

January 2016

# Alert

## Q4 2015: Regulatory Round-Up

### White Collar Defense & Investigations

This round-up contains a summary by sector of certain key global regulatory developments which occurred during the fourth quarter of 2015. The sectors covered in this round-up include: Financial Services, Sport, Technology, Data & Cyber Security, Pharma, Transport & Motor and "Other". Detail contained within is publicly available information. This note does not contain legal commentary on the mentioned.

#### Financial Services

- On 31 December 2015, the U.K. Financial Conduct Authority ("**FCA**") announced that it would no longer conduct an investigation into the culture, pay and behaviour of staff in the banking sector. The review had originally been included in the FCA's business plan for 2015; however, was dropped after an initial assessment found it difficult to compare different cultures inside banks.<sup>1</sup>
- **Tom Hayes**, the first individual to be charged, stand trial, convicted and sentenced to 14 years in prison for manipulating Libor in the U.K., has asked the court to overturn his conviction. On 1 December 2015, Tom Hayes' lawyer claimed that the trial judge should have allowed the jury to listen to psychiatric evidence on the basis that Hayes suffers from Asperger's syndrome and was depressed at the time of the interviews with the Serious Fraud Office ("**SFO**").<sup>2</sup> In related news, in September 2015, the SFO stated that it would not fulfill a mutual legal assistance request from the U.S. District of New York due to concerns that it would prejudice the SFO's own pending Libor trials.<sup>3</sup>
- On 30 November 2015, Judge Leveson, sitting at the Royal Courts of Justice, approved the first U.K. deferred prosecution agreement ("**DPA**") agreed between **Standard Bank** and the SFO. Standard Bank was liable for failure to prevent bribery in its Tanzanian subsidiary, **Stanbic Bank Tanzania**, between June 2012 and March 2013. This is also the first case under section 7 of the U.K. Bribery Act. Under the DPA, Standard Bank has agreed to pay US\$32.5 million, including US\$4.2 million to the U.S. Securities and Exchange Commission ("**SEC**"). The DPA will last for three years, in which time the indictment against Standard Bank will be suspended, provided the company meets certain conditions, including cooperating in the investigation and prosecution of culpable individuals and conducting an independent review of its internal anti-corruption compliance controls.<sup>4</sup>
- On 26 November 2015, the **FCA** fined **Barclays** £72 million for failing to adequately perform enhanced due diligence checks arranged for politically exposed persons on £1.88 billion transactions between 2011 and 2012. The FCA's rules on money laundering require that checks are conducted, including corroborating the clients' stated source of wealth and sources of funds for the transactions.<sup>5</sup>

- On 18 November 2015, **Barclays** paid US\$150 million to the New York Department of Financial Services (“**NYDFS**”) to end investigations and resolve allegations that Barclays implemented algorithms to automatically reject unprofitable forex trades. This follows Barclays’ previous settlement of US\$2.4 billion for forex manipulation in May 2015.<sup>6</sup>
- On 13 November 2015, the SFO issued criminal proceedings against six current and former **Deutsche Bank** employees and four former employees at **Barclays** for conspiracy to defraud in relation to Euribor manipulation. This is part of the SFO’s ongoing investigation into **Euribor** which commenced in July 2012.<sup>7</sup>
- On 5 November 2015, in **Property Alliance Group v RBS**, Mr Justice Snowden held that legal advice privilege can include factual briefings if given in a relevant legal context. He held that **legal advice privilege** was not confined to advising the client on the law. The documents held to be privileged included those compiled by RBS’s Executive Steering Group which was comprised of in-house counsel, HR and external lawyers.<sup>8</sup>
- On 5 November 2015, two U.K.-based **Rabobank** derivative traders were convicted of conspiracy to commit wire and bank fraud and counts of wire fraud for manipulating **Libor** in New York. Both defendants intend to appeal the decision on the basis that the Department of Justice (“**DOJ**”) violated the defendants’ rights not to incriminate themselves by calling another Rabobank employee, Paul Robson, to testify against the defendants. During the U.K. enforcement proceedings, Robson, who has since pled guilty in the U.S. proceedings, had been given access to all evidence against him, including testimony of the defendants which they were compelled to give to the FCA.<sup>9</sup>
- On 5 November 2015, **Credit Suisse** and two law firms were issued with a “statement of public criticism” by the U.K. Takeover Panel for their conduct when advising on the creation of Bumi, a London-listed miner of Indonesian coal in 2010. In their statement, the U.K. Takeover Panel noted that they had failed to consult the panel on whether the Bakrie Group and Bukit Mutiara were “acting in concert” when acquiring over 30% of stakes in Vallar and had failed to present the panel with information according to rules.<sup>10</sup>
- On 4 November 2015, the U.K. Supreme Court announced that it would hear the FCA’s appeal against the Court of Appeal’s decision that the FCA had improperly identified **Achilles Macris**, the former JP Morgan Chase banker, in a FCA final notice issued to JPMorgan regarding losses of US\$6.2 billion which were incurred on a London portfolio. Achilles Macris is challenging the FCA under section 393 of FSMA.<sup>11</sup> A number of other individuals have brought similar cases against the FCA regarding identification in other FCA final notices.
- On 4 November 2015, the NYDFS announced that **Deutsche Bank** would pay US\$258 million and appoint an independent monitor due to New York Banking Law violations in connection with countries subject to U.S. sanctions, including Iran, Libya, Burma and Sudan. From at least 1999 to 2006, Deutsche Bank used non-transparent methods and practices to conduct more than 27,200 US\$ clearing transactions valued at over US\$10.86 billion on behalf of Iranian, Libyan, Syrian, Burmese and Sudanese financial institutions and other entities on the Specially Designated Nationals List of OFAC.<sup>12</sup>
- On 30 October 2015, **Credit Suisse** was the first bank to disclose that it had been contacted by U.S. and Swiss authorities in relation to the Fifa corruption. Credit Suisse is one of more than 20 lenders in a U.S. indictment against Fifa for handling allegedly corrupt payments.<sup>13</sup>
- On 15 October 2015, the **U.K. Treasury** abandoned the “reversal of burden of proof” which would have required executives to prove that they had taken all reasonable steps to prevent breaches. Rather, as part of the Bank of England and Financial Services Bill to be introduced to the House of Lords, **senior managers** will have a statutory duty to take all appropriate steps to prevent a regulatory breach from occurring; however, it will be for the regulator to prove that those steps were not followed.<sup>14</sup> On 15 December 2015, the House of Lords passed this amendment with a majority of two votes.<sup>15</sup>
- The former Chief Executive of **Anglo Irish Bank**, **David Drumm**, was arrested in the U.S. following an extradition request from Ireland. Drumm faces charges, including forgery, unlawful financial assistance, conspiracy to defraud and false accounting.<sup>16</sup>
- A 12-14 week trial at Southwark Crown Court commenced in October 2015, involving six brokers accused of conspiring with Tom Hayes, former Tokyo-based UBS trader, to manipulate the **Libor** rate of the Japanese yen.<sup>17</sup>

## Sport

- On 3 December 2015, U.S. authorities announced criminal charges against 16 current and former Fifa executives. This follows the arrest of seven officials in May 2015.<sup>18</sup>
- In November 2015, the Frankfurt Prosecutor's Office announced that it was investigating certain German football association officials on suspicion of tax evasion linked to allegations that they bribed Fifa representatives. Due to Germany's statute of limitations, the focus of the investigation is on tax evasion rather than corruption. Three individuals are accused of submitting inaccurate tax returns on a payment totaling €6.7 million. Dawn raids were conducted at the offices of the German football association, as well as at the homes of its president and former employees.<sup>19</sup>
- On 27 October, David Green, Director of the SFO appeared before a U.K. parliamentary committee to defend the SFO's position regarding its decision to not open a criminal investigation into Fifa. He stated that there were various reasons for the decision, including an unwillingness by the SFO to interfere with the work of U.S. investigators, as well as a refusal by the Swiss authorities to hand over relevant evidence.<sup>20</sup>
- On 8 October 2015, Fifa provisionally suspended its president **Sepp Blatter**, vice president **Michel Platini** and secretary general **Jarome Valkce** while investigating corruption allegations. The suspension continues for a period of 90 days and Issa Hayatou, the head of Africa's football confederation, will stand in as acting president.<sup>21</sup>

## Technology

- On 16 November 2015, the Federal Cartel Office in Germany announced that it had opened an investigation into an agreement between **Apple** and **Amazon** regarding the sale of audiobooks after a complaint was made by the German Publishers and Booksellers Association.<sup>22</sup>
- On 3 November 2015, telecoms business **VimpelCom** announced that it had made provision of US\$900 million for potential foreign bribery liabilities. This follows investigations by the SEC, DOJ and Dutch authorities which were announced in March 2014. It is alleged that various schemes (reported to total US\$300 million) were used to bribe the Uzbek president's daughter, Gulnara Karimova.<sup>23</sup>

- On 13 October 2015, Michael Bromwich, **Apple's** monitor, reported to U.S. District Judge Denise Cote that the company's procedures looked adequate on paper. His report also noted that his original two-year term was set to expire on 16 October 2015. Mr Bromwich was appointed to review and re-evaluate Apple's internal antitrust compliance policies and procedures following a violation of section 1 of the Sherman Act by coordinating e-book publishers' agreements.<sup>24</sup>

## Data & Cyber Security

- On 15 December 2015, the European Commission, the European Parliament and European Council agreed on the text of a significant new data protection and privacy law. Although the full text has not been released, the agreement sets a maximum corporate fine for violating user privacy to 4% of the company's worldwide revenue. The final texts will be formally adopted by the European Parliament and Council at the beginning 2016. The new rules will become applicable two years thereafter.<sup>25</sup>
- On 11 December 2015, the U.K. Crown Prosecution Service ("**CPS**") announced that it would take no further action against **News Group Newspapers** and ten individuals at Mirror Group Newspapers for alleged phone hacking. The Director of Public Prosecutions stated "*after a thorough analysis, we have decided there is insufficient evidence to provide a realistic prospect of conviction [...] There has been considerable public concern about phone hacking and invasion of privacy. Over the past three years, we have brought 12 prosecutions and secured nine convictions for these serious offences. These decisions bring the CPS's involvement in current investigations into phone hacking to a close.*"<sup>26</sup>
- On 6 October 2015, the Court of Justice of the European Union ("**CJEU**") ruled that **Safe Harbour**, an agreement between the U.S. Department of Commerce and the European Commission, was invalid because it did not adequately protect the personal data of EU citizens. The Safe Harbour was signed in 2000 and allowed U.S. companies to transfer information from an EU subsidiary to a U.S. parent company freely so long as EU data protection standards were incorporated into the U.S. parent company's internal privacy policies. As a result of this ruling, it is expected that it will be more difficult for companies to conduct internal investigations and comply with requests from U.S.

authorities.<sup>27</sup> Please follow this link to read our co-authored article [“Avoiding data protection pitfalls: Spotlight on cross-border investigations”](#).

- In October 2015, **TalkTalk** was subject to a significant and sustained cyber-attack on their website, which affected 4% of its customers. Initially, TalkTalk had estimated that 4 million customers could have been affected. To date, the police have made five arrests regarding the attack.<sup>28</sup> Please follow this link to read our Alert [“Cyber Security: Lessons to be learned from TalkTalk”](#).

## Pharma

- On 6 October 2015, **Bristol-Myers** agreed to pay a penalty of US\$14 million to the SEC for improper business practices in China, including making payments to Chinese hospital officials to increase drug sales. The company agreed to the administrative order without admitting or denying any wrongdoing. The SEC stated that the company *“failed to respond effectively to red flags indicating that sales personnel provided improper payments and other benefits in order to generate sales”*.<sup>29</sup>

## Transport & Motor

- On 4 January 2016, the DoJ, on behalf of the Environmental Protection Agency (“**EPA**”) filed a civil complaint against a number of **Volkswagen** entities, alleging that nearly 600,000 diesel engine vehicles had illegal defeat devices installed that impair their emission control systems and cause emissions to exceed EPA’s standards, resulting in harmful air pollution.<sup>30</sup> This follows confirmation on 16 December 2015 from the EU’s anti-fraud agency, Olaf, that it had commenced an investigation into Volkswagen in relation to whether the company misused loans provided by the European Investment Bank (“**EIB**”). EIB has provided VW with loans worth €4.5 billion since 1990, of which €1.9 billion remains outstanding.<sup>31</sup>
- An investigation into the former prime minister of Mauritius, **Navinchandra Ramgoolam**, is being conducted by the NCA due to accusations that he was involved in a corrupt contract between **Air Mauritius** and **Airbus**. This follows the country’s police examination of an order placed in July 2014 involving the purchase of six planes from Airbus. It also follows his arrest in February by the Mauritian police who found over US\$6 million in cash at his home.<sup>32</sup>

## Other

- In an interview in January 2016, David Green, Director of the SFO called for reform of the U.K.’s corporate criminal liability to be in line with the U.S. system of vicarious liability. Green stated that the law should be changed as a matter of public confidence to ensure that companies can be held criminally responsible for wrongdoing carried out by their staff.<sup>33</sup> This follows the U.K. shadow attorney general, Catherine McKinnell, on 16 December 2015 writing to the government requesting a full and transparent review on corporate criminal liability following the SFO’s recent cases involving Standard Bank and Sweett Group (see further above and below).<sup>34</sup> This follows the government’s decision in September 2015 that the U.K. would not reform the corporate criminal liability laws and would not introduce a general corporate offence for failure to prevent economic crime.<sup>35</sup>
- On 18 December 2015, construction company **Sweett Group** pleaded guilty to an offence under section 7 of the U.K. Bribery Act in relation to two related contracts entered into in 2013 in the Middle East by its subsidiary. The subsidiary, **Cyril Sweett International** bribed Khaled Al Badie to win a cost consulting and project management contract with insurance business Al Ain Ahlia. The contract was linked to the construction of a hotel in Dubai.<sup>36</sup>
- On 27 November 2015, the U.K. National Crime Agency (“**NCA**”) announced that it would commence an internal investigation after it admitted that it may have acted unlawfully. There will be a review of inherited processes and standards relating to warrant applications, including live cases. The review will examine all search warrants and other court orders, including production orders. The review will be conducted by a member of the NCA legal team with assistance from the Crown Prosecution Service. In addition to the investigation, guidance and training will be revised and updated for officers applying for warrants.<sup>37</sup>
- On 18 November 2015, the **French Senate** rejected an anti-corruption bill, which, if accepted, would have resulted in all companies headquartered in France with 5,000 plus employees, or headquartered in France with 10,000 employees globally, having to create effective anti-corruption programs or face civil penalties of up to €10 million. The French Senate rejected the draft bill on the grounds that it was too vague and imposed an unfair burden on French companies compared to their overseas competitors.<sup>38</sup>



- On 3 November 2015, the former finance director at **Compass Group** subsidiary ESS Support Services, Karim Pabani, brought a private prosecution against three of the Compass Group's executives. On 4 December, the three individuals appeared at Milton Keynes Magistrates' Court facing charges of fraud. Separately, Mr Pabani is pursuing an unfair dismissal case against Compass Group in which he alleges corruption in relation to Compass's Kazakhstan subsidiary and that he was fired as a result of raising the issue internally. The SFO is investigating the allegations of corruption.<sup>39</sup>
- On 2 November 2015, Leslie Caldwell, head of the DOJ Criminal Division, discussed the DOJ's creation of a new compliance counsel role. Caldwell stated that the role was to assist the DOJ fraud section prosecutors test as to whether a company's claims about the effectiveness of its compliance program were valid and was not the DOJ moving towards introducing a compliance defense.<sup>40</sup>
- On 23 October 2015, Alun Milford, the SFO general counsel, announced that the **Yates Memo** was not incompatible with the SFO's policies. The Yates Memo was issued on 9 September to all U.S. criminal and civil prosecutors and requires that companies shall not receive cooperation credit unless they have done everything they can to identify individuals guilty of misconduct and pass on all information relevant to the DOJ.<sup>41</sup>

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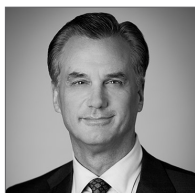
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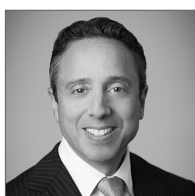
# Q4 2015: Regulatory Round-Up

## White Collar Defence and Investigations Contacts

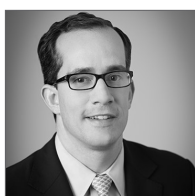
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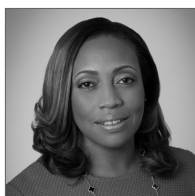
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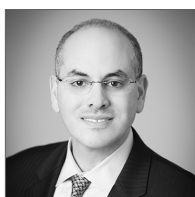
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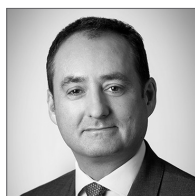


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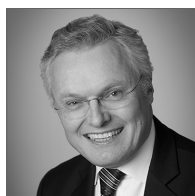


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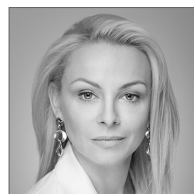
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