

ARREST OF FORMER UBS TRADER DURING U.S. TRAVEL REVEALS DOJ'S CONTINUED FOCUS ON PROSECUTIONS OF FOREIGN NATIONALS FOR ALLEGED MARKET ABUSE

On September 13, 2017, Andre Flotron, a Swiss citizen and former UBS precious metals trader, was arrested by U.S. authorities while visiting his girlfriend in New Jersey. Flotron was charged with commodities fraud and spoofing. After his arrest, Flotron was denied bail pending his transfer to federal court in Connecticut where the charges against Flotron had been filed. This arrest highlights the U.S. authorities' continued focus on investigating non-U.S. citizens for conduct that impacts U.S. markets. Given the government's continuing interest in prosecuting such offenses, foreign nationals engaged in trading and other forms of international business should be familiar with the substance and extraterritorial scope of U.S. criminal laws.

Flotron worked at UBS's precious metals trading desk in Stamford, Connecticut, where he traded futures contracts in gold, silver, platinum, and palladium. The criminal complaint alleges that between July 2008 and November 2013, Flotron fraudulently manipulated the market in precious metals futures contracts, by spoofing and other means. Spoofing involves a trader placing one or more orders on a U.S. regulated exchange market to buy or sell a commodity contract (a futures, options, or swap contract) that the trader intends to cancel before execution of the order. In most cases, the trader will also place genuine opposite orders, which benefit from the price movement resulting from the unexecuted spoof orders. The complaint alleges that Flotron personally engaged in spoofing, and also trained other UBS traders on how to spoof markets and engage in other deceptive trading practices.

Flotron's arrest comes soon after the resolution of enforcement actions by the Department of Justice ("DOJ") and Commodity Futures Trading Commission ("CFTC") against another precious metals trader who operated overseas. In June 2017, David Liew, a Singapore resident and former Deutsche Bank trader, pleaded guilty to similar charges of commodities fraud and spoofing. Liew admitted

his participation in a conspiracy to manipulate precious metals futures contracts traded on a U.S. commodities exchange while working at the bank's precious metals trading desk in Singapore. As part of the settlement with the U.S. enforcement agencies, Liew is permanently banned from trading in CFTC-regulated markets, which extend far beyond traditional "commodities" to various interest rate, foreign exchange, and credit securities products.

Other recent cases covering a wide range of sectors demonstrate that foreign nationals, even when operating outside the U.S., may fall within the ambit of U.S. criminal prosecution. U.S. prosecutors' use of sealed indictments, stayed statutes of limitations and arrest requests to border and overseas authorities suggest that non-U.S. citizens and residents engaged in international business should be aware of the potentially applicable prohibitions of U.S. criminal law. They should stay alert to current prosecutorial priorities as well as to the existence of investigations, which can relate to long-past conduct.

The DOJ is often able to establish jurisdiction despite the fact that the conduct at issue occurred largely, if not entirely, overseas. For example, the broad wire fraud statute

criminalizes any scheme to defraud that affects "interstate or foreign commerce," and may be prosecuted in the United States whenever an electronic communication, such as a telephone call or email, in furtherance of the alleged scheme travels through the United States.

For instance, in January 2017, Oliver Schmidt, a German citizen and former general manager of Volkswagen's U.S. Engineering and Environmental Office, was unexpectedly arrested at Miami International Airport shortly before he was scheduled to board a flight to Germany. The DOJ charged Schmidt and several other Volkswagen executives with a number of offenses in connection with the Volkswagen emissions scandal, including conspiring to defraud the United States, to defraud Volkswagen's U.S. customers, and to violate the Clean Air Act. The DOJ argued that the actions of the indicted German executives fell within its jurisdiction because the executives conspired to impede the U.S. Environmental Protection Agency's ability to implement and enforce emissions standards, sent emails from and to the United States, and intentionally deceived U.S. consumers. On August 4, Schmidt pleaded guilty to one count of conspiracy to defraud the federal government and one count of violating the Clean Air Act. Schmidt is scheduled to be sentenced in December and faces up to seven years in prison and up to \$500,000 in fines.

Similarly, in July 2016, Mark Johnson, a citizen of the United Kingdom and the global head of FX trading at HSBC, was arrested at New York's John F. Kennedy airport while attempting to board a flight to London. Following his arrest, the DOJ unsealed a criminal complaint that had previously been filed in secret against Johnson and one of his colleagues in the U.K., Stuart Scott. The complaint alleged that the defendants conspired to defraud an HSBC client using a scheme commonly known as "front running." While most of the trading activity occurred in London, related trading activity and wires used to settle accounts were routed through New York. Johnson pleaded not guilty to charges of wire fraud and conspiracy. His case is currently pending in the Eastern District of New York.

In contrast to criminal procedures in some European countries, U.S. federal criminal investigations are typically conducted via a "grand jury" (a group of citizens convened by the prosecutor to hear evidence) and occur in secret, often without notice to or the involvement of individuals under investigation. Likewise, indictments and criminal complaints are usually filed under seal when the defendant is outside of the United States. Indictments may remain sealed indefinitely and are often kept sealed until the

defendant is apprehended. In addition, individuals who are arrested and charged with crimes may cooperate or plead guilty in sealed proceedings. The filing of a sealed indictment will pause, or "toll," the expiration of the statute of limitations, which prohibits the prosecution of crimes after a certain period of time (usually five years). The government may also toll the statute of limitations by making a request for information from another nation pursuant to a Mutual Legal Assistance Treaty ("**MLAT**"), which has become more common in the context of cross-border investigations.

After a criminal charge has been filed against a foreign national, the United States may seek the defendant's extradition. The U.S. has extradition agreements with more than 100 countries around the world. However, some countries will not extradite their own nationals. In the event that the U.S. does not have an extradition treaty with a particular country, or the treaty does not allow for extradition in a particular case, American authorities may seek an Interpol "red notice," which typically serves to trigger an alert at border crossings when an individual who is subject to a sealed arrest warrant travels internationally. U.S. authorities may also wait until a suspect travels to or transits through the United States, and then execute the arrest warrant when he or she arrives at the border.

For example, in June 2015, Gregg Mulholland, a dual citizen of the United States and Canada, attempted to fly from Canada to Mexico. When the plane stopped for a brief layover at Phoenix International Airport, F.B.I. agents arrested Mulholland. In a criminal complaint that was unsealed following his arrest, Mulholland was charged with conspiracy to commit securities fraud and money laundering arising from an alleged Belize-based stock manipulation scheme. Mulholland pleaded guilty to money laundering conspiracy and was ultimately sentenced to 12 years in prison.

While criminal investigations in the U.S generally are conducted in secret, prosecutors typically disclose, when asked, if a particular individual is a "subject" or "target" of an ongoing investigation. Prosecutors do this, among other reasons, to encourage cooperation by individuals under investigation – particularly when those individuals are located outside the subpoena power of the prosecutor. Thus, when there is reason to suspect that an investigation is under way, it is advisable to consult counsel regarding whether and when it may be appropriate to contact U.S. authorities, and whether travel to the United States is prudent.

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