Miller & Chevalier

Executives at Risk: Navigating Individual Exposure in Government Investigations - Winter 2016/2017

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2017 brings with it several noteworthy developments and trends that are significant for corporate executives. At least three major, high-profile investigations are underway as we begin the new year: the Volkswagen emissions investigation; the Fédération Internationale de Football Association (FIFA) corruption investigation; and Foreign Corrupt Practices Act (FCPA) investigations related to Venezuelan oil company Petroleos de Venezuela S.A. (PDVSA) and Hunt Pan AM Aviation.

Noticeably absent from this list is a major global investigation by the Antitrust Division of the Department of Justice (DOJ). For the first time in almost a decade, the Antitrust Division does not appear to be dedicating its time and resources to a significant, cross-border, multi-jurisdictional investigation. Instead, the Antitrust Division is focusing on smaller, domestic investigations. Without a large-scale international investigation, such as previous investigations of the auto parts and freight forwarding industries, corporate fines and prosecutions of executives may decline this year. As an example of this trend, in the fourth quarter of 2016, the Antitrust Division failed to secure a single guilty plea in a global cartel case.

In addition to key developments in these large investigations, we highlight some of the notable white collar sentences from the fourth quarter of 2016, some of which fall outside the Federal Sentencing Guidelines.

Finally, we note that to date, the Yates Memo (issued more than 15 months ago) has not yet resulted in a substantial increase in charges against corporate executives. For example, the very modest number of FCPA-related cases against individuals has not increased significantly. In 2015, only eight individuals were charged with FCPA offenses. In 2016, 10 were charged. While DOJ's charging decisions may reflect some attitudinal changes, it remains to be seen whether there will be a significant uptick in the prosecution of executives.

Criminal Actions Against Executives

Volkswagen Emissions Scandal

Six Volkswagen Executives Charged with Defrauding the U.S. Government: On January 11, 2017, a federal grand jury sitting in the Eastern District of Michigan returned an 18-count indictment against six Volkswagen (VW) executives for their alleged participation in a conspiracy to defraud the U.S. government and U.S. consumers by engaging in a years-long scheme to rig the emissions tests of certain VW diesel vehicles sold in the U.S. between 2009 and 2015. The executives are all German nationals, five of whom presumably remain in Germany: Heinz-Jakob Neusser (VW's former head of Development and a former head of Engine Development), Jens Hadler (a former head of Engine Development), Richard Dorenkamp (head of VW's Engine Development After-Treatment Department), Bernd Gottweis (a supervisor in Quality Management and Product Safety), and Jürgen Peter (who worked in VW's certification group and acted as a liaison between VW and U.S. regulatory agencies). It is unclear whether the U.S. will attempt to extradite the individuals, as German law precludes the extradition of its citizens. The sixth defendant, Oliver Schmidt, the former head of VW AG's U.S. regulatory compliance office, was arrested in Miami on January 7 on the basis of an earlier criminal complaint. The Southern District of Florida denied Schmidt's request for pretrial release and ordered that he be transferred to the Eastern District of Michigan for further proceedings.

DOJ alleges that the six defendants and their co-conspirators: knew that the 585,000 vehicles in question did not meet U.S. emissions standards; knew that VW was using a computer algorithm known as a "defeat device" to cheat the emissions testing process by making it appear as if the vehicles met emissions standards (when they did not); and concealed these facts from regulators and customers. Dorenkamp and Hadler are accused of directing VW employees to design the defeat device. Schmidt allegedly participated in a meeting at which VW executives discussed the secret software, the consequences for the company, and the decision to continue misleading U.S. authorities. All six defendants are accused of falsely certifying that the vehicles met U.S. emissions standards. As we previously reported, former VW engineer James Robert Liang pled guilty in September 2016 to charges alleging his role in developing the defeat device.

Foreign Corrupt Practices Act (FCPA)

Two More Executives Plead Guilty to Bribing Venezuelan Officials to Obtain Energy Contracts: Two more executives have pled guilty to charges arising from the U.S. government's ongoing investigation into bribery at Venezuela's state-owned and state-controlled oil company, Petroleos de Venezuela S.A. (PDVSA). Juan Jose Hernandez Comerma, a former general manager and owner of a Florida energy company, and Charles Quintard Beech III, owner of multiple Texas energy companies, admitted to participating in a scheme to pay thousands of dollars in bribes to PDVSA purchasing analysts who, in exchange, helped them obtain lucrative contracts for their own U.S.-based companies. Six others have also pled guilty to charges stemming from the U.S. government's investigation. Hernandez faces five years imprisonment for conspiring to violate the FCPA and five years for violating the FCPA. Beech faces five years for conspiracy. Both are scheduled for sentencing on July 14, 2017.

Three Aviation Executives Admit Their Roles in a $2 Million FCPA Bribery Scheme: In November 2016, three executives of a U.S. aircraft maintenance company Hunt Pan AM Aviation pled guilty to conspiracy to violate the anti-bribery provisions of the FCPA, among other charges. According to their plea agreements, Douglas Ray (the company's President), Kamta Ramnarine (its General Manager and former President), and Daniel Perez (the Director of Maintenance) participated in a decade-long conspiracy in which they and their co-conspirators paid officials of Mexican state-owned entities more than $2 million to secure aircraft parts and servicing contracts with state-owned entities in Mexico. Ramnarine and Perez are scheduled for sentencing on January 30, 2017, and Ray is scheduled to be sentenced on February 23, 2017. All three defendants face a maximum of five years of imprisonment.

Son of Former Prime Minister of Gabon Pleads Guilty to FCPA-Related Charges: In December 2016, Samuel Mebiame, son of the former Prime Minister of Gabon, pled guilty to conspiracy to violate the FCPA. According to the criminal information to which he pled guilty, Mebiame engaged in a scheme to bribe government officials in Niger, Chad, Guinea, and elsewhere in order to obtain uranium mining licenses. Mebiame did so while working as a "fixer" on behalf of a joint venture between a Turks & Caicos entity and U.S.-based hedge fund Och-Ziff Capital Management Group LLC. As reported in Miller & Chevalier's Autumn 2016 FCPA Review, the Securities and Exchange Commission (SEC) and the DOJ settled related charges with Och-Ziff in September 2016 in a joint resolution of more than $400 million.

FIFA Corruption Scandal

Four Executives Plead Guilty in FIFA Corruption Scandal: In the fourth quarter of 2016, four executives pled guilty to racketeering conspiracy, wire fraud, and/or wire fraud conspiracy charges in connection with the FIFA corruption scandal. Eduardo Li, former FIFA official and president of the Costa Rican soccer federation, admitted that he received bribes in exchange for awarding media and marketing contracts for FIFA World Cup qualifier matches, among other things. In addition, Aaron Davidson, president of Traffic USA, Inc., a sports marketing company, admitted to arranging bribes for former FIFA president Jeffrey Webb in exchange for lucrative media rights to soccer tournaments and matches. Rafael Esquivel, former president of the Venezuelan soccer federation and former vice president of Confederación Sudamericana de Fútbol (CONMEBOL), the South American soccer confederation, copped to receiving bribes related to the sale of media and marketing rights to soccer tournaments. As part of his plea, Esquivel promised to forfeit more than $16 million to the U.S. government. Julio Rocha Lopez, the former president of the Federación Nicaragüense de Fútbol (FENIFUT), the Nicaraguan soccer federation, admitted he accepted bribes for assisting Traffic Group USA to acquire media and marketing rights contracts to FIFA-related events. As we previously reported, Li, Esquivel, and Lopez were among the FIFA officials arrested in Switzerland and extradited to the U.S. to face charges. The three defendants face a maximum of 20 years in prison for each count.

Cartel

DOJ Fails to Secure Guilty Pleas from Executives in International Cartel Investigations: In the fourth quarter of 2016, DOJ failed to secure a single guilty plea from an executive in any of its international cartel investigations for the second quarter in a row. As we reported previously, only two executives have pled guilty to charges stemming from one of DOJ's international cartel investigations in 2016--one in the auto parts investigation in April, and one in the London Interbank Offered Rate (LIBOR) investigation in July. DOJ has made more progress in its investigation into price-fixing of electrolytic capacitors, securing the indictment of nine individuals in Q4 of 2016. However, no individual has pled guilty as part of the investigation. All of these individuals are foreign nationals living abroad, raising the question whether individuals in the capacitors investigation will continue the trend we have reported in the auto parts investigation of refusing to plead guilty. In early 2017, the trend away from foreign executives pleading guilty continues. In January, DOJ charged five individuals in the foreign exchange currency manipulation (FOREX) investigation, but only two have pled guilty. Two additional individuals were charged in July 2016.

DOJ Continues to Focus on Domestic Cartel Conduct, Brings Charges in Two New Investigations: DOJ has made more progress in its domestic investigations, charging executives in two new investigations related to the packaged seafood and generic drug industries. In December 2016, two Bumble Bee Foods executives pled guilty to conspiring to fix prices with their company's competitors, representing DOJ's first guilty pleas in connection with its cartel investigation into price-fixing in the packaged seafood industry. Also in December 2016, DOJ charged two pharmaceutical executives for their involvement in price-fixing and customer allocation of generic drugs. The two executives have subsequently admitted the charges and pled guilty. The charges came on the heels of a civil complaint filed by Heritage Pharmaceuticals against the two executives--former CEO Jeffrey Glazer and former president Jason Malek--in connection with a scheme to set up dummy drug companies, which they allegedly used to pilfer millions in profits from Heritage. The charges are the first in DOJ's investigation into price-fixing in the generic drug industry, which was sparked by a Congressional investigation into generic drug prices, which have skyrocketed since 2014. Finally, two more individuals have pled guilty in the ongoing real estate foreclosure auction bid-rigging investigation, covered in our previous edition. Fifty-nine individuals have agreed to enter or have entered guilty pleas in connection with that investigation.

Government Contracts Fraud

Construction Executive Ordered to Forfeit Post-Conspiracy Profits: In November 2016, David Gorski, owner of Legion Construction, Inc., was ordered to forfeit $6.7 million after he was convicted of falsely claiming that his company was entitled to federal government set-asides for service-disabled veterans. At the forfeiture proceeding, Gorski unsuccessfully argued that his forfeiture should be limited to money that could be traced to the conspiracy period alleged in the indictment. Instead, the court adopted the government's position that profits from contracts awarded after the scheme were also subject to forfeiture because if not for Gorski's fraud, he would not have been awarded any contracts from the program. As reported in our Fall 2016 newsletter, Gorski was also fined $1 million and sentenced to 30 months in prison.

Tax

Federal Employment Tax Enforcement Initiative Progresses: DOJ's Tax Division continues its push on civil and criminal employment tax enforcement. In October 2016, the former CEO of one of Hollywood's largest payroll service providers was convicted of tax evasion, conspiracy to defraud the Internal Revenue Service (IRS), and filing a false tax return. According to evidence presented at trial, former Axium International, Inc., CEO John Visconti diverted $5.1 million in corporate funds using a variety of schemes including sending federal tax refunds into shell accounts off the company's books. Visconti faces a maximum sentence of 13 years and a fine of $750,000.

Separately, in December 2016, the CEO of Virginia health care technology firm VitalSpring pled guilty to fraud and failure to pay federal employment taxes after admitting to soliciting $32 million from more than 160 investors by making false representations about VitalSpring's profitability and an alleged imminent sale. Sreedhar Potarazu further admitted that between 2007 and 2016 his company withheld federal taxes from employee paychecks but failed to pay the withheld funds to the IRS, accruing more than $7.5 million in tax liabilities. Potarazu faces a maximum sentence of 10 years for inducing interstate travel to commit a fraud and 5 years for failing to pay employment taxes.

IRS Focuses on Virtual Currencies: In November 2016, a federal court authorized the IRS to serve a John Doe summons on digital currency exchange Coinbase, Inc., seeking information about taxpayers who conducted transactions in virtual currency. The IRS had previously announced that it treats virtual currencies as property for tax purposes—meaning that taxpayers can have gain or loss on sales and exchanges. The court's order grants the IRS permission to serve a summons to obtain information about possible violations of internal revenue laws by individuals whose identities are unknown. In December 2016, Coinbase customer Jeffrey K. Berns filed a motion to quash the summons, arguing that the summons is overly broad and was issued for research purposes, as opposed to tax enforcement. A hearing on the motion is scheduled for February 16, 2017.

Extradition and Extraterritoriality

Israeli National Extradited to U.S. to Face Charges That He Defrauded Federal Foreign Aid Program: In October 2016, Yuval Marshak, the former owner and executive of an Israeli-based defense contractor, was extradited from Bulgaria to the United States and charged with defrauding the federal government. According to the indictment, Marshak engaged in multiple schemes to defraud the U.S. Foreign Military Financing program (FMF), which provides funds to foreign governments to purchase military equipment and services from U.S. companies. Marshak allegedly: falsified bid documents to make it appear that certain FMF contracts had been competitively bid when they had not; caused false certifications to be made to the U.S. government stating that no FMF funds were spent on commissions, even though he had received such commissions; and used a U.S. company to launder the proceeds of his fraud. Marshak has been charged under numerous fraud statutes, some of which carry a maximum penalty of 20 years in prison.

Two Former Executives Extradited in Navy's "Fat Leonard" Bribery Scheme: In November 2016, two former executives of Singapore-based Glenn Defense Marine Asia (GDMA) were extradited to the U.S. to face charges in the ballooning bribery scandal involving U.S. Navy contracts awarded to GDMA, a port services contractor. Neil Peterson (GDMA's Vice President for Global Operations) and Linda Raja (the company's General Manager for Singapore, Australia and the Pacific Isles) have been charged with participating in a conspiracy to submit $5 million in false claims and invoices to the U.S. Navy. Peterson and Raja, both residents of Singapore, have been denied bail and await trial. So far, 16 individuals, including 11 current or former

U.S. Navy officials, have been charged in the so-called "Fat Leonard" scandal, named after Leonard Glenn Francis, GDMA's CEO and the alleged ringleader of a $35 million scheme to bribe Navy officials with cash, prostitutes, and lavish parties to ensure that Navy ships stopped at ports where GDMA operated.

Perjury & Obstruction

Former NYC Tour Bus Executive Pleads Guilty to Obstruction: In October 2016, the former vice president and director of information technology for Coach USA Inc., a bus company operating hop-on, hop-off tours in New York City, pled guilty to concealing and attempting to destroy documents and backup tapes related to a civil antitrust investigation and subsequent lawsuit launched by the DOJ and New York's Attorney General. The executive, Ralph Groen, also allegedly made false statements under oath during the litigation, including during a deposition. The government probe alleged that a joint venture created by Coach and another New York City bus company, City Sights LLC, resulted in an unlawful monopoly in the city's hop-on, hop-off bus tour market. The companies settled the civil lawsuit in November 2015 and agreed to pay $7.5 million in disgorgement and other penalties.

Former CFO of Bankrupt Furniture Company Sentenced to Two Years for Proffer Session Lies: In December 2016, a federal district court sentenced Norman D'Souza, the CFO of a now-bankrupt furniture company, to two years in prison and over $12 million in restitution for his part in a fraudulent scheme to obtain $17 million in loans from an international bank and another $1 million in municipal loans from a city in Indiana. D'Souza eventually cooperated and assisted the bank in recouping its losses, but DOJ cited D'Souza's decision to lie during a 2015 proffer session as "instrumental" in the decision to bring charges.

Noteworthy Sentencings of Executives

Two Deepwater Horizon Compensation Fund Scammers Sentenced to a Combined 17 Years in Prison: In December 2016, two owners of a Mississippi-based consulting firm were sentenced to lengthy prison terms for their roles in a scheme to defraud the claims fund established by British Petroleum (BP) following the 2010 Deepwater Horizon oil spill. Thi Houng Le and Gregory Warren, owners of K&G Consulting, were sentenced to 7 and 17 years in prison, respectively, after they were convicted of collecting and submitting to the claims fund the names and personal information of nearly 40,000 people who either never existed, had not been injured, or were dead. After a four-week trial, a federal jury found Le and Warren guilty. Three other defendants, including Le and Warren's lawyer, were acquitted.

Banker Secures Gambling Addiction-Related Downward Departure: In November 2016, Andrew Caspersen, a former private equity banker, was sentenced to four years in prison after he was convicted of engaging in a $95 million securities fraud scheme. He was also ordered to pay $27.8 million in restitution. For three years, Caspersen defrauded investors—including a charity—by soliciting over $150 million in investments that he then funneled to shell company bank accounts he controlled. Caspersen's 4-year sentence is nonetheless a downward departure from a possible 15-year term, in part because the court agreed that his gambling addiction prevented him from fully controlling his behavior.

Pharmacy Executives Sentenced to Probation for Violating Anti-Money Laundering Laws: In November 2016, two former executives of a Massachusetts pharmacy, Carla Conigliaro and Douglas Conigliaro, were sentenced to probation for violating anti-money laundering laws in connection with a fungal meningitis outbreak involving their pharmacy. The two executives were convicted of withdrawing more than $100,000 in small amounts of cash from their bank account to hide their assets after the meningitis outbreak from their pharmacy resulted in a criminal investigation and tort litigation. In late 2015, the Conigliaros were severed from the larger case against the pharmacy related to the outbreak, which allegedly caused more than 60 deaths. The charges against the executives related to the deaths were dismissed.

Real Estate Executive Receives Above-Guidelines Sentence of 10 Years for $17 Million Fraud Scheme: In October 2016, Carlton Cabot, a former commercial real estate investment CEO, was sentenced to a decade in prison and ordered to pay $17 million in restitution after his conviction for securities fraud. For four years, Cabot diverted funds from numerous tenant-in-common investments to pay for other investments, personal expenses, and business expenses. To conceal his scheme, Cabot provided false financial reports to investors. The Federal Sentencing Guidelines suggested a 97-month sentence, but the sentencing judge found that the economic hardship suffered by Cabot's predominantly elderly investors and Cabot's use of the investment funds to pay personal debts justified an upward departure to 120 months. Particularly persuasive were letters submitted to the court by Cabot's victims, who described the economic ruin Cabot's scheme inflicted on them.

CEO Sentenced to 30 Months in Prison for Redflex Bribery Scheme: In November 2016, Karen Finley, a former CEO of Chicago's red-light camera vendor, Redflex, was sentenced to 30 months in prison and ordered to pay $2 million in restitution after she was convicted of federal bribery charges. From 2002-2011, Finley paid bribes to John Bills, the former assistant transportation commissioner for Chicago, in exchange for assistance in securing contracts for Redflex to install red-light cameras. In August, Bills was sentenced to 10 years in prison after a jury convicted him of mail fraud, wire fraud, extortion, bribery, and conspiracy to commit bribery as part of the scheme. In September, Martin O'Malley, who funneled hundreds of thousands of dollars in bribes from Finley to Bills, was sentenced to six months in prison for conspiracy to commit bribery.

Auto Shop Owner Gets 15 Months for Attempted Defense Procurement Bribery: In November 2016, Razak Dosunmu, owner of auto body shop United Globe Auto Body, was sentenced to 15 months in prison for charges related to alleged bribery of a U.S. Department of Defense procurement official during the negotiation of aviation fuel contracts worth more than $1 billion. Dosunmu was convicted in August of offering illegal gratuities to a procurement officer in the form of $2 million cash, a new house, and earnings on future contracts in exchange for jet fuel contracts. Dosunmu argued for a lesser sentence because his purported offer to the procurement officer was contingent upon his company winning the contract, which trial evidence showed would not have happened. The government countered that purported bribes do not have to result in actual payment to be considered bribes and sought 36-48 months. The sentence is below the recommended Federal Sentencing Guidelines range.

Rabobank Traders Receive Light Sentences in LIBOR Manipulation Investigation: After entering guilty pleas, two Rabobank traders were sentenced in November 2016 for their roles in a conspiracy to fix LIBOR rates, a benchmark rate that leading banks charge each other for short-term loans. Paul Robson, who cooperated with the DOJ in the investigation and testified against his co-conspirators at trial, was sentenced to time served--presumably "the time spent at Court on the day of his surrender." In its sentencing memorandum, the government noted the significant degree of assistance Robson provided in the investigation. In addition, Australian national Paul Thompson was sentenced to three months in prison for his role in the conspiracy, still well below the Federal Sentencing Guidelines range. DOJ argued that Thompson deserved a non-Guidelines sentence because "all available evidence suggests that Mr. Thompson is fundamentally a decent person."

Noteworthy Appeals

***United States v. Hoskins*: Potential Expansion of FCPA Liability for Foreign Nationals?**: DOJ has appealed to the Second Circuit the dismissal of conspiracy-related charges against a former Alstom S.A. executive in a case that may have broad implications for the extraterritorial reach of FCPA liability.

In July 2013, Lawrence Hoskins was charged with participating in a scheme to bribe Indonesian officials in return for a $118 million power station construction contract in Indonesia. A grand jury later returned a superseding indictment in April 2015, charging Hoskins, a U.K. national, with the additional crimes of conspiracy to violate the FCPA and aiding and abetting. The district court dismissed the new charges against Hoskins, however, ruling that conspiracy and aiding and abetting liability cannot extend to a party not covered by the underlying FCPA statute. The court reasoned that because the conspiracy counts did not allege that Hoskins was an "agent" of a "domestic concern," but rather a foreign national not covered by the FCPA who conspired with others who were covered by the FCPA, the charges were infirm.

DOJ appealed the ruling to the Second Circuit in September 2016, arguing that Hoskins could be held liable on conspiracy and aiding and abetting charges, based on what the government characterized as the "well-established rule" that conspirator and accomplice liability are not limited to those individuals expressly enumerated in the underlying statute. DOJ relied on the Supreme Court's 2016 decision in *Ocasio v. United States*, 136 S. Ct. 1423 (2016), which upheld a Hobbs Act conspiracy conviction against a willing bribe payer, rejecting the argument that such a conviction was barred because the Hobbs Act itself only reaches the recipient of the bribe. Hoskins filed his opposition brief in December 2016, arguing that the government cannot circumvent Congress's deliberate decision to exclude foreign nationals like Hoskins from criminal liability under the FCPA. DOJ filed its reply in early January.

A win on appeal for the DOJ could usher in an expanded scope of liability under the FCPA. Going forward, the DOJ could attempt to prosecute foreign individuals for conspiracy and accomplice liability as a way of pursuing criminal charges against certain foreign individuals otherwise outside the reach of the FCPA. We will be sure to keep you apprised of pertinent developments in upcoming issues of *Executives at Risk*.

Civil Litigation

CEO of Two Mortgage Lenders Found Personally Liable for Civil Mortgage Fraud: In November 2016, a federal jury found Jim Hodge, founder of mortgage lenders Americus Mortgage Corp. and AllQuest Home Mortgage Corp., liable under the False Claims Act and the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) for $7.3 million in lending fraud. The verdict came after a five-week jury trial on charges stemming from the 2008 housing crisis, during which Hodge--in an attempt to conceal a high number of loan defaults--personally directed his employees to use improper lending practices and to falsify housing agency certifications.

Director and Officer Issues

Derivative Suit Targeting Home Depot Data Breach Fails at Pleading Stage: In November 2016, a federal court dismissed a shareholder derivative suit against Home Depot, Inc. and several of its officers and directors stemming from the company's 2014 data breach. The court found that the plaintiffs had "failed to show beyond a reasonable doubt that a majority of the Board faced substantial liability because it consciously failed to act in the face of a known duty to act." The Court acknowledged that "[w]ith the benefit of hindsight, one can safely say that the implementation of a [cyber-security] plan was probably too slow," but concluded that the failure to implement it sooner did not rise to the level of actionable conduct. This was yet another high-profile dismissal of a shareholder data breach suit at the pleading stage in the past two years. Two others include suits against Wyndham Worldwide Corp. and Target Corp.

DOJ Management

DOJ Creates New Position in London to Enhance Cooperation in International Investigations: In December 2016, DOJ announced a new Fraud Section position that will be based in London. The position, meant to enhance DOJ's cooperation with U.K. authorities, will place a lawyer from the Fraud Section's Strategy, Policy and Training Unit with the U.K.'s Financial Conduct Authority (FCA) and then with the U.K.'s Serious Fraud Office (SFO). In the job posting, DOJ stated that "the cross-border nature of many financial frauds has increased the need for international cooperation and coordination among regulators and prosecutors, including the Fraud Section, the FCA, and the SFO." For the third year of the position, the attorney will return to the Fraud Section and train its attorneys on "best practices and experiences learned at the SFO and FCA" and is expected to continue working closely with both U.K. agencies on financial fraud cases affecting the United States. David Green, the SFO's director, stated, "This is a concrete demonstration of the close and valued relationship we have built with our American colleagues, which has been so evident in our casework."

Federal Rules

Federal Rule Change Governing Warrants for Access to Electronic Communications Takes Effect: On December 1, 2016, an amendment to Federal Rule of Criminal Procedure 41(b) took effect, allowing judges to issue search warrants for data stored anywhere in the world in two situations: if the subject computer employs technology to shield its location, or if the computer may be part of a botnet, which is a network of computers infected by malware. As we reported previously, in July 2016 the Second Circuit ruled in a unanimous, three-judge decision that the U.S. government cannot use search warrants to access consumer data stored on servers abroad. At the time, the decision was considered a victory for executives of multinational companies whose emails and other data may be housed outside the United States. However, the new amendment to Rule 41(b) appears to nullify the Second Circuit's decision.

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