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U.S. Enforcement Policy and Foreign Corporations

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Editor's Note: John F. Savarese is a partner in the Litigation Department of Wachtell, Lipton, Rosen & Katz. This post is based on a Wachtell Lipton firm memorandum by Mr. Savarese, David Gruenstein, Ralph M. Levene, David B. Anders, and Lauren M. Kofke.

We recently reported on a new U.S. Department of Justice policy which expanded expectations for corporate cooperation in white collar investigations. While the initial wave of attention given to the DOJ pronouncement focused on U.S. companies, this new policy is also important for all companies with operations in the U.S. or whose activities otherwise bring them within the long arm of U.S. enforcement jurisdiction. Underscoring the relevance of these new policies to non-U.S. companies, Deputy Attorney General Yates noted in her remarks announcing the new policy that among "the challenges we face in pursuing financial fraud cases against individuals" is the fact that "since virtually all of these corporations operate worldwide, restrictive foreign data privacy laws and a limited ability to compel the testimony of witnesses abroad make it even more challenging to obtain the necessary evidence to bring individuals to justice."

As these comments suggest, a broad array of statutes has long been in place aimed at protecting important interests such as preserving the ability of a foreign sovereign to control how evidence is gathered on its soil, protecting the privacy of employees and non-U.S. citizens, and safeguarding the confidentiality of customer information. Examples include the French blocking statute (law No. 68-678 of July 26, 1968, as modified by law No. 80-538 of July 16, 1980) and Swiss Penal Code Article 271, which impose restrictions on the provision and collection of evidence for use in foreign proceedings; the European Union's Data Protection Directive (95/46/EC), which imposes requirements regarding the processing of personal data and transfer outside of the EU; and statutes protecting disclosure of banking information, such as exist in many jurisdictions in Europe, the Caribbean, and Asia.

The DOJ and other U.S. law-enforcement authorities already have available to them a range of tools that can be used to seek information located outside the United States. Formal means of obtaining such information include mutual legal assistance treaties, letters rogatory, executive agreements and memoranda of understanding on mutual assistance, subpoenas to nationals or residents of the U.S. located abroad, or serving subpoenas on branches of a non-U.S. bank or business located in the U.S. In the tax area, information exchange agreements and treaties, as well as the requirements of the Foreign Account Tax Compliance Act, which has resulted in a series of intergovernmental agreements concerning the implementation of FATCA by non-U.S. financial institutions, may provide access to tax-related information. Informal means of obtaining information include persuading foreign governmental authorities to share information developed in an investigation conducted outside the U.S., making requests through diplomatic channels for documents that may be considered public records, taking depositions of voluntary witnesses at

U.S. embassies and consulates, and making treaty-type requests that may be accepted even where no formal treaty is in force.

Given the potential for conflict between DOJ expectations for corporate cooperation and foreign law, any corporation with non-U.S. operations that comes under U.S. investigative scrutiny should proceed with caution as it seeks to respond to such an inquiry, particularly if the company hopes to earn appropriate credit for its cooperation. Underscoring this need for caution are the high-profile instances in which non-U.S. firms have received harsher treatment and have been openly criticized by DOJ officials for failing to be fully cooperative. As Assistant

Attorney General for the Criminal Division Leslie Caldwell stated in April 2015, "[t]he lack of timely and complete cooperation, which effectively frustrated the prosecution of culpable individuals, was one of the tipping points leading to charges, guilty pleas and landmark monetary penalties in the BNP Paribas and Credit Suisse cases last year." In remarks in May 2015, Caldwell stated that "the department's prosecution of French power and transportation company Alstom"—which resulted in an historic $772 million penalty and guilty plea—"also demonstrates the perils of non-cooperation."

Every case will, of course, require adjustment to these general considerations, depending upon the particular facts and circumstances, but our experience teaches that non-U.S. companies should consider the following four steps as they seek to fashion an effective response to a U.S. investigation: *first*, consider pursuing a prompt, thorough internal review of the underlying facts, so the company can intelligently chart its course and determine how best to respond; *second*, the company should simultaneously assess in a thorough and fully informed manner the impact of applicable laws, regulations, and governmental practices on its ability to lawfully produce documents, information, and witnesses in response to a U.S. inquiry; *third*, the company should consider how it may be able to assist U.S. authorities in establishing a collaborative, cooperative set of mechanisms to permit lawful transfers of information, data, and testimony from offshore locations to U.S. investigators; and, *finally*, early in the process, the company should consider initiating candid discussions with U.S. investigators about the potential obstacles and the company's proposals to work collaboratively with relevant foreign governments and U.S. investigators to provide information responsive to the U.S. inquiry. We have found that companies can secure cooperation credit by working with U.S. authorities to fashion effective treaty or other information requests by the U.S. to foreign governmental counterparts and also by engaging with relevant foreign governmental authorities to explain the company's desire to be cooperative but to do so within the bounds of applicable law.

On the other side of the table, we trust that the U.S. government, if fully informed and approached in the right spirit, will recognize that when a company that is organized under foreign law and faces substantial foreign-law restrictions on information exchange has done everything it lawfully can to share the facts, provide documents and information, and identify wrongdoers, such a company should not be penalized under the DOJ Principles.