to two years in prison.
- In an effort to reinforce the importance of effective systems and controls in the banking sector, and in a show of its civil enforcement powers, the FCA fined EFG Private Bank £4.2 million in April 2013 for failing to take reasonable care to establish and maintain effective anti-money laundering controls. RBS was fined more than £5 million in July for incorrectly reporting transactions in wholesale markets. In December 2013, the FCA fined Lloyds Banking Group more than £28 million for serious failings in its controls over sales incentive schemes.

- The extraterritorial reach of the FCA's market abuse regime also was evident when it fined U.S.-based high-frequency trader Michael Coscia and his company, Panther Energy Trading LLC, $900,000 for deliberate manipulation of the commodities markets. The CFTC banned Coscia and his company from trading for one year and fined him $2.8 million for creating false commodity futures contracts.

International Cooperation

Given the ongoing nature of various multijurisdictional and multi-agency investigations, U.K. regulators will continue to participate in significant international enforcement actions in 2014. The high levels of international cooperation observed in 2013 between U.K., U.S. and other regulators in conducting international investigations into market abuse, bribery, fraud and corruption is set to continue in 2014.