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# *Global Anti-Bribery Year-in-Review: 2022 Developments and Predictions for 2023*

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## I. 2022 ENFORCEMENT TRENDS AND KEY DEVELOPMENTS

### A. Introduction

While Foreign Corrupt Practices Act (FCPA) enforcement activity has not come close to returning to the heights seen a few years ago, 2022 reflected significant increases from the prior year in both the number of cases against corporate defendants (eight vs. four) and the combined total of monetary penalties levied (\$1.56 billion<sup>1</sup> vs. \$459 million). Consistent with this upward trend of enforcement activity, the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) continue to signal that anti-corruption enforcement is a priority and that there will be significant and growing enforcement efforts going forward. Below are four key takeaways regarding FCPA enforcement in 2022:

1. **Updated Enforcement Guidance.** US authorities continued to provide further detail and clarification regarding their approach to corporate enforcement. Recent key guidance indicates (1) continued priority focus on individual accountability and

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<sup>1</sup> To calculate the total monetary penalties imposed in FCPA-related actions against companies, we counted the amounts set out in resolution papers that a settling party could be liable to pay to US enforcement agencies, even if those penalties were ultimately offset by payments to other entities (e.g., foreign authorities).

corporate cooperation in individual prosecutions;<sup>2</sup> (2) continued DOJ efforts to incentivize voluntary self-disclosure, cooperation, robust corporate compliance programs, and remediation;<sup>3</sup> (3) a revised approach to prior misconduct;<sup>4</sup> and (4) a restricted use of DPAs for certain types of offenders.<sup>5</sup>

2. **New Senior-Level Hires in the DOJ Fraud Section.** Two senior-level hires in the DOJ Fraud Section in 2022 indicate the Department's increased focus on encouraging corporate compliance to prevent and detect misconduct.<sup>6</sup> The new hires have experience that includes leading in-house compliance programs, developing data analytics tools, and evaluating corporate compliance programs.
3. **Corporate Executive Certification Requirement.** Corporate FCPA resolutions going forward are expected to require both the Chief Executive Officer and the Chief Compliance Officer to certify compliance programs at the end of corporate resolution periods.<sup>7</sup> Every corporate DOJ resolution announced since May 2022—Glencore International A.G., GOL Linhas Aéreas Inteligentes S.A., ABB Ltd., and Honeywell UOP—has required these certifications.<sup>8</sup>

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<sup>2</sup> See Merrick B. Garland, Att'y Gen., DOJ, Remarks to the ABA Institute on White Collar Crime (Mar. 3, 2022), <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-aba-institute-white-collar-crime> (stating DOJ's "first priority in corporate criminal cases is to prosecute the individuals who commit and profit from corporate malfeasance"); Lisa O. Monaco, Deputy Att'y Gen., DOJ, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group, at 2-3 (Sept. 15, 2022); Lisa O. Monaco, Deputy Att'y Gen., DOJ, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group (Sept. 15, 2022), <https://www.justice.gov/opa/speech/file/1535301/download> (discussing the importance of cooperation related to "the government's ability to assess individual culpability"); see also, *infra* at Sections II.B.2.a. and Section III.D.1.

<sup>3</sup> See, e.g., Lisa O. Monaco, Deputy Att'y Gen., DOJ, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group (Sept. 15, 2022), <https://www.justice.gov/opa/speech/file/1535301/download>; See Nicole M. Argentieri, Acting Principal Deputy Assistant Att'y Gen., DOJ, Remarks at the 39th International Conference on the Foreign Corrupt Practices Act (Dec. 1, 2022), <https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-nicole-m-argentieri-delivers-remarks> (stating that "a history of misconduct will not mean a guilty plea for a company that self-discloses, cooperates, and remediates unless other aggravating factors – aside from recidivism – are present.").

<sup>4</sup> See Lisa O. Monaco, Deputy Att'y Gen., DOJ, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group, at 5 (Sept. 15, 2022), <https://www.justice.gov/opa/speech/file/1535301/download> (stating "[n]ot all instances of prior misconduct ... are equally relevant or probative."); see also, *infra* at Section II.B.2.b.

<sup>5</sup> See Lisa A. Monaco, Deputy Att'y Gen., DOJ, Remarks on Corporate Criminal Enforcement (Sept. 15, 2022), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-corporate-criminal-enforcement> (emphasizing that the DOJ will disfavor multiple, successive non-prosecution or deferred prosecution agreements with the same company and the same leadership).

<sup>6</sup> See *infra* at Section II.D.1.

<sup>7</sup> See Kenneth A. Polite Jr., Assistant Att'y Gen., DOJ, Remarks at the University of Texas Law School (Sept. 16, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-delivers-remarks-university-texas-law-school> (describing certification requirements in the Glencore A.G. and GOL Airlines resolutions and stating "[w]e will continue to use similar certifications in our corporate resolutions as appropriate for each case.").

<sup>8</sup> Plea Agreement, *United States v. Glencore Int'l AG*, No. 22-CR-00297, Attach. H (S.D.N.Y. May 24, 2022); Deferred Prosecution Agreement, *United States v. GOL Linhas Aéreas Inteligentes S.A.*, No. 22-CR-00325, Attach. F (D. Md. Sept. 16, 2022) ECF No. 12-6; Deferred Prosecution Agreement, *United States v. ABB Ltd.*, No. 22-CR-00220, Attach. F (D. Va. Dec. 2, 2022) ECF No. 16-6; Deferred Prosecution Agreement, *United States v. UOP, LLC*, No. 22-CR-00624, Attach. F (S.D. Tex. Dec. 19, 2022) ECF No. 10.

#### **4. Continued International and Cross-Border Cooperation and Penalty Crediting**

**With a Move Away from Simultaneous Resolutions.** International cooperation and cross-border investigations have now become an established characteristic of corporate anti-corruption enforcement. In 2022, each of the five corporate resolutions announced by the DOJ's FCPA Unit involved the DOJ agreeing to credit penalties to resolutions with foreign authorities, including the first-ever coordination with authorities in South Africa.<sup>9</sup> While the trend of international and cross-border cooperation and penalty crediting continued in 2022, the prior convention of international authorities announcing resolutions simultaneously no longer appears to be the given practice. Increasingly, different governments resolve cases on different timelines and, in certain cases, with credits for penalties in potential future actions by foreign authorities.<sup>10</sup>

#### **B. 2022 Enforcement Trends and Priorities**

##### **1. Level of Enforcement Activity in 2022**

In total, the number of FCPA enforcement actions in 2022 increased by one more than in 2021, but remained significantly lower than the number of actions in 2020 and other recent years. There have been 25 enforcement actions in 2022,<sup>11</sup> as compared to 24 in 2021. The 25 actions include

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<sup>9</sup> U.S. Department of Justice Press Release No. 22-1383: Honeywell UOP to Pay Over \$160 Million to Resolve Foreign Bribery Investigations in U.S. and Brazil (Dec. 19, 2022), <https://www.justice.gov/opa/pr/honeywell-uop-pay-over-160-million-resolve-foreign-bribery-investigations-us-and-brazil>; U.S. Department of Justice Press Release No. 22-1296: ABB Agrees to Pay Over \$315 Million to Resolve Coordinated Global Foreign Bribery Case (Dec. 2, 2022), <https://www.justice.gov/opa/pr/abb-agrees-pay-over-315-million-resolve-coordinated-global-foreign-bribery-case>; U.S. Department of Justice Press Release No. 22-978: GOL Linhas Aéreas Inteligentes S.A. Will Pay Over \$41 Million in Resolution of Foreign Bribery Investigations in the United States and Brazil (Sept. 15, 2022), <https://www.justice.gov/opa/pr/gol-linhas-reas-inteligentes-sa-will-pay-over-41-million-resolution-foreign-bribery>; U.S. Department of Justice Press Release No. 22-554: Glencore Entered Guilty Pleas to Foreign Bribery and Market Manipulation Schemes (May 24, 2022), <https://www.justice.gov/opa/pr/glencore-entered-guilty-pleas-foreign-bribery-and-market-manipulation-schemes>; U.S. Department of Justice Press Release No. 22-401: Stericycle Agrees to Pay Over \$84 Million in Coordinated Foreign Bribery Resolution (Apr. 20, 2022), <https://www.justice.gov/opa/pr/stericycle-agrees-pay-over-84-million-coordinated-foreign-bribery-resolution>.

<sup>10</sup> For example, in the Glencore resolution, US authorities agreed to credit the company for payments made to authorities in Switzerland in the event that the company reaches a resolution with Swiss authorities within one year. US authorities similarly agreed to credit ABB Ltd. for payments the company made to German authorities pursuant to a pending resolution. See U.S. Department of Justice Press Release No. 22-554: Glencore Entered Guilty Pleas to Foreign Bribery and Market Manipulation Schemes (May 24, 2022), <https://www.justice.gov/opa/pr/glencore-entered-guilty-pleas-foreign-bribery-and-market-manipulation-schemes>; U.S. Department of Justice Press Release No. 22-1296, ABB Agrees to Pay Over \$315 Million to Resolve Coordinated Global Foreign Bribery Case (Dec. 2, 2022), <https://www.justice.gov/opa/pr/abb-agrees-pay-over-315-million-resolve-coordinated-global-foreign-bribery-case>.

<sup>11</sup> We recognize that other commentators may present slightly different numbers depending on their methodology. To determine the number of corporate enforcement actions for the year, we counted enforcement actions brought by the SEC and DOJ separately (e.g., parallel settlements with the same entity by the SEC and DOJ count as two actions). However, actions brought by a single agency against related corporate entities (e.g., a parent and subsidiary) for the same core conduct count as only one action. Declinations and case closures are not included within this metric.

eight corporate defendants, four of which were parties to parallel settlements with both the DOJ and SEC, and 13 individuals. The DOJ resolved five corporate cases and charged 13 individuals, and the SEC resolved seven corporate cases and did not bring any cases against individuals.

Unlike 2021, when all four of the FCPA resolutions against corporate defendants were against non-US companies,<sup>12</sup> in 2022, three of the eight corporate defendants were US companies.<sup>13</sup> Also, three of the 2022 resolutions involved recidivist corporate defendants—companies that had resolved FCPA-related matters previously—bringing to 21 the total number of companies that have settled more than one FCPA-related matter.<sup>14</sup>

Notwithstanding the DOJ's oft-repeated commitment to bringing individual prosecutions,<sup>15</sup> the number of individual enforcement actions continued to decline in 2022, from 50 in 2019, to 31 in 2020, to 17 in 2021, to 13 in 2022. While this trend surely reflects the longtail of individual prosecutions that continue to follow corporate resolutions, it also appears in tension with the DOJ's stated goal of prioritizing individual prosecutions.

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To determine the number of enforcement actions against individuals for the year, we counted charges against individuals in the year they were filed, not the year they were announced (i.e., criminal charges unsealed at a later date are included in the count for the year they were originally filed). As a result, the numbers reported for previous years in this alert are updated and therefore may be different from prior reports. In addition to charges alleging violations of the substantive FCPA provisions, we also included non-FCPA charges for which the allegations relate to bribery schemes. These non-FCPA charges included, but are not limited to, conspiracy to violate the FCPA, money laundering, and conspiracy to commit money laundering.

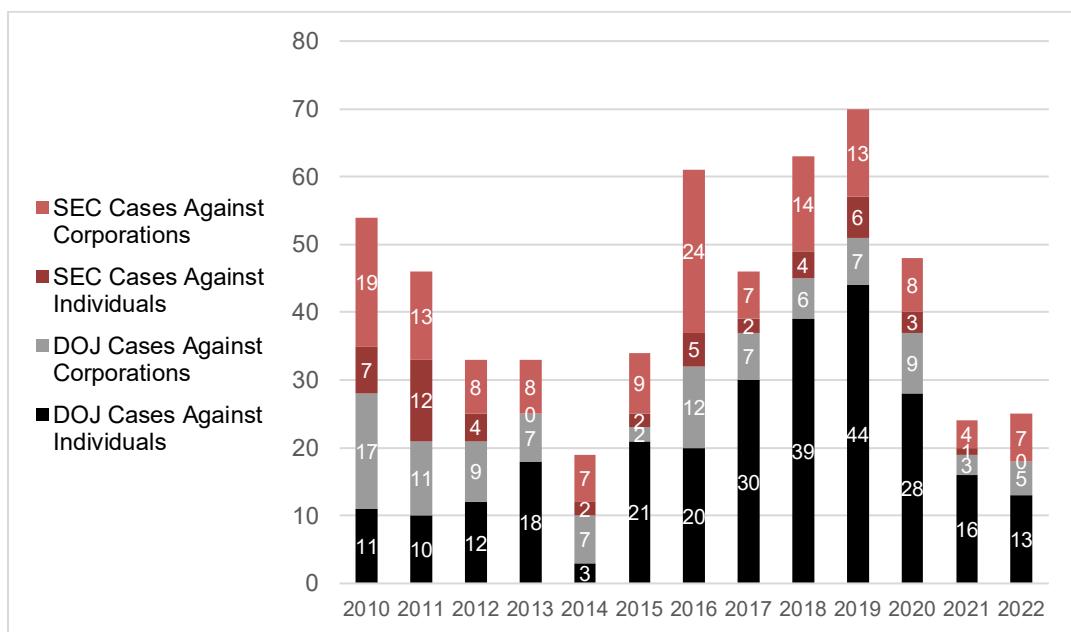
<sup>12</sup> See WilmerHale, *Global Anti-Bribery Year-in-Review: 2021 Developments and Predictions for 2022*, at 5 (Jan. 27, 2022), <https://www.wilmerhale.com/en/insights/client-alerts/20220127-2021-global-anti-bribery-year-in-review>.

<sup>13</sup> Deferred Prosecution Agreement, *United States v. Stericycle, Inc.*, No. 22-CR-20156 (S.D. Fla. Apr. 18, 2022) ECF No. 14; Order Instituting Cease-and-Desist Proc., *In the Matter of Oracle Corp.*, Rel. No. 95913, File No. 3-21158, Section IV (Sept. 27, 2022); Order Instituting Cease-and-Desist Proc., *In the Matter of Honeywell Int'l Inc.*, Rel. No. 96529, File No. 3-21255 (Dec. 19, 2022).

<sup>14</sup> See U.S. Department of Justice Press Release No. 22-1296: ABB Agrees to Pay Over \$315 Million to Resolve Coordinated Global Foreign Bribery Case (Dec. 2, 2022), <https://www.justice.gov/opa/pr/abb-agrees-pay-over-315-million-resolve-coordinated-global-foreign-bribery-case>; U.S. Securities and Exchange Commission Press Release No. 2022-173: SEC Charges Oracle a Second Time for Violations of the Foreign Corrupt Practices Act (Sept. 27, 2022), <https://www.sec.gov/news/press-release/2022-173>; U.S. Securities and Exchange Commission Press Release No. 2022-98: SEC Charges Global Steel Pipe Manufacturer with Violating Foreign Corrupt Practices Act (June 2, 2022), <https://www.sec.gov/news/press-release/2022-98>; WilmerHale, *Global Anti-Bribery Year-in-Review: 2021 Developments and Predictions for 2022*, at 6 (Jan. 27, 2022), <https://www.wilmerhale.com/en/insights/client-alerts/20220127-2021-global-anti-bribery-year-in-review> (noting 18 as the total number of companies that have settled more than one FCPA-related matter).

<sup>15</sup> See *supra* at Section I.A.; see *infra* at Section II.B.2.a. and Section III.D.1.

### DOJ and SEC Enforcement Actions 2010-2022<sup>16</sup>



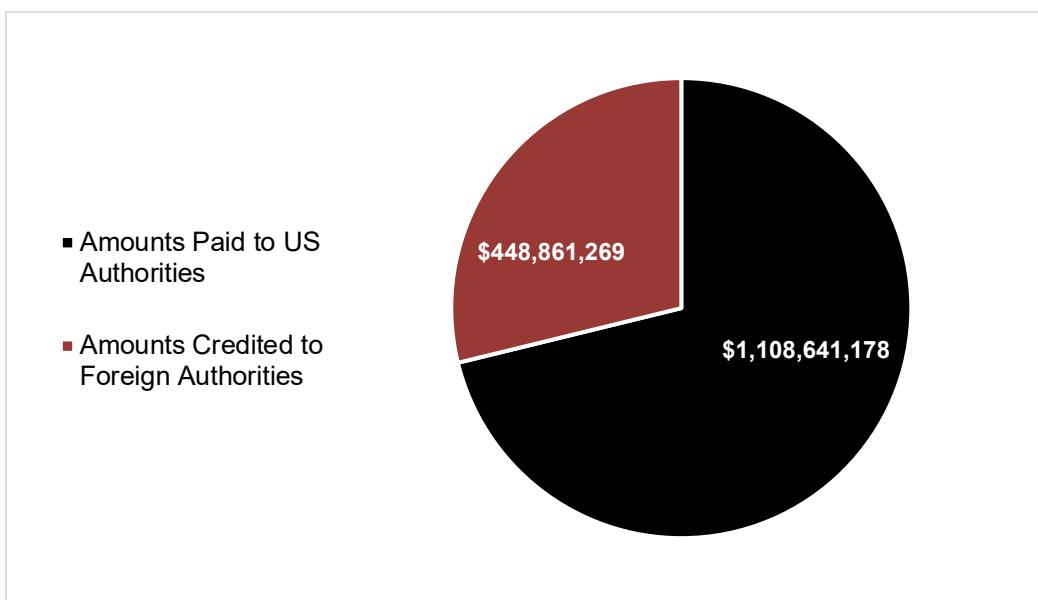
As noted above, despite a similar number of actions to 2021, the total monetary penalties in 2022, approximately \$1.56 billion,<sup>17</sup> were significantly higher than in 2021, which saw monetary penalties of \$459 million. Similar to previous years, a small number of companies accounted for nearly all of the FCPA penalties imposed by US authorities.

Some of the 2022 monetary penalties for FCPA-related conduct were offset by payments to foreign authorities, but the majority were imposed and collected by US authorities. In total, US authorities received approximately \$1.11 billion in penalties and credited approximately \$448.86 million to foreign authorities. While this aligns with corporate resolutions in 2021, it is in contrast to 2020, where FCPA penalty amounts credited to foreign authorities eclipsed the total paid to US authorities.

<sup>16</sup> For a description of our methodology for counting corporate and individual enforcement actions, please refer to footnote 11 above.

<sup>17</sup> To calculate the total monetary penalties imposed in FCPA-related actions against companies, we counted the amounts set out in resolution papers that a settling party could be liable to pay to US enforcement agencies, even if those penalties were ultimately offset by payments to other entities (e.g., foreign authorities).

## Total FCPA Penalty Amounts Paid<sup>18</sup> to US and Foreign Authorities in 2022



### 2. Enforcement Trends

#### a. Continued Focus on Certain High-Risk Industries

In 2022, the SEC and DOJ continued to focus enforcement actions on high-risk industries, such as energy, technology, aerospace, and telecommunications. These industries have historically attracted FCPA enforcement attention due to their broad geographic reach, reliance on third parties, and involvement in sectors with heavy government regulation.

1. *Energy.* Many companies in the energy sector, and companies that sell to state-owned energy companies, conduct business in markets perceived to be affected by high levels of corruption, including those with cash-based economies or unstable governments, and in countries where contact with foreign government officials is unavoidable because energy assets are nationalized and/or highly regulated.<sup>19</sup> As a result, US enforcement authorities continue to focus on the energy sector in 2022, including the resolutions with Glencore, Honeywell (allegedly involving bribes paid to officials at Petróleo Brasileiro S.A. (Petrobras), Brazil's state-owned oil company), and Tenaris (allegedly involving bribes paid to Brazilian government officials to obtain business from Petrobras). In addition, there were three FCPA-related actions against

<sup>18</sup> For purposes of this graph, we necessarily take into account the offsets discussed in footnote 1 in calculating the total amount of FCPA-related penalties that were ultimately paid to both US and foreign authorities. In doing so, however, we only include payments to foreign regulators specifically credited in the DOJ or SEC papers, and do not count payments made pursuant to separate resolutions entered into by companies with foreign regulators that are not factored into the DOJ and SEC numbers.

<sup>19</sup> WilmerHale, *Foreign Corrupt Practices Act Enforcement in the Energy Sector* (Mar. 7, 2019), <https://www.wilmerhale.com/insights/client-alerts/20190307-foreign-corrupt-practices-act-enforcement-in-the-energy-sector>.

- five total individuals related to Venezuela's state-owned and state-controlled oil company, Petróleos de Venezuela, S.A. (PDVSA).
2. *Technology*. Companies in the technology sector often engage third parties and sell to government end users. Enforcement focus on this industry continued this year as Texas-based technology company, Oracle Corporation, settled SEC charges that it violated provisions of the FCPA.<sup>20</sup>
  3. *Aerospace*. Aerospace companies are also considered to be high risk for corruption due to two main factors inherent in the industry: a high percentage of government-owned or -controlled airlines and the heavy use of third parties in countries with a perceived high risk of corruption. The 2022 resolution with GOL Linhas Aéreas Inteligentes S.A. (GOL), the second largest domestic Brazilian airline, illustrated those risk factors: GOL allegedly paid millions of dollars in bribes to foreign officials in Brazil in exchange for the passage of legislation that was beneficial to the airline, and entered into fraudulent contracts with third-party vendors for the purpose of generating and concealing the funds necessary for the bribes.<sup>21</sup>
  4. *Telecommunications*. In February, Korea's largest telecommunications operator, KT Corporation, resolved FCPA books-and-records and internal controls charges with the SEC.<sup>22</sup> Telecommunications companies often compete for foreign government contracts, and many of the international carriers and equipment manufacturers with which they do business are either partially or wholly-state-owned.<sup>23</sup> As a result, telecommunications companies, including foreign issuers like KT Corporation, are considered to be high risk for potential FCPA violations, as they have significant interaction with government officials and regularly bid for government contracts as a major source of business.

**b. Continued International Cooperation with a Move Away from Simultaneous Resolutions**

Cross-border coordination between the US and other jurisdictions has now become a hallmark of corporate anti-corruption enforcement. In 2022, both the DOJ and SEC continued to pursue extensive coordination and cooperation with foreign regulators, especially those in Europe and Latin America. All of the DOJ and SEC corporate settlements entered in 2022, except the SEC's

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<sup>20</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of Oracle Corp.*, Rel. No. 95913, File No. 3-21158 (Sept. 27, 2022); *see infra* at Section III.A.4.f.

<sup>21</sup> Deferred Prosecution Agreement, *United States v. GOL Linhas Aéreas Inteligentes S.A.*, No. 22-CR-00325 (D. Md. Sept. 16, 2022) ECF No. 12; Order Instituting Cease-and-Desist Proc., *In the Matter of GOL Linhas Aéreas Inteligentes S.A.*, Rel. No. 95800, File No. 3-21094 (Sept. 15, 2022); U.S. Department of Justice Press Release No. 22-978: GOL Linhas Aéreas Inteligentes S.A. Will Pay Over \$41 Million in Resolution of Foreign Bribery Investigations in the United States and Brazil (Sept. 15, 2022), <https://www.justice.gov/opa/pr/gol-linhas-aerias-inteligentes-sa-will-pay-over-41-million-resolution-foreign-bribery>; *see infra* at Section III.A.4.e.

<sup>22</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of KT Corp.*, Rel. No. 94279, File No. 3-20780 (Feb. 17, 2022); *see also, infra* at Section III.A.4.a.

<sup>23</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of KT Corp.*, Rel. No. 94279, File No. 3-20780 (Feb. 17, 2022).

resolution with KT Corporation, involved publicly announced coordination with or assistance from foreign authorities. The DOJ coordinated with foreign authorities, including by crediting penalties to be paid pursuant to resolutions reached with foreign authorities, in all five of the corporate resolutions that it announced in 2022: (1) Stericycle, involving coordination with authorities in Brazil;<sup>24</sup> (2) Glencore, involving coordination with authorities in the UK and Brazil;<sup>25</sup> (3) GOL, involving coordination with authorities in Brazil<sup>26</sup>; (4) ABB Ltd, involving coordination with authorities in South Africa (the first ever coordinated resolution with South Africa), Switzerland, and Germany<sup>27</sup>; and (5) Honeywell, involving coordination with authorities in Brazil.<sup>28</sup> The SEC agreed to credit disgorgement and/or prejudgment interest in three of the seven SEC corporate settlements that it announced in 2022.<sup>29</sup> Of note, the SEC did not credit disgorgement in any cases that did not involve the DOJ.

Assistant Attorney General for the Criminal Division Kenneth A. Polite and Acting Principal Deputy Assistant Attorney General Nicole M. Argentieri both recently highlighted the DOJ's past collaboration with certain foreign authorities and their efforts to expand their reach to work with authorities in other unspecified countries.<sup>30</sup> Acting Principal DAAG Argentieri also emphasized the

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<sup>24</sup> U.S. Department of Justice Press Release No. 22-401: Stericycle Agrees to Pay Over \$84 Million in Coordinated Foreign Bribery Resolution (Apr. 20, 2022), <https://www.justice.gov/opa/pr/stericycle-agrees-pay-over-84-million-coordinated-foreign-bribery-resolution>.

<sup>25</sup> U.S. Department of Justice Press Release No. 22-554: Glencore Entered Guilty Pleas to Foreign Bribery and Market Manipulation Schemes (May 24, 2022), <https://www.justice.gov/opa/pr/glencore-entered-guilty-pleas-foreign-bribery-and-market-manipulation-schemes>.

<sup>26</sup> U.S. Department of Justice Press Release No. 22-978: GOL Linhas Aéreas Inteligentes S.A. Will Pay Over \$41 Million in Resolution of Foreign Bribery Investigations in the United States and Brazil (Sept. 15, 2022), <https://www.justice.gov/opa/pr/gol-linhas-reas-inteligentes-sa-will-pay-over-41-million-resolution-foreign-bribery>.

<sup>27</sup> U.S. Department of Justice Press Release No. 22-1296: ABB Agrees to Pay Over \$315 Million to Resolve Coordinated Global Foreign Bribery Case (Dec. 2, 2022), <https://www.justice.gov/opa/pr/abb-agrees-pay-over-315-million-resolve-coordinated-global-foreign-bribery-case> (noting that the credits to German authorities will be granted "so long as payments underlying an anticipated resolution with German authorities are made within 12 months of [December 2, 2022]").

<sup>28</sup> U.S. Securities and Exchange Commission Press Release No. 2022-230: SEC Charges Honeywell with Bribery Schemes in Algeria and Brazil (Dec. 19, 2022), <https://www.sec.gov/news/press-release/2022-230>.

<sup>29</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of Honeywell Int'l Inc.*, Rel. No. 96529, File No. 3-21255, at 9 (Dec. 19, 2022), <https://www.sec.gov/litigation/admin/2022/34-96529.pdf>; U.S. Securities and Exchange Commission Press Release No. 2022-214: ABB Settles SEC Charges That It Engaged in Bribery Scheme in South Africa (Dec. 3, 2022), <https://www.sec.gov/news/press-release/2022-214> (noting that the Commission deemed the disgorgement payment satisfied by ABB's reimbursement of its ill-gotten gains to the South African government as part of an earlier civil settlement based largely on the same underlying facts as the SEC's action); U.S. Securities and Exchange Commission Press Release No. 2022-30: Largest South Korean Telecommunications Co. Agrees to Pay the SEC to Settle FCPA Charges (Feb. 17, 2022), <https://www.sec.gov/news/press-release/2022-30> (stating that the SEC order provides for offsetting up to approximately \$4.2 million of any disgorgement paid to Brazilian authorities).

<sup>30</sup> Kenneth A. Polite Jr., Assistant Att'y Gen., DOJ, Remarks at the 20th International Anti-Corruption Conference (Dec. 9, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-closing-remarks-20th-international>; see also Nicole M. Argentieri, Acting Principal Deputy Assistant Att'y Gen., DOJ, Remarks at the 39th International Conference on the Foreign Corrupt Practices Act (Dec. 1, 2022), <https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-nicole-m-argentieri-delivers-remarks>.

DOJ's investment of resources into providing expert assistance, case-based mentoring, and other training to foreign authorities and law enforcement.<sup>31</sup>

Although this trend of cross-border cooperation appears to be here to stay, US authorities appear to be moving away from simultaneous resolution announcements with foreign authorities. Instead of one coordinated announcement of simultaneous resolutions across jurisdictions, resolutions are increasingly resolved by different governments on different timelines. For example, in the Glencore resolution, US authorities agreed to credit the company for payments made to the authorities in the UK and authorities in Switzerland in the event that the company reached a resolution those authorities within respective defined time periods.<sup>32</sup> And US authorities similarly agreed to credit ABB Ltd. for payments the company was expected to make to German authorities pursuant to a pending resolution.<sup>33</sup>

### **c. Enforcement Focused on Conduct in Latin America**

As in prior years, a number of the enforcement actions in 2022 involved conduct that occurred in Latin America. This trend may be explained in part by (1) potentially greater US touch points for many Latin American businesses and government officials; and (2) a strong, cooperative relationship between the DOJ and Brazilian authorities. Examples of 2022 enforcement activity related to conduct in Latin America include the DOJ's and SEC's resolutions with Stericycle connected to bribery schemes in Argentina, Brazil, and Mexico,<sup>34</sup> GOL related to a bribery scheme involving Brazilian government officials,<sup>35</sup> Tenaris related to conduct involving its Brazilian subsidiary;<sup>36</sup> and Honeywell related to a bribery scheme involving a state-owned oil company in Brazil.<sup>37</sup>

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<sup>31</sup> Nicole M. Argentieri, Acting Principal Deputy Assistant Att'y Gen., DOJ, Remarks at the 39th International Conference on the Foreign Corrupt Practices Act (Dec. 1, 2022), <https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-nicole-m-argentieri-delivers-remarks>.

<sup>32</sup> U.S. Department of Justice Press Release No. 22-554: Glencore Entered Guilty Pleas to Foreign Bribery and Market Manipulation Schemes (May 24, 2022), <https://www.justice.gov/opa/pr/glencore-entered-guilty-pleas-foreign-bribery-and-market-manipulation-schemes>.

<sup>33</sup> U.S. Department of Justice Press Release No. 22-1296, ABB Agrees to Pay Over \$315 Million to Resolve Coordinated Global Foreign Bribery Case (Dec. 2, 2022), <https://www.justice.gov/opa/pr/abb-agrees-pay-over-315-million-resolve-coordinated-global-foreign-bribery-case>.

<sup>34</sup> U.S. Securities and Exchange Commission Press Release No. 2022-65: SEC Charges Stericycle with Bribery Schemes in Latin America (Apr. 20, 2022), <https://www.sec.gov/news/press-release/2022-65>.

<sup>35</sup> U.S. Securities and Exchange Commission Press Release No. 2022-164: SEC Charges Gol Intelligent Airlines, Brazil's Second Largest Airline, with FCPA Violations (Sept. 15, 2022), <https://www.sec.gov/news/press-release/2022-164>.

<sup>36</sup> U.S. Securities and Exchange Commission Press Release No. 2022-98: SEC Charges Global Steel Pipe Manufacturer with Violating Foreign Corrupt Practices Act (June 2, 2022), <https://www.sec.gov/news/press-release/2022-98>.

<sup>37</sup> U.S. Department of Justice Press Release No. 22-1383: Honeywell UOP to Pay Over \$160 Million to Resolve Foreign Bribery Investigations in U.S. and Brazil (Dec. 19, 2022), <https://www.justice.gov/opa/pr/honeywell-uop-pay-over-160-million-resolve-foreign-bribery-investigations-us-and-brazil>; U.S. Securities and Exchange Commission Press Release No. 2022-230: SEC Charges Honeywell with Bribery Schemes in Algeria and Brazil (Dec. 19, 2022), <https://www.sec.gov/news/press-release/2022-230>.

We expect this trend to continue in the future and we expect to see continued investigation and enforcement activity in Latin America, as evidenced by the DOJ issuing several subpoenas this year in relation to companies' businesses in Latin America. In November 2022, the DOJ subpoenaed insurance company Arthur Gallagher & Co to seek information related to the company's insurance business with public entities in Ecuador.<sup>38</sup> In May 2022, Millicom International Cellular SA, a telecommunications company that focuses on emerging markets in Latin America and Africa, announced that it received a subpoena requesting information related to the company's business in Guatemala and other Latin American countries.<sup>39</sup>

#### **d. Increase in Imposition of Monitorships**

As predicted in our 2021 FCPA Year-In-Review,<sup>40</sup> the US government returned to imposing monitorships more actively in 2022, a reversal of the trend for the past few years. The increased use of monitorships is consistent with the DOJ's recent guidance that focuses on incentivizing the development of stronger corporate compliance programs.<sup>41</sup>

In 2022, DOJ imposed FCPA monitorships in two out of five corporate resolutions: (1) Stericycle, Inc. and (2) Glencore International A.G.<sup>42</sup> In April, Stericycle agreed to continue to enhance its compliance program and retain an independent compliance monitor for two years, followed by self-reporting to the Department for the remainder of the company's three-year DPA term.<sup>43</sup> In announcing the \$84 million resolution, DOJ noted that although the company took "extensive remedial measures, [the imposition of a monitor is necessary because] it has not fully implemented

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<sup>38</sup> Dylan Toker, *Insurance Broker Arthur J. Gallagher Subpoenaed by Justice Department's Foreign Bribery Unit*, WALL ST. J. (Nov. 4, 2022, 2:09 PM), <https://www.wsj.com/articles/insurance-broker-arthur-j-gallagher-subpoenaed-by-justice-departments-foreign-bribery-unit-11667584283>.

<sup>39</sup> *Millicom Under Scrutiny...Again*, FCPA PROFESSOR (May 13, 2022), <https://fcpaprofessor.com/millicom-under-scrutiny-again/>.

<sup>40</sup> See WilmerHale, *2021 Global Anti-Bribery Year-in-Review*, at 117 (Jan. 27, 2022), <https://www.wilmerhale.com/en/insights/client-alerts/20220127-2021-global-anti-bribery-year-in-review>.

<sup>41</sup> See, e.g., Lisa O. Monaco, Deputy Att'y Gen., DOJ, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group, at 14 (Sept. 15, 2022), <https://www.justice.gov/opa/speech/file/1535301/download> (introducing new factors for prosecutors to consider when evaluating the imposition of a monitor, including whether the company voluntarily self-disclosed the misconduct and whether the underlying criminal conduct involved active participation of compliance personnel or the failure of compliance personnel to appropriately escalate or respond to red flags); Kenneth A. Polite, Jr., Assistant Att'y Gen., DOJ, Remarks on Corporate Compliance and Enforcement (Mar. 25, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-nyu-law-s-program-corporate> (noting to "expect to see the Department imposing independent corporate monitors whenever it is appropriate in order to satisfy our prosecutors that a company is living up to its compliance and disclosure obligations under a non-trial resolution" and offering three expectations DOJ attorneys will have when investigating a compliance program: that the programs "1) are well designed, 2) are adequately resourced and empowered to function effectively, and 3) work in practice."); see also, *infra* at Section II.B.2.c. and Section II.C.1.

<sup>42</sup> Plea Agreement, *United States v. Glencore Int'l AG*, No. 22-CR-00297, Attachs. D, E (S.D.N.Y. May 24, 2022); U.S. Department of Justice Press Release No. 22-554: Glencore Entered Guilty Pleas to Foreign Bribery and Market Manipulation Schemes (May 24, 2022), <https://www.justice.gov/usao-sdny/pr/glencore-entered-guilty-pleas-foreign-bribery-and-market-manipulation-conspiracies>.

<sup>43</sup> U.S. Department of Justice Press Release No. 22-401: Stericycle Agrees to Pay Over \$84 Million in Coordinated Foreign Bribery Resolution (Apr. 20, 2022), <https://www.justice.gov/opa/pr/stericycle-agrees-pay-over-84-million-coordinated-foreign-bribery-resolution>.

or tested its enhanced compliance program.”<sup>44</sup> Then in May, for the first time, the DOJ imposed two separate three-year monitorships in a coordinated settlement between two different divisions of the DOJ Fraud Section (the FCPA unit and the MIMF unit).<sup>45</sup> The monitor in the resolution with Glencore International A.G. will focus on anti-corruption issues, while the monitor in the resolution with Glencore Ltd. will focus on market manipulation issues.<sup>46</sup> The Department noted some of the compliance enhancements Glencore had taken—including “establishing a centralized compliance function, hiring a Head of Compliance, and significantly increasing the number of employees in compliance functions,”<sup>47</sup>—but nevertheless concluded that a monitor was appropriate because certain aspects of the program had not yet been fully implemented and tested.<sup>48</sup>

The DOJ specifically declined to impose a monitor on GOL, ABB Ltd., and Honeywell, citing the companies’ respective remediation efforts, the state of their compliance programs, and/or their agreement to report to the DOJ on the status of their compliance programs. For example, with respect to GOL, the DOJ specifically declined to impose an independent compliance monitor because (1) the company had “redesigned its whole anti-corruption compliance program” at the time of the resolution; (2) “demonstrated [] through testing that the program was functioning effectively and adequately resourced;” and (3) agree that its CEO and CCO would certify the compliance program’s ongoing effectiveness at the end of the DPA term.<sup>49</sup> Similarly, in ABB Ltd., the DOJ noted that an independent compliance monitor was unnecessary based on the company’s “extensive remedial efforts,” which included hiring experienced compliance personnel, implementing targeted training programs, and conducting continuing monitoring and testing, among other efforts.

#### e. Continued Investment in Data Analytics

As predicted in our 2021 FCPA Year-in-Review, data analytics continued to be an important focus of investment for the DOJ and SEC in 2022.<sup>50</sup> In March, Attorney General Merrick Garland described data analytics as an “important force-multiplier” in corporate criminal law enforcement

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<sup>44</sup> U.S. Department of Justice Press Release No. 22-401: Stericycle Agrees to Pay Over \$84 Million in Coordinated Foreign Bribery Resolution (Apr. 20, 2022), <https://www.justice.gov/opa/pr/stericycle-agrees-pay-over-84-million-coordinated-foreign-bribery-resolution>.

<sup>45</sup> Plea Agreement, *United States v. Glencore Int'l AG*, No. 22-CR-00297, Attachs. D, E (S.D.N.Y. May 24, 2022); Plea Agreement, *United States v. Glencore Int'l AG*, No. 22-CR-00071, Attach. D (D. Conn May 24, 2022) ECF No. 12; U.S. Department of Justice Press Release No. 22-554: Glencore Entered Guilty Pleas to Foreign Bribery and Market Manipulation Schemes (May 24, 2022), <https://www.justice.gov/opa/pr/glencore-entered-guilty-pleas-foreign-bribery-and-market-manipulation-schemes>.

<sup>46</sup> Plea Agreement, *United States v. Glencore Int'l AG*, No. 22-CR-00297, Attachs. D, E (S.D.N.Y. May 24, 2022); Plea Agreement, *United States v. Glencore Int'l AG*, No. 22-CR-00071, Attach. D (D. Conn. May 24, 2022) ECF No. 12.

<sup>47</sup> Plea Agreement, *United States v. Glencore Int'l AG*, No. 20-CR-00071 (D. Conn. May 24, 2022).

<sup>48</sup> U.S. Department of Justice Press Release No. 22-554: Glencore Entered Guilty Pleas to Foreign Bribery and Market Manipulation Schemes (May 24, 2022).

<sup>49</sup> Nicole M. Argentieri, Acting Principal Deputy Assistant Att'y Gen., DOJ, Remarks at the 39th International Conference on the Foreign Corrupt Practices Act (Dec. 1, 2022), <https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-nicole-m-argentieri-delivers-remarks>.

<sup>50</sup> See WilmerHale, 2021 Global Anti-Bribery Year-in-Review, at 117 (Jan. 27, 2022), <https://www.wilmerhale.com/en/insights/client-alerts/20220127-2021-global-anti-bribery-year-in-review>.

actions.<sup>51</sup> And in September, the DOJ invested in this tool by hiring Matthew Galvin to serve in a newly created position as the Fraud Section's compliance and big data expert. In his former in-house role as global chief of compliance at AB InBev, Mr. Galvin and his team developed an analytics platform that processes volumes of corporate data to identify potentially risky transactions and third parties.<sup>52</sup>

The DOJ has also signaled that it expects corporations to use data as an important part of their compliance programs in both public remarks, as well as in updates to the 2022 DOJ Corporate Criminal Enforcement Guidance. For example, in remarks delivered in March, AAG Polite noted: "Just as we use data analytics to detect and combat criminal schemes, we urge corporations to consider what data analytics tools they can use to monitor compliance with laws and policies within their operations and to ferret out wrongdoing when it occurs."<sup>53</sup> We anticipate that the DOJ will continue to expect companies to appropriately use and retain data, and to use data analytics in their compliance program to monitor and prevent misconduct and violations of the law.<sup>54</sup>

#### **f. Continued CFTC Involvement in FCPA-Related Cases**

The Commodity Futures Trading Commission (CFTC) continues to be involved in FCPA-related cases that involve commodities.<sup>55</sup> For example, the CFTC conducted a parallel investigation of Glencore and also entered into a settlement with the company. While Glencore's payment of approximate \$1.19 billion total to the CFTC consisted of the highest civil monetary penalty (\$866 million) and highest disgorgement amount (\$321 million) in CFTC history, approximately 72% (\$852 million) was offset by the amount made by Glencore owed to the DOJ pursuant to resolutions concerning manipulation and corruption.<sup>56</sup> While only part of the settlement related to allegations of foreign corruption (the rest was connected to manipulation or attempted manipulation of US-

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<sup>51</sup> Merrick B. Garland, Att'y Gen., DOJ, Remarks to the ABA Institute on White Collar Crime (Mar. 3, 2022), <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-aba-institute-white-collar-crime>.

<sup>52</sup> See *infra* at Section II.D.1.

<sup>53</sup> Kenneth A. Polite Jr., Assistant Att'y Gen., DOJ, Remarks at NYU Law's Program on Corporate Compliance and Enforcement (PCCE) (Mar. 25, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-nyu-law-s-program-corporate>.

<sup>54</sup> Note however, that DOJ Fraud Chief Glenn Leon noted that the DOJ did not expect companies to "spend hundreds of thousands of dollars" on the "shiniest [new] tool," but to "think more about data" and how it can be harnessed. See Max Fillion, *Glenn Leon: Data Analytics in Corporate Compliance Not About the "Shiniest Tool"*, GLOBAL INVESTIGATIONS REV. (Dec 1. 2022), <https://globalinvestigationsreview.com/news-and-features/in-house/2020/article/glenn-leon-data-analytics-in-corporate-compliance-not-about-the-shiniest-tool>.

<sup>55</sup> See U.S. Commodity Futures Trading Commission Enforcement Advisory: Advisory on Self Reporting and Cooperation for CEA Violations Involving Foreign Corrupt Practices (Mar. 6, 2019), <https://www.cftc.gov/sites/default/files/2019-03/enfadvisoryselfreporting030619.pdf>; U.S. Commodity Futures Trading Commission Release No. 8326-20: CFTC Orders Vitol Inc. to Pay \$95.7 Million for Corruption-Based Fraud and Attempted Manipulation (Dec. 3, 2020), <https://www.cftc.gov/PressRoom/PressReleases/8326-20>; U.S. Department of Justice Press Release No. 21-23: Deutsche Bank Agrees to Pay over \$130 Million to Resolve Foreign Corrupt Practices Act and Fraud Case (Jan. 8, 2021), <https://www.justice.gov/opa/pr/deutsche-bank-agrees-pay-over-130-million-resolve-foreign-corrupt-practices-act-and-fraud>.

<sup>56</sup> Order Instituting Proc., *In the Matter of Glencore Int'l AG*, CFTC No. 22-16, 2022 WL 1963727 (May 24, 2022); U.S. Commodity Futures Trading Commission Press Release No. 8534-22: CFTC Orders Glencore to Pay \$1.186 Billion for Manipulation and Corruption (May 24, 2022), <https://www.cftc.gov/PressRoom/PressReleases/8534-22>.

based physical oil benchmarks), the CFTC emphasized that the case was brought in coordination with the CFTC Division of Enforcement’s Corruption Task Force and is the second action brought by the CFTC involving foreign corruption.<sup>57</sup>

Prior to the Glencore settlement, CFTC had previously resolved charges with Vitol Inc., an energy and commodities trading firm, for more than \$95 million relating to manipulative and deceptive conduct involving foreign corruption.<sup>58</sup>

## **II. KEY POLICY ANNOUNCEMENTS**

### **A. Introduction**

Following the creation of the DOJ’s Corporate Crime Advisory Group (CCAG) in 2021, the DOJ used 2022 and early 2023 to issue further revisions to its corporate criminal enforcement policies and spell out new priorities concerning prosecutions, cooperation, and corporate compliance. Meanwhile, though the SEC did not make any notable formal policy changes, its leadership telegraphed a shift toward heightened penalties aimed at increasing deterrence. The year also featured notable personnel moves in FCPA enforcement, including the appointment of a new chief for the DOJ’s Fraud Section and the Section’s subsequent creation of a new compliance and big data expert position.

### **B. DOJ Announces Revisions to Corporate Criminal Enforcement Policies**

#### **1. January 2023 Revisions to the Department of Justice Criminal Division’s Corporate Enforcement Policy**

On January 17, 2023, Assistant Attorney General Kenneth A. Polite announced revisions to the Department of Justice Criminal Division’s Corporate Enforcement Policy.<sup>59</sup> The Corporate Enforcement Policy—which was formerly known as the FCPA Corporate Enforcement Policy—revises the FCPA Corporate Enforcement Policy and expressly expands its application to all corporate criminal matters handled by the Criminal Division.<sup>60</sup> The revisions are aimed at further incentivizing companies to develop and maintain robust corporate compliance programs, to swiftly voluntarily self-disclose suspected corporate misconduct, to cooperate fully with government investigations, and to timely and appropriately remediate.

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<sup>57</sup> U.S. Commodity Futures Trading Commission Press Release No. 8534-22: CFTC Orders Glencore to Pay \$1.186 Billion for Manipulation and Corruption (May 24, 2022), <https://www.cftc.gov/PressRoom/PressReleases/8534-22>.

<sup>58</sup> U.S. Commodity Futures Trading Commission Release No. 8326-20: CFTC Orders Vitol Inc. to Pay \$95.7 Million for Corruption-Based Fraud and Attempted Manipulation (Dec. 3, 2020), <https://www.cftc.gov/PressRoom/PressReleases/8326-20>.

<sup>59</sup> Kenneth A. Polite, Jr., Assistant Att’y Gen., DOJ, Remarks on Revisions to the Criminal Division’s Corporate Enforcement Policy, (Jan. 17, 2023) <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-georgetown-university-law>.

<sup>60</sup> With this expansion, the Corporate Enforcement Policy now applies not just to FCPA cases, but also to all corporate criminal matters handled by the Criminal Division, which includes cases handled by the Money Laundering and Asset Recovery Section and the Fraud Section (which includes the FCPA Unit, Healthcare Frauds Unit, and Market Integrity and Major Frauds Unit).

Under the revised Corporate Enforcement Policy:

**a. Expanded Eligibility for Declinations Even With Aggravating Circumstances**

Companies that voluntarily self-disclose misconduct will be eligible for declinations, even where aggravating circumstances that may ordinarily warrant a criminal prosecution are present, provided the following conditions are met:

- The company voluntarily disclosed immediately upon becoming aware of the allegation of misconduct;
- At the time of the misconduct and disclosure, the company had in place an effective compliance program and system of internal accounting controls that enabled the identification of the misconduct and led to the voluntary self-disclosure; and
- The company engaged in “extraordinary” cooperation and remediation.

Although this revision to the Corporate Enforcement Policy may appear to mark a significant policy change, the DOJ has in the past awarded Corporate Enforcement Policy declinations where aggravating circumstances appear to have been present. Nonetheless, with this announcement, the Criminal Division appears to have formalized eligibility for obtaining a declination where aggravating circumstances are present and to have established specific, if demanding, requirements for eligibility. The bar for obtaining a declination with aggravating circumstances will be considerable, given that disclosure must be “immediate” and cooperation and remediation must be “extraordinary.”

**b. Increased Potential Credit for Voluntary Self-Disclosures that Do Not Receive a Declination**

If a company voluntarily self-discloses misconduct, fully cooperates, and timely and appropriately remediates, but does not receive a declination under the Corporate Enforcement Policy, the DOJ will recommend a reduction of at least 50% and up to 75% off of the low end of the US Sentencing Guidelines range as part of the criminal resolution—provided that the company is not a criminal recidivist; if a company is a recidivist, the DOJ will still apply a 50% to 75% reduction, but generally not from the low end of the Guidelines range. Such a situation might occur where a company voluntarily self-discloses misconduct, the DOJ determines that aggravating circumstances are present, and the DOJ determines that the company has failed to meet the specific conditions required to obtain a declination. Previously, the reduction available in such circumstances was 50% off of the low end of the Guidelines range.

**c. Increased Potential Credit for Companies that Do Not Voluntarily Self-Disclose But Engage in Extraordinary Cooperation and Remediation**

Companies that do not voluntarily self-disclose will be eligible for a fine reduction of up to 50% from the low end of the US Sentencing Guidelines range. However, there will be no presumption of

entitlement to such a reduction, and the most substantial reductions will be reserved for only the “most extraordinary levels” of cooperation and remediation. Recidivists will be eligible for a similar reduction, but generally not from the low end of the Guidelines range. This represents a significant change from the prior Corporate Enforcement Policy, which provided for a maximum penalty reduction of 25% off of the low end of the Guidelines range, absent voluntary self-disclosure.

Throughout his remarks, AAG Polite reiterated that the Corporate Enforcement Policy aligns with the Division’s top priority, as stated in prior DOJ memoranda and public announcements: ensuring individual accountability for corporate wrongdoing, as the Division is best positioned to secure such individual accountability when companies proactively bring corporate misconduct to light.

## **2. September 2022 Revisions to Corporate Criminal Enforcement Policies**

In September 2022, Deputy Attorney General (DAG) Lisa Monaco issued a memorandum revising several key aspects of the DOJ’s corporate criminal enforcement policies titled “Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group” (the September 2022 Revised Policy).<sup>61</sup> The new policy prioritizes four areas: (1) individual accountability, (2) corporate accountability, (3) independent compliance monitors, and (4) a commitment to transparency. Building on the foundation laid in the October 2021 “Memorandum on Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies” (the October 2021 Memorandum), the new policy was also informed in part by a series of meetings between the Corporate Crime Advisory Group (CCAG) and civil society groups, criminal law experts, in-house counsel and business leaders, among other stakeholders, to discuss corporate enforcement.<sup>62</sup> DAG Monaco previewed the key priorities of the new policy in a speech at NYU School of Law’s Corporate Compliance Enforcement Program on the same day as issuing the memo.<sup>63</sup>

Among other goals, the new policy seeks to provide General Counsels and Chief Compliance Officers with the tools needed to make the business case for compliance, to further incentivize robust self-disclosure, as well as to provide prosecutors with additional guidance and resources to pursue Department priorities in the four key areas:

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<sup>61</sup> Lisa O. Monaco, Deputy Att’y Gen., DOJ, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group (Sept. 15, 2022), <https://www.justice.gov/opa/speech/file/1535301/download>.

<sup>62</sup> Lisa O. Monaco, Deputy Att’y Gen., DOJ, Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies (Oct. 28, 2021), <https://www.justice.gov/dag/page/file/1445106/download> (announcing the creation of the CCAG’s and providing initial revisions to DOJ’s corporate enforcement policies); see also WilmerHale, 2021 Global Anti-Bribery Year-in-Review, at 18-21 (Jan. 27, 2022), <https://www.wilmerhale.com/en/insights/client-alerts/20220127-2021-global-anti-bribery-year-in-review> (discussing the 2021 memorandum).

<sup>63</sup> Lisa A. Monaco, Deputy Att’y Gen., DOJ, Remarks on Corporate Criminal Enforcement (Sept. 15, 2022), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-corporate-criminal-enforcement>.

a. ***Individual Accountability: Timely Disclosure, Prioritization of Individual Investigations, and Foreign Prosecutions of Individuals***

The September 2022 Revised Policy states that individual accountability is the “first priority” in corporate enforcement.<sup>64</sup> The new policy sets forth the DOJ’s requirements that, in order to be eligible for cooperation credit, companies must produce all relevant, non-privileged facts about individual misconduct to the DOJ. In order to be eligible for full cooperation credit, companies must make those disclosures “swiftly and without delay” to minimize challenges to individual prosecutions that might arise as statutes of limitation expire, evidence dissipates, and memories fade.<sup>65</sup> Cooperating companies should note that companies that identify relevant information but delay its production for any reason, including to complete an internal investigation or to minimize collateral damage, risk losing cooperation credit.

For its part, the Department will empower its prosecutors to prioritize expediency. Under the new policy, prosecutors must “strive” to complete their investigations and file any individual charges before or concurrent with the corporate resolution.<sup>66</sup> Should a prosecutor seek a corporate resolution before an investigation is complete, the prosecutor must delineate their full investigative plan, outline the remaining steps to be taken on any individual cases, and draft a timeline to carry out those steps. The investigative plan must be reviewed and approved in advance of the corporate resolution.<sup>67</sup> Given the historical longtails of individual prosecutions following corporate resolutions,<sup>68</sup> companies should consider how the new requirement could potentially result in delays of corporate resolutions and more aggressive individual investigations early on by prosecutors.

The September 2022 Revised Policy also addresses the increasingly global nature of prosecutions of individuals through which corporations act. While acknowledging that the Principles of Federal

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<sup>64</sup> Lisa O. Monaco, Deputy Att'y Gen., DOJ, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group, at 3 (Sept. 15, 2022), <https://www.justice.gov/opa/speech/file/1535301/download>.

<sup>65</sup> Lisa O. Monaco, Deputy Att'y Gen., DOJ, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group, at 3 (Sept. 15, 2022), <https://www.justice.gov/opa/speech/file/1535301/download>.

<sup>66</sup> Lisa O. Monaco, Deputy Att'y Gen., DOJ, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group, at 3 (Sept. 15, 2022), <https://www.justice.gov/opa/speech/file/1535301/download>.

<sup>67</sup> Indeed, prosecutors must submit a memorandum detailing the status of the investigation of all potentially culpable individuals and a detailed plan to “bring the matter to resolution” prior to the end of the statute of limitations period. Lisa O. Monaco, Deputy Att'y Gen., DOJ, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group, at 3 (Sept. 15, 2022), <https://www.justice.gov/opa/speech/file/1535301/download>.

<sup>68</sup> For example, individual resolutions stemming from the December 2016 resolution between authorities in the US, Brazil, and Switzerland and global construction company Odebrecht S.A. have continued six years later, into 2022. See U.S. Department of Justice Press Release No. 16-1515: Odebrecht and Braskem Plead Guilty and Agree to Pay at Least \$3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History (Dec. 21, 2016), <https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve>; U.S. Department of Justice Press Release No. 22-298: Former Comptroller General of Ecuador Indicted for Alleged Bribery and Money Laundering Scheme (Mar. 29, 2022), <https://www.justice.gov/opa/pr/former-comptroller-general-ecuador-indicted-alleged-bribery-and-money-laundering-scheme>; see also *infra* at Section III.D.4.c.

Prosecution “recognize that effective prosecution in another jurisdiction may be grounds to forego federal prosecution,”<sup>69</sup> the September 2022 Revised Policy also keeps central the Department’s desire to vindicate US justice interests. The new policy requires prosecutors to make a “case-specific determination” as to the efficacy of prosecution against an individual in another jurisdiction based on “(1) the strength of the other jurisdiction’s interest in the prosecution; (2) the other jurisdiction’s ability and willingness to prosecute effectively; and (3) the probable sentence and/or other consequences if the individual is convicted in the other jurisdiction.”<sup>70</sup>

**b.      *Corporate Accountability: Evaluating a Corporation’s History of Misconduct, Voluntary Self-Disclosure, Cooperation, Evaluation of Compliance Programs***

The September 2022 Revised Policy refines the Department’s policies on recidivism, making clear that “not all instances of prior misconduct … are equally relevant or probative.”<sup>71</sup> The most relevant prior misconduct will involve (1) US enforcement agencies, or (2) the same individuals as those implicated in the case under investigation. DAG Monaco specifically singled out instances where past wrongdoing occurred under the same management team or executive leadership as indicative of a shared root cause.<sup>72</sup> Importantly, the Department will consider the age of the prior misconduct, giving prior criminal misconduct less weight after ten years, and civil and regulatory misconduct less weight after five.<sup>73</sup> The Department caveats that repeated misconduct even outside of these time parameters may be indicative of a corporation that operates without an appropriate compliance culture or institutional safeguards and thus may result in prosecution and/or more severe charges. Companies will also be viewed in the context of their peers in terms of

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<sup>69</sup> Lisa O. Monaco, Deputy Att'y Gen., DOJ, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group, at 4 (Sept. 15, 2022), <https://www.justice.gov/opa/speech/file/1535301/download>; U.S. Department of Justice, Principles of Federal Prosecution, JUSTICE MANUAL § 9-27.220, <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#9-27.220>.

<sup>70</sup> Lisa O. Monaco, Deputy Att'y Gen., DOJ, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group, at 4 (Sept. 15, 2022), <https://www.justice.gov/opa/speech/file/1535301/download>; U.S. Department of Justice, Principles of Federal Prosecution, JUSTICE MANUAL § 9-27.220, <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#9-27.220>.

<sup>71</sup> Lisa O. Monaco, Deputy Att'y Gen., DOJ, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group, at 5 (Sept. 15, 2022), <https://www.justice.gov/opa/speech/file/1535301/download>.

<sup>72</sup> Lisa A. Monaco, Deputy Att'y Gen., DOJ, Remarks on Corporate Criminal Enforcement (Sept. 15, 2022), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-corporate-criminal-enforcement>.

<sup>73</sup> For example, on December 2, 2022, ABB Ltd. agreed to pay over \$315 million for violations of the FCPA after it had previously been charged with FCPA offenses in 2004 and 2010. ABB is the only company to have three separate FCPA settlements, while fourteen have two. In its announcement, the DOJ noted ABB’s historical misconduct: “[t]his resolution demonstrates the Criminal Division’s thoughtful approach to appropriately balancing ABB’s extensive remediation, timely and full cooperation, and demonstrated intent to bring the misconduct to the department’s attention promptly upon discovering it, while also accounting for ABB’s historical misconduct.” U.S. Department of Justice Press Release No. 22-1296, ABB Agrees to Pay Over \$315 Million to Resolve Coordinated Global Foreign Bribery Case (Dec. 2, 2022), <https://www.justice.gov/opa/pr/abb-agrees-pay-over-315-million-resolve-coordinated-global-foreign-bribery-case>; see also Harry Cassin, Double recidivist ABB pays \$462.5 million to settle FCPA offenses, FCPA BLOG (Dec. 2, 2022, 5:08 PM), <https://fcpablog.com/2022/12/02/double-recidivist-abb-pays-327-million-to-settle-fcpa-offenses/>.

misconduct—those in highly regulated environments will be evaluated differently than those not subject to those same requirements.

The September 2022 Revised Policy preserves existing voluntary disclosure initiatives<sup>74</sup> and expands to all DOJ divisions prosecuting corporate crime the principle that companies that promptly and voluntarily self-disclose potential misconduct may be eligible for leniency at the point of resolution. Each Department component that prosecutes corporate crime must now develop and publish a formal, written policy to incentivize self-disclosure that incorporates the following principles: (1) corporations that have voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated will not receive a guilty plea absent aggravating circumstances; and (2) the Department will not impose an independent compliance monitor for a cooperating corporation that voluntarily self-discloses if that company can show at the time of resolution that it implemented and tested an effective compliance program.

The September 2022 Revised Policy also builds on existing Department guidance that outlines factors prosecutors must consider when evaluating the strength of a corporate compliance program at the time of the misconduct and at the point of resolution<sup>75</sup> by requiring prosecutors to take into account whether company compensation systems “clearly and effectively impose financial penalties for misconduct” that “incentivize compliant conduct, deter risky behavior, and instill a corporate culture in which employees follow the law and avoid legal ‘gray areas.’”<sup>76</sup> In her remarks, DAG Monaco especially emphasized whether a company employs compensation claw back provisions for executives or employees involved in wrongdoing in determining the strength of a company’s compliance system. DAG Monaco expressed that, going forward, the Criminal Division will develop guidance on how to reward corporations that develop and apply compensation claw back policies.

Furthermore, the September 2022 Revised Policy expressed that the increased use of third-party messaging platforms and personal devices to conduct business poses significant corporate compliance risk. The Department will consider whether a company has implemented effective policies and procedures governing its employees’ use of personal devices and third-party messaging platforms to ensure that business-related communications and electronic data are preserved, can be collected, and will be provided to the Department in an investigation. DAG Monaco expressed that the Department’s Criminal Division will continue to assess the best

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<sup>74</sup> The Department cited the Foreign Corrupt Practices Act (FCPA) Corporate Enforcement Policy (Criminal Division); Leniency Policy and Procedures (Antitrust Division); Export Control and Sanctions Enforcement Policy for Business Organizations (National Security Division); and Factors in Decisions on Criminal Prosecutions (Environment & Natural Resources Division).

<sup>75</sup> See e.g., U.S. Department of Justice, Criminal Division, Evaluation of Corporate Compliance Programs (updated June 2020), <https://www.justice.gov/criminal-fraud/page/file/937501/download>; U.S. Department of Justice, Antitrust Division, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (July 2019), <https://www.justice.gov/atr/page/file/1182001/download>.

<sup>76</sup> Lisa O. Monaco, Deputy Atty Gen., DOJ, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group, at 9 (Sept. 15, 2022), <https://www.justice.gov/opa/speech/file/1535301/download>.

corporate practices on this issue and plans to incorporate its findings in the next edition of its Evaluation of Corporate Compliance Programs guidance.

**c. *Independent Compliance Monitors: Evaluating Whether a Monitor is Appropriate, Selecting Monitors, and Reviewing Monitorships***

The September 2022 Revised Policy clarifies that there is no presumption with respect to the imposition of a monitor: “Department prosecutors will not apply any general presumption against requiring an independent compliance monitor . . . as part of a corporate criminal resolution, nor will they apply any presumption in favor of imposing one.”<sup>77</sup> Instead, the memorandum repeatedly emphasizes that the selection of a monitor “must depend on the facts and circumstances of the particular case” and that prosecutors’ assessments of the need for a monitor must occur on a “case-by-case basis.” The emphasis on the need for “case-by-case” assessment notwithstanding, DAG Monaco’s remarks and the September 2022 Revised Policy do not in any way suggest a decreased use in compliance monitors as part of corporate criminal resolutions; to the contrary, it is clear that the potential imposition of a monitor will continue to be an important consideration for companies navigating a resolution with the Department. The September 2022 Revised Policy introduces new factors for prosecutors to consider when evaluating the imposition of a monitor:

- The corporation voluntarily self-disclosed the underlying misconduct in a manner that satisfies DOJ self-disclosure policy;
- The underlying criminal conduct involved active participation of compliance personnel or the failure of compliance personnel to appropriately escalate or respond to red flags;
- The corporation faces any unique risks or compliance challenges, such as with respect to a particular region or business sector; and
- The corporation is subject to oversight from industry regulators or the imposition of a monitor by another domestic or foreign enforcement authority or regulator.

With respect to the selection of monitors, the DOJ re-emphasized the need for transparency in order to instill public confidence in the process. To that end, the September 2022 Revised Policy mandates that every unit in the Department that is “involved in corporate criminal resolutions that does not currently have a public monitor selection process must adopt an already existing Department process, or develop and publish its own selection process before December 31, 2022.”<sup>78</sup> Going forward, a record of each of these relevant selection processes will be maintained by the Assistant Attorney General for the Criminal Division.

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<sup>77</sup> Lisa O. Monaco, Deputy Att'y Gen., DOJ, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group, at 11 (Sept. 15, 2022), <https://www.justice.gov/opa/speech/file/1535301/download>.

<sup>78</sup> Lisa O. Monaco, Deputy Att'y Gen., DOJ, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group, at 13 (Sept. 15, 2022), <https://www.justice.gov/opa/speech/file/1535301/download>.

The September 2022 Revised Policy also emphasizes the need for monitorships to be properly scoped and for monitors themselves to stay in communication with the Department.<sup>79</sup>

#### d. Commitment to Transparency

Finally, the September 2022 Revised Policy emphasizes the importance of transparency in the Department's corporate criminal enforcement processes and expectations, and consequences for meeting or failing to meet those expectations. The memorandum and remarks by DAG Monaco make clear the Department's stance that transparency from all components of the DOJ can motivate companies to adopt robust compliance programs, voluntarily disclose misconduct, and cooperate with the Department's investigations, as well as instill public confidence in the Department's work. To this end, the September 2022 Revised Policy makes clear that corporate criminal resolutions should include an agreed-upon statement of facts outlining the criminal conduct that forms the basis of an agreement, and a statement of relevant considerations that explains the Department's reasoning for entering into the agreement.<sup>80</sup> All corporate criminal resolutions, "absent exceptional circumstances," will continue to be published on the Department's website.<sup>81</sup>

In her remarks, DAG Monaco also stressed that the DOJ will *disfavor* multiple, successive non-prosecution or deferred prosecution agreements (NPAs or DPAs) with the same company and the same leadership. Where a company has previously entered into a DPA, the DOJ will scrutinize to a higher degree any further DPA proposal a prosecutor intends to offer.<sup>82</sup> When considered in tandem with the broadened directive on recidivism discussed above,<sup>83</sup> this stance suggests that

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<sup>79</sup> To ensure that the Department, monitor and corporation are aligned on the scope of review, the September 2022 Revised Policy requires prosecutors to prepare a written and well-defined description of the monitor's responsibilities and scope of authority and to ensure that a clear work plan is in place. Lisa O. Monaco, Deputy Att'y Gen., DOJ, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group, at 14 (Sept. 15, 2022),

<https://www.justice.gov/opa/speech/file/1535301/download>. In the same regard, the September 2022 Revised Policy also clarifies the Department's ongoing role during a monitorship. Prosecutors should be regularly updated about the status of the monitorship and the monitor's work, to evaluate whether (1) the work adheres to the workplan and anticipated scope, and (2) the monitor's review is reasonable, including issues related to cost. *Id.* Monitors should also inform prosecutors if there are obstacles to the information, resources or personnel necessary to perform their responsibilities. *Id.*

<sup>80</sup> Lisa O. Monaco, Deputy Att'y Gen., DOJ, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group, at 15 (Sept. 15, 2022), <https://www.justice.gov/opa/speech/file/1535301/download> (examples of "relevant considerations" include (i) voluntary self-disclosure, cooperation and remedial efforts (or lack thereof); (ii) any cooperation credit the company is receiving; (iii) the seriousness and pervasiveness of the criminal conduct; (iv) the corporation's history of misconduct; (v) the state of the corporation's compliance program at the time of the underlying criminal conduct and at the time of the resolution; (vi) the reasons for imposing an independent compliance monitor or any other compliance undertaking, if applicable; (vii) other applicable factors listed in the Department's Justice Manual (JM § 9-28.300); and (viii) any other "key considerations" related to the Department's decision regarding the corporate resolution).

<sup>81</sup> Lisa O. Monaco, Deputy Att'y Gen., DOJ, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group, at 15 (Sept. 15, 2022), <https://www.justice.gov/opa/speech/file/1535301/download>.

<sup>82</sup> Lisa A. Monaco, Deputy Att'y Gen., DOJ, Remarks on Corporate Criminal Enforcement (Sept. 15, 2022), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-corporate-criminal-enforcement>.

<sup>83</sup> See *supra* at Section II.B.2.d.

any type of prior corporate misconduct—regardless of subject area—may diminish a company’s likelihood of receiving an NPA or DPA.<sup>84</sup>

Overall, the Monaco Memo and DAG Monaco’s address clarify that this Administration will continue to take a more robust approach in examining and evaluating potential corporate misconduct—one that seeks expeditious and comprehensive disclosures and compliance measures.

### C. DOJ and SEC Statements on Enforcement Priorities

#### 1. DOJ: Polite’s Announcement on Compliance Program Certification by Corporate Executives

The September 2022 Revised Policy and accompanying remarks by Deputy Attorney General (DAG) Lisa Monaco reinforced the DOJ’s focus on robust compliance programs, a consistent DOJ theme that was also endorsed and articulated by Assistant Attorney General Kenneth A. Polite, himself a former Chief Compliance Officer (CCO), in remarks given earlier in the year in March. Most notably, during the speech in March, AAG Polite announced that he has asked prosecutors to consider requiring certification from CCOs and Chief Executive Officers (CEOs) that a company has met its compliance obligations as part of corporate resolutions where independent monitors are not imposed.<sup>85</sup>

##### a. CCO and CEO Compliance Certification

AAG Polite stated that the purpose of the Compliance Certification is “to further empower [CCOs].”<sup>86</sup> He remarked that it is “the type of resource that compliance officials, including myself, have wanted for some time, because it makes it clear that you should and must have appropriate stature in corporate decision-making.”<sup>87</sup> Despite these stated intentions, many in the defense bar have expressed skepticism regarding whether the certification and the possible extension of personal liability to CCOs as part of corporate resolutions will have these intended effects.<sup>88</sup>

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<sup>84</sup> While the ABB Ltd. DPA, *see infra* at Section III.A.4.g., serves as a counterexample, ABB Ltd.’s prior misconduct was over 10 years ago. U.S. Department of Justice Press Release No. 22-1296, ABB Agrees to Pay Over \$315 Million to Resolve Coordinated Global Foreign Bribery Case (Dec. 2, 2022), <https://www.justice.gov/opa/pr/abb-agrees-pay-over-315-million-resolve-coordinated-global-foreign-bribery-case>; *see also* Harry Cassin, Double recidivist ABB pays \$462.5 million to settle FCPA offenses, FCPA BLOG (Dec. 2, 2022, 5:08 PM), <https://fcpablog.com/2022/12/02/double-recidivist-abb-pays-327-million-to-settle-fcpa-offenses/>.

<sup>85</sup> Kenneth A. Polite, Jr., Assistant Att’y Gen., DOJ, Remarks on Corporate Compliance and Enforcement (Mar. 25, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-nyu-law-s-program-corporate>.

<sup>86</sup> Kenneth A. Polite, Jr., Assistant Att’y Gen., DOJ, Remarks on Corporate Compliance and Enforcement (Mar. 25, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-nyu-law-s-program-corporate>.

<sup>87</sup> Kenneth A. Polite, Jr., Assistant Att’y Gen., DOJ, Remarks on Corporate Compliance and Enforcement (Mar. 25, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-nyu-law-s-program-corporate>.

<sup>88</sup> Clara Hudson, *Lawyers warn CCO initiative could have “unintended consequences”*, GLOBAL INVESTIGATIONS REV. (Apr. 11, 2022), <https://globalinvestigationsreview.com/news-and-features/in-house/2020/article/lawyers-warn-cco-initiative-could-have-unintended-consequences>.

The DOJ's FCPA Unit has included a corporate compliance certification, to be signed by the CCO and CEO, in every corporate resolution announced since May 2022, including in the resolutions with Glencore A.G., GOL Linhas Aéreas Inteligentes, ABB Ltd., and Honeywell UOP.<sup>89</sup> The CCO and CEO Compliance Certification is expected to be a standard component of FCPA Unit resolutions moving forward. These certifications, in sum and substance, have required that the CCO and the CEO certify (under penalty of potential criminal prosecution) at the end of the three-year term of the resolution that:

- the company has implemented an anti-corruption compliance program that meets the requirements set forth in the plea agreement (describing minimum elements of an effective compliance program);
- the company's compliance program is "reasonably designed to detect and prevent violations of [the relevant laws implicated by the resolution]"; and
- in the cases where there is self-reporting by the company (as opposed to the imposition of an independent compliance monitor) during the term of the resolution, that any compliance reports submitted to the Department pursuant to that self-reporting "were true, accurate, and complete as of the date they were submitted." As such, companies should be prepared for enhanced DOJ scrutiny of corporate misconduct and compliance programs and should restructure their programs and presentations accordingly.

Perhaps in response to concerns raised by the defense bar regarding the Certification, in June 2022, FCPA Unit Chief David Last clarified that the compliance certification is designed to "make sure that the company is taking compliance seriously."<sup>90</sup> It is not, Chief Last emphasized, intended to "provide fodder" to prosecute CCOs or CEOs.<sup>91</sup> Also in June 2022, Fraud Section Assistant Chief Lauren Kootman stated that the intention of the policy change "is not to put a target on the back of a chief compliance officer," but to incentivize companies to ensure their compliance programs are comprehensive and effective.<sup>92</sup>

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<sup>89</sup> Plea Agreement, *United States v. Glencore Int'l AG*, No. 22-CR-00297, Attach. H (S.D.N.Y. May 24, 2022); Deferred Prosecution Agreement, *United States v. GOL Linhas Aéreas Inteligentes S.A.*, No. 22-CR-00325, Attach. F (D. Md. Sept. 16, 2022) ECF No. 12; Deferred Prosecution Agreement, *United States v. ABB Ltd.*, No. 22-CR-00220, Attach. F (E.D. Va. Dec. 2, 2022) ECF No. 16; Deferred Prosecution Agreement, *United States v. UOP, LLC*, No. 22-CR-00624, Attach. F (S.D. Tex. Dec. 19, 2022) ECF No. 10.

<sup>90</sup> Anna Bianca Roach, *FCPA chief clarifies compliance certification efforts*, GLOBAL INVESTIGATIONS REV. (June 14, 2022), <https://globalinvestigationsreview.com/just-anti-corruption/article/fcpa-chief-clarifies-compliance-certification-efforts>.

<sup>91</sup> Anna Bianca Roach, *FCPA chief clarifies compliance certification efforts*, GLOBAL INVESTIGATIONS REV. (June 14, 2022), <https://globalinvestigationsreview.com/just-anti-corruption/article/fcpa-chief-clarifies-compliance-certification-efforts>.

<sup>92</sup> Anna Bianca Roach, *DOJ official: compliance certification to be incorporated into every corporate resolution*, GLOBAL INVESTIGATIONS REV. (June 23, 2022), <https://globalinvestigationsreview.com/just-anti-corruption/article/doj-official-compliance-certification-be-incorporated-every-corporate-resolution>.

## b. Compliance Assessment Factors and Monitors

In his remarks, AAG Polite also discussed the approach that the DOJ takes towards evaluating and assessing a company's compliance programs, emphasizing that compliance programs should be: (1) well designed to address critical risk areas, and an established process for reporting violations of law or policy, (2) adequately resourced and empowered to function effectively, and (3) functional in practice.<sup>93</sup> AAG Polite added that a company's CCO, who is expected to lead the compliance presentation from which the DOJ will evaluate the compliance program's merits, should be able to offer evidence that the company's program meets these standards.<sup>94</sup>

AAG Polite also discussed how a company must demonstrate an ethical culture in practice. This should be reflected in company presentations to DOJ prosecutors. For example, companies should affirmatively offer whether, among other things, employees feel empowered to bring issues and questions to management's attention, and whether managers and compliance officers are providing ethical advice to the company's sales personnel, even though such advice may mean loss of business.

Based on what the DOJ learns about the company's compliance program through the presentation or other means, the DOJ will determine whether an independent compliance monitor should be imposed and will not hesitate to impose a monitor "whenever it is appropriate in order to satisfy [the DOJ] that a company is living up to its compliance and disclosure obligations under a corporate resolution."<sup>95</sup> AAG Polite also cautioned that even if the DOJ determines a monitor is *not* necessary, that "does not mean that the company's obligations to continue to test, improve, and demonstrate the effectiveness of its compliance program end when the resolution is papered."<sup>96</sup> Companies that are not required to have a monitor nevertheless must "comply with ongoing obligations and report to the Department regarding the status of compliance obligations."<sup>97</sup>

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<sup>93</sup> Kenneth A. Polite Jr., Assistant Att'y Gen., DOJ, Remarks at the 20th International Anti-Corruption Conference (Dec. 9, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-closing-remarks-20th-international>.

<sup>94</sup> Other senior management should also be involved in the presentations, "taking ownership of their role in the compliance program and demonstrating commitment to compliance." Kenneth A. Polite, Jr., Assistant Att'y Gen., DOJ, Remarks on Corporate Compliance and Enforcement (Mar. 25, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-nyu-law-s-program-corporate>.

<sup>95</sup> Kenneth A. Polite, Jr., Assistant Att'y Gen., DOJ, Remarks on Corporate Compliance and Enforcement (Mar. 25, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-nyu-law-s-program-corporate>.

<sup>96</sup> Kenneth A. Polite Jr., Assistant Att'y Gen., DOJ, Remarks at the 20th International Anti-Corruption Conference (Dec. 9, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-closing-remarks-20th-international>.

<sup>97</sup> Kenneth A. Polite Jr., Assistant Att'y Gen., DOJ, Remarks at the 20th International Anti-Corruption Conference (Dec. 9, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-closing-remarks-20th-international>.

## **2. DOJ: Argentieri Speech on FCPA Enforcement**

In a December 2022 speech at the 39th International Conference on the Foreign Corrupt Practices Act, Acting Principal Deputy Assistant Attorney General Nicole M. Argentieri discussed three topics: (1) the critical importance of international cooperation, (2) FCPA-related enforcement actions in 2022, and (3) the aforementioned Monaco policy changes.<sup>98</sup> Key take-aways include that Acting Principal DAAG Argentieri specifically mentioned the United Kingdom, Brazil, Malaysia, Switzerland, Ecuador, France, and the Netherlands as countries with which the Department works frequently, and noted that the Department was expanding its reach to work with other unspecified countries. In addition, Acting Principal DAAG Argentieri pointed to the April 2022 Stericycle case to showcase that the DOJ will not limit itself to focusing on large payments to senior officials, but will also prosecute “smaller, ubiquitous payments” because “smaller commonplace bribes slowly weave corruption into an industry and country’s culture.”<sup>99</sup> Acting Principal DAAG Argentieri also noted that GOL Linhas Airlines was not required to retain a monitor in its September 2022 settlement with the SEC and DOJ because the company had redesigned its entire anti-corruption compliance program.

## **3. SEC: Cain and Grewal Addresses on FCPA Enforcement**

In September 2022, Charles Cain—Chief of the Foreign Corrupt Practices Unit (the Unit) of the SEC—presented an update on recent trends in FCPA cases at the “The SEC Speaks” 2022 conference.<sup>100</sup> Notable updates include that, first, Chief Cain began his address by remarking on the impact of COVID-19 on the Unit’s caseload. He stated that while the pandemic has slowed current FCPA matters by making it more difficult to obtain evidence abroad, an ebb and flow of FCPA cases in the Commission is expected due to long investigative timelines, and the current ebb is not abnormal. Chief Cain emphasized that the SEC has a “strong pipeline” and expressed an expectation for significant matters and an uptick in the number of cases going forward.<sup>101</sup> Second, Chief Cain described a few examples of cases the SEC investigated in 2022, noting that the actions continue to occur in critical industries: telecommunications, life sciences, financial services, and extractive industries. Third, regarding cooperation, Chief Cain noted while the SEC does not have a formal cooperation program in the FCPA space, the Unit does try to balance the desire to incentivize companies and individuals to cooperate with the need for accountability and deterrence. Fourth, he noted that cooperation often involves companies self-reporting violations earlier,

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<sup>98</sup> Nicole M. Argentieri, Acting Principal Deputy Assistant Att'y Gen., DOJ, Remarks at the 39th International Conference on the Foreign Corrupt Practices Act (Dec. 1, 2022), <https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-nicole-m-argentieri-delivers-remarks>.

<sup>99</sup> Nicole M. Argentieri, Acting Principal Deputy Assistant Att'y Gen., DOJ, Remarks at the 39th International Conference on the Foreign Corrupt Practices Act (Dec. 1, 2022), <https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-nicole-m-argentieri-delivers-remarks>.

<sup>100</sup> U.S. Securities and Exchange Commission, The SEC Speaks in 2022—Workshop E: Division of Enforcement, PRACTICING LAW INST. (Sept. 8, 2022), [https://media.pli.edu/player/?rid=197YZISbWjH9nxzF6zB9YQ2&cid=k3n7kmfTalAqLzzN4b\\_htQ2](https://media.pli.edu/player/?rid=197YZISbWjH9nxzF6zB9YQ2&cid=k3n7kmfTalAqLzzN4b_htQ2).

<sup>101</sup> U.S. Securities and Exchange Commission, The SEC Speaks in 2022—Workshop E: Division of Enforcement, PRACTICING LAW INST. (Sept. 8, 2022), [https://media.pli.edu/player/?rid=197YZISbWjH9nxzF6zB9YQ2&cid=k3n7kmfTalAqLzzN4b\\_htQ2](https://media.pli.edu/player/?rid=197YZISbWjH9nxzF6zB9YQ2&cid=k3n7kmfTalAqLzzN4b_htQ2).

translating documents (including witness statements, to the extent they are shared), encouraging their employees to speak with the Unit, and even sending employees from overseas to the US for interviews with the SEC.

In a talk given at Global Investigations Review's Live Conference in April, the Director of the SEC's Division of Enforcement, Gurbir Grewal, provided additional insight, including providing the following non-exhaustive examples of cooperation that the Division is often willing to credit, including through reduced penalties or even no penalties at all:

- Engaging in behaviors such as self-reporting and remediation;
- Making documents or witnesses available to the SEC on an expedited basis, highlighting “hot” documents or providing translations of key documents where applicable;
- Flagging documents the SEC would be interested in, even if they might arguably fall outside the scope of a subpoena;
- Making presentations to the staff during an investigation that are not simply advocacy pieces, but that meaningfully illuminate events; and
- Generally taking steps that enable the SEC to efficiently conduct investigations, protect investors, and rebuild trust in the markets and the law.

In July 2022, Director Grewal testified before the Investor Protection, Entrepreneurship, and Capital Markets Subcommittee of the US House of Representatives Committee on Financial Services and provided additional insight into the Division's enforcement priorities.<sup>102</sup> He indicated the Division's intention to focus on “robust enforcement,” “robust remedies,” and “robust compliance,” and requested a budget for FY 2023 that would enable the Division to hire additional staff. Regarding “robust remedies in particular,” Director Grewal made clear that the SEC's remedies are intended not only to punish wrongdoers but also to deter those violations from happening in the first place.<sup>103</sup> Specifically, he explained that the Division assesses whether penalties in prior comparable cases have been sufficient to appropriately deter the misconduct at issue, and where they have not been, seeks stiffer penalties. He also foreshadowed that, on the SEC side, heightened penalties will be sought for recidivists because prior penalties clearly have not had the appropriate deterrent effect.

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<sup>102</sup> *Oversight of the SEC's Division of Enforcement: Hearing before the Subcomm. on Investor Protection, Entrepreneurship, and Capital Markets of the H. Comm. on Fin. Servs.*, 117th Cong. (2022), <https://www.sec.gov/news/statement/grewal-statement-house-testimony-071922> (statement of G. Grewal, Dir. of the Div. of Enft, SEC).

<sup>103</sup> *Oversight of the SEC's Division of Enforcement: Hearing before the Subcomm. on Investor Protection, Entrepreneurship, and Capital Markets of the H. Comm. on Fin. Servs.*, 117th Cong. (2022), <https://www.sec.gov/news/statement/grewal-statement-house-testimony-071922> (statement of G. Grewal, Dir. of the Div. of Enft, SEC).

In November 2022, the SEC announced its enforcement results for fiscal year 2022.<sup>104</sup> Director Grewal stated that the Enforcement Division is “working with a sense of urgency” and that a “centerpiece” of the Enforcement Division’s efforts is to use “every tool in our toolkit, including penalties that have a deterrent effect and are viewed as more than the cost of doing business.”<sup>105</sup> In particular, Director Grewal provided insight into the SEC’s approach to penalties. Director Grewal said that 2022 was the first time that the amount ordered to be paid in penalties (nearly \$4.2 billion) was about double the amount ordered to be paid in disgorgement (\$2.2 billion). For the previous five fiscal years, the SEC ordered more than twice as much in disgorgement as it did in penalties, a ratio that Director Grewal said he views as “backwards” and enabling certain people to take “an acceptable calculated risk.”<sup>106</sup> He contended that today’s increased penalty to disgorgement ratio means that the “potential consequences of violating the law are significantly greater than the potential rewards” and that the risk-reward calculation is no longer the same.<sup>107</sup>

#### **4. DOJ and SEC Statements on Expectations on Company Ephemeral Messaging Rules**

During the aforementioned 39th International Conference on the FCPA, DOJ and SEC anti-bribery officials discussed their expectations for company rules around ephemeral messaging platforms.<sup>108</sup> DOJ FCPA Unit Chief David Last said the Department will want to see the company’s policies around this issue “so that we don’t have disappearing evidence.” Chief Last said when evaluating the company’s approach to ephemeral messaging, the DOJ will consider whether the company’s policies make sense considering the company’s business, size, and other characteristics. Tracy Price, the Deputy Chief of the SEC’s FCPA Unit, said the SEC is looking at any training on ephemeral messaging that companies provide to ensure that such platforms are being used lawfully and for legitimate business purposes. SEC FCPA Unit Chief Charles Cain added that the agency looks at whether companies actually enforce their policies and procedures on ephemeral messaging.

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<sup>104</sup> U.S. Securities and Exchange Commission Press Release No. 2022-206: SEC Announces Enforcement Results for FY22 (Nov. 15, 2022), <https://www.sec.gov/news/press-release/2022-206>.

<sup>105</sup> U.S. Securities and Exchange Commission Press Release No. 2022-206: SEC Announces Enforcement Results for FY22 (Nov. 15, 2022), <https://www.sec.gov/news/press-release/2022-206>.

<sup>106</sup> Gurbir S. Grewal, Dir. of the Div. of Enft, SEC, Remarks at Securities Enforcement Forum (Nov. 15, 2022), <https://www.sec.gov/news/speech/grewal-speech-securities-enforcement-forum-111522>.

<sup>107</sup> Gurbir S. Grewal, Dir. of the Div. of Enft, SEC, Remarks at Securities Enforcement Forum (Nov. 15, 2022), <https://www.sec.gov/news/speech/grewal-speech-securities-enforcement-forum-111522>.

<sup>108</sup> See Max Fillion, *DOJ, SEC Officials Build Out Expectations on Company Ephemerals Messaging Rules*, GLOBAL INVESTIGATIONS REV. (Nov. 30, 2022), <https://globalinvestigationsreview.com/news-and-features/in-house/2020/article/doj-sec-officials-build-out-expectations-company-ephemeral-messaging-rules>.

## D. Changes in Relevant Personnel

### 1. DOJ

In June, the DOJ hired Glenn Leon, formerly senior vice president and chief ethics and compliance officer at Hewlett-Packard, as the new chief of the Fraud Section.<sup>109</sup> At Hewlett-Packard, Mr. Leon was initially hired to lead the company's internal investigations team as the company was preparing to reach FCPA settlements with US authorities over conduct in Russia, Poland, and Mexico, and was later promoted to lead the company's compliance program.<sup>110</sup> Before working in house, Mr. Leon previously worked in the Fraud section for about three years, including briefly as its deputy chief of the Securities and Financial Fraud Unit (now called the Market Integrity and Major Fraud Unit), and for more than a decade as a federal prosecutor in the DC US Attorney's office. Mr. Leon's hiring reflects a heightened focus on internal compliance programs aimed at deterring corporate crime.

In September, the DOJ announced the hiring of Matthew Galvin, formerly the global chief of compliance at Anheuser-Busch InBev, to serve in a newly created position as the Fraud Section's compliance and big data expert. While at AB InBev, Mr. Galvin and his team developed an analytics platform that processes volumes of corporate data to identify potentially risky transactions and third parties. Mr. Galvin's hiring is consistent with the DOJ's emphasis on the role that data analytics can play in identifying potential compliance issues<sup>111</sup> and signals that the DOJ will continue to focus on the use of data both to identify leads for cases across the Fraud Section's three prosecuting units and in its evaluation of corporate compliance programs.

Finally, Nicole M. Argentieri was named the Acting Principal Deputy Assistant Attorney General of the Criminal Division. Ms. Argentieri previously worked in the US Attorney's Office for the Eastern District of New York and was a partner in the white-collar defense and corporate investigations practice at O'Melveny & Meyers.

The additions of Mr. Leon, Mr. Galvin, and Ms. Argentieri evince the DOJ's continued focus on expanding its Corporate Enforcement, Compliance, & Policy Unit within the Fraud Section, which it restructured in 2021 to "ensure that it is comprised of not just veteran prosecutors, but also former

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<sup>109</sup> Dylan Tokar, *Hewlett Packard Enterprise Executive to Lead Justice Department's Fraud Section*, WALL ST. J. (June 7, 2022), <https://www.wsj.com/articles/hewlett-packard-enterprise-executive-to-lead-justice-departments-fraud-section-11654609305>.

<sup>110</sup> Dylan Tokar, *Hewlett Packard Enterprise Executive to Lead Justice Department's Fraud Section*, WALL ST. J. (June 7, 2022), <https://www.wsj.com/articles/hewlett-packard-enterprise-executive-to-lead-justice-departments-fraud-section-11654609305>.

<sup>111</sup> For example, in March 2022, Attorney General Merrick Garland referred to data analytics as an "important force multiplier" in identifying fraud and prosecuting corporate crime. Merrick B. Garland, Att'y Gen., DOJ, Remarks at ABA Institute on White Collar Crime (Mar. 3, 2022), <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-aba-institute-white-collar-crime>. DOJ Fraud Chief Glenn Leon also discussed the importance of data analytics at the 39th International Conference on the FCPA, noting that the DOJ did not expect companies to "spend hundreds of thousands of dollars" on the "shiniest [new] tool," but to "think more about data" and how it can be harnessed. See Max Fillion, *Glenn Leon: Data Analytics in Corporate Compliance Not About the "Shiniest Tool"*, GLOBAL INVESTIGATIONS REV. (Dec. 1, 2022), <https://globalinvestigationsreview.com/news-and-features/in-house/2020/article/glenn-leon-data-analytics-in-corporate-compliance-not-about-the-shiniest-tool>.

defense lawyers and in-house counsel with experience in compliance, monitorships, and corporate enforcement matters.”<sup>112</sup> To further focus on encouraging corporate compliance, the DOJ also plans on training all its prosecutors in assessing companies’ compliance programs.<sup>113</sup>

## 2. SEC

In 2022, the SEC swore in two new SEC Commissioners:

- Mark T. Uyeda was sworn in on June 30, 2022, though he has served on the Commission’s staff since 2006, including as Senior Advisor to Chairman Jay Clayton, Senior Advisor to Acting Chairman Michael S. Piwowar, Counsel to Commissioner Paul S. Atkins, and in various staff positions in the Division of Investment Management.<sup>114</sup>
- Jaime Lizárraga was sworn in on July 18, 2022, after having served as Senior Adviser to House Speaker Nancy Pelosi. In that role, he oversaw issues involving financial markets, small business, international finance, and immigration.<sup>115</sup>

There were no appointments of FCPA-specific enforcement personnel for the SEC in 2022.

## E. Takeaways

Building on the 2021 revisions to its corporate criminal enforcement policies and the creation of a Corporate Crime Advisory Group, the DOJ expounded its FCPA enforcement priorities in 2022 and in early 2023. In particular, the Department made clear its intent to prosecute individuals alongside corporations, and its corresponding expectation that companies timely and proactively cooperate and produce information relevant to individual prosecutions, including through its attempts to further incentive self-reporting and cooperation (including incentivizing “extraordinary cooperation”) through the expanded incentives articulated in the January 2023 revisions to the Corporate Enforcement Policy. The DOJ also announced a revised approach to prior misconduct, a Department-wide effort to incentive robust corporate compliance and remediation, a restricted use of DPAs, and a requirement that Chief Executive Officers and Chief Compliance Officers (COOs) certify compliance programs at the end of corporate resolution periods. While these policies arguably raise the standards that companies must meet to receive full cooperation credit in any resolution, they are also intended to increase transparency about how prosecutors operate as well

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<sup>112</sup> Kenneth A. Polite, Jr., Assistant Att’y Gen., DOJ, Remarks at University of Texas Law School (Sept. 16, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-delivers-remarks-university-texas-law-school>.

<sup>113</sup> Kenneth A. Polite, Jr., Assistant Att’y Gen., DOJ, Remarks at University of Texas Law School (Sept. 16, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-delivers-remarks-university-texas-law-school>.

<sup>114</sup> U.S. Securities and Exchange Commission Press Release No. 2022-118: Mark T. Uyeda Sworn In as SEC Commissioner (June 30, 2022), <https://www.sec.gov/news/press-release/2022-118>; see also *Commissioner Mark T. Uyeda Biography*, SEC. & EXCH. COMM’N, <https://www.sec.gov/about/commissioners/mark-t-uyeda>.

<sup>115</sup> U.S. Securities and Exchange Commission Press Release No. 2022-123: Jaime Lizárraga Sworn In as SEC Commissioner (July 18, 2022), <https://www.sec.gov/news/press-release/2022-123>; see also *Commissioner Jaime Lizárraga Biography*, SEC. & EXCH. COMM’N, <https://www.sec.gov/about/commissioners/jaime-lizarraga>.

as help General Counsel and CCOs make the business case for compliance inside their boardrooms. More broadly, the DOJ and SEC announcements and addresses in 2022 confirm the US enforcement authorities remain dedicated to vigorous cross-border investigations and have high expectations for corporate compliance.

### **III. KEY INVESTIGATION RELATED DEVELOPMENTS**

#### **A. Notable Features of Corporate Resolutions**

The year 2022 saw an uptick in the number of corporate FCPA settlements by US enforcement authorities. Eight corporations—KT Corporation, Stericycle, Inc., Glencore International AG, Tenaris S.A., GOL Linhas Aéreas S.A., Oracle Corporation, ABB Ltd., and Honeywell—entered into FCPA settlements with the DOJ, SEC, or both, compared to four corporations that settled cases in 2021.

##### **1. Resolutions with Recidivists**

This year, three out of the eight corporate resolutions involved corporations that had previously been charged with FCPA violations: Tenaris, Oracle, and ABB. Tenaris resolved prior FCPA charges in 2011 via an NPA with the DOJ and a DPA with the SEC in connection with allegations of bribery in Uzbekistan. Oracle settled FCPA charges with the SEC in 2012 arising from side funds in India. ABB was the subject of two prior FCPA cases—one in 2004 related to bribery schemes in Nigeria, Angola, and Kazakhstan, and one in 2010 related to bribery schemes in Mexico and related to the U.N. Oil for Food Program—and also had entered into a guilty plea for non-FCPA related bid rigging in 2001.

In 2021, the DOJ directed prosecutors to consider *all* previous misconduct no matter the subject area, not only prior similar conduct related to bribery. This broadened directive on recidivism suggested that any sort of prior corporate misconduct—regardless of subject area—may diminish a company's likelihood of receiving an NPA or DPA because “[c]orporate recidivism undermines the purpose of pretrial diversion.”<sup>116</sup>

In 2022, Deputy Attorney General Lisa Monaco’s revised guidance (the September 2022 Revised Policy) narrowed and refined the Department’s policies on recidivism, clarifying that the most relevant prior misconduct will generally be that (1) involving US enforcement agencies, or (2) involving the same individuals, emphasizing that the DOJ will disfavor multiple, successive non-prosecution or deferred prosecution agreements with the same company and the same leadership.<sup>117</sup> The revised memo also clarified that the Department will give prior criminal

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<sup>116</sup> Lisa O. Monaco, Deputy Att'y Gen., DOJ, Keynote Address at the ABA's 36th National Institute on White Collar Crime (Oct. 28, 2021), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute>.

<sup>117</sup> See Lisa O. Monaco, Deputy Att'y Gen., DOJ, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group, at 5 (Sept. 15, 2022), <https://www.justice.gov/opa/speech/file/1535301/download>; Lisa A. Monaco, Deputy Att'y Gen., DOJ, Remarks on Corporate Criminal Enforcement (Sept. 15, 2022), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-corporate-criminal-enforcement>.

misconduct less weight after ten years, and civil and regulatory misconduct less weight after five years. This policy may explain why the DOJ agreed to a DPA with ABB without a requirement for a compliance monitor. Although ABB had two prior FCPA plea agreements with the DOJ, they were both more than ten years old.

Ultimately, the DOJ's revisions to recidivism policies appear to be focused on incentivizing disclosure by making the "clearest path for a company," even a recidivist, "to avoid a guilty plea or an indictment [occur through] voluntary self-disclosure."<sup>118</sup> This is consistent with Acting Principal Deputy Assistant Attorney General Nicole M. Argentieri's statements that "a history of misconduct will not mean a guilty plea for a company that self-discloses, cooperates, and remediates unless other aggravating factors—aside from recidivism—are present."<sup>119</sup>

## **2. Focus on Smaller, Commonplace Bribes that Weave Corruption into Culture**

The DOJ indicated its focus on prosecuting smaller, ubiquitous payments to lower-level government officials. Citing to the Stericycle resolution, Acting Principal DAAG Argentieri emphasized that "systematic and pervasive payments are incredibly important to prosecute even if they're relatively smaller," as these bribes "weave corruption into an industry's and country's culture."<sup>120</sup> Stericycle resolved charges that, over a five-year period, it caused hundreds of small bribe payments, mostly paid in cash, to foreign officials in Brazil, Mexico, and Argentina, totaling an alleged \$10.5 million worth of bribe payments and \$21.5 million in ill-gotten profits.<sup>121</sup>

## **3. Use of Agency Theories in Corporate Enforcement Actions**

As predicted in the 2021 FCPA Year-in-Review, the DOJ and SEC continue to use aggressive agency theories to bring charges against parent organizations under the FCPA based on the actions of the parent's alleged agents, including in some cases its wholly owned foreign subsidiaries and subsidiary employees.<sup>122</sup>

For example, in court documents related to the Stericycle case, the DOJ argued that under the FCPA, Stericycle subsidiaries in Mexico, Argentina, and Brazil and their respective employees were

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<sup>118</sup> Nicole M. Argentieri, Acting Principal Deputy Assistant Att'y Gen., DOJ, Remarks at the 39th International Conference on the Foreign Corrupt Practices Act (Dec. 1, 2022), <https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-nicole-m-argentieri-delivers-remarks>.

<sup>119</sup> Nicole M. Argentieri, Acting Principal Deputy Assistant Att'y Gen., DOJ, Remarks at the 39th International Conference on the Foreign Corrupt Practices Act (Dec. 1, 2022), <https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-nicole-m-argentieri-delivers-remarks>.

<sup>120</sup> Nicole M. Argentieri, Acting Principal Deputy Assistant Att'y Gen., DOJ, Remarks at the 39th International Conference on the Foreign Corrupt Practices Act (Dec. 1, 2022), <https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-nicole-m-argentieri-delivers-remarks>.

<sup>121</sup> Deferred Prosecution Agreement, *United States v. Stericycle, Inc.*, No. 22-CR-20156, Attach. A ¶ 14 (S.D. Fla. Apr. 18, 2022) ECF No. 14.

<sup>122</sup> See, e.g., WilmerHale, 2021 Global Anti-Bribery Year-in-Review, at 13-14, 117 (Jan. 27, 2022), <https://www.wilmerhale.com/en/insights/client-alerts/20220127-2021-global-anti-bribery-year-in-review>.

“agents” of the Stericycle US parent company, and that Stericycle was therefore liable under the FCPA “through certain of its employees and agents.”<sup>123</sup>

The Honeywell resolutions with both the DOJ and SEC also involved application of agency theory. On the DOJ side, the company’s US subsidiary, Honeywell UOP, entered into a DPA charging the subsidiary with conspiracy to violate the FCPA’s anti-bribery provisions in connection with conduct in Brazil, but the DPA also required the parent, Honeywell International, Inc., to agree to terms and obligations in the DPA.<sup>124</sup> In addition, the SEC resolved anti-bribery, books and records, and internal accounting controls charges with the Honeywell parent company in connection with conduct in Brazil and Algeria involving the company’s US and Belgium subsidiaries.<sup>125</sup> The SEC alleged that third parties engaged by Honeywell subsidiaries were “agent[s] of Honeywell,” despite little indication that Honeywell interacted directly with the issuer.<sup>126</sup>

In the Oracle resolutions, the SEC’s order stated as part of its agency theory, that Oracle “exercised control over its subsidiaries,” that Oracle’s “legal, audit, and compliance functions” were centrally coordinated from Oracle’s US headquarters,<sup>127</sup> that employees at Oracle’s subsidiaries reported up to the parent corporation through “lines of business,” and that Oracle set business and financial targets for each line of business.<sup>128</sup>

We also continue to see in our own interactions with US enforcement authorities’ similar aggressive approaches to agency theories in corporate investigations and resolutions. Because companies almost never litigate, the government’s theories are rarely tested, and companies may in some cases acquiesce to resolving cases even if there may be potentially meritorious agency defenses. This dynamic continues to present challenges for companies in the context of negotiating over potential bribery charges.

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<sup>123</sup> See, e.g., Deferred Prosecution Agreement, *United States v. Stericycle, Inc.*, No. 22-CR-20156, Attach. A, at ¶ 14 (S.D. Fla. Apr. 14, 2022) ECF No. 14; see also, Deferred Prosecution Agreement, *United States v. Telefonaktiebolaget LM Ericsson*, No. 19-CR-00884, Attach. A, ¶ 1 (S.D.N.Y. Dec. 6, 2019) ECF No. 6 (“Ericsson was a holding company operating worldwide through its subsidiaries and affiliated entities. The subsidiaries acted as divisions of the parent, rather than separate and independent entities.”); Order Instituting Cease-and-Desist Proc., *In the Matter of PTC Inc.*, Rel. No. 77145, File No. 3-17118 (Feb. 16, 2016); Order Instituting Cease-and-Desist Proc., *In the Matter of Alcoa Inc.*, Rel. No. 71261, File No. 3-15673 (Jan. 9, 2014); Order Instituting Cease-and-Desist Proc., *In the Matter of United Indus. Corp.*, Rel. No. 60005, File No. 3-13495 (May 29, 2009).

<sup>124</sup> Deferred Prosecution Agreement, *United States v. UOP, LLC*, No. 22-CR-00624, Attach. F (S.D. Tex. Dec. 19, 2022) ECF No. 10.

<sup>125</sup> U.S. Securities and Exchange Commission Press Release No. 2022-230: SEC Charges Honeywell with Bribery Schemes in Algeria and Brazil (Dec. 19, 2022), <https://www.sec.gov/news/press-release/2022-230>.

<sup>126</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of Honeywell International, Inc.*, Rel. No. 96529, File No. 3-21255, ¶ 6-7 (Dec. 19, 2022).

<sup>127</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of Oracle Corp.*, Rel. No. 95913, File No. 3-21158, ¶ 3 (Sept. 27, 2022).

<sup>128</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of Oracle Corp.*, Rel. No. 95913, File No. 3-21158, ¶ 4 (Sept. 27, 2022).

The *Hoskins* ruling, discussed below,<sup>129</sup> may have implications for companies with foreign subsidiary organizations, as the agency analysis undertaken in *Hoskins* may serve as a check on the DOJ's and SEC's ability to charge FCPA violations based on actions undertaken wholly at a foreign subsidiary organization.

#### **4. Notable Resolutions**

##### **a. KT Corporation**

In February, the SEC entered a cease-and-desist order against KT Corporation, South Korea's largest telecommunications company, in which the company agreed to pay \$6.3 million to resolve allegations that it provided improper payments and benefits to Korean and Vietnamese government officials in violation of the FCPA's books and records and internal accounting controls provisions.<sup>130</sup> In its order, the SEC noted KT's lack of voluntary disclosure and failure to self-report the alleged conduct.<sup>131</sup> South Korean officials had previously indicted KT and 14 executives for criminal violations related to illegal political contributions from slush funds in November 2021.<sup>132</sup>

The SEC described the scheme, in part, as one in which KT maintained and used "slush funds" consisting of "off-the-books accounts and physical stashes of cash" to provide gifts, entertainment, and illegal political contributions to government officials—including to Korean National Assembly members serving on committees relevant to KT's business.<sup>133</sup> Per the SEC, a KT Executive Officer and a Senior Executive worked together to approve inflated bonuses to company officers and executives, funds from which were ultimately returned to the Executive Officer in cash and used to generate a slush fund of approximately \$1 million.<sup>134</sup> The Executive Officer then allegedly used the cash to purchase gifts for government officials who could influence KT's business.<sup>135</sup> Despite media reports in 2013 revealing this "bonus scheme," which resulted in the Executive Officer's resignation, KT officials allegedly "devised a new method to continue generating a slush fund."<sup>136</sup> The SEC described this "new method" as one in which KT's Corporate Relations Group purchased

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<sup>129</sup> See *infra* at Section IV.A.2.

<sup>130</sup> U.S. Securities and Exchange Commission Press Release No. 2022-30: Largest South Korean Telecommunications Co. Agrees to Pay the SEC to Settle FCPA Charges (Feb. 17, 2022), <https://www.sec.gov/news/press-release/2022-30>; Order Instituting Cease-and-Desist Proc., *In the Matter of KT Corp.*, Rel. No. 94279, File No. 3-20780, ¶¶ 1-2 (Feb. 17, 2022).

<sup>131</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of KT Corp.*, Rel. No. 94279, File No. 3-20780, ¶ 28 (Feb. 17, 2022).

<sup>132</sup> U.S. Securities and Exchange Commission Press Release No. 2022-30: Largest South Korean Telecommunications Co. Agrees to Pay the SEC to Settle FCPA Charges (Feb. 17, 2022), <https://www.sec.gov/news/press-release/2022-30>.

<sup>133</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of KT Corp.*, Rel. No. 94279, File No. 3-20780, ¶ 3 (Feb. 17, 2022).

<sup>134</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of KT Corp.*, Rel. No. 94279, File No. 3-20780, ¶ 4 (Feb. 17, 2022).

<sup>135</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of KT Corp.*, Rel. No. 94279, File No. 3-20780, ¶ 4 (Feb. 17, 2022).

<sup>136</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of KT Corp.*, Rel. No. 94279, File No. 3-20780, ¶ 5 (Feb. 17, 2022).

gift cards that were converted to cash, “with the understanding that [KT officers and managers] would transfer the funds electronically to the contributions accounts for various Korean lawmakers,” in direct conflict with Korean law prohibiting corporations from making political contributions.<sup>137</sup> The SEC noted that this alleged scheme resulted in a \$1.3 million slush fund for KT’s disposal.<sup>138</sup> KT, at the request of high-level Korean government officials, allegedly made more than \$1.6 million in payments that were booked as either charitable donations or as sponsorships to three organizations.<sup>139</sup>

The SEC’s resolution also described KT engaging in unlawful conduct in Vietnam in order to obtain contracts for two projects.<sup>140</sup> For one of these projects, KT allegedly coordinated with a construction company to bribe a high-level Vietnamese official to obtain the contract, reimbursing the construction company for bribes that it paid to the official.<sup>141</sup> KT allegedly improperly booked the payment to the construction company as “Support/consulting for performance of the business (completed).”<sup>142</sup> For the second project, KT allegedly coordinated with a high-level Vietnamese official to participate in a consortium to bid on and secure the contract.<sup>143</sup> The SEC order states that the official introduced KT to a Vietnamese company which “served as a communication channel between KT’s consortium and government officials.”<sup>144</sup> Per the SEC, KT sent the agent payments “cloaked” as fees for consulting services, among other things.<sup>145</sup>

KT consented to the SEC’s order and settled the books and records and internal accounting charges on a neither-admit-nor-denry basis.<sup>146</sup> KT agreed to pay approximately \$3.5 million in civil

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<sup>137</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of KT Corp.*, Rel. No. 94279, File No. 3-20780, ¶¶ 5, 7 (Feb. 17, 2022).

<sup>138</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of KT Corp.*, Rel. No. 94279, File No. 3-20780, ¶ 8 (Feb. 17, 2022).

<sup>139</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of KT Corp.*, Rel. No. 94279, File No. 3-20780, ¶ 10 (Feb. 17, 2022).

<sup>140</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of KT Corp.*, Rel. No. 94279, File No. 3-20780, ¶¶ 13-24 (Feb. 17, 2022).

<sup>141</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of KT Corp.*, Rel. No. 94279, File No. 3-20780, ¶¶ 14-16 (Feb. 17, 2022).

<sup>142</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of KT Corp.*, Rel. No. 94279, File No. 3-20780, ¶ 16 (Feb. 17, 2022).

<sup>143</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of KT Corp.*, Rel. No. 94279, File No. 3-20780, ¶¶ 18-19 (Feb. 17, 2022).

<sup>144</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of KT Corp.*, Rel. No. 94279, File No. 3-20780, ¶ 19 (Feb. 17, 2022).

<sup>145</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of KT Corp.*, Rel. No. 94279, File No. 3-20780, ¶¶ 19, 22, 24 (Feb. 17, 2022).

<sup>146</sup> U.S. Securities and Exchange Commission Press Release No. 2022-30: Largest South Korean Telecommunications Co. Agrees to Pay the SEC to Settle FCPA Charges (Feb. 17, 2022), <https://www.sec.gov/news/press-release/2022-30>.

penalties and \$2.8 million in disgorgement.<sup>147</sup> Notably, the SEC explicitly cited its consideration of KT's cooperation with its investigation as the reason why it did not impose a larger civil penalty.<sup>148</sup>

**b. Stericycle, Inc.**

In April, Stericycle, Inc., a US-based international medical waste management company, agreed to pay approximately \$84 million to resolve parallel investigations by authorities in the US and Brazil. Stericycle entered into a three-year DPA with DOJ related to charges for conspiracy to violate the FCPA's anti-bribery and books and records provisions, as well as agreeing to a cease-and-desist order filed by the SEC for violating the FCPA's anti-bribery, books and records, and internal accounting controls provisions.<sup>149</sup> The SEC agreed to offset \$4.2 million for any disgorgement paid to Brazilian authorities as a result of a federal court proceeding in Brazil involving the same matter.<sup>150</sup> The DOJ also agreed to credit up to one-third of the criminal penalty for fines Stericycle paid to Brazilian authorities in related proceedings, including approximately \$9.3 million to resolve investigations by the Controladoria-Geral da União (CGU) and the Advocacia-Geral de União (Attorney General's Office) in Brazil.<sup>151</sup>

Stericycle allegedly paid \$10.5 million in bribes to foreign officials in Brazil, Mexico, and Argentina between 2011 and 2016 and gained approximately \$21.5 million in profits from the schemes.<sup>152</sup> In Brazil, for example, Stericycle Brazil executives allegedly instructed employees to hide cash bribe payments by making them appear as legitimate business expenses in account records.<sup>153</sup> The scheme in Mexico allegedly involved Stericycle employees and agents conspiring to bribe foreign

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<sup>147</sup> U.S. Securities and Exchange Commission Press Release No. 2022-30: Largest South Korean Telecommunications Co. Agrees to Pay the SEC to Settle FCPA Charges (Feb. 17, 2022), <https://www.sec.gov/news/press-release/2022-30>.

<sup>148</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of KT Corp.*, Rel. No. 94279, File No. 3-20780, at 11 (Feb. 17, 2022).

<sup>149</sup> U.S. Department of Justice Press Release No. 22-401: Stericycle Agrees to Pay Over \$84 Million in Coordinated Foreign Bribery Resolution (Apr. 20, 2022), <https://www.justice.gov/opa/pr/stericycle-agrees-pay-over-84-million-coordinated-foreign-bribery-resolution>; U.S. Securities and Exchange Commission Press Release No. 2022-65: SEC Charges Stericycle with Bribery Schemes in Latin America (Apr. 20, 2022), <https://www.sec.gov/news/press-release/2022-65>.

<sup>150</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of Stericycle, Inc.*, Rel. No. 94760, File No. 3-20826, Section IV, ¶ C (Apr. 20, 2022); U.S. Securities and Exchange Commission Press Release No. 2022-65: SEC Charges Stericycle with Bribery Schemes in Latin America (Apr. 20, 2022), <https://www.sec.gov/news/press-release/2022-65>.

<sup>151</sup> U.S. Department of Justice Press Release No. 22-401: Stericycle Agrees to Pay Over \$84 Million in Coordinated Foreign Bribery Resolution (Apr. 20, 2022), <https://www.justice.gov/opa/pr/stericycle-agrees-pay-over-84-million-coordinated-foreign-bribery-resolution>.

<sup>152</sup> Crim. Info., *United States v. Stericycle, Inc.*, No. 22-CR-20156, ¶¶ 47-52 (S.D. Fla. Apr. 14, 2022) ECF No. 1; U.S. Department of Justice Press Release No. 22-401: Stericycle Agrees to Pay Over \$84 Million in Coordinated Foreign Bribery Resolution (Apr. 20, 2022), <https://www.justice.gov/opa/pr/stericycle-agrees-pay-over-84-million-coordinated-foreign-bribery-resolution>; U.S. Securities and Exchange Commission Press Release No. 2022-65: SEC Charges Stericycle with Bribery Schemes in Latin America (Apr. 20, 2022), <https://www.sec.gov/news/press-release/2022-65>.

<sup>153</sup> Deferred Prosecution Agreement, *United States v. Stericycle, Inc.*, No. 22-CR-20156, Attach. A ¶ 21 (S.D. Fla. Apr. 18, 2022) ECF No. 14; Order Instituting Cease-and-Desist Proc., *In the Matter of Stericycle, Inc.*, Rel. No. 94760, File No. 3-20826, ¶ 10 (Apr. 20, 2022).

officials employed by approximately 15 Mexican government agencies.<sup>154</sup> The US government also claimed that the bribe payments, which Stericycle Mexico employees allegedly paid monthly in cash, were “calculated as a percentage of the customer’s invoice value, a percentage of the amount of waste collected, or as a fixed amount,” and referred to in code as “little pieces of chocolates” or “IP payments” (for incentive payments).<sup>155</sup> In Argentina, the DOJ and SEC described a scheme to bribe Argentinian officials to, in part, retain business from government-owned healthcare facilities and to obtain authorization or priority release of payments owed under various waste management services contracts.<sup>156</sup> Stericycle Argentina employees allegedly used the words “alfa” and “alfajores,” traditional cookies popular in Argentina, as code words for the bribe payments.<sup>157</sup>

The US government relied on agency theory in charging Stericycle and holding it liable for its subsidiaries’ and their employees’ actions in each of the three jurisdictions.<sup>158</sup> Stericycle’s liability under an agency theory suggests an aggressive approach to FCPA enforcement, as the resolutions indicate that parent companies can and will be held liable for their subsidiaries’ illicit activities. Furthermore, and as explained above,<sup>159</sup> Stericycle’s resolutions signal that the US government will not only focus on prosecuting large illegal payments to government officials, it will also consider prosecuting companies for making smaller, pervasive bribe payments.

Under the DPA, Stericycle agreed to pay a criminal penalty totaling \$52.5 million, which reflected a 25 percent discount off the bottom of the applicable Sentencing Guidelines range due to the company’s cooperation and remedial measures.<sup>160</sup> Stericycle is also subject to a two-year monitorship, along with a self-reporting obligation for an additional year, which is discussed in further detail below.<sup>161</sup> Stericycle did not receive voluntary disclosure credit because it did not

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<sup>154</sup> Deferred Prosecution Agreement, *United States v. Stericycle, Inc.*, No. 22-CR-20156, Attach. A ¶ 27 (S.D. Fla. Apr. 18, 2022) ECF No. 14; Order Instituting Cease-and-Desist Proc., *In the Matter of Stericycle, Inc.*, Rel. No. 94760, File No. 3-20826, ¶ 14 (Apr. 20, 2022).

<sup>155</sup> Deferred Prosecution Agreement, *United States v. Stericycle, Inc.*, No. 22-CR-20156, Attach. A ¶¶ 28, 31 (S.D. Fla. Apr. 18, 2022) ECF No. 14; Order Instituting Cease-and-Desist Proc., *In the Matter of Stericycle, Inc.*, Rel. No. 94760, File No. 3-20826, ¶ 14 (Apr. 20, 2022).

<sup>156</sup> Deferred Prosecution Agreement, *United States v. Stericycle, Inc.*, No. 22-CR-20156, Attach. A ¶ 36 (S.D. Fla. Apr. 18, 2022) ECF No. 14; Order Instituting Cease-and-Desist Proc., *In the Matter of Stericycle, Inc.*, Rel. No. 94760, File No. 3-20826, ¶ 16 (Apr. 20, 2022).

<sup>157</sup> Deferred Prosecution Agreement, *United States v. Stericycle, Inc.*, No. 22-CR-20156, Attach. A ¶ 40 (S.D. Fla. Apr. 18, 2022) ECF No. 14; U.S. Securities and Exchange Commission Press Release No. 2022-65: SEC Charges Stericycle with Bribery Schemes in Latin America (Apr. 20, 2022), <https://www.sec.gov/news/press-release/2022-65>.

<sup>158</sup> Deferred Prosecution Agreement, *United States v. Stericycle, Inc.*, No. 22-CR-20156, Attach. A ¶¶ 3-4, 7-9, 13 (S.D. Fla. Apr. 18, 2022) ECF No. 14.

<sup>159</sup> See *supra* at Section III.A.2.

<sup>160</sup> Deferred Prosecution Agreement, *United States v. Stericycle, Inc.*, No. 22-CR-20156, ¶ 4(k) (S.D. Fla. Apr. 18, 2022) ECF No. 14; U.S. Department of Justice Press Release No. 22-401: Stericycle Agrees to Pay Over \$84 Million in Coordinated Foreign Bribery Resolution (Apr. 20, 2022), <https://www.justice.gov/opa/pr/stericycle-agrees-pay-over-84-million-coordinated-foreign-bribery-resolution>.

<sup>161</sup> Deferred Prosecution Agreement, *United States v. Stericycle, Inc.*, No. 22-CR-20156, Attach. D ¶ 1 (S.D. Fla. Apr. 18, 2022) ECF No. 14; see *infra* at Section III.B.1.

voluntarily and timely disclose its conduct to the government.<sup>162</sup> However, the company received full credit for its cooperation with the government's investigation, including by proactively providing the government with information obtained through the company's internal investigations, making detailed factual presentations to the government, and facilitating interviews in the US of foreign-based employees.<sup>163</sup> The DPA also stated that Stericycle "engaged in extensive remedial measures," both before and after the government's investigation, which included strengthening its corporate governance, establishing a Safety, Operations, and Environmental Committee, hiring additional compliance personnel, and updating its code of conduct, policies, procedures, and internal controls concerning anti-corruption, retention and management of commercial agents and third parties, gifts, travel, and entertainment.<sup>164</sup>

#### c. Glencore International A.G.

In May, Glencore International A.G. pleaded guilty and agreed to pay approximately \$700 million to resolve the DOJ's investigation into alleged FCPA violations.<sup>165</sup> According to the DOJ, the charges in the FCPA matter involved payments through intermediaries for the benefit of foreign officials across multiple countries, including Nigeria and West Africa, Brazil, Venezuela, and the Democratic Republic of the Congo (DRC).<sup>166</sup>

According to the plea agreement, the company's oil department made payments of \$52 million to two intermediary companies in Nigeria between 2007 and 2014 with the intent that a portion of the payments be used as bribes for Glencore to earn \$124 million in profits;<sup>167</sup> one payment of approximately \$147,202 to one consultant in Brazil in 2011, knowing that a portion of the funds would be paid in bribes to an employee of Petrobras to obtain oil cargoes for \$453,686 in profits;<sup>168</sup> and payments of \$1.29 million to one intermediary company in Venezuela made between 2011 and 2014 with the intent that a portion of the payments be used to obtain priority for \$11.98 million in

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<sup>162</sup> Deferred Prosecution Agreement, *United States v. Stericycle, Inc.*, No. 22-CR-20156, ¶ 4(a) (S.D. Fla. Apr. 18, 2022) ECF No. 14.

<sup>163</sup> Deferred Prosecution Agreement, *United States v. Stericycle, Inc.*, No. 22-CR-20156, ¶ 4(b) (S.D. Fla. Apr. 18, 2022) ECF No. 14.

<sup>164</sup> Deferred Prosecution Agreement, *United States v. Stericycle, Inc.*, No. 22-CR-20156, ¶ 4(d) (S.D. Fla. Apr. 18, 2022) ECF No. 14.

<sup>165</sup> Plea Agreement, *United States v. Glencore Int'l AG*, No. 22-CR-00297 (S.D.N.Y. May 24, 2022). In addition to the FCPA charges, Glencore Ltd. pleaded guilty in a separate case announced the same day to one count of conspiracy to engage in commodity price manipulation, for which Glencore Ltd. paid a criminal fine of \$341 million and criminal forfeiture of \$144 million. The Department will credit \$242 million of the payments the company made to the CFTC, which total half of the combined penalty and forfeiture amounts. See U.S. Department of Justice Press Release No. 22-554: Glencore Entered Guilty Pleas to Foreign Bribery and Market Manipulation Schemes (May 24, 2022), <https://www.justice.gov/opa/pr/glencore-entered-guilty-pleas-foreign-bribery-and-market-manipulation-schemes>.

<sup>166</sup> Plea Agreement, *United States v. Glencore Int'l AG*, No. 22-CR-00297, Attach. A ¶¶ 35-75 (S.D.N.Y. May 24, 2022).

<sup>167</sup> Plea Agreement, *United States v. Glencore Int'l AG*, No. 22-CR-00297, Attach. A ¶¶ 35, 52 (S.D.N.Y. May 24, 2022).

<sup>168</sup> Plea Agreement, *United States v. Glencore Int'l AG*, No. 22-CR-00297, Attach. A ¶¶ 58-60 (S.D.N.Y. May 24, 2022).

payments from PDVSA.<sup>169</sup> The DOJ also alleged that Glencore offered and paid more than \$27.5 million to third parties with the intent that a portion of the payments be passed onto DRC officials.<sup>170</sup> Glencore agreed to a criminal fine of \$428.5 million and to criminal forfeiture and disgorgement of more than \$272 million.<sup>171</sup> The forfeiture was an unusual feature of the settlement, as the DOJ has not typically sought forfeiture in FCPA cases.

On the same day as the US resolution in May, three other agencies, the US Commodity Futures Trading Commission (CFTC), the UK's Serious Fraud Office, and Brazil's Ministério Pùblico da União (Federal Prosecution Service or MPF), also announced resolutions with Glencore.<sup>172</sup> In the United Kingdom, Glencore pleaded guilty in Southwark Crown Court in June 2022 to seven counts of breaching the UK Bribery Act by paying over \$28 million in bribes to officials at state-owned energy companies in five countries in West Africa between 2011 and 2015. The company ultimately paid a £182.9 million fine and a £93.4 million confiscation order.<sup>173</sup> Under the settlement agreement with Brazil prosecutors, Glencore agreed to pay \$39.6 million to Brazilian authorities in connection with fuel purchase and sale contracts with Petrobras.<sup>174</sup> For its part, the CFTC entered an order settling charges against Glencore for \$1.186 billion for conduct related both to manipulation or attempted manipulation of US-based physical oil benchmarks and conduct involving alleged fraud and corrupt payments to employees and agents of state-owned entities in Brazil, Cameroon, Nigeria, and Venezuela, and misappropriation of confidential information from employees and agents of state-owned entities in Mexico.<sup>175</sup>

In its settlement papers, the DOJ noted that Glencore engaged in various remedial measures, including terminating employees involved in the conduct, establishing and significantly increasing resources in its centralized compliance function, enhancing its business partner management program, investing in data analytics to support real-time compliance monitoring and risk

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<sup>169</sup> Plea Agreement, *United States v. Glencore Int'l AG*, No. 22-CR-00297, Attach. A ¶¶ 61-65 (S.D.N.Y. May 24, 2022).

<sup>170</sup> Plea Agreement, *United States v. Glencore Int'l AG*, No. 22-CR-00297, Attach. A ¶ 66 (S.D.N.Y. May 24, 2022).

<sup>171</sup> Plea Agreement, *United States v. Glencore Int'l AG*, No. 22-CR-00297, ¶ 22 (S.D.N.Y. May 24, 2022).

<sup>172</sup> U.S. Department of Justice Press Release No. 22-554: Glencore Entered Guilty Pleas to Foreign Bribery and Market Manipulation Schemes (May 24, 2022), <https://www.justice.gov/opa/pr/glencore-entered-guilty-pleas-foreign-bribery-and-market-manipulation-schemes>.

<sup>173</sup> *Glencore to pay £280 million for 'highly corrosive' and 'endemic' corruption*, U.K. SERIOUS FRAUD OFFICE (Nov. 3, 2022), <https://www.sfo.gov.uk/2022/11/03/glencore-energy-uk-ltd-will-pay-280965092-95-million-over-400-million-usd-after-an-sfo-investigation-revealed-it-paid-us-29-million-in-bribes-to-gain-preferential-access-to-oil-in-africa>; Alice Johnson, *Glencore fined £281m in UK over Africa bribery schemes*, GLOBAL INVESTIGATIONS REV. (Nov. 3, 2022), <https://globalinvestigationsreview.com/article/glencore-fined-ps281m-in-uk-over-africa-bribery-schemes>.

<sup>174</sup>, *Ministério Pùblico Federal assina acordo de leniência com trading company no âmbito da Operação Lava Jato* ("Federal Prosecution Service signs leniency agreement with trading company within the scope of Operation Lava Jato"), MINISTÉRIO PÙBlico FEDERAL (May 24, 2022), <https://www.mpf.mp.br/pr/sala-de-imprensa/noticias-pr/ministerio-publico-federal-assina-acordo-de-leniencia-com-trading-company-no-ambito-da-operacao-lava-jato>.

<sup>175</sup> U.S. Commodity Futures Trading Commission Press Release No. 8534-22: CFTC Orders Glencore to Pay \$1.186 Billion for Manipulation and Corruption (May 24, 2022), <https://www.cftc.gov/PressRoom/PressReleases/8534-22>.

assessment, and augmenting its anti-corruption training programs and requirements.<sup>176</sup> Glencore also received partial cooperation under the Corporate Enforcement Policy, reflected as a 15 percent discount off the bottom of the applicable Sentencing Guidelines fine range, for Providing information obtained through its internal investigation, making regular and detailed factual presentations to the DOJ, producing a significant amount of documents located outside the US, and producing an analysis of complex trading activities conducted by an outside forensic accounting firm.<sup>177</sup>

The DOJ agreed to credit the company over \$257 million with respect to FCPA-related offenses in combined payments made to the CFTC, to the court in the United Kingdom, and authorities in Switzerland, in the event that the company reaches a resolution with Swiss authorities within one year.<sup>178</sup> Switzerland's Office of the Attorney General and the Netherlands' Public Prosecution Service both continue to investigate the company over allegations in the DRC.<sup>179</sup>

As part of its plea agreement, as discussed below,<sup>180</sup> Glencore agreed to a three-year monitorship in connection with the FCPA-related settlement.<sup>181</sup> As a condition of the settlement with the DOJ, Glencore's CEO and CCO will also be required to certify to the sufficiency of the design and implementation of the company's revamped compliance program at the end of the company's monitorships, in a first-of-its-kind requirement that the DOJ has continued to impose in subsequent corporate resolutions.<sup>182</sup>

**d. Tenaris S.A.**

In June, Tenaris S.A., a Luxembourg-based global steel pipe manufacturer and supplier, settled anti-bribery, books and records, and internal accounting controls charges for \$78 million with the

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<sup>176</sup> Plea Agreement, *United States v. Glencore Int'l AG*, No. 22-CR-00297, ¶ 7(e) (S.D.N.Y. May 24, 2022).

<sup>177</sup> Plea Agreement, *United States v. Glencore Int'l AG*, No. 22-CR-00297, ¶ 7(c), (l) (S.D.N.Y. May 24, 2022).

<sup>178</sup> Plea Agreement, *United States v. Glencore Int'l AG*, No. 22-CR-00297, ¶ 22 (S.D.N.Y. May 24, 2022).

<sup>179</sup> *Glencore Reaches Coordinated Resolutions with US, UK and Brazilian Authorities*, GLENCORE (May 24, 2022), <https://otp.tools.investis.com/clients/uk/glencore2/rns/regulatory-story.aspx?cid=275&newsid=1587381>.

<sup>180</sup> See *infra* at Section III.B.1.

<sup>181</sup> Plea Agreement, *United States v. Glencore Int'l AG*, No. 22-CR-00297, Attachs. D, E (S.D.N.Y. May 24, 2022). In addition, Glencore agreed to a separate three-year monitorship in connection with its settlement of the market manipulation charges. Plea Agreement, *United States v. Glencore Ltd.*, No. 22-CR-00071, Attach. D (D. Conn. May 24, 2022) ECF No. 18.

<sup>182</sup> Plea Agreement, *United States v. Glencore Int'l AG*, No. 22-CR-00297, Attach. H (S.D.N.Y. May 24, 2022) ("The agreement states that the CEO and CCO will need to certify that "the Company has implemented an anti-corruption compliance program that meets the requirements set forth in Attachment C to the Agreement. The undersigned certifies that such compliance program is reasonably designed to detect and prevent violations of the Foreign Corrupt Practices Act and other applicable anti-corruption laws throughout the Company's operations.")

SEC on a neither-admit-nor-deney basis.<sup>183</sup> The resolution arises from allegations of improper payments aimed at obtaining and retaining business from Brazilian state-owned entity Petrobras.<sup>184</sup>

According to the SEC order, Tenaris's Brazilian subsidiary, Confab, engaged in a bribery scheme that funneled \$10.4 million to a Brazilian government official, which was concealed in part by a Uruguayan shell company.<sup>185</sup> Specifically, the SEC alleged that, between 2008 and 2013, companies affiliated with Tenaris and Tenaris's controlling shareholder funded bribes on behalf of Confab in order to bypass an international tender process for certain pipes and tubes.<sup>186</sup> This enabled Confab to gain preferred status as the only domestic supplier and eliminate international competitors.<sup>187</sup> As a result, Confab allegedly obtained more than \$1 billion in contracts from Petrobras.<sup>188</sup>

To resolve the matter, Tenaris consented to a cease-and-desist order and agreed to pay \$78 million, consisting of nearly \$43 million in disgorgement, \$10 million in prejudgment interest, and a \$25 million civil penalty.<sup>189</sup> The DOJ simultaneously informed Tenaris that it closed a parallel FCPA investigation.<sup>190</sup> In reaching the settlement terms, the SEC considered Tenaris's cooperation, including "providing translated copies of various documents and relevant witness testimony," "encouraging parties outside of the Commission's subpoena power to provide relevant evidence and information," and making "enhancements to its internal accounting controls, global compliance organization and its policies and procedures regarding due diligence, use of third parties, and maintenance of adequate records."<sup>191</sup> Additionally, Tenaris agreed to report to the SEC "the status

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<sup>183</sup> U.S. Securities and Exchange Commission Press Release No. 2022-98: SEC Charges Global Steel Pipe Manufacturer with Violating Foreign Corrupt Practices Act (June 2, 2022), <https://www.sec.gov/news/press-release/2022-98>.

<sup>184</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of Tenaris S.A.*, Rel. No. 95030, File No. 3-20875, ¶¶ 1, 5-6 (June 2, 2022).

<sup>185</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of Tenaris S.A.*, Rel. No. 95030, File No. 3-20875, ¶¶ 1, 11-16 (June 2, 2022).

<sup>186</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of Tenaris S.A.*, Rel. No. 95030, File No. 3-20875, ¶¶ 1, 10, 13 (June 2, 2022).

<sup>187</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of Tenaris S.A.*, Rel. No. 95030, File No. 3-20875, ¶¶ 1, 10 (June 2, 2022).

<sup>188</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of Tenaris S.A.*, Rel. No. 95030, File No. 3-20875, ¶ 1 (June 2, 2022).

<sup>189</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of Tenaris S.A.*, Rel. No. 95030, File No. 3-20875, Section IV, ¶ B (June 2, 2022).

<sup>190</sup> *Tenaris Resolves U.S. Securities and Exchange Commission Investigation into Legacy Issue in Brazil; U.S. Department of Justice Closes Parallel Inquiry Without Taking Action*, TENARIS (June 2, 2022), <https://ir.tenaris.com/news-releases/news-release-details/tenaris-resolves-us-securities-and-exchange-commission>.

<sup>191</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of Tenaris S.A.*, Rel. No. 95030, File No. 3-20875, ¶¶ 24-25 (June 2, 2022).

of its remediation and implementation of compliance measures . . . particularly as to preventing the use of unaccounted funds for illicit purposes" every six months for a two-year period.<sup>192</sup>

This settlement offers one example of how SEC authorities may approach resolutions with corporations who have previously resolved FCPA matters. In 2011, Tenaris entered into an NPA with the DOJ and DPA with the SEC stemming from alleged bribes paid to obtain business from a state-owned enterprise in Uzbekistan.<sup>193</sup> The SEC noted that Tenaris was a repeat player, but did not indicate how, if at all, Tenaris' 2011 settlements affected this resolution.<sup>194</sup>

**e. GOL Linhas Aéreas Inteligentes S.A.**

In September, Brazilian airline GOL Linhas Aéreas Inteligentes S.A. reached settlements with the DOJ and SEC to resolve criminal and civil foreign bribery charges.<sup>195</sup> The US government coordinated with authorities in Brazil to investigate GOL's scheme to bribe Brazilian government officials in exchange for tax reductions.<sup>196</sup>

According to the DOJ DPA, between 2012 and 2013, GOL paid \$3.8 million in bribes to Brazilian government officials to secure passage of two pieces of legislation that would reduce GOL's tax liabilities.<sup>197</sup> Under the first piece of legislation, the Brazilian legislature applied a 1% payroll tax, the lowest rate possible under the new law, to the air transport industry, which saved GOL approximately \$39.7 million.<sup>198</sup> Through the second piece of legislation, the Brazilian legislature lowered the aviation fuel tax from 25% to 12% in the country's federal capital Brasilia, saving GOL approximately \$12.24 million.<sup>199</sup>

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<sup>192</sup> Order Instituting Cease-and-Desist Proceedings, *In the Matter of Tenaris S.A.*, Rel. No. 95030, File No. 3-20875, at 6 (June 2, 2022); U.S. Securities and Exchange Commission Press Release No. 2022-98: SEC Charges Global Steel Pipe Manufacturer with Violating Foreign Corrupt Practices Act (June 2, 2022), <https://www.sec.gov/news/press-release/2022-98>.

<sup>193</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of Tenaris S.A.*, Rel. No. 95030, File No. 3-20875, ¶ 2 (June 2, 2022).

<sup>194</sup> U.S. Securities and Exchange Commission Press Release No. 2022-98: SEC Charges Global Steel Pipe Manufacturer with Violating Foreign Corrupt Practices Act (June 2, 2022), <https://www.sec.gov/news/press-release/2022-98> ("This is not the first time Tenaris has been involved in a corruption scheme. In 2011, the company entered into a Non-Prosecution Agreement with the Department of Justice and a Deferred Prosecution Agreement with the SEC as a result of alleged bribes the company paid to obtain business from a state-owned entity in Uzbekistan.").

<sup>195</sup> U.S. Department of Justice Press Release No. 22-978: GOL Linhas Aéreas Inteligentes S.A. Will Pay Over \$41 Million in Resolution of Foreign Bribery Investigations in the United States and Brazil (Sept. 15, 2022), <https://www.justice.gov/opa/pr/gol-linhas-aerneas-inteligentes-sa-will-pay-over-41-million-resolution-foreign-bribery>.

<sup>196</sup> U.S. Department of Justice Press Release No. 22-978: GOL Linhas Aéreas Inteligentes S.A. Will Pay Over \$41 Million in Resolution of Foreign Bribery Investigations in the United States and Brazil (Sept. 15, 2022), <https://www.justice.gov/opa/pr/gol-linhas-aerneas-inteligentes-sa-will-pay-over-41-million-resolution-foreign-bribery>.

<sup>197</sup> Deferred Prosecution Agreement, *United States v. GOL Linhas Aéreas Inteligentes S.A.*, No. 22-CR-00325, ¶ 15 (D. Md. Sept. 16, 2022) ECF No. 12.

<sup>198</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of GOL Linhas Aéreas Inteligentes S.A.*, Rel. No. 95800, File No. 3-21094, ¶¶ 2-3, 6 (Sept. 15, 2022).

<sup>199</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of GOL Linhas Aéreas Inteligentes S.A.*, Rel. No. 95800, File No. 3-21094, ¶¶ 7-8 (Sept. 15, 2022).

GOL consented to a cease-and-desist order with the SEC and agreed to a three-year DPA with the DOJ.<sup>200</sup> The DOJ credited GOL's cooperation with the investigation, which included "reviewing voluminous documents, interviewing witnesses, conducting background checks, and testing over two thousand transactions," and "redesigning its entire anti-corruption program."<sup>201</sup> For these efforts, the DOJ gave GOL full credit for cooperation and remediation, resulting in a criminal penalty reduction of 25% from the low end of the US Sentencing Guidelines range.<sup>202</sup>

Additionally, the DOJ specifically declined to impose a monitor "[b]ased on the Company's remediation and the state of its compliance program."<sup>203</sup> Per the DOJ, GOL demonstrated to the DOJ "through testing that the program was functioning effectively and adequately resourced."<sup>204</sup> Discussing the decision to forgo a monitor, Assistant Attorney General Kenneth A. Polite explained that the DOJ would also require officer compliance certifications.<sup>205</sup> This provision requires both GOL's CEO and CCO to certify at the end of the DPA term that the compliance program is effective.<sup>206</sup>

In total, the DOJ and SEC imposed total financial penalties of \$87 million and \$70 million, respectively.<sup>207</sup> However, US authorities also considered the company's demonstrated financial condition and inability to pay, waiving payment of all but \$17 million to the DOJ and \$24.5 million to the SEC.<sup>208</sup> Furthermore, GOL agreed to pay \$3.4 million in restitution to the Brazilian government, with the DOJ offering to credit up to \$1.7 million of the criminal penalty against this fine.<sup>209</sup>

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<sup>200</sup> U.S. Securities and Exchange Commission Press Release No. 2022-164: SEC Charges Gol Intelligent Airlines, Brazil's Second Largest Airline, with FCPA Violations (Sept. 15, 2022), <https://www.sec.gov/news/press-release/2022-164>.

<sup>201</sup> U.S. Department of Justice Press Release No. 22-978: GOL Linhas Aéreas Inteligentes S.A. Will Pay Over \$41 Million in Resolution of Foreign Bribery Investigations in the United States and Brazil (Sept. 15, 2022), <https://www.justice.gov/opa/pr/gol-linhas-reas-inteligentes-sa-will-pay-over-41-million-resolution-foreign-bribery>.

<sup>202</sup> U.S. Department of Justice Press Release No. 22-978: GOL Linhas Aéreas Inteligentes S.A. Will Pay Over \$41 Million in Resolution of Foreign Bribery Investigations in the United States and Brazil (Sept. 15, 2022), <https://www.justice.gov/opa/pr/gol-linhas-reas-inteligentes-sa-will-pay-over-41-million-resolution-foreign-bribery>.

<sup>203</sup> Deferred Prosecution Agreement, *United States v. GOL Linhas Aéreas Inteligentes S.A.*, No. 22-CR-00325, ¶ 4(m) (D. Md. Sept. 16, 2022).

<sup>204</sup> Nicole M. Argentieri, Acting Principal Deputy Assistant Att'y Gen., DOJ, Remarks at the 39th International Conference on the Foreign Corrupt Practices Act (Dec. 1, 2022), <https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-nicole-m-argentieri-delivers-remarks>.

<sup>205</sup> Kenneth A. Polite Jr., Assistant Att'y Gen., DOJ, Remarks at the University of Texas Law School (Sept. 16, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-delivers-remarks-university-texas-law-school>.

<sup>206</sup> Kenneth A. Polite Jr., Assistant Att'y Gen., DOJ, Remarks at the University of Texas Law School (Sept. 16, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-delivers-remarks-university-texas-law-school>.

<sup>207</sup> Deferred Prosecution Agreement, *United States v. GOL Linhas Aéreas Inteligentes S.A.*, No. 22-CR-00325, ¶ 8 (D. Md. Sept. 16, 2022) ECF No. 12; Order Instituting Cease-and-Desist Proc., *In the Matter of GOL Linhas Aéreas Inteligentes S.A.*, Rel. No. 95800, File No. 3-21094, Section IV ¶ B (Sept. 15, 2022).

<sup>208</sup> U.S. Securities and Exchange Commission Press Release No. 2022-164: SEC Charges Gol Intelligent Airlines, Brazil's Second Largest Airline, with FCPA Violations (Sept. 15, 2022), <https://www.sec.gov/news/press-release/2022-164>.

<sup>209</sup> Deferred Prosecution Agreement, *United States v. GOL Linhas Aéreas Inteligentes S.A.*, No. 22-CR-00325, ¶ 10 (D. Md. Sept. 16, 2022) ECF No. 12.

#### **f. Oracle Corporation**

Also in September, Oracle Corporation agreed to pay \$23 million—consisting of \$8 million in disgorgement and a \$15 million civil penalty—to settle charges brought by the SEC that it had violated the anti-bribery, books and records, and internal accounting controls provisions of the FCPA with respect to conduct in Turkey, the United Arab Emirates, and India.<sup>210</sup> The SEC’s settlement was the second involving the company. In August 2012, the SEC alleged that employees of Oracle’s India subsidiary violated the books and records and internal accounting controls provisions of the FCPA by directing local distributors to set aside money in unauthorized side funds, and Oracle agreed to pay a \$2 million penalty to resolve those charges.<sup>211</sup>

In its 2022 cease-and-desist order, the SEC alleged that, from 2014 to 2019, subsidiaries of Oracle in Turkey, the United Arab Emirates, and India created and maintained side funds to provide improper payments and other benefits, including travel benefits, to foreign officials.<sup>212</sup> In accepting Oracle’s offer of settlement, the SEC considered Oracle’s cooperation efforts, its self-reporting of certain unrelated conduct, and its numerous remedial efforts, including its termination of senior employees, distributors, and resellers involved in the misconduct, expansion of its global compliance and risk management functions, and implementation of its compliance analytics program, among several other initiatives.<sup>213</sup>

Importantly, the SEC’s imputation of the conduct of the employees of Oracle’s foreign subsidiaries to Oracle Corporation rested on the SEC’s expansive approach to agency principles. For example, the SEC’s order stated that Oracle “exercised control over its subsidiaries” during the relevant period and that Oracle’s “legal, audit, and compliance functions” were centrally coordinated from Oracle’s US headquarters.<sup>214</sup> The SEC further noted that employees at Oracle’s subsidiaries reported up to the parent corporation through “lines of business,” and that Oracle set business and financial targets for each line of business.<sup>215</sup> The SEC’s order also alleged that Oracle Corporation maintained a global onboarding and due diligence process for VADs and VARs that prohibited its

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<sup>210</sup> See U.S. Securities and Exchange Commission Press Release No. 2022-173: SEC Charges Oracle a Second Time for Violations of the Foreign Corrupt Practices Act (Sept. 27, 2022), <https://www.sec.gov/news/press-release/2022-173>; Order Instituting Cease-and-Desist Proc., *In the Matter of Oracle Corp.*, Rel. No. 95913, File No. 3-21158, Section IV (Sept. 27, 2022).

<sup>211</sup> See U.S. Securities and Exchange Commission Press Release No. 2012-158: SEC Charges Oracle Corporation With FCPA Violations Related to Secret Side Funds in India (Aug. 16, 2012); see also WilmerHale, *FCPA Year-in-Review: Developments of 2012 and Predictions for 2013* (Jan. 31, 2013), <https://www.wilmerhale.com/en/insights/client-alerts/fcpa-year-in-review-developments-of-2012-and-predictions-for-2013>.

<sup>212</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of Oracle Corp.*, Rel. No. 95913, File No. 3-21158, ¶ 1 (Sept. 27, 2022).

<sup>213</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of Oracle Corp.*, Rel. No. 95913, File No. 3-21158, ¶¶ 26-28 (Sept. 27, 2022).

<sup>214</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of Oracle Corp.*, Rel. No. 95913, File No. 3-21158, ¶ 3 (Sept. 27, 2022).

<sup>215</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of Oracle Corp.*, Rel. No. 95913, File No. 3-21158, ¶ 4 (Sept. 27, 2022).

various subsidiaries from working with unapproved VADs or VARs.<sup>216</sup> And at various points, the SEC's order emphasized that discounts requested by subsidiary employees might be approved by designated approvers from outside the subsidiary, including in some cases, personnel from Oracle's headquarters.<sup>217</sup> Oracle neither admitted nor denied the charges.

**g. ABB Ltd.**

In December, ABB Ltd., a Swiss-based technology company specializing in electrical equipment, automation, and robotics, settled criminal and civil charges with the DOJ and SEC arising from an alleged bribery scheme in South Africa.<sup>218</sup> This marks the first resolution the US has reached in coordination with South African enforcement authorities,<sup>219</sup> and it makes ABB Ltd. the first company to have settled three separate FCPA investigations.<sup>220</sup> According to the DPA, ABB Ltd., through its subsidiaries, paid bribes to a government official at a South African state-owned energy company to gain an improper business advantage and obtain contracts, including a \$160 million deal for engineering work on a power plant.<sup>221</sup> To pay the bribes, ABB Ltd.'s Swiss and South African subsidiaries allegedly funneled money by awarding contracts to subcontractors designated by the official, despite the subcontractors' "poor technical qualifications and lack of experience."<sup>222</sup> The DOJ and SEC alleged that, between 2014 and 2017, ABB subsidiaries paid more than \$37 million to unqualified subcontractors, much of which was intended to be bribes.<sup>223</sup>

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<sup>216</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of Oracle Corp.*, Rel. No. 95913, File No. 3-21158, ¶ 4 (Sept. 27, 2022).

<sup>217</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of Oracle Corp.*, Rel. No. 95913, File No. 3-21158, ¶¶ 7, 14, 16-17, 21 (Sept. 27, 2022).

<sup>218</sup> U.S. Department of Justice Press Release No. 22-1296: ABB Agrees to Pay Over \$315 Million to Resolve Coordinated Global Foreign Bribery Case (Dec. 2, 2022), <https://www.justice.gov/opa/pr/abb-agrees-pay-over-315-million-resolve-coordinated-global-foreign-bribery-case>; U.S. Securities and Exchange Commission Press Release No. 2022-214: ABB Settles SEC Charges That It Engaged in Bribery Scheme in South Africa (Dec. 3, 2022), <https://www.sec.gov/news/press-release/2022-214>.

<sup>219</sup> U.S. Department of Justice Press Release No. 22-1296: ABB Agrees to Pay Over \$315 Million to Resolve Coordinated Global Foreign Bribery Case (Dec. 2, 2022), <https://www.justice.gov/opa/pr/abb-agrees-pay-over-315-million-resolve-coordinated-global-foreign-bribery-case>; see also Kenneth A. Polite Jr., Assistant Att'y Gen., DOJ, Closing Remarks at the 20th International Anti-Corruption Conference (Dec. 9, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-closing-remarks-20th-international>.

<sup>220</sup> Dylan Tokar, *ABB Nears Deal to Resolve Third U.S. Bribery Case Against Company*, WALL ST. J. (Nov. 25, 2022), <https://www.wsj.com/articles/abb-nears-deal-to-resolve-third-u-s-bribery-case-against-company-11669407951>.

<sup>221</sup> Deferred Prosecution Agreement, *United States v. ABB Ltd.*, No. 22-CR-00220, Attach. A ¶¶ 9, 14-17 (D. Va. Dec. 2, 2022) ECF No. 16; U.S. Securities and Exchange Commission Press Release No. 2022-214: ABB Settles SEC Charges That It Engaged in Bribery Scheme in South Africa (Dec. 3, 2022), <https://www.sec.gov/news/press-release/2022-214>.

<sup>222</sup> U.S. Department of Justice Press Release No. 22-1296: ABB Agrees to Pay Over \$315 Million to Resolve Coordinated Global Foreign Bribery Case (Dec. 2, 2022), <https://www.justice.gov/opa/pr/abb-agrees-pay-over-315-million-resolve-coordinated-global-foreign-bribery-case>; Deferred Prosecution Agreement, *United States v. ABB Ltd.*, No. 22-CR-00220, Attach. A ¶ 15 (D. Va. Dec. 2, 2022) ECF No. 16.

<sup>223</sup> Deferred Prosecution Agreement, *United States v. ABB Ltd.*, No. 22-CR-00220, Attach. A ¶ 14 (D. Va. Dec. 2, 2022) ECF No. 16; U.S. Securities and Exchange Commission Press Release No. 2022-214: ABB Settles SEC Charges That It Engaged in Bribery Scheme in South Africa (Dec. 3, 2022), <https://www.sec.gov/news/press-release/2022-214>.

ABB Ltd. entered into a three-year DPA and agreed to pay more than \$315 million to resolve criminal charges of conspiracy to violate the FCPA's anti-bribery and books and records provisions and direct violations of the FCPA.<sup>224</sup> In addition, ABB Ltd.'s Swiss and South African subsidiaries each pleaded guilty to one count of conspiracy to violate the FCPA's anti-bribery provision.<sup>225</sup> To resolve the civil charges, ABB Ltd. consented to a cease-and-desist order, agreeing to pay \$75 million and report on its remediation and compliance programs for three years.<sup>226</sup>

In reaching the settlements, US authorities considered ABB Ltd.'s "extraordinary cooperation;" extensive remedial efforts, including a "root-cause analysis" and significant compliance and monitoring investments; willingness to meet quarterly with the DOJ and provide annual reports; and concurrent resolutions with authorities in South Africa and Switzerland, as well as a pending resolution in Germany.<sup>227</sup> The DOJ and SEC also took into consideration ABB Ltd.'s prior misconduct, including the resolutions that ABB Ltd. entered into in 2010 and 2004 to resolve FCPA allegations.<sup>228</sup> ABB Ltd. received a 25% reduction off the mid-point between the middle and the high end of the US Sentencing Guidelines, and a credit of up to one-half of the penalty against ABB Ltd.'s settlements entered with South African, Swiss, and German agencies.<sup>229</sup> The DOJ did not impose a compliance monitor, which suggests that US authorities may have given more weight to the fact that ABB Ltd. had "enhanced and has committed to continuing to enhance its compliance

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<sup>224</sup> Deferred Prosecution Agreement, *United States v. ABB Ltd.*, No. 22-CR-00220, ¶¶ 1, 3, 7(d) (D. Va. Dec. 2, 2022) ECF No. 16; see U.S. Department of Justice Press Release No. 22-1296: ABB Agrees to Pay Over \$315 Million to Resolve Coordinated Global Foreign Bribery Case (Dec. 2, 2022), <https://www.justice.gov/opa/pr/abb-agrees-pay-over-315-million-resolve-coordinated-global-foreign-bribery-case>.

<sup>225</sup> See Plea Agreement, *United States v. ABB South Africa (Pty) Ltd.*, No. 22-CR-00222, ¶ 1 (E.D. Va. Dec. 2, 2022) ECF No. 10; Plea Agreement, *United States v. ABB Mgmt. Serv. Ltd.*, No. 22-CR-00221, ¶ 1 (E.D. Va. Dec. 2, 2022) ECF No 17.

<sup>226</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of ABB Ltd.*, Rel. No. 96444, File No. 3-21248, ¶ 46 (Dec. 3, 2022).

<sup>227</sup> Deferred Prosecution Agreement, *United States v. ABB Ltd.*, No. 22-CR-00220, ¶¶ 4(c), 4(d), 4(f)) (D. Va. Dec. 2, 2022) ECF No. 16; U.S. Department of Justice Press Release No. 22-1296: ABB Agrees to Pay Over \$315 Million to Resolve Coordinated Global Foreign Bribery Case (Dec. 2, 2022), <https://www.justice.gov/opa/pr/abb-agrees-pay-over-315-million-resolve-coordinated-global-foreign-bribery-case>.

<sup>228</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of ABB Ltd.*, Rel. No. 96444, File No. 3-21248, ¶¶ 3-4 (Dec. 3, 2022); Deferred Prosecution Agreement, *United States v. ABB Ltd.*, No. 22-CR-00220, ¶ 4(g) (D. Va. Dec. 2, 2022) ECF No. 16. In 2010, ABB entered into a DPA arising from alleged kickbacks to officials in Mexico and Iraq in connection with a UN aid program, which was accompanied by guilty pleas from US and Jordan-based subsidiaries. Deferred Prosecution Agreement, *United States v. ABB Ltd.*, No. 10-CR-00665 (S.D. Tex. Sept. 29, 2010). And in 2004, US and UK-based subsidiaries of ABB pleaded guilty to FCPA violations stemming from bribery of Nigerian officials. U.S. Securities and Exchange Commission Press Release No. 18775: SEC Sues ABB Ltd in Foreign Bribery Case (July 6, 2004), <https://www.sec.gov/news/press-release/2022-214>. ABB also entered a guilty plea for bid rigging in 2001. U.S. Department of Justice Press Release No. 01-170: ABB Asea Brown Boveri Ltd. Subsidiary Pleads Guilty to Bid Rigging on USAID Construction Contract in Egypt (Apr. 12, 2001), [https://www.justice.gov/archive/atr/public/press\\_releases/2001/7984.htm](https://www.justice.gov/archive/atr/public/press_releases/2001/7984.htm); see also Deferred Prosecution Agreement, *United States v. ABB Ltd.*, No. 22-CR-00220, ¶ 4(g) (D. Va. Dec. 2, 2022) ECF No. 16.

<sup>229</sup> U.S. Department of Justice Press Release No. 22-1296: ABB Agrees to Pay Over \$315 Million to Resolve Coordinated Global Foreign Bribery Case (Dec. 2, 2022), <https://www.justice.gov/opa/pr/abb-agrees-pay-over-315-million-resolve-coordinated-global-foreign-bribery-case> (stating "the criminal monetary penalty reflects a 25% discount off the mid-point between the middle and high end" of the US Sentencing Guidelines).

program and internal controls throughout its operations” over the company’s “decade-old criminal history” when considering the imposition of a monitor.<sup>230</sup>

The ABB Ltd. matter presents two key takeaways. First, as the first coordinated resolution with South Africa, it demonstrates US authorities’ interest in expanding enforcement partnerships globally.<sup>231</sup> Second, the resolution illustrates the approach prosecutors may take in weighing strong remediation and compliance efforts against the DOJ’s pledge to address corporate recidivism, and the DOJ’s recent comments that it will give prior criminal misconduct less weight after ten years, and civil and regulatory misconduct less weight after five. Reflecting on the ABB Ltd. resolution, Principal Associate DAG Marshall Miller underscored the importance of voluntary disclosure, noting that a “narrow, technical approach” was not appropriate considering the company’s “documented efforts to self-disclose” and its “A+ cooperation.”<sup>232</sup>

#### **h. Honeywell**

In December, Honeywell International, Inc. (Honeywell), a US-based global manufacturer of aerospace, building technologies, and automation products, and its US-based subsidiary, Honeywell UOP, entered into resolutions with the DOJ, SEC, and Brazilian authorities to resolve investigations arising out of alleged bribery schemes occurring in Brazil and Algeria.<sup>233</sup> Under the resolution, Honeywell agreed to pay \$202.7 million to US and Brazilian government authorities. Honeywell consented to the SEC’s cease-and-desist order, which stated that the company violated the anti-bribery, books and records, and internal accounting controls provisions of the Securities Exchange Act.<sup>234</sup> With respect to the DOJ, Honeywell UOP entered into a three-year DPA in connection with a criminal information charging the company with conspiracy to violate the FCPA’s

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<sup>230</sup> Deferred Prosecution Agreement, *United States v. ABB Ltd.*, No. 22-CR-00220, ¶ 4(f) (D. Va. Dec. 2, 2022) ECF No. 16.

<sup>231</sup> Kenneth A. Polite Jr., Assistant Att'y Gen., DOJ, Remarks at the 20th International Anti-Corruption Conference (Dec. 9, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-closing-remarks-20th-international>.

<sup>232</sup> Marshall Miller, Principal Associate Deputy Att'y Gen., DOJ, Remarks at the American Bankers Association Financial Crimes Enforcement Conference (Dec. 6, 2022), <https://www.justice.gov/opa/speech/principal-associate-deputy-attorney-general-marshall-miller-delivers-remarks-american>.

<sup>233</sup> U.S. Securities and Exchange Commission Press Release No. 2022-230: SEC Charges Honeywell with Bribery Schemes in Algeria and Brazil (Dec. 19, 2022), <https://www.sec.gov/news/press-release/2022-230>; U.S. Department of Justice Press Release No. 22-1383: Honeywell UP to Pay Over \$160 Million to Resolve Foreign Bribery Investigations in U.S. and Brazil (Dec. 19, 2022), <https://www.justice.gov/opa/pr/honeywell-uop-pay-over-160-million-resolve-foreign-bribery-investigations-us-and-brazil>; *Honeywell Settles Legacy Foreign Corrupt Practices Act Issues And Will Pay A Total Of \$202.7 Million*, HONEYWELL (Dec. 19, 2022), <https://www.honeywell.com/us/en/press/2022/12/honeywell-settles-legacy-foreign-corrupt-practices-act-issues-and-will-pay-a-total-of-202-7-million>.

<sup>234</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of Honeywell Int'l Inc.*, Rel. No. 96529, File No. 3-21255 (Dec. 19, 2022); U.S. Securities and Exchange Commission Press Release No. 2022-230: SEC Charges Honeywell with Bribery Schemes in Algeria and Brazil (Dec. 19, 2022), <https://www.sec.gov/news/press-release/2022-230>.

anti-bribery provisions.<sup>235</sup> Honeywell also entered leniency agreements with the Brazilian government to settle additional charges.<sup>236</sup> It is also worth noting that although Honeywell UOP's parent, Honeywell International, Inc., was not charged by the DOJ, the DOJ required the latter to be a signatory to the DPA and to assume certain compliance, cooperation, and disclosure commitments.<sup>237</sup>

The DOJ and SEC alleged that Honeywell UOP, with the assistance of intermediaries and employees in Brazil, offered to pay a Brazilian official as much as \$4 million to secure a \$425 million contract with the Brazilian state-owned oil company, Petrobras, to build an oil refinery.<sup>238</sup> In a meeting in 2010, the Honeywell account manager for Petrobras allegedly offered a Brazilian lobbyist and Petrobras official a 1 to 3 percent commission on the contract that, given the size of the total contract, was approximately \$12 million. Government papers described a bribery scheme in which Honeywell UOP earned about \$106 million in profits and gained inside information from a high-ranking Petrobras official as a result of the alleged corrupt payments.<sup>239</sup> The SEC additionally alleged that Honeywell employees bribed an Algerian government official to win a contract amendment with the Algerian state-owned oil company, La Société Nationale pour la Recherche, la Production, le Transport, la Transformation, et la Commercialisation des Hydrocarbures (Sonatrach).<sup>240</sup> Per the SEC, the alleged misconduct in Algeria dated as far back as 2004 when Honeywell's Belgian subsidiary made more than \$75,000 in bribe payments—made through a series of intermediary transfers involving multiple US correspondent banks located in New York—to an Algerian government official to secure business with Sonatrach.<sup>241</sup>

Honeywell received full credit from the DOJ for its cooperation with the investigation.<sup>242</sup> The DOJ and SEC both declined to impose a monitor and noted Honeywell's prompt remedial actions and

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<sup>235</sup> Deferred Prosecution Agreement, *United States v. UOP, LLC*, No. 22-CR-00624 (S.D. Tex. Dec. 19, 2022) ECF No. 10; U.S. Department of Justice Press Release No. 22-1383: Honeywell UP to Pay Over \$160 Million to Resolve Foreign Bribery Investigations in U.S. and Brazil (Dec. 19, 2022), <https://www.justice.gov/opa/pr/honeywell-uop-pay-over-160-million-resolve-foreign-bribery-investigations-us-and-brazil>.

<sup>236</sup> *Honeywell Settles Legacy Foreign Corrupt Practices Act Issues And Will Pay A Total Of \$202.7 Million*, HONEYWELL (Dec. 19, 2022), <https://www.honeywell.com/us/en/press/2022/12/honeywell-settles-legacy-foreign-corrupt-practices-act-issues-and-will-pay-a-total-of-202-7-million>.

<sup>237</sup> Deferred Prosecution Agreement, *United States v. UOP, LLC*, No. 22-CR-00624, Attach. A ¶ 10 (S.D. Tex. Dec. 19, 2022) ECF No. 10.

<sup>238</sup> Deferred Prosecution Agreement, *United States v. UOP, LLC*, No. 22-CR-00624, Attach. A ¶ 10 (S.D. Tex. Dec. 19, 2022) ECF No. 10; Order Instituting Cease-and-Desist Proc., *In the Matter of Honeywell Int'l Inc.*, Rel. No. 96529, File No. 3-21255, ¶ 14 (Dec. 19, 2022).

<sup>239</sup> Deferred Prosecution Agreement, *United States v. UOP, LLC*, No. 22-CR-00624, Attach. A ¶ 10 (S.D. Tex. Dec. 19, 2022) ECF No. 10; Order Instituting Cease-and-Desist Proc., *In the Matter of Honeywell Int'l Inc.*, Rel. No. 96529, File No. 3-21255, ¶ 14 (Dec. 19, 2022).

<sup>240</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of Honeywell Int'l Inc.*, Rel. No. 96529, File No. 3-21255 ¶ 1 (Dec. 19, 2022); Deferred Prosecution Agreement, *United States v. UOP, LLC*, No. 22-CR-00624, Attach. A ¶¶ 21-23 (S.D. Tex. Dec. 19, 2022) ECF No. 10.

<sup>241</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of Honeywell Int'l Inc.*, Rel. No. 96529, File No. 3-21255, ¶¶ 27, 31 (Dec. 19, 2022).

<sup>242</sup> Deferred Prosecution Agreement, *United States v. UOP, LLC*, No. 22-CR-00624, ¶ 4(c) (S.D. Tex. Dec. 19, 2022) ECF No. 10.

cooperation afforded to the government, including, among other things, timely production of key documents and evidence identified in the company's internal investigation, terminating and disciplining employees involved in the misconduct, and strengthening its compliance program.<sup>243</sup> In light of these considerations, the DOJ imposed a criminal monetary penalty of \$79.2 million, reflecting a 25 percent reduction off the bottom of the applicable US Sentencing Guidelines fine range, and also agreed to credit up to approximately \$39.6 million against payments the company would make to Brazilian authorities in connection with related proceedings in Brazil.<sup>244</sup> In addition, the DOJ required forfeiture of \$105.7 million by Honeywell UOP. To settle the SEC's charges, Honeywell agreed to pay more than \$81 million to the SEC in disgorgement and prejudgment interest, which is not inclusive of a \$38.7 million offset the SEC will apply to account for any payments made to Brazilian authorities.<sup>245</sup>

In addition to the monetary penalties, Honeywell UOP agreed to continue cooperating with the DOJ in any ongoing or future criminal investigations relating to its alleged conduct, and both Honeywell UOP and Honeywell have agreed to continue enhancing its compliance program.<sup>246</sup> Honeywell agreed that its CEO and CCO would certify to the compliance program's ongoing effectiveness at the end of the DPA term.<sup>247</sup>

The Brazil scheme in the Honeywell resolution, in which a one to three percent commission allegedly resulted in a \$12 million dollar bribe payment, is a reminder that overall commission amounts, even where the percentage is low, can create substantial sums that potentially could be used by agents for improper purposes. However, the Honeywell resolution also suggests that the government viewed Honeywell's cooperation and remediation steps as appropriate and befitting a company with a strong ethical record, which presumably convinced the authorities that a monitor was not necessary in this case. As noted above, the Honeywell resolution is also another example of the SEC using agency theory to charge a parent for the actions of subsidiaries.

## B. Monitorships

### 1. Impositions of Monitorships and 2022 Guidance

As discussed above,<sup>248</sup> the DOJ imposed FCPA monitorships on two corporations in 2022: Stericycle, Inc. in April and Glencore International AG in May. This is in line with recent DOJ

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<sup>243</sup> Deferred Prosecution Agreement, *United States v. UOP, LLC*, No. 22-CR-00624, ¶ 4(e) (S.D. Tex. Dec. 19, 2022) ECF No. 10; Order Instituting Cease-and-Desist Proc., *In the Matter of Honeywell Int'l Inc.*, Rel. No. 96529, File No. 3-21255, ¶¶ 37-38 (Dec. 19, 2022).

<sup>244</sup> Deferred Prosecution Agreement, *United States v. UOP, LLC*, No. 22-CR-00624, ¶ 4(k) (S.D. Tex. Dec. 19, 2022) ECF No. 10.

<sup>245</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of Honeywell Int'l Inc.*, Rel. No. 96529, File No. 3-21255 ¶ 41(B) (Dec. 19, 2022).

<sup>246</sup> Deferred Prosecution Agreement, *United States v. UOP, LLC*, No. 22-CR-00624, ¶¶ 5, 10 (S.D. Tex. Dec. 19, 2022) ECF No. 10.

<sup>247</sup> Deferred Prosecution Agreement, *United States v. UOP, LLC*, No. 22-CR-00624, Attach. F (S.D. Tex. Dec. 19, 2022) ECF No. 10.

<sup>248</sup> See *supra* at Section III.A.4.b. and Section III.A.4.c.

guidance on monitorships that focuses on strengthening compliance culture and programs and may signal a trend toward more monitorships in the future.<sup>249</sup>

The DOJ said that it considered several factors when deciding to impose monitorships on Stericycle and Glencore, including the remedial measures taken by the company; the need to test compliance systems; lack of cooperation; and the seriousness of the offense.<sup>250</sup> With respect to Stericycle, the Department noted that, while the company had “taken extensive measures, it ha[d] not implemented or tested its enhanced compliance program, necessitating the imposition of an independent compliance monitor for a term of two years.”<sup>251</sup> With respect to the Glencore monitorship, the Department noted that, the company had implemented a number of compliance enhancements—including “establishing a centralized compliance function, hiring a Head of Compliance, and significantly increasing the number of employees in compliance functions,”<sup>252</sup>—but nevertheless concluded that a monitor was appropriate because certain aspects of the program had not yet been fully implemented and tested.<sup>253</sup>

Conversely, in the Honeywell, ABB Ltd., and GOL resolutions, which did not involve the imposition of monitors, the DOJ cited the companies’ cooperation with the investigations and prompt remedial measures. The measures cited by the DOJ included “terminating and disciplining certain employees involved in the misconduct and strengthening [the company’s] compliance program,”<sup>254</sup> demonstrating an “intent to bring the misconduct to the department’s attention promptly upon

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<sup>249</sup> See e.g., Lisa O. Monaco, Deputy Att'y Gen., DOJ, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group, at 14 (Sept. 15, 2022), <https://www.justice.gov/opa/speech/file/1535301/download> (introducing new factors for prosecutors to consider when evaluating the imposition of a monitor, including whether the company voluntarily self-disclosed the misconduct and whether the underlying criminal conduct involved active participation of compliance personnel or the failure of compliance personnel to appropriately escalate or respond to red flags); Kenneth A. Polite, Jr., Assistant Att'y Gen., DOJ, Remarks on Corporate Compliance and Enforcement (Mar. 25, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-nyu-law-s-program-corporate> (noting to “expect to see the Department imposing independent corporate monitors whenever it is appropriate in order to satisfy our prosecutors that a company is living up to its compliance and disclosure obligations under a non-trial resolution” and offering three expectations DOJ attorneys will have when investigating a compliance program: that the programs “1) are well designed, 2) are adequately resourced and empowered to function effectively, and 3) work in practice.”); *see also supra* at Section II.B.2.c. and Section II.C.1.

<sup>250</sup> While the SEC has not released detailed guidance on monitorships in recent years, it considers many of the same factors as those considered by the DOJ when deciding whether to impose a monitor.

<sup>251</sup> U.S. Department of Justice Press Release No. 22-401: Stericycle Agrees to Pay Over \$84 Million in Coordinated Foreign Bribery Resolution (Apr. 20, 2022), <https://www.justice.gov/opa/pr/stericycle-agrees-pay-over-84-million-coordinated-foreign-bribery-resolution>.

<sup>252</sup> Plea Agreement, *United States v. Glencore Int'l AG*, No. 20-CR-00071 (D. Conn. May 24, 2022) ECF No. 18.

<sup>253</sup> U.S. Department of Justice Press Release No. 22-554: Glencore Entered Guilty Pleas to Foreign Bribery and Market Manipulation Schemes (May 24, 2022), <https://www.justice.gov/opa/pr/glencore-entered-guilty-pleas-foreign-bribery-and-market-manipulation-schemes>.

<sup>254</sup> U.S. Department of Justice Press Release No. 22-1383: Honeywell UOP to Pay Over \$160 Million to Resolve Foreign Bribery Investigations in U.S. and Brazil (Dec. 19, 2022), <https://www.justice.gov/opa/pr/honeywell-uop-pay-over-160-million-resolve-foreign-bribery-investigations-us-and-brazil>.

discovering it, while also accounting for [] historical misconduct,”<sup>255</sup> and “redesign[ing] [the company’s] entire anti-corruption program.”<sup>256</sup>

## 2. Monitorships Ending

### a. Fresenius

Fresenius Medical Care AG & Co. KGaA, a German-based provider of medical products and services, stated in its latest annual report that it was working to have all of its obligations with the DOJ and SEC finalized in connection with the scheduled resolution of its monitorship on December 31, 2022, despite facing delays due to COVID-19 restrictions.<sup>257</sup> Fresenius agreed to pay approximately \$231 million to resolve parallel investigations by the DOJ and SEC into violations of the FCPA in 2019.<sup>258</sup> DOJ alleged that, between 2007 and 2016, Fresenius paid bribes to public officials, knowingly and willfully failed to implement reasonable internal accounting controls, and failed to maintain accurate records of transactions.<sup>259</sup> Fresenius agreed to an NPA with the DOJ, and settled a related FCPA matter with the SEC on the same day, paying \$147 million in disgorgement and prejudgment interest to the SEC, which the DOJ credited in its resolution.<sup>260</sup>

## C. DPA and Monitorship Extensions

### 1. Mobile TeleSystems PJSC (MTS)

In March 2022, MTS was notified by the DOJ that it was imposing a one-year extension of its DPA.<sup>261</sup> The original two-year term DPA permitted the DOJ, in its sole discretion, to extend the

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<sup>255</sup> U.S. Department of Justice Press Release No. 22-1296: ABB Agrees to Pay Over \$315 Million to Resolve Coordinated Global Foreign Bribery Case (Dec. 2, 2022), <https://www.justice.gov/opa/pr/abb-agrees-pay-over-315-million-resolve-coordinated-global-foreign-bribery-case>.

<sup>256</sup> U.S. Department of Justice Press Release No. 22-978: GOL Linhas Aéreas Inteligentes S.A. Will Pay Over \$41 Million in Resolution of Foreign Bribery Investigations in the United States and Brazil (Sept. 15, 2022), <https://www.justice.gov/opa/pr/gol-linhas-reas-inteligentes-sa-will-pay-over-41-million-resolution-foreign-bribery>.

<sup>257</sup> See Fresenius, *Annual Report 2021*, at 342-43, [https://www.fresenius.com/sites/default/files/2022-06/Fresenius\\_Annual\\_Report\\_2021\\_0.pdf](https://www.fresenius.com/sites/default/files/2022-06/Fresenius_Annual_Report_2021_0.pdf).

<sup>258</sup> U.S. Securities and Exchange Commission Press Release No. 2019-48: SEC Charges Medical Device Company with FCPA Violations (Mar. 29, 2019), <https://www.sec.gov/news/press-release/2019-48>; U.S. Department of Justice Press Release No. 19-290: Fresenius Medical Care Agrees to Pay \$231 Million in Criminal Penalties and Disgorgement to Resolve Foreign Corrupt Practices Act Charges (Mar. 29, 2019), <https://www.justice.gov/opa/pr/fresenius-medical-care-agrees-pay-231-million-criminal-penalties-and-disgorgement-resolve>.

<sup>259</sup> U.S. Department of Justice Press Release No. 19-290: Fresenius Medical Care Agrees to Pay \$231 Million in Criminal Penalties and Disgorgement to Resolve Foreign Corrupt Practices Act Charges (Mar. 29, 2019), <https://www.justice.gov/opa/pr/fresenius-medical-care-agrees-pay-231-million-criminal-penalties-and-disgorgement-resolve>; WilmerHale, *Global Anti-Bribery Year-in-Review: 2019 Developments and Predictions for 2020* (Jan. 30, 2020), <https://www.wilmerhale.com/en/insights/client-alerts/20200130-global-anti-bribery-year-in-review-2019-developments-and-predictions-for-2020>.

<sup>260</sup> U.S. Department of Justice Press Release No. 19-290: Fresenius Medical Care Agrees to Pay \$231 Million in Criminal Penalties and Disgorgement to Resolve Foreign Corrupt Practices Act Charges (Mar. 29, 2019), <https://www.justice.gov/opa/pr/fresenius-medical-care-agrees-pay-231-million-criminal-penalties-and-disgorgement-resolve>; Order Instituting Cease-and-Desist Proc., *In the Matter of Fresenius Medical Care AG & Co. KGaA*, Rel. No. 85468, File No. 3-19126 (Mar. 29, 2019).

<sup>261</sup> Letter Regarding Extension of Deferred Prosecution Agreement from US Department of Justice to Mobile TeleSystems PJSC, at 1 (Mar. 1, 2022), <https://www.justice.gov/criminal-fraud/file/1518836/download>.

agreement for one year without prejudice to any of the Department's other remedies.<sup>262</sup> The DOJ stated that it made the determination to extend MTS's DPA and monitorship "upon consideration of several factors, including the fact that, while [MTS] had made significant improvements to its compliance program, critical components of MTS's anti-corruption compliance and ethics program are in the early stages of development, are not yet effective, and will not be implemented and tested prior to the end of the term."<sup>263</sup>

MTS's DPA and agreement with the SEC stems from a February 22, 2019 agreement with the SEC and a DPA with the DOJ to resolve bribery charges.<sup>264</sup> According to MTS' admissions, between 2004 and 2012, the company paid approximately \$420 million in bribes to an Uzbek citizen named Gulnara Karimova, who had influence over the Uzbek governmental body that regulated the telecom industry, in order to enter the Uzbek market by acquiring an Uzbek telecom company.<sup>265</sup> The MTS resolution was one of the largest FCPA resolutions in history, with MTS and its Uzbek subsidiary paying a total of \$850 million in criminal and regulatory penalties.<sup>266</sup>

In March 2022, MTS submitted a joint letter with the DOJ to the federal court stating that the parties agreed to extend the DPA "including all obligations contained therein,"<sup>267</sup> and announced in its annual report that its monitorship will continue until September 2023.<sup>268</sup> In a filing with the SEC, MTS explained the extension of the agreement was a result of "a variety of factors, including the COVID-19 pandemic," and said that it had not received notice from the DOJ, SEC, or its monitor of any breaches of the terms of its DPA.<sup>269</sup>

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<sup>262</sup> Deferred Prosecution Agreement, *United States v. Mobile TeleSystems PJSC*, No. 19-CR-00167 (S.D.N.Y. Feb. 22, 2019) ECF No. 10.

<sup>263</sup> Letter Regarding Extension of Deferred Prosecution Agreement, *United States v. Mobile TeleSystems PJSC*, No. 19-CR-00167, at 1-2 (S.D.N.Y. Mar. 3, 2022) ECF No. 18.

<sup>264</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of Mobile TeleSystems PJSC*, Rel. No. 85621, File No. 3-19022 (Mar. 6, 2019); Deferred Prosecution Agreement, *United States v. Mobile TeleSystems PJSC*, No. 19-CR-00167, ¶ 3 (S.D.N.Y. Feb. 22, 2019) ECF No. 10.

<sup>265</sup> U.S. Department of Justice Press Release No. 19-200: Mobile Telesystems Pjsc and Its Uzbek Subsidiary Enter into Resolutions of \$850 Million with the Department of Justice for Paying Bribes in Uzbekistan (Mar. 7, 2019), <https://www.justice.gov/opa/pr/mobile-telesystems-pjsc-and-its-uzbek-subsidiary-enter-resolutions-850-million-department>.

<sup>266</sup> MTS paid \$850 million to the DOJ in a criminal penalty and \$100 million to the SEC in a civil penalty, and the DOJ credited that \$100 million to the SEC towards the \$850 million criminal penalty, meaning the total amount owed to US authorities was \$850 million. See U.S. Department of Justice Press Release No. 19-200: Mobile Telesystems Pjsc and Its Uzbek Subsidiary Enter into Resolutions of \$850 Million with the Department of Justice for Paying Bribes in Uzbekistan (Mar. 7, 2019), <https://www.justice.gov/opa/pr/mobile-telesystems-pjsc-and-its-uzbek-subsidiary-enter-resolutions-850-million-department>.

<sup>267</sup> Consent Mot. for Speedy Trial Exclusion of Time, *United States v. Mobile TeleSystems PJSC*, No. 19-CR-00167, at 1 (S.D.N.Y. Mar. 3, 2022) ECF No. 18.

<sup>268</sup> Mobile TeleSystems, *Reports Q4 & FY 2021 Results*, at 9 (2021), [https://s22.q4cdn.com/722839827/files/doc\\_financials/2021/q4/MTS-Q4-FY-2021-Results-Press-Release-final.pdf](https://s22.q4cdn.com/722839827/files/doc_financials/2021/q4/MTS-Q4-FY-2021-Results-Press-Release-final.pdf).

<sup>269</sup> Mobile TeleSystems, *Foreign Issuer Report (Form 6-K)*, SEC (Mar. 3, 2022), [https://www.sec.gov/Archives/edgar/data/1115837/000110465922029768/tm228305d1\\_6k.htm](https://www.sec.gov/Archives/edgar/data/1115837/000110465922029768/tm228305d1_6k.htm); see also Henry Cassin, *Russia Telecom MTS Agrees to Voluntary One-Year DPA Extension*, FCPA BLOG (Mar. 8, 2022), <https://fcpablog.com/2022/03/08/russia-telecom-mts-agrees-to-voluntary-one-year-dpa-extension>.

## **2. Ericsson**

In 2022, more information came to light regarding Ericsson's breach of its DPA, which was initially announced in 2021.<sup>270</sup> In 2019, Ericsson entered into a DPA for allegedly "bribing government officials," "falsifying books and records," and "failing to implement reasonable internal accounting controls" related to its business conduct in Djibouti, China, Vietnam, Indonesia, and Kuwait.<sup>271</sup>

In March 2022, Ericsson disclosed that the DOJ had informed the company in additional correspondence that "the disclosure made by the company prior to the DPA about its internal investigation into conduct in Iraq . . . was insufficient."<sup>272</sup> The DOJ also stated that Ericsson failed to make disclosures regarding the investigation after the DPA was signed.<sup>273</sup> The DOJ's notice to Ericsson was sent days after the International Consortium of Investigative Journalists published details of Ericsson's alleged corrupt activities in Iraq between 2011 and 2019.<sup>274</sup>

In December 2022, Ericsson announced that it had reached an agreement with the DOJ and SEC to extend the term of its monitorship for one year, to June 2024.<sup>275</sup> In January 2023, Ericsson announced that it has set aside \$211 million to settle the breach of its DPA, and that discussions with the Department are ongoing.<sup>276</sup>

## **D. Notable Features of Individual Resolutions**

### **1. Continued Prioritization of Individual Enforcement Actions**

This year marked the third in a row that experienced a decline in individual enforcement actions brought by both the DOJ and SEC. In 2022, the DOJ brought charges against 13 individuals, compared to 16 individuals in 2021, 28 in 2020, and a record-setting 44 in 2019. The SEC brought

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<sup>270</sup> In October 2021, Ericsson issued a press release stating that the DOJ alerted the company to the Department's view "that Ericsson breached its obligations under the DPA by failing to provide certain documents and factual information." Telefonaktiebolaget LM Ericsson Press Release: Update on Deferred Prosecution Agreement (Oct. 21, 2021), <https://www.ericsson.com/en/press-releases/2021/10/update-on-deferred-prosecution-agreement>.

<sup>271</sup> U.S. Department of Justice Press Release No. 19-420: Ericsson Agrees to Pay More Than \$1 Billion to Resolve Foreign Corrupt Practices Act Case (Dec. 6, 2019), <https://www.justice.gov/usao-sdny/pr/ericsson-agrees-pay-more-1-billion-resolve-foreign-corrupt-practices-act-case>.

<sup>272</sup> Telefonaktiebolaget LM Ericsson Press Release: Update on Deferred Prosecution Agreement (Mar. 2, 2022), <https://www.ericsson.com/en/press-releases/2022/3/update-on-deferred-prosecution-agreement>.

<sup>273</sup> Telefonaktiebolaget LM Ericsson Press Release: Update on Deferred Prosecution Agreement (Mar. 2, 2022), <https://www.ericsson.com/en/press-releases/2022/3/update-on-deferred-prosecution-agreement>.

<sup>274</sup> Clara Hudson, *Investors Press Ericsson Following DOJ Concerns*, GLOBAL INVESTIGATIONS REV. (Mar. 22, 2022), <https://globalinvestigationsreview.com/news-and-features/in-house/2020/article/investors-press-ericsson-following-doj-concerns>.

<sup>275</sup> Telefonaktiebolaget LM Ericsson Press Release: Ericsson Announces Extension of Compliance Monitorship (Dec. 14, 2022), <https://www.ericsson.com/en/press-releases/2022/12/ericsson-announces-extension-of-compliance-monitorship>.

<sup>276</sup> Telefonaktiebolaget LM Ericsson Press Release: Ericsson Makes Provision in Fourth Quarter of 2022 in Relation to Potential DPA Breach Resolution with U.S. Department of Justice (Jan. 12, 2023), <https://www.ericsson.com/en/press-releases/2023/1/ericsson-makes-provision-in-fourth-quarter-of-2022-in-relation-to-potential-dpa-breach-resolution-with-u-s-department-of-justice>.

no enforcement actions against individuals in 2022, following one in 2021, three in 2020, and six in 2019.

Despite the declining number of individual enforcement actions, leading DOJ officials have continued to emphasize that individual prosecutions remain a priority. In a March 2022 speech delivered to the ABA Institute on White Collar Crime, Attorney General Merrick Garland confirmed that the DOJ's "first priority in corporate criminal cases is to prosecute individuals for corporate malfeasance."<sup>277</sup> AG Garland acknowledged that obtaining individual convictions as opposed to "accepting big-dollar corporate dispositions" poses more difficulty and is more resource intensive for the DOJ.<sup>278</sup> To address this gap, the President's FY22 budget sought a budget increase for the DOJ's corporate criminal enforcement efforts, including funds to hire an additional 120 attorneys dedicated to the issue.<sup>279</sup> AG Garland also discussed how, in 2021, the DOJ restored a prior policy that requires companies to provide the DOJ with all non-privileged information about individuals involved in or responsible for misconduct at issue in order to be eligible for cooperation credit. The purpose of the policy is to ensure that when the DOJ offers a company an opportunity to enter into a resolution, it is in the company's "best interest to provide [the DOJ] with a full picture of what happened and who was involved"—regardless of position, status, seniority, or whether the company deems the individual's involvement to be "substantial."<sup>280</sup>

As discussed above,<sup>281</sup> Deputy Attorney General Lisa Monaco also recently outlined steps to strengthen individual prosecutions in connection with corporate misconduct in a memorandum revising several key aspects of DOJ's corporate criminal enforcement policies.<sup>282</sup> The new policy requires companies to produce all relevant, non-privileged facts about individual misconduct to the DOJ "swiftly and without delay" to minimize challenges to individual prosecutions that might arise as statutes of limitation expire, evidence dissipates, and memories fade.<sup>283</sup>

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<sup>277</sup> Merrick B. Garland, Att'y Gen., DOJ, Remarks to the ABA Institute on White Collar Crime (Mar. 3, 2022), <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-aba-institute-white-collar-crime>.

<sup>278</sup> Merrick B. Garland, Att'y Gen., DOJ, Remarks to the ABA Institute on White Collar Crime (Mar. 3, 2022), <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-aba-institute-white-collar-crime>.

<sup>279</sup> Merrick B. Garland, Att'y Gen., DOJ, Remarks to the ABA Institute on White Collar Crime (Mar. 3, 2022), <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-aba-institute-white-collar-crime>.

<sup>280</sup> Merrick B. Garland, Att'y Gen., DOJ, Remarks to the ABA Institute on White Collar Crime (Mar. 3, 2022), <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-aba-institute-white-collar-crime>.

<sup>281</sup> See *supra* at Section II.B.2.a.

<sup>282</sup> Lisa O. Monaco, Deputy Att'y Gen., DOJ, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group (Sept. 15, 2022), <https://www.justice.gov/opa/speech/file/1535301/download>.

<sup>283</sup> Lisa O. Monaco, Deputy Att'y Gen., DOJ, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group (Sept. 15, 2022), <https://www.justice.gov/opa/speech/file/1535301/download>.

The Department's priority to prosecute individuals involved in corporate misconduct is also evident from the wave of individual prosecutions that have followed corporate resolutions, including the government's resolutions with Odebrecht S.A. (2016), Vitol Inc. (2020), and Sargeant Marine Inc. (2020).

## **2. Continued Use of Money Laundering Charges Against Individuals in Foreign Bribery Schemes**

As we observed in the 2021 FCPA Year-in-Review, the DOJ has continued to use the money laundering statutes to target corrupt conduct of individuals, especially in instances where FCPA jurisdiction cannot be established. The DOJ brought or resolved money laundering charges against 13 individuals in 2021.<sup>284</sup> This trend continued in 2022, where the DOJ either brought or resolved money laundering charges against 16 individuals, including eight against foreign officials, in connection with their roles in foreign bribery schemes and related conduct.

Foreign countries have similarly ramped up enforcement actions using money laundering charges. For example, the Solicitor's Regulation Authority in the UK reported in October that it instigated 51 enforcement actions for breaches of UK money laundering rules, compared to just 29 in 2021.<sup>285</sup>

### **a. Charles Hunter Hobson**

In March, Charles Hunter Hobson, a former vice president of Pennsylvania-based Corsa Coal Corporation, was arrested for alleged violations of the FCPA and money laundering laws.<sup>286</sup> Similar to charges filed against another former Corsa Coal Corp. executive last year, Hobson's charges stem from a bribery and money laundering scheme spanning from 2016 to 2020 between Corsa Coal Corp. and Egypt's state-owned Al-Nasr Company for Coke and Chemicals (Al-Nasr).<sup>287</sup>

The DOJ alleged that, at Hobson's direction, Corsa Coal Corp. contracted with an Egyptian intermediary, who was paid approximately \$4.8 million, and that this intermediary later used these

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<sup>284</sup> WilmerHale, *2021 Global Anti-Bribery Year-in-Review*, at 49 (Jan. 27, 2022), <https://www.wilmerhale.com/en/insights/client-alerts/20220127-2021-global-anti-bribery-year-in-review>.

<sup>285</sup> Ana de Liz, *UK Legal Regulator Ramps Up Anti-Money Laundering Enforcement*, GLOBAL INVESTIGATIONS REV. (Oct. 28, 2022), <https://globalinvestigationsreview.com/article/uk-legal-regulator-ramps-anti-money-laundering-enforcement>.

<sup>286</sup> U.S. Department of Justice Press Release No. 22-308: Former Coal Company Vice President Arrested and Charged with Foreign Bribery, Money Laundering, and Wire Fraud (Mar. 31, 2022), <https://www.justice.gov/opa/pr/former-coal-company-vice-president-arrested-and-charged-foreign-bribery-money-laundering-and> ("Hobson is charged with one count of conspiracy to violate the FCPA, two counts of violating the FCPA, one count of conspiracy to launder money, two counts of money laundering, and one count of conspiracy to commit wire fraud."); see also WilmerHale, *2021 Global Anti-Bribery Year-in-Review*, at 49 (Jan. 27, 2022), <https://www.wilmerhale.com/en/insights/client-alerts/20220127-2021-global-anti-bribery-year-in-review> ("Frederick Cushmore Jr., the former Vice President and Head of International Sales at Pennsylvania-based coal mining company Corsa Coal, pleaded guilty in November 2021 to a single count of conspiracy to violate the anti-bribery provisions of the FCPA.").

<sup>287</sup> Indictment, *United States v. Charles Hunter Hobson*, No. 22-CR-00086, ¶¶ 3-8, 10-12 (W.D. Pa. Mar. 29, 2022) ECF No. 3; see also WilmerHale, *2021 Global Anti-Bribery Year-in-Review*, at 49 (Jan. 27, 2022), <https://www.wilmerhale.com/en/insights/client-alerts/20220127-2021-global-anti-bribery-year-in-review>.

funds to bribe Al-Nasr officials in order to obtain \$143 million in coal contracts.<sup>288</sup> Notably, the indictment characterized the Egyptian intermediary who received commissions as a “sales agent” of Corsa Coal Corp.<sup>289</sup> The DOJ also alleged that Hobson secretly conspired to receive a portion of the Egyptian intermediary’s commissions as kickbacks.<sup>290</sup>

**b. Rixon Raphael Moreno Oporeza**

In August, Rixon Raphael Moreno Oporeza, a Venezuelan businessman, was charged with conspiracy to commit money laundering, concealment of money laundering, international promotional money laundering, and engaging in transactions involving criminally-derived property in relation to proceeds of inflated procurement contracts that he had obtained through bribery.<sup>291</sup> According to the indictment, from 2015 through May 2019, Moreno engaged in a scheme to obtain multi-million-dollar contracts from Petropiar, a joint venture between Venezuela’s state-owned energy company and an American oil company.<sup>292</sup> Moreno allegedly conspired with others to bribe a senior Venezuelan government official to install another person as a high ranking official in Petropiar’s procurement division.<sup>293</sup> Then, through bribe payments from bank accounts in South Florida to this senior Venezuelan government official and other Petropiar officials, Moreno allegedly received improper benefits, including over \$30 million in payments related to contracts from Petropiar, which were often highly inflated.<sup>294</sup> Moreno allegedly used the corruptly-obtained proceeds for his personal benefit, including to purchase real estate, a private jet, and luxury vehicles in South Florida.<sup>295</sup> Although the government noted that Moreno also violated the FCPA, it

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<sup>288</sup> Indictment, *United States v. Charles Hunter Hobson*, No. 22-CR-00086, ¶¶ 13, 18 (W.D. Pa. Mar. 29, 2022) ECF No. 3.

<sup>289</sup> Indictment, *United States v. Charles Hunter Hobson*, No. 22-CR-00086, ¶ 7 (W.D. Pa. Mar. 29, 2022) ECF No. 3.

<sup>290</sup> Indictment, *United States v. Charles Hunter Hobson*, No. 22-CR-00086, ¶ 57 (W.D. Pa. Mar. 29, 2022) ECF No. 3.

<sup>291</sup> U.S. Department of Justice Press Release No. 22-910: Venezuelan Businessman Charged in Bribery and Money Laundering Scheme (Aug. 24, 2022), <https://www.justice.gov/opa/pr/venezuelan-businessman-charged-bribery-and-money-laundering-scheme>; Anna Bianca Roach, *Venezuelan Businessman Indicted for Money Laundering*, GLOBAL INVESTIGATIONS REV. (Aug. 25, 2022), <https://globalinvestigationsreview.com/just-anti-corruption/article/venezuelan-businessman-indicted-money-laundering>.

<sup>292</sup> U.S. Department of Justice Press Release No. 22-910: Venezuelan Businessman Charged in Bribery and Money Laundering Scheme (Aug. 24, 2022), <https://www.justice.gov/opa/pr/venezuelan-businessman-charged-bribery-and-money-laundering-scheme>.

<sup>293</sup> Indictment, *United States v. Rixon Rafael Moreno Oropeza*, No. 22-CR-20391, at 5 (S.D. Fla. Aug. 24, 2022) ECF No. 1.

<sup>294</sup> For example, Moreno received approximately \$2.7 million from a Petropiar contract to supply breathing devices, and the payments to Moreno for this contract were allegedly inflated to 100 times the actual cost of the devices supplied. See Indictment, *United States v. Rixon Rafael Moreno Oropeza*, No. 22-CR-20391, at 5 (S.D. Fla. Aug. 24, 2022) ECF No. 1; see also U.S. Department of Justice Press Release No. 22-910: Venezuelan Businessman Charged in Bribery and Money Laundering Scheme (Aug. 24, 2022), <https://www.justice.gov/opa/pr/venezuelan-businessman-charged-bribery-and-money-laundering-scheme>.

<sup>295</sup> U.S. Department of Justice Press Release No. 22-910: Venezuelan Businessman Charged in Bribery and Money Laundering Scheme (Aug. 24, 2022), <https://www.justice.gov/opa/pr/venezuelan-businessman-charged-bribery-and-money-laundering-scheme>.

did not file charges under the statute, and the use of South Florida bank accounts appears to be the only basis alleged for jurisdiction.<sup>296</sup>

**c. Esteban Eduardo Merlo Hidalgo, Cristian Patricio Pintado Garcia, and Luis Lenin Maldonado Matute**

In July 2022, a grand jury in the Southern District of Florida indicted Esteban Eduardo Merlo Hidalgo, from Florida, and Christian Patricio Pintado Garcia and Luis Lenin Maldonado Matute, from Costa Rica, for their alleged participation in a bribery and money laundering scheme to obtain business from Ecuadorian state-owned insurance companies.<sup>297</sup> Each defendant was charged with one count of conspiracy to violate the FCPA, one substantive violation of the FCPA, one count of conspiracy to commit money laundering, and four counts of engaging in transactions involving criminally-derived property.<sup>298</sup>

According to the indictment, the defendants allegedly conspired to bribe officials at Ecuador's state-owned insurance companies, Seruros Sucre S.A. and Seguros Rocafuerte S.A., to obtain business for themselves, an intermediary company, and two reinsurance clients.<sup>299</sup> The intermediary company used a portion of the brokerage commission obtained from Seguros Sucre and Seguros Rocafuerte to make bribe payments.<sup>300</sup> Further, the defendants allegedly laundered funds related to the bribery scheme to and from bank accounts in Florida and used the proceeds for their personal benefits.<sup>301</sup> Merlo made his initial court appearance in the US District Court for the Southern District of Florida, and Pintado and Maldonado remain at large.<sup>302</sup>

**d. Joseph Baptiste and Roger Richard Boncy**

In June 2022, DOJ prosecutors dropped a case against two Haitian American businessmen after the FBI found a previously undisclosed text message that defendants argued contained exculpatory

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<sup>296</sup> Indictment, *United States v. Rixon Rafael Moreno Oropeza*, No. 22-CR-20391, at 3-10 (S.D. Fla. Aug. 24, 2022) ECF No. 1.

<sup>297</sup> U.S. Department of Justice Press Release: No. 22-770 Three Men Charged in Ecuadorian Bribery and Money Laundering Scheme (July 19, 2022), <https://www.justice.gov/opa/pr/three-men-charged-ecuadorian-bribery-and-money-laundering-scheme>.

<sup>298</sup> U.S. Department of Justice Press Release No. 22-770: Three Men Charged in Ecuadorian Bribery and Money Laundering Scheme (July 19, 2022), <https://www.justice.gov/opa/pr/three-men-charged-ecuadorian-bribery-and-money-laundering-scheme>.

<sup>299</sup> Indictment, *United States v. Esteban Eduardo Merlo Hidalgo*, No. 22-CR-20311, at 6 (S.D. Fla. July 14, 2022) ECF No. 3.

<sup>300</sup> Indictment, *United States v. Esteban Eduardo Merlo Hidalgo*, No. 22-CR-20311 (S.D. Fla. July 14, 2022) ECF No. 3; U.S. Department of Justice Press Release No. 22-770: Three Men Charged in Ecuadorian Bribery and Money Laundering Scheme (July 19, 2022), <https://www.justice.gov/opa/pr/three-men-charged-ecuadorian-bribery-and-money-laundering-scheme>.

<sup>301</sup> U.S. Department of Justice Press Release No. 22-770: Three Men Charged in Ecuadorian Bribery and Money Laundering Scheme (July 19, 2022), <https://www.justice.gov/opa/pr/three-men-charged-ecuadorian-bribery-and-money-laundering-scheme>.

<sup>302</sup> U.S. Department of Justice Press Release No. 22-770: Three Men Charged in Ecuadorian Bribery and Money Laundering Scheme (July 19, 2022), <https://www.justice.gov/opa/pr/three-men-charged-ecuadorian-bribery-and-money-laundering-scheme>.

evidence.<sup>303</sup> The text message, according to defense counsel, describes a phone call between an undercover FBI agent and one of the defendants, Roger Richard Boncy, in which Boncy denied that certain money would be used to pay bribes.<sup>304</sup>

Boncy, a Madrid-based businessman, and fellow defendant Joseph Baptiste, a former US army colonel, had been charged in October 2018 and August 2017, respectively, for allegedly soliciting bribes from two undercover FBI agents pretending to be businessmen looking to invest in an \$84 million project to develop a port in Haiti.<sup>305</sup> The defendants had accused the FBI of destroying exculpatory evidence after the government said a “miscommunication” had caused the FBI not to download recordings of two of Boncy’s calls with an undercover agent.<sup>306</sup> After unsuccessfully moving to dismiss the case based on the lost audio recordings—with the court finding the deletion unintentional—both Boncy and Baptiste were convicted in a December 2019 jury trial, but were awaiting retrial after their conviction was set aside for ineffective assistance of counsel.<sup>307</sup> In June 2022, the FBI sent the DOJ copies of text messages describing the phone calls, after finding them on an FBI computer server. The DOJ moved to dismiss the case shortly after and issued a statement saying that the communications had not been disclosed to prosecutors prior to June 2022.<sup>308</sup>

#### e. Asante Kwaku Berko

In November 2022, UK Authorities arrested Asante Kwaku Berko, a former investment banker, at London’s Heathrow Airport in connection with a bribery scheme involving Ghanaian officials.<sup>309</sup> On the same day, the DOJ unsealed an August 2020 indictment charging Berko with violating the FCPA, conspiracy to violate the FCPA, and conspiracy to commit money laundering.<sup>310</sup> The DOJ

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<sup>303</sup> Anna Bianca Roach, *DOJ drops Haiti bribery case after FBI surfaces new evidence*, GLOBAL INVESTIGATIONS REV. (June 28, 2022), <https://globalinvestigationsreview.com/just-anti-corruption/article/doj-drops-haiti-bribery-case-after-fbi-surfaces-new-evidence>.

<sup>304</sup> Anna Bianca Roach, *DOJ drops Haiti bribery case after FBI surfaces new evidence*, GLOBAL INVESTIGATIONS REV. (June 28, 2022), <https://globalinvestigationsreview.com/just-anti-corruption/article/doj-drops-haiti-bribery-case-after-fbi-surfaces-new-evidence>.

<sup>305</sup> Anna Bianca Roach, *DOJ drops Haiti bribery case after FBI surfaces new evidence*, GLOBAL INVESTIGATIONS REV. (June 28, 2022), <https://globalinvestigationsreview.com/just-anti-corruption/article/doj-drops-haiti-bribery-case-after-fbi-surfaces-new-evidence>.

<sup>306</sup> Anna Bianca Roach, *DOJ drops Haiti bribery case after FBI surfaces new evidence*, GLOBAL INVESTIGATIONS REV. (June 28, 2022), <https://globalinvestigationsreview.com/just-anti-corruption/article/doj-drops-haiti-bribery-case-after-fbi-surfaces-new-evidence>.

<sup>307</sup> Anna Bianca Roach, *DOJ drops Haiti bribery case after FBI surfaces new evidence*, GLOBAL INVESTIGATIONS REV. (June 28, 2022), <https://globalinvestigationsreview.com/just-anti-corruption/article/doj-drops-haiti-bribery-case-after-fbi-surfaces-new-evidence>.

<sup>308</sup> U.S. Department of Justice Press Release: Statement from United States Attorney Rachael S. Rollins on the Motion to Dismiss in United States v. Baptiste (June 27, 2022), <https://www.justice.gov/usao-ma/pr/statement-united-states-attorney-rachael-s-rollins-motion-dismiss-united-states-v>.

<sup>309</sup> Anna Bianca Roach, *Ex-Goldman Sachs Banker Arrested for Ghanaian Bribery Scheme*, GLOBAL INVESTIGATIONS REV. (Nov. 10, 2022), <https://globalinvestigationsreview.com/just-anti-corruption/article/ex-goldman-sachs-banker-arrested-ghanaian-bribery-scheme>.

<sup>310</sup> Anna Bianca Roach, *Ex-Goldman Sachs Banker Arrested for Ghanaian Bribery Scheme*, GLOBAL INVESTIGATIONS REV. (Nov. 10, 2022), <https://globalinvestigationsreview.com/just-anti-corruption/article/ex-goldman-sachs-banker-arrested-ghanaian-bribery-scheme>; Indictment, *United States v. Asante Kwaku Berko*, No. 20-CR-00328, ¶¶ 64, 67, 69 (E.D.N.Y. Aug. 26, 2020) ECF No. 3.

indictment alleged that, between 2014 and 2017, Berko paid Ghanaian energy officials more than \$700,000 in bribes on behalf of a Turkish energy company to obtain approvals necessary for building a power plant in Ghana.<sup>311</sup>

In 2020, Berko previously settled with the SEC regarding the same core conduct for nearly \$330,000.<sup>312</sup> At that time, the SEC only pursued Berko individually, and, notably, not his employer.<sup>313</sup> According to the original 2020 SEC complaint, Berko allegedly took deliberate measures to hide his corruption from his employer.<sup>314</sup> Additionally, the SEC complaint highlighted that his employer's personnel "continued to question" the energy company's use of a Ghanaian intermediary company through which the bribes were paid and ultimately "effectively terminated" its involvement in the power plant project.<sup>315</sup>

The Berko case is a reminder to the many foreign individuals who are part of DOJ investigations but are not publicly charged that there may still be risk in traveling internationally. This case also demonstrates that strong compliance programs that prevent and detect misconduct is rewarded by the US government. As noted in the SEC's press release about its complaint, "[t]he firm's compliance personnel took appropriate steps to prevent the firm from participating in the transaction and it is not being charged."<sup>316</sup>

#### **f. Cary Yan and Gina Zhou**

In December 2022, two Marshall Islands nationals, Cary Yan and Gina Zhou, each pleaded guilty to one count of conspiracy to violate the FCPA for paying bribes to elected officials of the Republic of the Marshall Islands (RMI) in exchange for passing legislation that would benefit Yan, Zhou, and their associates.<sup>317</sup>

In September 2022, Yan and Zhou were extradited to the US after their November 17, 2020, arrest in Thailand.<sup>318</sup> Yan, the former president of a New York-based, UN-affiliated non-government

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<sup>311</sup> Indictment, *United States v. Asante Kwaku Berko*, No. 20-CR-00328, ¶¶ 13-14, 19 (E.D.N.Y. Aug. 26, 2020) ECF No. 3.

<sup>312</sup> Anna Bianca Roach, *Ex-Goldman Sachs Banker Arrested for Ghanaian Bribery Scheme*, GLOBAL INVESTIGATIONS REV. (Nov. 10, 2022), <https://globalinvestigationsreview.com/just-anti-corruption/article/ex-goldman-sachs-banker-arrested-ghananian-bribery-scheme>.

<sup>313</sup> Compl., *SEC v. Asante K. Berko*, No. 20-CV-01789 (E.D.N.Y. Apr. 13, 2020) ECF No. 1.

<sup>314</sup> Compl., *SEC v. Asante K. Berko*, No. 20-CV-01789, ¶ 8 (E.D.N.Y. Apr. 13, 2020) ECF No. 1.

<sup>315</sup> Compl., *SEC v. Asante K. Berko*, No. 20-CV-01789, ¶ 90 (E.D.N.Y. Apr. 13, 2020) ECF No. 1.

<sup>316</sup> U.S. Securities and Exchange Commission Press Release No. 2020-88: SEC Charges Former Financial Services Executive With FCPA Violations (Apr. 13, 2020), <https://www.sec.gov/news/press-release/2020-88>.

<sup>317</sup> U.S. Department of Justice Press Release No. 22-1289: Former Heads of New York-Based Non-Governmental Organization Plead Guilty to Conspiring to Bribe Elected Officials of the Marshall Islands (Dec. 1, 2022), <https://www.justice.gov/opa/pr/former-heads-new-york-based-non-governmental-organization-charged-bribing-elected-officials>.

<sup>318</sup> U.S. Department of Justice Press Release No. 22-945: Former Heads of New York-Based Non-Governmental Organization Charged with Bribing Elected Officials of the Marshall Islands Extradited to the United States from Thailand (Sept. 2, 2022), <https://www.justice.gov/opa/pr/former-heads-new-york-based-non-governmental-organization-charged-bribing-elected-officials>.

organization (NGO), and Zhou, Yan’s assistant, were indicted in the Southern District of New York in 2020 for violating the FCPA, money laundering, and conspiracy to commit those offenses.<sup>319</sup>

According to court documents, between 2016 and until at least 2020, Yan and Zhou offered and paid tens of thousands of dollars in bribes to elected RMI officials in exchange for supporting legislation creating a semi-autonomous region within the RMI called the Rongelap Atoll Special Administrative Region (RASAR), which was touted to be a foreign investment paradise due to lax immigration laws and little to no tax.<sup>320</sup> Yan and Zhou carried out the bribery and money laundering scheme using the NGO, including the physical use of its headquarters in Manhattan, to meet with and communicate with RMI officials. They also paid for the government officials’ travel, lodging, and entertainment to and in New York and Hong Kong.<sup>321</sup> Although a resolution passed with the support of legislators who had been offered or received bribes from Yan and Zhou, a RASAR bill was never filed due to strong legislative opposition.<sup>322</sup>

### **3. Continued Prosecution of Individuals in Long-Running Investigations**

In 2022, we continued to see individuals being charged in connection with long-running investigations. For example, in 2022, the DOJ announced charges against several individuals allegedly involved in FCPA and FCPA-related misconduct related to the IMDB, PDVSA, Vitol Inc., and Odebrecht investigations.

It is worth noting that we likely can expect to see additional investigations resulting in individual prosecutions for many years after corporate resolutions are reached, given Deputy Attorney General Lisa Monaco memorandum “Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group.” In particular, the new requirement that there be a full investigative plan for individuals that is reviewed and approved in advance of a corporate resolution may lay the groundwork for continued long-lasting and broad reach of related individual prosecutions.<sup>323</sup>

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<sup>319</sup> Indictment, *United States v. Cary Yan & Gina Zhou*, No. 20-CR-00402, ¶¶ 1-4 (S.D.N.Y. Aug. 10, 2020).

<sup>320</sup> U.S. Department of Justice Press Release No. 22-945: Former Heads of New York-Based Non-Governmental Organization Charged with Bribing Elected Officials of the Marshall Islands Extradited to the United States from Thailand (Sept. 2, 2022), <https://www.justice.gov/opa/pr/former-heads-new-york-based-non-governmental-organization-charged-bribing-elected-officials>.

<sup>321</sup> Indictment, *United States v. Cary Yan & Gina Zhou*, No. 20-CR-00402, ¶¶ 6-10 (S.D.N.Y. Aug. 10, 2020) ECF No. 2.

<sup>322</sup> Indictment, *United States v. Cary Yan & Gina Zhou*, No. 20-CR-00402, ¶ 17 (S.D.N.Y. Aug. 10, 2020) ECF No. 2; see also Mar-Vic Cagurangan & Helen Davidson, *Ex-President Demands Inquiry into Marshall Islands Mini-State Plot*, GUARDIAN (Sept. 8, 2022), <https://www.theguardian.com/world/2022/sep/08/call-investigation-marshall-islands-chinese-couple-alleged-plot-mini-state>.

<sup>323</sup> Lisa O. Monaco, Deputy Att’y Gen., DOJ, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group, at 3 (Sept. 15, 2022), <https://www.justice.gov/opa/speech/file/1535301/download>.

**a. Lionel Hanst**

In March 2022, the DOJ charged Lionel Hanst with conspiracy to commit money laundering for his role in aiding Vitol Inc., an energy trading firm, in bribing officials in Ecuador, Mexico, and Venezuela.<sup>324</sup> Hanst was allegedly engaged by a Vitol trader to help the company with concealing and facilitating bribe payments, and in exchange, Hanst would receive five percent of the bribe payments.<sup>325</sup> To this end, Hanst allegedly created shell companies and corresponding bank accounts in Curaçao,<sup>326</sup> and from 2014 to 2020, used these companies to create sham agreements that allowed him to conceal and facilitate the transfer of nearly \$40 million in bribe payments to various bank accounts in the UK, US, and Mexico, which were allegedly ultimately used to bribe government officials.<sup>327</sup>

**b. Ralph Steinmann and Luis Fernando Vuteff**

Ralph Steinmann, from Switzerland, and Luis Fernando Vuteff, from Argentina, both financial managers, were each charged with one count of conspiracy to commit money laundering in July.<sup>328</sup> The DOJ alleged that from December 2014 until August 2018, Steinmann and Vuteff conspired with others to launder funds obtained through corruption from Venezuela's state-owned energy company, PDVSA.<sup>329</sup> According to the indictment, the defendants and other conspirators agreed to create sophisticated financial mechanisms and relationships to launder more than \$200 million.<sup>330</sup> This included opening bank accounts in both US and foreign banks to bribe Venezuelan officials and purchasing a real estate property in the Southern District of Florida.<sup>331</sup> Vuteff was arrested in

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<sup>324</sup> Info., *United States v. Lionel Hanst*, No. 22-CR-00075, at 6 (E.D.N.Y. Mar. 16, 2022) ECF No. 8.

<sup>325</sup> Info., *United States v. Lionel Hanst*, No. 22-CR-00075, at 7 (E.D.N.Y. Mar. 16, 2022) ECF No. 8.

<sup>326</sup> Info., *United States v. Lionel Hanst*, No. 22-CR-00075, at 7-8 (E.D.N.Y. Mar. 16, 2022) ECF No. 8.

<sup>327</sup> Info., *United States v. Lionel Hanst*, No. 22-CR-00075, at 9-10 (E.D.N.Y. Mar. 16, 2022) ECF No. 8.

<sup>328</sup> U.S. Department of Justice Press Release No. 22-735: Two Financial Asset Managers Charged in Alleged \$1.2 Billion Venezuelan Money Laundering Scheme (July 12, 2022), <https://www.justice.gov/opa/pr/two-financial-asset-managers-charged-alleged-12-billion-venezuelan-money-laundering-scheme>.

<sup>329</sup> U.S. Department of Justice Press Release No. 22-735: Two Financial Asset Managers Charged in Alleged \$1.2 Billion Venezuelan Money Laundering Scheme (July 12, 2022), <https://www.justice.gov/opa/pr/two-financial-asset-managers-charged-alleged-12-billion-venezuelan-money-laundering-scheme>.

<sup>330</sup> U.S. Department of Justice Press Release No. 22-735: Two Financial Asset Managers Charged in Alleged \$1.2 Billion Venezuelan Money Laundering Scheme (July 12, 2022), <https://www.justice.gov/opa/pr/two-financial-asset-managers-charged-alleged-12-billion-venezuelan-money-laundering-scheme>.

<sup>331</sup> U.S. Department of Justice Press Release No. 22-735: Two Financial Asset Managers Charged in Alleged \$1.2 Billion Venezuelan Money Laundering Scheme (July 12, 2022), <https://www.justice.gov/opa/pr/two-financial-asset-managers-charged-alleged-12-billion-venezuelan-money-laundering-scheme>.

Switzerland in July 2022,<sup>332</sup> and was extradited to the US one month later.<sup>333</sup> Steinmann remains a fugitive.<sup>334</sup>

#### c. Jhonnatan Teodoro Marin Sanguino

In June 2022, Jhonnatan Marin, the former mayor of Guanta, Venezuela, pleaded guilty to a single count of conspiracy to commit money laundering.<sup>335</sup> Between 2015 and 2017, Marin accepted \$3.8 million in bribes from a contractor and agreed to exert his influence to cause several joint ventures with PDVSA to award tens of millions of dollars' worth of business to the contractor.<sup>336</sup> Bribe payments were sent and received from bank accounts in South Florida as well as in other countries.<sup>337</sup> In October, the Southern District of Florida sentenced Marin to 27 months of imprisonment and one year of supervised release.<sup>338</sup>

### 4. Former Foreign Officials and Relatives

This year, the DOJ brought or resolved charges against a number of former foreign officials and/or their family members from Bolivia, Ecuador, Panama, and Venezuela as discussed above.<sup>339</sup> Notably, although bribe recipients are not liable under the FCPA, we continue to see the DOJ charging these individuals with statutes that cover related conduct, such as money laundering.

#### a. Arturo Carlos Murillo Prijic

In October 2022, Arturo Carlos Murillo Prijic, the former Bolivian Minister of Government, pleaded guilty to one count of conspiracy to commit money laundering.<sup>340</sup> In May 2021, Murillo Prijic was arrested for criminal charges related to his alleged role in a bribery and money laundering scheme

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<sup>332</sup> U.S. Department of Justice Press Release No. 22-735: Two Financial Asset Managers Charged in Alleged \$1.2 Billion Venezuelan Money Laundering Scheme (July 12, 2022), <https://www.justice.gov/opa/pr/two-financial-asset-managers-charged-alleged-12-billion-venezuelan-money-laundering-scheme>.

<sup>333</sup> U.S. Homeland Security Investigations Miami (@HSI\_Miami), TWITTER (Aug. 18, 2022, 7:54 PM), <https://twitter.com/hsimiami/status/1560414870926925825>.

<sup>334</sup> U.S. Department of Justice Press Release No. 22-735: Two Financial Asset Managers Charged in Alleged \$1.2 Billion Venezuelan Money Laundering Scheme (July 12, 2022), <https://www.justice.gov/opa/pr/two-financial-asset-managers-charged-alleged-12-billion-venezuelan-money-laundering-scheme>.

<sup>335</sup> Plea Agreement, *United States v. Jhonnatan Teodoro Marin Sanguino*, No. 22-CR-20164, ¶ 2 (S.D. Fla. June 23, 2022) ECF No. 17.

<sup>336</sup> Info., *United States v. Johnnatan Teodoro Marin Sanguino*, No. 22-CR-20164, at 6 (S.D. Fla. Apr. 21, 2022) ECF No. 1.

<sup>337</sup> Info., *United States v. Johnnatan Teodoro Marin Sanguino*, No. 22-CR-20164, at 5 (S.D. Fla. Apr. 21, 2022) ECF No. 1; Factual Proffer, *United States v. Johnnatan Teodoro Marin Sanguino*, No. 22-CR-20164, at 3 (S.D. Fla. June 23, 2022) ECF No. 18.

<sup>338</sup> Minute Entry, *United States v. Johnnatan Teodoro Marin Sanguino*, No. 22-CR-20164 (S.D. Fla. Oct. 26, 2022) ECF No. 32.

<sup>339</sup> See *supra* at Section III.D.3.c.

<sup>340</sup> U.S. Department of Justice Press Release No. 22-1131: Former Government of Bolivia Minister Pleads Guilty to Conspire to Launder Proceeds of Bribery Scheme (Oct. 20, 2022), <https://www.justice.gov/opa/pr/former-bolivia-minister-pleads-guilty-conspiracy-launder-proceeds-bribery-scheme>.

involving the Bolivian Ministry of Defense that spanned from November 2019 to April 2020.<sup>341</sup> Murillo personally received at least \$532,000 in bribes from a Florida-based company in exchange for helping that company win a \$5.6 million contract to provide the Bolivian Ministry of Defense with military supplies.<sup>342</sup> Murillo and his co-conspirators, Sergio Rodrigo Mendez Mendizabal, Luis Berkman, Bryan Berkman, and Philip Lichtenfeld, laundered proceeds from the bribery scheme through the US financial system, including bank accounts in Miami, Florida. Of the total \$532,000 in bribes, Murillo received approximately \$130,000 in cash bribe payments at a family member's home in Miami that were laundered through bank accounts in Florida.<sup>343</sup> The Florida-based company, which was reportedly Bravo Tactical Solutions, was owned and run by one of the co-conspirators, Bryan Berkman.<sup>344</sup>

Murillo was sentenced to 70 months in prison and three years of supervised release on January 4, 2023.<sup>345</sup>

**b. Daniel D'Andrea Golindano and Luis Javier Sanchez Rangel**

In March 2022, the DOJ announced charges against two former Venezuelan prosecutors, Daniel D'Andrea Golindano and Luis Javier Sanchez Rangel, on one count of conspiracy to commit money laundering and two counts of engaging in monetary transactions in criminally-derived property.<sup>346</sup> D'Andrea and Sanchez were tasked with investigating a contractor for alleged corrupt dealing with subsidiaries of Venezuela's state-owned oil company, PDVSA.<sup>347</sup> Working with other co-conspirators, D'Andrea and Sanchez agreed not to pursue criminal charges against the contractor in exchange for one million dollars.<sup>348</sup> While both D'Andrea and Sanchez remain at large, if convicted, both could face up to 20 years in prison for conspiracy to commit money

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<sup>341</sup> U.S. Department of Justice Press Release No. 21-489: Former Minister of Government of Bolivia, Owner of Florida-Based Company, and Three Others Charged in Bribery and Money Laundering Scheme (May 26, 2021), <https://www.justice.gov/opa/pr/former-bolivian-minister-government-sentenced-bribery-conspiracy>.

<sup>342</sup> U.S. Department of Justice Press Release No. 22-1131: Former Government of Bolivia Minister Pleads Guilty to Conspire to Launder Proceeds of Bribery Scheme (Oct. 20, 2022), <https://www.justice.gov/opa/pr/former-bolivia-minister-pleads-guilty-conspiracy-launder-proceeds-bribery-scheme>; Factual Proffer, *United States v. Arturo Carlos Murillo Prijic*, No. 21-CR-60340, ¶ 8 (S.D. Fla. Oct. 20, 2022) ECF No. 87.

<sup>343</sup> U.S. Department of Justice Press Release No. 22-1131: Former Government of Bolivia Minister Pleads Guilty to Conspire to Launder Proceeds of Bribery Scheme (Oct. 20, 2022), <https://www.justice.gov/opa/pr/former-bolivia-minister-pleads-guilty-conspiracy-launder-proceeds-bribery-scheme>.

<sup>344</sup> Joshua Goodman, *Former Bolivian Interior Minister Receives Stiff Jail Sentence for Bribes*, PBS NEWS (Jan. 4, 2023), <https://www.pbs.org/newshour/world/former-bolivian-interior-minister-receives-stiff-jail-sentence-for-bribes>.

<sup>345</sup> Judgment, *United States v. Arturo Carlos Murillo Prijic*, No. 21-CR-60340 (S.D. Fla. Oct. 20, 2022) ECF No. 104.

<sup>346</sup> U.S. Department of Justice Press Release No. 22-200: Two Former Senior Venezuelan Prosecutors Charged for Receiving Over \$1 Million in Bribes (Mar. 8, 2022), <https://www.justice.gov/opa/pr/two-former-senior-venezuelan-prosecutors-charged-receiving-over-1-million-bribes>.

<sup>347</sup> Indictment, *United States v. Daniel D'Andrea Golindano & Luis Javier Sanchez Rangel*, No. 22-CR-20087, at 4 (S.D. Fla. Mar. 8, 2022) ECF No. 1.

<sup>348</sup> Indictment, *United States v. Daniel D'Andrea Golindano & Luis Javier Sanchez Rangel*, No. 22-CR-20087, at 5 (S.D. Fla. Mar. 8, 2022) ECF No. 1.

laundering, and up to 10 years in prison for each count of engaging in monetary transactions in criminally-derived property.<sup>349</sup>

**c. Carlos Ramon Polit Faggioni**

In March 2022, a grand jury indicted the former Comptroller General of Ecuador, Carlos Ramon Polit Faggiono, in the Southern District of Florida for allegedly engaging in a scheme to launder money in an effort to conceal an illegal foreign bribery scheme in Ecuador.<sup>350</sup> Polit was charged with one count of conspiracy to commit money laundering, three counts of concealment of money laundering, and two counts of engaging in transactions in criminally derived property.<sup>351</sup>

Between 2010 and 2016, Polit allegedly solicited and received over \$10 million in bribe payments from Odebrecht S.A. in exchange for using his official position to influence the comptroller office's official actions to benefit Odebrecht S.A. and its business in Ecuador.<sup>352</sup> Beginning in 2010 and continuing until at least 2017, Polit allegedly directed a co-conspirator to "disappear" the proceeds of the bribery scheme by using Florida companies registered in the names of certain associates, often without their knowledge.<sup>353</sup> Funds derived from Polit's bribery scheme were allegedly used to purchase and renovate real estate in South Florida and elsewhere and to purchase restaurants, a dry cleaner and other businesses in the name of one of 14 Florida companies to conceal that those assets were for the benefit of Polit and his relatives.<sup>354</sup>

Polit is also alleged to have received a bribe payment of approximately \$510,000 in December 2015 from an Ecuadorian businessman in exchange for assisting the businessman and his

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<sup>349</sup> U.S. Department of Justice Press Release No. 22-200: Two Former Senior Venezuelan Prosecutors Charged for Receiving Over \$1 Million in Bribes (Mar. 8, 2022), <https://www.justice.gov/opa/pr/two-former-senior-venezuelan-prosecutors-charged-receiving-over-1-million-bribes>.

<sup>350</sup> U.S. Department of Justice Press Release No. 22-298: Former Comptroller General of Ecuador Indicted for Alleged Bribery and Money Laundering Scheme (Mar. 29, 2022), <https://www.justice.gov/opa/pr/former-comptroller-general-ecuador-indicted-alleged-bribery-and-money-laundering-scheme>.

<sup>351</sup> U.S. Department of Justice Press Release No. 22-298: Former Comptroller General of Ecuador Indicted for Alleged Bribery and Money Laundering Scheme (Mar. 29, 2022), <https://www.justice.gov/opa/pr/former-comptroller-general-ecuador-indicted-alleged-bribery-and-money-laundering-scheme>.

<sup>352</sup> U.S. Department of Justice Press Release No. 22-298: Former Comptroller General of Ecuador Indicted for Alleged Bribery and Money Laundering Scheme (Mar. 29, 2022), <https://www.justice.gov/opa/pr/former-comptroller-general-ecuador-indicted-alleged-bribery-and-money-laundering-scheme>; Indictment, *United States v. Carlos Ramon Polit Faggioni*, No. 22-CR-20114, ¶¶ 4-5, 8, 10, 12, 15-16 (S.D. Fla. Mar. 24, 2022) ECF No. 1.

<sup>353</sup> U.S. Department of Justice Press Release No. 22-298: Former Comptroller General of Ecuador Indicted for Alleged Bribery and Money Laundering Scheme (Mar. 29, 2022), <https://www.justice.gov/opa/pr/former-comptroller-general-ecuador-indicted-alleged-bribery-and-money-laundering-scheme>.

<sup>354</sup> U.S. Department of Justice Press Release No. 22-298: Former Comptroller General of Ecuador Indicted for Alleged Bribery and Money Laundering Scheme (Mar. 29, 2022), <https://www.justice.gov/opa/pr/former-comptroller-general-ecuador-indicted-alleged-bribery-and-money-laundering-scheme>; Indictment, *United States v. Carlos Ramon Polit Faggioni*, 22-CR-20114, ¶¶ 4-6 (S.D. Fla. Mar. 24, 2022) ECF No. 1.

company in connection with certain contracts from Seguros Sucre, the state-owned insurance company of Ecuador.<sup>355</sup>

Polit has not entered a plea and is currently awaiting trial.<sup>356</sup> If convicted, Polit faces up to 20 years in prison for each count of money laundering and conspiracy to commit money laundering, and up to 10 years in prison for each count of engaging in transactions in criminally derived property.<sup>357</sup>

#### d. Nilsen Arias Sandoval

In October 2022, the DOJ unsealed a criminal information against Nilsen Arias Sandoval, a former high-ranking Petroecuador official, for allegedly participating in a bribery and money laundering scheme.<sup>358</sup> A sealed complaint against Arias was originally filed in August 2021.<sup>359</sup> In January 2022, Arias waived his indictment and the information against him was filed.<sup>360</sup> A plea agreement hearing was held the same day, during which Arias pleaded guilty.<sup>361</sup> Details of the plea agreement are not public and a sentencing hearing is yet to be scheduled.

The information alleged that between 2010 and 2021 Arias accepted over \$17 million in bribes from various energy trading and asphalt companies, including Vitol Inc., Sargeant Marine, Inc., and others.<sup>362</sup> In exchange, Arias used his official position and influence at Petroecuador to secure improper advantages for the companies and assist them in obtaining and retaining business with Petroecuador and other state-owned entities.<sup>363</sup> The information further alleged that to promote the scheme, sham consulting agreements and invoices with unnamed intermediaries were created to conceal the bribe payments.<sup>364</sup> The intermediaries would subsequently transfer the bribe

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<sup>355</sup> U.S. Department of Justice Press Release No. 22-298: Former Comptroller General of Ecuador Indicted for Alleged Bribery and Money Laundering Scheme (Mar. 29, 2022), <https://www.justice.gov/opa/pr/former-comptroller-general-ecuador-indicted-alleged-bribery-and-money-laundering-scheme>; Indictment, *United States v. Carlos Ramon Polit Faggioni*, No. 22-CR-20114, ¶¶ 9, 14 (S.D. Fla. Mar. 24, 2022) ECF No. 1; Dylan Tokar, *Insurance Broker Arthur J. Gallagher Subpoenaed by Justice Department's Foreign Bribery Unit*, WALL ST. J. (Nov. 2, 2022), <https://www.wsj.com/articles/insurance-broker-arthur-j-gallagher-subpoenaed-by-justice-departments-foreign-bribery-unit-11667584283>.

<sup>356</sup> Minute Entry, *United States v. Carlos Ramon Polit Faggioni*, No. 22-CR-20114 (S.D. Fla. July 7, 2022) ECF No. 57.

<sup>357</sup> U.S. Department of Justice Press Release No. 22-298: Former Comptroller General of Ecuador Indicted for Alleged Bribery and Money Laundering Scheme (Mar. 29, 2022), <https://www.justice.gov/opa/pr/former-comptroller-general-ecuador-indicted-alleged-bribery-and-money-laundering-scheme>.

<sup>358</sup> Info., *United States v. Nilsen Arias Sandoval*, No. 21-CR-00628 (E.D.N.Y. Jan. 19, 2022) ECF No. 19.

<sup>359</sup> Sealed Compl., *United States v. Nilsen Arias Sandoval*, No. 21-CR-00628 (E.D.N.Y. Aug. 4, 2021) ECF No. 1.

<sup>360</sup> Waiver of Indictment, *United States v. Nilsen Arias Sandoval*, No. 21-CR-00628 (E.D.N.Y. Jan. 19, 2022) ECF No. 20; Info., *United States v. Nilsen Arias Sandoval*, No. 21-CR-00628 (E.D.N.Y. Jan. 19, 2022) ECF No. 19.

<sup>361</sup> Minute Entry, *United States v. Nilsen Arias Sandoval*, No. 21-CR-00628 (E.D.N.Y. Jan. 19, 2022) ECF No. 21.

<sup>362</sup> Info., *United States v. Nilsen Arias Sandoval*, No. 21-CR-00628, ¶¶ 36-65 (E.D.N.Y. Jan. 19, 2022) ECF No. 19.

<sup>363</sup> Info., *United States v. Nilsen Arias Sandoval*, No. 21-CR-00628, ¶ 31 (E.D.N.Y. Jan. 19, 2022) ECF No. 19.

<sup>364</sup> Info., *United States v. Nilsen Arias Sandoval*, No. 21-CR-00628, ¶¶ 31-35, 40-41, 47-48, 53-54, 59-59 (E.D.N.Y. Jan. 19, 2022) ECF No. 19.

payments to accounts for the benefit of Arias on behalf of the companies.<sup>365</sup> Arias is believed to be cooperating with the DOJ.

**e. Claudia Patricia Diaz Guillen and Adrian Jose Velasquez Figueroa**

On December 13, 2022, former National Treasurer of Venezuela Claudia Patricia Diaz Guillen and her husband, Adrian Jose Velasquez Figueroa were convicted of accepting at least \$100 million in bribes from an indicted co-conspirator, Raul Gorrin Belisario.<sup>366</sup> According to the DOJ, Gorrin, a Venezuelan billionaire businessman, paid bribes to Diaz, at times through Velasquez, so that Gorrin could purchase bonds from the Venezuelan National Treasury at a favorable exchange rate, earning Gorrin “more hundreds of millions of dollars” in profits.<sup>367</sup> A federal jury in the Southern District of Florida found Diaz guilty of one count of conspiring to commit money laundering and one count of money laundering, and acquitted Diaz of a second count of money laundering.<sup>368</sup> The jury also found Velasquez guilty of one count of conspiring to commit money laundering and two counts of money laundering.<sup>369</sup> Diaz and Velasquez are scheduled to be sentenced on March 28, 2023.<sup>370</sup> Gorrin remains a fugitive, residing in Venezuela.<sup>371</sup>

**5. Sentencing Trends**

Eleven individuals were sentenced in FCPA-related cases in 2022, which is eleven fewer than in 2021 and two fewer than in 2020. In addition, a default judgment was issued against one individual this year. Defendants in 2022 received an average of approximately 33 months imprisonment, compared to an average of approximately 25 months in 2021. These defendants faced fines ranging from \$79,000 to \$35 million and forfeiture orders ranging from \$3.8 million to \$49 million.<sup>372</sup> Similar to previous years, several of these individuals had pleaded guilty to criminal charges in connection with bribery schemes that resulted in large corporate FCPA settlements.

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<sup>365</sup> Info., *United States v. Nilsen Arias Sandoval*, No. 21-CR-00628, ¶¶ 34-35 (E.D.N.Y. Jan. 19, 2022) ECF No. 19.

<sup>366</sup> U.S. Department of Justice Press Release No. 22-1364: Former Venezuelan National Treasurer and Husband Convicted in International Bribery Scheme (Dec. 15, 2022), <https://www.justice.gov/opa/pr/former-venezuelan-national-treasurer-and-husband-convicted-international-bribery-scheme>.

<sup>367</sup> Superseding Indictment, *United States v. Raul Gorrin Belisario*, No. 18-CR-80160, ¶ 10 (S.D. Fla. Dec. 16, 2020) ECF No. 44.

<sup>368</sup> Verdict Form, *United States v. Claudia Patricia Diaz Guillen & Adrian Velasquez Figueroa*, No. 18-CR-80160 (S.D. Fla. Dec. 13, 2022) ECF No. 310.

<sup>369</sup> Verdict Form, *United States v. Claudia Patricia Diaz Guillen & Adrian Velasquez Figueroa*, No. 18-CR-80160 (S.D. Fla. Dec. 13, 2022) ECF No. 310.

<sup>370</sup> Order, *United States v. Claudia Patricia Diaz Guillen & Adrian Velasquez Figueroa*, No. 18-CR-80160 (S.D. Fla. Jan. 20, 2023) ECF No. 327; Order, *United States v. Claudia Patricia Diaz Guillen & Adrian Velasquez Figueroa*, No. 18-CR-80160 (S.D. Fla. Jan. 20, 2023) ECF No. 328.

<sup>371</sup> U.S. Department of Justice Press Release No. 22-1364: Former Venezuelan National Treasurer and Husband Convicted in International Bribery Scheme (Dec. 15, 2022), <https://www.justice.gov/opa/pr/former-venezuelan-national-treasurer-and-husband-convicted-international-bribery-scheme>.

<sup>372</sup> For more details on the FCPA sentencing in 2021, see generally, WilmerHale, *Global Anti-Bribery Year-in-Review: 2021 Developments and Predictions for 2022*, at 51 (Jan. 27, 2022), <https://www.wilmerhale.com/en/insights/client-alerts/20220127-2021-global-anti-bribery-year-in-review>.

Of the eleven individuals, three individuals who pleaded guilty as part of the long-running PDVSA bribery probe were sentenced in 2022. First, Carmelo Antonio Urdaneta Aquí, the former legal counsel for the Venezuelan Ministry of Oil and Mining, pleaded guilty to conspiracy to commit money laundering and racketeering. Aquí played a direct role in a conspiracy to provide bribes to PDVSA, which included writing fake loan contracts and exploiting the Venezuelan government's foreign-currency exchange program.<sup>373</sup> He was sentenced to 52 months in prison and ordered to pay \$84 million for his role in the bribery scheme.<sup>374</sup> Second, as discussed above, another Venezuelan official, a former mayor of the city of Guanta, Jhonnatan Teodoro Marin Sanguino (Jhonnatan Marin),<sup>375</sup> pleaded guilty to one count of conspiracy to commit money laundering and was sentenced in October to 27 months in prison<sup>376</sup> and ordered to forfeit over \$3.8 million.<sup>377</sup> Sanguino accepted bribes in exchange for using his position as mayor to influence PDVSA officials to award contracts to his co-conspirators.<sup>378</sup> Finally, in May, Venezuelan businessman Carlos Enrique Urbano Fermín was sentenced to five years of probation and "intermittent" confinement for his role in delivering bribes to several PDVSA subsidiaries to secure oil contracts.<sup>379</sup>

Two individuals involved in the long-running Odebrecht bribery case—brothers Luis Enrique Martinelli Linares and Ricardo Enrique Martinelli Linares—also were sentenced in 2022. In 2021, the brothers pleaded guilty to conspiracy to commit money laundering and admitted that they had agreed with others to establish offshore bank accounts in the names of shell companies to receive and disguise over \$28 million in bribe proceeds for the benefit of a high-ranking Panamanian public

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<sup>373</sup> Judgment, *United States v. Carmelo Antonio Urdanta Aqui*, No. 18-CR-20685 (S.D. Fla. June 21, 2022) ECF No. 614.

<sup>374</sup> Judgment, *United States v. Carmelo Antonio Urdanta Aqui*, No. 18-CR-20685 (S.D. Fla. June 21, 2022) ECF No. 614.

<sup>375</sup> See *supra* at Section III.D.3.c.

<sup>376</sup> Judgment, *United States v. Jhonnatan Teodoro Marin Sanguino*, No. 22-CR-20164 (S.D. Fla. Oct. 26, 2022) ECF No. 35.

<sup>377</sup> Plea Agreement, *United States v. Jhonnatan Teodoro Marin Sanguino*, No. 22-CR-20164 (S.D. Fla. June 23, 2022) ECF No. 17.

<sup>378</sup> Factual Proffer, *United States v. Jhonnatan Teodoro Marin Sanguino*, No. 22-CR-20164 (S.D. Fla. June 23, 2022) ECF No. 18.

<sup>379</sup> Judgment, *United States v. Carlos Enrique Urbano Fermin*, No. 20-CR-20163 (S.D. Fla. May 24, 2022) ECF No. 50.

official.<sup>380</sup> In May, both brothers were sentenced to 36 months in prison and two years of supervised release.<sup>381</sup> They were ordered to forfeit \$18.8 million and pay a \$250,000 fine.<sup>382</sup>

Three defendants were sentenced in connection with the DOJ's investigation into an adoption agency in Strongsville, Ohio involving two criminal schemes: (1) a scheme to procure adoptions of children from Uganda through bribery of Ugandan officials (the Uganda Scheme); and (2) a non FCPA-related scheme to defraud US authorities concerning the improper transfer of a Polish child (the Poland Scheme). Co-defendants Debra Parris and Robin Longoria pleaded guilty to conspiracy to violate the FCPA and to commit visa fraud in connection with the Uganda Scheme. Parris was sentenced to one year and one day in prison plus three years of supervised release in November 2022.<sup>383</sup> Longoria was sentenced to a year and a day in prison and ordered to pay almost \$79,000 in restitution.<sup>384</sup> An Ugandan attorney who facilitated the Uganda Scheme remains at large. Separately, the executive director of the adoption agency, Margaret Cole, pleaded guilty to non-FCPA related offenses involving the Poland Scheme.

## 6. Default Judgment

Finally, 2022 saw a default judgment entered in the government's case against Yanliang "Jerry" Li, a Chinese national and the former head of supplement company Herbalife's Chinese subsidiary. Li was ordered to pay approximately \$550,000 in a default judgment after he failed to respond to a complaint filed by the SEC.<sup>385</sup> The SEC alleged that Li had paid bribes to Chinese officials to expand Herbalife's operations in China by obtaining necessary business licenses and evading regulatory scrutiny. In August 2020, Herbalife agreed to pay more than \$122 million in criminal and civil penalties to resolve DOJ and SEC charges that the company falsified books and records and provided improper payments to government officials in China to obtain, retain, and increase Herbalife's business, in violation of the FCPA. Li remains at large.<sup>386</sup>

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<sup>380</sup> U.S. Department of Justice Press Release No. 22-547: Panama Intermediaries Each Sentenced to 36 Months in Prison for International Bribery and Money Laundering Scheme (May 20, 2022), <https://www.justice.gov/opa/pr/panama-intermediaries-each-sentenced-36-months-prison-international-bribery-and-money>.

<sup>381</sup> U.S. Department of Justice Press Release No. 22-547: Panama Intermediaries Each Sentenced to 36 Months in Prison for International Bribery and Money Laundering Scheme (May 20, 2022), <https://www.justice.gov/opa/pr/panama-intermediaries-each-sentenced-36-months-prison-international-bribery-and-money>.

<sup>382</sup> U.S. Department of Justice Press Release No. 22-547: Panama Intermediaries Each Sentenced to 36 Months in Prison for International Bribery and Money Laundering Scheme (May 20, 2022), <https://www.justice.gov/opa/pr/panama-intermediaries-each-sentenced-36-months-prison-international-bribery-and-money>.

<sup>383</sup> Judgment, *United States v. Debra Parris*, No. 20-CR-00424 (N.D. Ohio Nov. 4, 2022) ECF No. 195.

<sup>384</sup> Judgment, *United States v. Robin Longoria*, No. 19-CR-00482 (N.D. Ohio Mar. 23, 2022) ECF No. 37.

<sup>385</sup> Default Judgment, *SEC v. Jerry Li*, No. 19-CV-10562 (S.D.N.Y. June 28, 2022) ECF No. 22.

<sup>386</sup> Compl., *SEC v. Jerry Li*, No. 19-CV-10562 (S.D.N.Y. Nov. 14, 2019) ECF No. 1.

## E. Declinations under the FCPA Corporate Enforcement Policy

In 2022, the DOJ declined to prosecute two cases under its Corporate Enforcement Policy. While the two declinations are an increase from the zero declinations issued in 2021, there remains an overall downward trend of declinations in recent years (zero in 2021, one in 2020, two in 2019, and four in 2018).<sup>387</sup> As we noted last year, it is unclear whether this trend is a temporary reflection of the natural ebbs and flows in DOJ investigations or a signal that the DOJ has been receiving fewer voluntary self-disclosures from companies.<sup>388</sup> The downward trend of declinations might reflect a perception that the benefits to voluntary self-disclosure are outweighed by the downsides.

The DOJ issued its first Corporate Enforcement Policy declination of 2022 in March to Jardine Lloyd Thompson Group Holdings (JLT), an insurance company based in England. In the declination letter, the DOJ stated that it was declining to prosecute JLT for alleged bribes paid to Ecuadorian officials.<sup>389</sup> According to the DOJ, its investigation found that from 2014 to 2016, JLT, through its employees and agents, paid \$10.8 million to an intermediary that it knew would be used, in part, to pay more than \$3 million in bribes to the officials, approximately \$1.2 million of which was laundered through US banks.<sup>390</sup> Although the DOJ concluded that an employee and agents of the company and its subsidiaries engaged in bribery,<sup>391</sup> the DOJ declined prosecution based on an assessment of the factors set forth in the Department's FCPA CEP.<sup>392</sup> Those factors were (1) JLT's voluntary self-disclosure of the misconduct; (2) JLT's cooperation, including provision of relevant information regarding individuals; (3) the nature and seriousness of the offense; (4) JLT's timely and full remediation, including separation from the executive and third-party intermediary involved in the conduct, and JLT's enhancement of its anti-corruption training and compliance program; and (5) JLT's disgorgement of \$29 million in profits, representing the total profit from the contracts that the DOJ believes were corruptly obtained and retained as a result of the bribery.<sup>393</sup> The DOJ agreed to credit JLT's disgorgement amount against any amount it pays to the UK Serious Fraud Office (SFO) within 12 months pursuant to a separate resolution addressing the same underlying conduct.<sup>394</sup> JLT has not reached a public resolution with the SFO. The DOJ declined to prosecute

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<sup>387</sup> U.S. Department of Justice, Declinations (updated Dec. 23, 2022), <https://www.justice.gov/criminal-fraud/corporate-enforcement-policy/declinations>.

<sup>388</sup> WilmerHale, *2021 Global Anti-Bribery Year-in-Review* (Jan. 27, 2022), <https://www.wilmerhale.com/en/insights/client-alerts/2020127-2021-global-anti-bribery-year-in-review>.

<sup>389</sup> Letter from Joseph S. Beemsterboer, DOJ, Re: Jardine Lloyd Thompson Group Holdings Ltd. (Mar. 18, 2022), <https://www.justice.gov/criminal-fraud/file/1486266/download>.

<sup>390</sup> Letter from Joseph S. Beemsterboer, DOJ, Re: Jardine Lloyd Thompson Group Holdings Ltd. (Mar. 18, 2022), <https://www.justice.gov/criminal-fraud/file/1486266/download>.

<sup>391</sup> As discussed in a previous Year-In-Review, in 2020, four individuals pleaded guilty to conspiracy to commit money laundering in connection with this scheme. See WilmerHale, *2020 Global Anti-Bribery Year-in-Review* (Jan. 28, 2021), <https://www.wilmerhale.com/insights/client-alerts/2020126-2020-global-antibribery-yearinreview>.

<sup>392</sup> Letter from Joseph S. Beemsterboer, DOJ, Re: Jardine Lloyd Thompson Group Holdings Ltd. (Mar. 18, 2022), <https://www.justice.gov/criminal-fraud/file/1486266/download>.

<sup>393</sup> Letter from Joseph S. Beemsterboer, DOJ, Re: Jardine Lloyd Thompson Group Holdings Ltd. (Mar. 18, 2022), <https://www.justice.gov/criminal-fraud/file/1486266/download>.

<sup>394</sup> Letter from Joseph S. Beemsterboer, DOJ, Re: Jardine Lloyd Thompson Group Holdings Ltd. (Mar. 18, 2022), <https://www.justice.gov/criminal-fraud/file/1486266/download>.

JLT despite the fact that it had earned fairly significant profits from the bribery (\$29 million, all of which was disgorged as part of the DOJ declination), a factor the DOJ considers as an aggravating circumstance under the CEP.<sup>395</sup> Only one other Corporate Enforcement Policy declination has involved more bribery profits—the DOJ’s 2018 decision not to prosecute Polycom Inc., which had obtained nearly \$31 million in profits from its misconduct.<sup>396</sup>

The DOJ issued its second Corporate Enforcement Policy declination of 2022 in December to Safran S.A., a French aerospace company. The DOJ had investigated Safran for bribery committed by employees and agents of its US subsidiary Monogram Systems (Monogram) and its German subsidiary EVAC GmbH (EVAC) that occurred before Safran acquired those subsidiaries. According to the DOJ, from 1999 until 2015, Monogram and EVAC paid millions of dollars to a China-based business consultant who was a close relative of a then-senior Chinese government official to obtain train lavatory contracts with the Chinese government.<sup>397</sup> Although the DOJ concluded that employees and agents of the company’s subsidiaries had engaged in bribery, the DOJ declined prosecution based on an assessment of the factors including: (1) Safran’s timely and voluntary disclosure of the misconduct; (2) Safran’s cooperation, including provision of relevant information regarding the misconduct, and its agreement to continue to cooperate in any ongoing government investigations; (3) the nature and seriousness of the offense; (4) Safran’s timely and full remediation, including termination of a remaining employee involved in the misconduct, withholding the deferred compensation of another employee involved in the misconduct, and enhancement of its anti-corruption training and compliance program; (5) the fact that Safran was the successor-in-interest to its acquired subsidiaries and that the misconduct had ceased pre-acquisition; (6) Safran’s identification of the misconduct through post-acquisition due diligence; (7) Safran’s agreement to disgorge \$17.1 million in profits, representing the full amount of Monogram’s ill-gotten gains; and (8) Safran’s intent to accept responsibility and resolve EVAC’s liability in connection with an ongoing investigation by German authorities.<sup>398</sup> EVAC’s ill-gotten gains were not factored in from the disgorgement amount as the DOJ “defer[ed] to German authorities in imposing any amount Safran owes resulting from EVAC’s involvement” in the scheme.<sup>399</sup>

The DOJ’s declination of cases against both JLT and Saffron, which were subject to parallel enforcement actions by the UK and German authorities, respectively, may reflect an application of

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<sup>395</sup> The DOJ considers whether the misconduct provided “a significant profit to the company” as “proportionally relative to the company’s overall profits.” 9-47.120—*Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy*, U.S. DEP’T OF JUSTICE, at 1 n. 1 (Jan. 2023), <https://www.justice.gov/criminal-fraud/file/1562831/download>.

<sup>396</sup> Letter from Sandra Moser, DOJ, Re: Polycom Inc. (Dec. 20, 2018), <https://www.justice.gov/criminal-fraud/file/1122966/download>.

<sup>397</sup> Letter from Glenn S. Leon & E. Martin Estrada, DOJ, Re: Safran S.A. (Dec. 21, 2022), <https://www.justice.gov/criminal-fraud/file/1559236/download>.

<sup>398</sup> Letter from Glenn S. Leon & E. Martin Estrada, DOJ, Re: Safran S.A. (Dec. 21, 2022), <https://www.justice.gov/criminal-fraud/file/1559236/download>.

<sup>399</sup> Letter from Glenn S. Leon & E. Martin Estrada, DOJ, Re: Safran S.A. (Dec. 21, 2022), <https://www.justice.gov/criminal-fraud/file/1559236/download>.

the DOJ's "no piling" policy, which aims to discourage disproportionate enforcement of laws by multiple authorities.<sup>400</sup> These declinations are also examples of coordinated resolutions with foreign authorities.

#### **IV. KEY LEGAL DEVELOPMENTS**

In 2022, federal courts considered a number of significant aspects of the FCPA, including the scope and applicability of agency theory to reach foreign nationals, the limits of the DOJ's extraterritorial reach under the FCPA, the scope and effect of orders tolling the statute of limitations in international investigations, and the scope of the FCPA's internal accounting controls provisions. There have also been some legislative developments, including proposed legislation extending the FCPA's definition of "corrupt practices" to include specific conduct in support of the Chinese Communist Party's alleged propaganda efforts.

##### **A. Cases**

###### **1. *United States v. Ng***

In April 2022, a jury in the Eastern District of New York found former investment banker Roger Ng guilty of one count of conspiracy to commit money laundering, and two counts of conspiracy to violate the FCPA through bribery and circumventing his employer's internal accounting controls.<sup>401</sup> The charges stemmed from Ng's participation in a conspiracy to misappropriate and launder billions of dollars from Malaysian sovereign wealth fund 1Malaysia Development Berhad (1MDB), including funds raised through several bond transactions underwritten by his employer.<sup>402</sup> A key figure in the scheme was Jho Low, a Malaysian businessman who had close relationships with government officials in Malaysia and Abu Dhabi and with whom Ng worked as part of the bond transactions.<sup>403</sup>

After the government rested its case, Ng moved for a judgment of acquittal on the internal accounting controls charge.<sup>404</sup> The government had presented evidence at trial that Ng and another co-conspirator did not disclose Low's identity and role in the transactions to his employer's Firmwide Capital Committee and Firmwide Suitability Committee, whose "appropriate approval and authorization before execution" was required pursuant to an internal accounting control, because they knew the committees would not authorize the transactions if they did.<sup>405</sup>

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<sup>400</sup> WilmerHale, *New DOJ Policy to Prevent "Piling-On"* (May 30, 2018), <https://www.wilmerhale.com/insights/client-alerts/2018-05-30-new-doj-policy-to-prevent-piling-on>.

<sup>401</sup> Jury Verdict, *United States v. Ng*, No. 18-CR-00538, 2022 WL 1062704 (E.D.N.Y. Apr. 8, 2022) ECF No. 198.

<sup>402</sup> Superseding Indictment, *United States v. Ng*, No. 18-CR-00538 ¶¶ 1-4, 18-23 (Dec. 20, 2021) ECF No. 105.

<sup>403</sup> Superseding Indictment, *United States v. Ng*, No. 18-CR-00538, ¶¶ 1, 18-23 (Dec. 20, 2021) ECF No. 105.

<sup>404</sup> See *United States v. Ng*, No. 18-CR-00538, 2022 WL 1062704, at \*1 (E.D.N.Y. Apr. 8, 2022).

<sup>405</sup> *United States v. Ng*, No. 18-CR-00538, 2022 WL 1062704, at \*3-4 (E.D.N.Y. Apr. 8, 2022).

In his motion, Ng argued that prosecutors had read the accounting provisions too broadly. Instead, Ng contended that “internal accounting controls” in the FCPA had to be understood to mean accounting-specific controls in order for the term “accounting” to have any meaning, and “to be distinguished from legal, risk-management, compliance, and other controls.”<sup>406</sup> He further argued that the government failed to provide any evidence that his employer’s accounting controls were violated—i.e., that his alleged conduct impacted its accounting and financial reporting—and that endorsing the government’s theory of liability would improperly extend the reach of the FCPA beyond what Congress contemplated.<sup>407</sup> Further, Ng argued in the alternative that, to the extent the court agreed with the government’s interpretation of the FCPA, the statute was void for vagueness as applied to him because it was impossible for him to know what conduct would be criminalized.<sup>408</sup>

The court orally denied the motion in March 2022, supplemented by a memorandum opinion in April 2022. The court disagreed with Ng’s narrow interpretation of the internal accounting controls provisions, holding that the plain language of the FCPA encompassed Ng’s conduct and rejected his narrow interpretation of “internal accounting controls.”<sup>409</sup> The court explained that although the statute did not specifically define the term “internal accounting controls,” it defined the term “by reference to the objectives of such a system,” and those objectives made clear that “such systems are intended not only to provide reasonable assurances of accurate internal accounting for purposes of external financial reporting, . . . but also to provide reasonable assurances that the company is adequately controlled . . .”<sup>410</sup> The court concluded that the evidence presented was sufficient for a trier of fact to reasonably conclude that Ng conspired to circumvent such a system by purposefully withholding information from his employer’s Firmwide Capital Committee and Firmwide Suitability Committee.<sup>411</sup> The court also rejected Ng’s vagueness challenge, explaining that the text of the statute “provides fair notice that a conspiracy to circumvent internal controls related to management’s authorization of transactions and access to assets is a criminal offense,” and that “[a]n ordinary person would understand that conspiring to withhold critical information and provide inaccurate information to [the] Firmwide Capital Committee and Firmwide Suitability Committee in order to procure their authorization for the bond deals” would violate the statute.<sup>412</sup>

Ng, who faces up to 30 years in prison, is scheduled to be sentenced in February 2023, but he has moved to continue the date of sentencing to March 7, 2023.<sup>413</sup>

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<sup>406</sup> *United States v. Ng*, No. 18-CR-00538, 2022 WL 1062704, at \*4 (E.D.N.Y. Apr. 8, 2022).

<sup>407</sup> *United States v. Ng*, No. 18-CR-00538, 2022 WL 1062704, at \*5 (E.D.N.Y. Apr. 8, 2022).

<sup>408</sup> *United States v. Ng*, No. 18-CR-00538, 2022 WL 1062704, at \*7 (E.D.N.Y. Apr. 8, 2022).

<sup>409</sup> See *United States v. Ng*, No. 18-CR-00538, 2022 WL 1062704, at \*6-7 (E.D.N.Y. Apr. 8, 2022).

<sup>410</sup> *United States v. Ng*, No. 18-CR-00538, 2022 WL 1062704, at \*7 (E.D.N.Y. Apr. 8, 2022).

<sup>411</sup> *United States v. Ng*, No. 18-CR-00538, 2022 WL 1062704, at \*7 (E.D.N.Y. Apr. 8, 2022).

<sup>412</sup> *United States v. Ng*, No. 18-CR-00538, 2022 WL 1062704, at \*9 (E.D.N.Y. Apr. 8, 2022).

<sup>413</sup> See Order Granting Prob. Status Rep., *United States v. Ng*, No. 18-CR-00538 (E.D.N.Y. Nov. 4, 2022) ECF No. 218.

## 2. *United States v. Lawrence Hoskins*

The DOJ has continued to face challenges in ongoing individual prosecutions, including challenges to the use of agency theory to reach conduct under the FCPA.<sup>414</sup> In August 2022, the US Court of Appeals for the Second Circuit issued another decision in the prosecution of Lawrence Hoskins, a long-running criminal action that holds significant implications for the reach of the FCPA over foreign individuals and companies.<sup>415</sup> In its second opinion in this case arising out of the DOJ's prosecution of French power company Alstom, the Second Circuit was asked to determine the reach of a provision of the FCPA that renders unlawful certain acts by an "agent" of "a domestic concern."<sup>416</sup> Siding with the defendant, the court held that Lawrence Hoskins, a UK national who formerly worked for a UK subsidiary of Alstom, was not acting as an "agent" of the US subsidiary of Alstom S.A., Alstom Power, Inc. (API), that hired consultants to bribe Indonesian government officials, relying largely on a finding that API had not exercised control over Hoskins sufficient to make him its agent.<sup>417</sup>

In 2013, the DOJ indicted Hoskins on charges alleging that, from 2002 to 2009, API had retained consultants to bribe Indonesian officials to help secure a \$118 million contract to build power stations for Indonesia's state-owned electricity company.<sup>418</sup> Although Hoskins never worked in a direct capacity for API and had not taken any action within the US, the DOJ alleged that he was nonetheless liable because he authorized payments to these consultants with the knowledge that portions of the payments were intended to cover bribes.<sup>419</sup>

In 2015, Judge Janet Bond Arterton of the US District Court for the District of Connecticut dismissed one count of conspiracy against Hoskins to the extent that it relied upon the theory that an individual who did not fall within any of the categories of individuals enumerated within the anti-bribery provisions of the FCPA could be prosecuted for conspiring to violate the anti-bribery provisions of the FCPA.<sup>420</sup> The court however declined to dismiss FCPA conspiracy charges alleging that Hoskins acted as an "agent of a domestic concern" under § 78dd-2.<sup>421</sup> On appeal

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<sup>414</sup> For example, in 2017, the DOJ used an agency theory to indict Daisy Teresa Rafoi-Bleuler, a Swiss citizen and asset manager of a Swiss company, on bribery charges related to an investigation into corruption in Venezuela. WilmerHale, *Global Anti-Bribery Year-in-Review: 2020 Developments and Predictions for 2021*, at 58 (Jan. 28, 2021), <https://www.wilmerhale.com/en/insights/client-alerts/20210126-2020-global-antibribery-yearinreview>. In November 2021, the District Court for the Southern District of Texas granted a motion to dismiss the indictment for lack of jurisdiction, rejecting the DOJ's agency theory, and the Department's appeal of this decision is pending in the Fifth Circuit. See Memo. Op. & Order, *United States v. Rafoi-Bleuler*, No. 17-CR-00514, at 13-18 (S.D. Tex. Nov. 10, 2021) ECF No. 255; Notice of Appeal, *United States v. Rafoi-Bleuler*, No. 17-CR-00514 (S.D. Tex. Dec. 7, 2021) ECF No. 257.

<sup>415</sup> See *United States v. Hoskins*, 44 F.4th 140 (2d Cir. 2022).

<sup>416</sup> *United States v. Hoskins*, 44 F.4th 140, 145 (2d Cir. 2022).

<sup>417</sup> *United States v. Hoskins*, 44 F.4th 140, 145 (2d Cir. 2022).

<sup>418</sup> *United States v. Hoskins*, 44 F.4th 140, 146-47 (2d Cir. 2022).

<sup>419</sup> *United States v. Hoskins*, 902 F.3d 69, 72-73 (2d Cir. 2018).

<sup>420</sup> *United States v. Hoskins*, 123 F. Supp. 3d 316, 317 (D. Conn. 2015), aff'd in part, rev'd in part, 902 F.3d 69 (2d Cir. 2018).

<sup>421</sup> *United States v. Hoskins*, 123 F. Supp. 3d 316, 317 (D. Conn. 2015), aff'd in part, rev'd in part, 902 F.3d 69 (2d Cir. 2018).

(*Hoskins I*), the Second Circuit upheld the dismissal of the conspiracy charge but remanded the case for trial on the question of whether Hoskins was guilty as an agent of API.<sup>422</sup>

In November 2019, a jury determined that Hoskins was acting as an agent of API and convicted Hoskins on several counts, including FCPA and related conspiracy charges.<sup>423</sup> Then, in a rare occurrence, Judge Arterton overturned the jury's FCPA verdict, ruling that the government failed to present sufficient evidence to establish an agency relationship between Hoskins and API.<sup>424</sup> The DOJ appealed (*Hoskins II*), with Hoskins cross-appealing on issues related to the Speedy Trial Act and Sixth Amendment, venue, and additional jury instructions.<sup>425</sup>

In August 2022, a year after hearing oral arguments, the Second Circuit issued its opinion in *Hoskins II*. The Court found there was insufficient evidence of an agency relationship between Hoskins and API and upheld the district court's acquittal of Hoskins on the FCPA charges.<sup>426</sup> In a split decision on this issue, a majority of the panel provided valuable guidance on the key elements of an agency relationship—guidance that holds implications for future FCPA actions. The majority began its analysis by confirming that the “common law meaning of agency” applied.<sup>427</sup> Drawing on Second Circuit precedent, the majority explained that “[t]he three elements necessary to an agency relationship are (1) a manifestation by the principal that the agent will act for him; (2) acceptance by the agent of the undertaking; and (3) an understanding between the parties that the principal will be in control of the undertaking.”<sup>428</sup>

The majority rested its decision primarily on API's lack of control over Hoskins. It first acknowledged there was evidence that Hoskins “collaborated with and supported” API and an employee centrally involved in the bribery scheme, however, the evidence failed to show that API “actually controlled Hoskins's actions.”<sup>429</sup> This conclusion relied in part on Alstom's corporate structure: Hoskins was employed by Alstom's UK subsidiary and assigned to work in the “International Network” department, supporting operational business units “on an as-needed basis.”<sup>430</sup> API had not directly hired Hoskins, could not fire him, and did not set or influence

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<sup>422</sup> *United States v. Hoskins*, 902 F.3d 69, 72-73, 97-98 (2d Cir. 2018).

<sup>423</sup> Verdict Form, *United States v. Hoskins*, No. 12-CR-00238, at 1-3 (D. Conn. Nov. 8, 2019) ECF No. 583; U.S. Department of Justice Press Release No. 19-1219: Former Senior Alstom Executive Convicted at Trial of Violating the Foreign Corrupt Practices Act, Money Laundering and Conspiracy (Nov. 8, 2019), <https://www.justice.gov/opa/pr/former-senior-alstom-executive-convicted-trial-violating-foreign-corrupt-practices-act-money>. The jury also convicted Hoskins of three counts of money laundering and one count of conspiracy to launder money. See *United States v. Hoskins*, 44 F.4th 140, 147 (2d Cir. 2022).

<sup>424</sup> Ruling on Def.'s Rule 29(C) and Rule 23 Motions, *United States v. Lawrence Hoskins*, No. 12-CR-00238, at 18 (D. Conn. Feb. 26, 2020) ECF No. 617. Judge Arterton denied Hoskins's motion for a judgment of acquittal on the money laundering and related conspiracy to launder money charges. See *id.* at 11.

<sup>425</sup> Br. of Pl.-Appellant-Cross Appellee, *United States v. Hoskins*, No. 20-842, at xi (2d Cir. July 13, 2020); Br. of Def.-Appellee-Cross Appellant, *United States v. Hoskins*, No. 20-842, at xi (2d Cir. Oct. 13, 2020).

<sup>426</sup> *United States v. Hoskins*, 44 F.4th 140, 145 (2d Cir. 2022).

<sup>427</sup> *United States v. Hoskins*, 44 F.4th 140, 149 (2d Cir. 2022).

<sup>428</sup> *United States v. Hoskins*, 44 F.4th 140, 149 (2d Cir. 2022).

<sup>429</sup> *United States v. Hoskins*, 44 F.4th 140, 150 (2d Cir. 2022).

<sup>430</sup> *United States v. Hoskins*, 44 F.4th 140, 160 (2d Cir. 2022).

Hoskins's compensation.<sup>431</sup> The majority concluded that this "lack of control" was "fundamental to the question of whether Hoskins was an agent" because a key justification for a principal's accountability for the acts of an agent is the "ability to select and control the agent and to terminate the agency relationship."<sup>432</sup>

The majority further observed that the relationship between Hoskins and API lacked "any indication that Hoskins had any authority to act on [API's] behalf."<sup>433</sup> For instance, there was no evidence Hoskins was authorized to enter into agreements on behalf of API, nor that Hoskins could independently hire a consultant without API's instruction.<sup>434</sup> This fact, the majority explained, was inconsistent with an agency relationship, under which an agent could "bind principals to certain legal commitments."<sup>435</sup> Ultimately, while acknowledging that "there is some evidence that Hoskins supported [API] in his working relationship," the Court nonetheless concluded this evidence was insufficient to establish that API actually "exercised control over the scope and duration of its relationship with Hoskins."<sup>436</sup> And without that control, there could be no finding of agency.<sup>437</sup>

Dissenting on majority's finding on agency, Judge Raymond Lohier explained that he would reverse the district court's acquittal of Hoskins on agency grounds.<sup>438</sup> While he acknowledged that Alstom's corporate organizational structure "favors the majority's account," he observed that the formal structure masked "the reality of the relationship[s] . . . on the ground."<sup>439</sup> Judge Lohier argued that evidence indicating that Hoskins's work for API was performed on an "as requested" basis supported an agency finding, as it was up to subsidiaries like API to initiate the agency relationship with Hoskins, thus giving API authority to revoke Hoskins's authority to work on its behalf.<sup>440</sup> Judge Lohier acknowledged that the evidence of an agency relationship was "slim" but sufficient, in his mind, to support the jury's verdict on this issue.<sup>441</sup>

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<sup>431</sup> *United States v. Hoskins*, 44 F.4th 140, 150 (2d Cir. 2022).

<sup>432</sup> *United States v. Hoskins*, 44 F.4th 140, 150 (2d Cir. 2022).

<sup>433</sup> *United States v. Hoskins*, 44 F.4th 140, 151 (2d Cir. 2022).

<sup>434</sup> *United States v. Hoskins*, 44 F.4th 140, 151 (2d Cir. 2022).

<sup>435</sup> *United States v. Hoskins*, 44 F.4th 140, 151 (2d Cir. 2022).

<sup>436</sup> *United States v. Hoskins*, 44 F.4th 140, 152 (2d Cir. 2022).

<sup>437</sup> *United States v. Hoskins*, 44 F.4th 140, 152 (2d Cir. 2022). After dispensing with the government's appeal, the majority moved on to consider Hoskins's cross-appeals and affirmed the district court's ruling denying Hoskins's motion to dismiss the indictment under the Speedy Trial Act and on Sixth Amendment grounds. *Id.* at 152-54. It likewise dismissed Hoskins's contentions that the district court committed reversible error in its jury instructions on withdrawal from a conspiracy and on venue. *Id.* at 154-58.

<sup>438</sup> *United States v. Hoskins*, 44 F.4th 140, 159 (2d Cir. 2022) (Lohier, J., concurring in part and dissenting in part).

<sup>439</sup> *United States v. Hoskins*, 44 F.4th 140, 160 (2d Cir. 2022) (Lohier, J., concurring in part and dissenting in part).

<sup>440</sup> *United States v. Hoskins*, 44 F.4th 140, 161 (2d Cir. 2022) (Lohier, J., concurring in part and dissenting in part).

<sup>441</sup> *United States v. Hoskins*, 44 F.4th 140, 161 (2d Cir. 2022) (Lohier, J., concurring in part and dissenting in part).

Although the full effects of *Hoskins II* are yet to be seen, the Second Circuit's opinion may give federal enforcement authorities pause before they charge individuals with violations of the FCPA under an agency theory. The *Hoskins II* decision is also likely to spur federal authorities to place a renewed focus on gathering evidence to support the fact-intensive inquiry required to assess whether a US company exerts sufficient control over alleged agents.<sup>442</sup>

The Second Circuit's decision is even more notable given two separate hallmarks of the FCPA enforcement space: the relative dearth of FCPA case law (especially appellate case law) and the increasing use of agency principles by the DOJ and SEC to charge parent organizations based on actions wholly undertaken by their subsidiaries. Numerous FCPA resolutions have included bribery charges against a parent organization under the FCPA based on the actions of the parent's alleged agents, including in some cases its wholly owned foreign subsidiaries and subsidiary employees.<sup>443</sup>

### **3. *United States v. Rafoi-Bleuler***

Another case that illustrates difficulties the DOJ may face in bringing FCPA prosecutions against foreign nationals is *United States v. Rafoi-Bleuler*. On October 6, 2022, the Fifth Circuit heard arguments for the related cases, *United States v. Rafoi-Bleuler* and *United States v. Paulo Jorge Da Costa Casqueiro Murta*, discussed below. Daisy Rafoi-Bleuler is a Swiss citizen who was indicted in 2019 in connection with the 2017 indictments of several Venezuelan citizens who were current and former employees of Petroleos de Venezuela, S.A. (PDVSA), a state-owned oil company, or its affiliates.<sup>444</sup> The 2019 indictment alleged that Rafoi-Bleuler and her wealth management company assisted the PDVSA defendants in laundering the proceeds of a bribery scheme through international wire transfers and by corruptly soliciting and participating in "selecting vendors for PDVSA in exchange for illegal kickbacks."<sup>445</sup>

On November 10, 2021, Judge Kenneth Hoyt of the US District Court for the Southern District of Texas dismissed FCPA and Money Laundering Control Act of 1986 (MLCA) charges against Rafoi-Bleuler. Rafoi-Bleuler had argued that the government lacked jurisdiction to prosecute her, that the indictment was unconstitutionally vague concerning her status as an "agent," and that the

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<sup>442</sup> See WilmerHale, *Second Circuit Limits Reach of FCPA's Anti-Bribery Provisions Charged Under Agency Principles* (Aug. 30, 2022), <https://www.wilmerhale.com/en/insights/client-alerts/20220830-second-circuit-limits-reach-of-fcpas-anti-bribery-provisions-charged-under-agency-principles>.

<sup>443</sup> See, e.g., Order Instituting Cease-and-Desist Proc, *In the Matter of United Indus. Corp.*, Rel. No. 60005, File No. 3-13495 (May 29, 2009); Order Instituting Cease-and-Desist Proc, *In the Matter of Alcoa Inc.*, Exchange Act Release No. 71261 (Jan. 9, 2014); Order Instituting Cease-and-Desist Proc, *In the Matter of PTC Inc.*, Rel. No. 77145, File No. 3-17118 (Feb. 16, 2016); Deferred Prosecution Agreement, *United States v. Telefonaktiebolaget LM Ericsson*, No. 19-CR-00884, Attach. A ¶ 1 (S.D.N.Y. Dec. 6, 2019) ECF No. 6 ("Ericsson was a holding company operating worldwide through its subsidiaries and affiliated entities. The subsidiaries acted as divisions of the parent, rather than separate and independent entities."); Deferred Prosecution Agreement, *United States v. Stericycle, Inc.*, No. 22-CR-20156, Attach. A at ¶¶ 2- 13 (S.D. Fla. Apr. 18, 2022) ECF No. 14.

<sup>444</sup> See WilmerHale, *Global Anti-Bribery Year-in-Review: 2021 Developments and Predictions for 2022*, at 59-61 (Jan. 27, 2022), <https://www.wilmerhale.com/en/insights/client-alerts/20220127-2021-global-anti-bribery-year-in-review>.

<sup>445</sup> Memo. & Order, *United States v. Rafoi-Bleuler*, No. 17-CR-00514, at 4 (S.D. Tex. Nov. 10, 2021) ECF No. 255; see also Superseding Indictment, *United States v. De Leon Perez*, No. 17-CR-00514 (S.D. Tex. Apr. 24, 2019) ECF No. 129.

indictment failed to state a prosecutable offense.<sup>446</sup> In order to establish jurisdiction for the money laundering and FCPA claims, the DOJ argued that Rafoi-Bleuler was an agent of certain US persons and US companies identified in the indictment, each alleged to be a domestic concern.<sup>447</sup> By contrast, Rafoi-Bleuler argued that she had never acted as an agent of a domestic concern and that none of the acts for which she was charged took place within the US.<sup>448</sup> Therefore, she argued, because the FCPA and MLCA could not apply to her under such circumstances, the court lacked jurisdiction.<sup>449</sup> Judge Hoyt agreed. With respect to the FCPA, the court noted that “[j]urisdiction over the defendant under the FCPA rests in whether the government can establish that the defendant was an ‘officer, director, employee or agent’ of a domestic concern,” citing *Hoskins I*, discussed above.<sup>450</sup> With respect to the MLCA, the court concluded that it did not confer jurisdiction over a foreign national where none of the defendant’s alleged conduct took place within the US.<sup>451</sup>

Further, the court found that the FCPA and MLCA were unconstitutionally vague as to the meaning of the word “agent” as applied to Rafoi-Bleuler.<sup>452</sup> The court found that:

“[t]he application of the term ‘agent’ to the defendant, as a basis for jurisdiction, is such a novel application that no court has interpreted the statute or rendered a judicial decision that fairly discloses the manner in which the term may be applied to establish jurisdiction.”<sup>453</sup>

In December 2021, the DOJ filed a notice of appeal in the Fifth Circuit. In its brief in support of its appeal, the DOJ argued that the court erred in dismissing the FCPA conspiracy charge on two grounds. First, the DOJ argued that Rafoi-Bleuler need not be subject to the direct prohibitions of the FCPA statute, and that conspirator liability “fully applies to those located abroad who conspire with individuals in the US, in order to capture their culpability in assisting domestic conduct.”<sup>454</sup> In so doing, the DOJ argued that *Hoskins I*, upon which the district court relied, was incorrectly

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<sup>446</sup> Memo. & Order, *United States v. Rafoi-Bleuler*, No. 17-CR-00514, at 6 (S.D. Tex. Nov. 10, 2021) ECF No. 255.

<sup>447</sup> Memo. & Order, *United States v. Rafoi-Bleuler*, No. 17-CR-00514, at 5 (S.D. Tex. Nov. 10, 2021) ECF No. 255.

<sup>448</sup> Memo. & Order, *United States v. Rafoi-Bleuler*, No. 17-CR-00514, at 7 (S.D. Tex. Nov. 10, 2021) ECF No. 255.

<sup>449</sup> Memo. & Order, *United States v. Rafoi-Bleuler*, No. 17-CR-00514, at 9, 11-12 (S.D. Tex. Nov. 10, 2021) ECF No. 255.

<sup>450</sup> Memo. & Order, *United States v. Rafoi-Bleuler*, No. 17-CR-00514, at 14 (S.D. Tex. Nov. 10, 2021) ECF No. 255.

<sup>451</sup> Memo. & Order, *United States v. Rafoi-Bleuler*, No. 17-CR-00514, at 19-20 (S.D. Tex. Nov. 10, 2021) ECF No. 255.

<sup>452</sup> Memo. & Order, *United States v. Rafoi-Bleuler*, No. 17-CR-00514, at 21-22 (S.D. Tex. Nov. 10, 2021) ECF No. 255.

<sup>453</sup> Memo. & Order, *United States v. Rafoi-Bleuler*, No. 17-CR-00514, at 22 (S.D. Tex. Nov. 10, 2021) ECF No. 255.

<sup>454</sup> Br. for the United States of America, *United States v. Rafoi-Bleuler*, No. 21-20658, at 11 (5th Cir. Mar. 30, 2022) ECF No. 29.

decided.<sup>455</sup> Second, the DOJ argued that it adequately pleaded that Rafoi-Bleuler acted as an agent of a domestic concern, and further argued that whether Rafoi-Bleuler qualifies as an agent is an issue of fact for the jury to determine.<sup>456</sup> The Fifth Circuit will decide whether the FCPA actually casts a wide net over foreign bribery and whether it applies to every person involved in the scheme, including foreign nationals.

Should the Fifth Circuit reverse the district court and agree with the DOJ's argument that a defendant need not fall within the enumerated categories of the FCPA's anti-bribery provisions to be held culpable for conspiracy liability, it would establish a direct circuit split with *Hoskins I*. This may lead district courts in other circuits to diverge from *Hoskins I* and may encourage the DOJ to charge conspiracy liability more frequently in similar circumstances. On the other hand, should the Fifth Circuit affirm the district court in full with respect to its holding that the FCPA is unconstitutionally vague with respect to the term "agent," as applied to foreign nationals who lack "an established agency relationship [with a domestic concern] that occurred in the [US],"<sup>457</sup> it may establish some tension with *Hoskins I* insofar as *Hoskins I* placed no such geographic limitations on an agency relationship.

#### **4.       *United States v. Paulo Jorge Da Costa Casqueiro-Murta***

In the same superseding indictment, discussed above, Judge Hoyt also dismissed the charges against defendant Paulo Jorge Da Costa Casqueiro-Murta (Murta), a citizen of Portugal and Switzerland, in part on the grounds that the statute of limitations had expired.<sup>458</sup> Murta was indicted on FCPA and MLCA charges in April 2019 in connection with an alleged scheme to pay officials of PDVSA and PDVSA's affiliates, and to launder money in connection with the bribery scheme.<sup>459</sup>

In December 2014, the DOJ issued a mutual legal assistance treaty (MLAT) request for bank records from several Swiss banks while investigating conduct based partially in Switzerland involving two former employees of PDVSA or its affiliates, Cesar David Rincon Godby (Rincon), Abraham Jose Shiera Bastidas (Shiera), and their affiliates and associates.<sup>460</sup> In September 2015, after the Swiss government did not promptly respond to the MLAT, the DOJ obtained a tolling order

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<sup>455</sup> Br. for the United States of America, *United States v. Rafoi-Bleuler*, No. 21-20658, at 21, 22-33 (5th Cir. Mar. 30, 2022) ECF No. 29.

<sup>456</sup> Br. for the United States of America, *United States v. Rafoi-Bleuler*, No. 21-20658, at 13 (5th Cir. Mar. 30, 2022) ECF No. 29.

<sup>457</sup> Memo. & Order, *United States v. Rafoi-Bleuler*, No. 17-CR-00514, at 21-22 (S.D. Tex. Nov. 10, 2021) (emphasis added) ECF No. 255.

<sup>458</sup> See *United States v. De Leon-Perez*, No. 17-CR-00514, 2022 WL 4002321, at \*2, \*11 (S.D. Tex. July 11, 2022). Judge Hoyt dismissed four counts of the indictment on alternative theories, including failure to state a claim, lack of jurisdiction, denial of due process rights, and vagueness.

<sup>459</sup> See *United States v. De Leon-Perez*, No. 17-CR-00514, 2022 WL 4002321, at \*1, \*5 (S.D. Tex. July 11, 2022).

<sup>460</sup> See *United States v. De Leon-Perez*, No. 17-CR-00514, 2022 WL 4002321, at \*4-5 (S.D. Tex. July 11, 2022).

from the court suspending the statute of limitations with respect to Rincon, Shiera, and their associates; Judge Hoyt found that Murta was not a target of the DOJ's investigation at that time.<sup>461</sup> A grand jury returned indictments against Rincon, Shiera, and four other individual defendants in December 2015.<sup>462</sup> In January 2017, the DOJ secured a second tolling order concerning an additional MLAT request to Swiss authorities, seeking what the government would later describe as supplemental or additional evidence.<sup>463</sup> A grand jury again returned an indictment in August 2017 based on the same charges as the December 2015 indictment.<sup>464</sup> Murta was indicted in April 2019 and moved to dismiss the indictment.<sup>465</sup>

Murta argued that the superseding indictment should be dismissed for violating the five-year statute of limitations applicable to the FCPA, among other arguments.<sup>466</sup> Specifically, Murta argued that the January 2017 tolling order, which permitted the government to again extend the statute of limitations for an additional three years, was improvidently granted because, in part, it was entered into after a grand jury returned an indictment against other defendants whose conduct was the subject of the first tolling order.<sup>467</sup> Judge Hoyt agreed with Murta, emphasizing that 18 U.S.C. § 3292(b), states that a tolling period is satisfied when the foreign authority takes "final action" on the MLAT request, and cited case law holding that a tolling order extends the limitations period only for the time "before" the return of an indictment.<sup>468</sup> Judge Hoyt reasoned that Swiss authorities had to have taken "final action" on the 2014 MLAT at some point before the grand jury's return of an indictment, as the records received from the Swiss authorities permitted the grand jury to return the December 2015 indictment.<sup>469</sup> Therefore, the September 2015 tolling order's period of suspension ended at some point before the indictment was returned on December 10, 2015.

The court rejected the government's argument that the September 2015 tolling order's period of suspension continued after the return of the indictment in December 2015 because the government issued a second, "supplemental" MLAT to Swiss authorities in November 2016.<sup>470</sup> The court found that there was no evidence of confusion concerning the nature or scope of the original December 2014 MLAT on the part of Swiss authorities, and that the grand jury did not request clarification or

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<sup>461</sup> See *United States v. De Leon-Perez*, No. 17-CR-00514, 2022 WL 4002321, at \*4 (S.D. Tex. July 11, 2022); *Tolling Order*, No. 15-MC-2022 (S.D. Tex. Sept. 21, 2015).

<sup>462</sup> See *United States v. De Leon-Perez*, No. 17-CR-00514, 2022 WL 4002321, at \*5 (S.D. Tex. July 11, 2022).

<sup>463</sup> See *United States v. De Leon-Perez*, No. 17-CR-00514, 2022 WL 4002321, at \*6 (S.D. Tex. July 11, 2022); *Tolling Order*, 17-MC-0094 (S.D. Tex. Jan. 12, 2017).

<sup>464</sup> See *United States v. De Leon-Perez*, No. 17-CR-00514, 2022 WL 4002321, at \*5 (S.D. Tex. July 11, 2022); *United States v. Leon-Perez*, No. 17-CR-00514 (S.D. Tex. Aug. 23, 2017) ECF No. 1.

<sup>465</sup> See *United States v. De Leon-Perez*, No. 17-CR-00514, 2022 WL 4002321, at \*5 (S.D. Tex. July 11, 2022).

<sup>466</sup> See *United States v. De Leon-Perez*, No. 17-CR-00514, 2022 WL 4002321, at \*1 (S.D. Tex. July 11, 2022).

<sup>467</sup> See *United States v. De Leon-Perez*, No. 17-CR-00514, 2022 WL 4002321, at \*6 (S.D. Tex. July 11, 2022).

<sup>468</sup> See *United States v. De Leon-Perez*, No. 17-CR-00514, 2022 WL 4002321, at \*7 (S.D. Tex. July 11, 2022) (citing *Texas Food Indus. Ass'n v. United States Dep't of Agric.*, 81 F.3d 578, 581–82 (5th Cir. 1996)).

<sup>469</sup> See *United States v. De Leon-Perez*, No. 17-CR-00514, 2022 WL 4002321, at \*5, \*7 (S.D. Tex. July 11, 2022).

<sup>470</sup> See *United States v. De Leon-Perez*, No. 17-CR-00514, 2022 WL 4002321, at \*7 (S.D. Tex. July 11, 2022).

supplementation about the December 2014 MLAT.<sup>471</sup> Judge Hoyt concluded that “nothing in [18 U.S.C. § 3292] permits the government to issue multiple MLATs simply as a tool to extend tolling.”<sup>472</sup> Additionally, the court reasoned that even if the January 2017 tolling order were valid, it failed to toll the statute concerning Murta because the individuals subject to the December 2014 MLAT—namely, Rincon, Shiera, and others—were all indicted prior to the 2017 indictment.<sup>473</sup> Therefore, even if it were supplemental to the first MLAT, the November 2016 MLAT did not apply to Murta.<sup>474</sup>

Because the indictment against Murta was brought in April 2019, outside the limitations period as it applied to Murta, Judge Hoyt dismissed the charges against Murta.<sup>475</sup>

Judge Hoyt held that a tolling order predicated on an MLAT request is no longer in effect once (1) foreign authorities provide the information requested, (2) there is no confusion about the nature or scope of the request, and (3) the parties subject to the MLAT are indicted. Judge Hoyt’s approach underscores some of the challenges the government might face with respect to the limitations period when investigating overseas conduct where documents and information are sought pursuant to MLAT requests, particularly with respect to individuals who are not initially targets of the investigation in relying on MLAT requests when suspending the statute of limitations period.

##### **5. *Cicel (Beijing) Science and Technology Co. v. Misonix***

In 2013, Cicel (Beijing) Science & Technology Co. Ltd. (Cicel) and Misonix Inc. (Misonix) entered into a distribution agreement, which was set to terminate in May 2018.<sup>476</sup> Under the agreement, Misonix, a New York corporation, agreed to sell its medical devices to Cicel, a Chinese corporation, for distribution in China and Hong Kong.<sup>477</sup>

In 2016, a Misonix employee raised concerns about Cicel’s potentially illegal conduct relating to its distribution of Misonix’s products, to which Misonix responded by hiring the law firm Morgan Lewis & Bockius LLP to conduct an internal investigation.<sup>478</sup> On September 27, 2016, while the investigation was ongoing, Misonix terminated its distribution agreement with Cicel; the next day, Misonix contacted the SEC and DOJ to “voluntarily inform both agencies that the [c]ompany may have had knowledge of certain business practices of the independent Chinese entity that

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<sup>471</sup> See *United States v. De Leon-Perez*, No. 17-CR-00514, 2022 WL 4002321, at \*7 (S.D. Tex. July 11, 2022).

<sup>472</sup> *United States v. De Leon-Perez*, No. 17-CR-00514, 2022 WL 4002321, at \*7 (S.D. Tex. July 11, 2022).

<sup>473</sup> See *United States v. De Leon-Perez*, No. 17-CR-00514, 2022 WL 4002321, at \*7 (S.D. Tex. July 11, 2022).

<sup>474</sup> See *United States v. De Leon-Perez*, No. 17-CR-00514, 2022 WL 4002321, at \*7-8 (S.D. Tex. July 11, 2022).

<sup>475</sup> See *United States v. De Leon-Perez*, No. 17-CR-00514, 2022 WL 4002321, at \*8 (S.D. Tex. July 11, 2022).

<sup>476</sup> *Cicel (Beijing) Sci. & Tech. Co. v. Misonix, Inc.*, No. 17-CV-1642, 2017 WL 4535933, at \*2 (E.D.N.Y Oct. 7, 2017).

<sup>477</sup> *Cicel (Beijing) Sci. & Tech. Co. v. Misonix, Inc.*, No. 17-CV-1642, 2017 WL 4535933, at \*\*1-2 (E.D.N.Y Oct. 7, 2017).

<sup>478</sup> *Cicel (Beijing) Sci. & Tech. Co. v. Misonix, Inc.*, 581 F. Supp. 3d 454, 456-58 (E.D.N.Y. 2022); *Cicel (Beijing) Sci. & Tech. Co. v. Misonix, Inc.*, 331 F.R.D. 218, 223-24 (E.D.N.Y. 2019).

distributes its products in China, which practices raise questions under the [FCPA].<sup>479</sup> Misonix also disclosed this information in its September 28, 2016 Form 8-K filed with the SEC, noting that the investigation was still ongoing and that the company intended to cooperate with the DOJ and SEC as the investigation continued.<sup>480</sup>

In 2017, Cicel brought a variety of civil claims against Misonix stemming from the termination of the distribution agreement.<sup>481</sup> After most of the claims were dismissed, Misonix moved for summary judgment on the remaining three claims: for breach of contract, defamation, and misappropriation of trade secrets.<sup>482</sup> In January 2022, Judge Gary R. Brown of the US District Court for the Eastern District of New York granted summary judgment on the breach of contract claim.<sup>483</sup> Citing the results of the internal investigation, including emails from Cicel management referencing “under the table” deals which the court deemed “incontrovertible proof” of illegal activity, the court reasoned that Misonix “certainly had a right and an obligation to act promptly to protect [itself] from FCPA liability” by terminating the distribution agreement.<sup>484</sup> Moreover, based on the “undisputed evidence establish[ing] that Cicel was using illegal methods in connection with the contract,” such “illegal conduct . . . render[ed] the contract unenforceable.”<sup>485</sup>

Although there were no FCPA charges involved in the case, *Cicel (Beijing) Sci. & Tech. Co. v. Misonix, Inc.* provides helpful guidance—at least in EDNY—on the circumstances under which a company may lawfully terminate a contract when its counterparty is suspected of violating the FCPA. However, it is not clear what quantum of evidence a party would have to muster regarding a counterparty’s suspected misconduct to justify an early termination of a contract where there is not “incontrovertible” proof as in this case.

## B. Legislative Developments

### 1. Countering Corporate Corruption in China Act

In February 2022, US Senator Marco Rubio of Florida introduced a bill to crack down on US corruption in China. The bill, named Countering Corporate Corruption in China Act, would use the

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<sup>479</sup> *Cicel (Beijing) Sci. & Tech. Co. v. Misonix, Inc.*, 331 F.R.D. 218, 223-25 (E.D.N.Y. 2019) (second alteration in original).

<sup>480</sup> *Cicel (Beijing) Sci. & Tech. Co. v. Misonix, Inc.*, 331 F.R.D. 218, 224-25 (E.D.N.Y. 2019).

<sup>481</sup> *Cicel (Beijing) Sci. & Tech. Co. v. Misonix, Inc.*, No. 17-CV-1642, 2017 WL 4535933, at \*1 (E.D.N.Y Oct. 7. 2017).

<sup>482</sup> *Cicel (Beijing) Sci. & Tech. Co. v. Misonix, Inc.*, 581 F. Supp. 3d 454, 455 (E.D.N.Y. 2022); *Cicel (Beijing) Sci. & Tech. Co. v. Misonix, Inc.*, No. 17-CV-1642 , 2020 WL 376581, at \*9 (E.D.N.Y. Jan. 23, 2020); *Cicel (Beijing) Sci. & Tech. Co. v. Misonix, Inc.*, No. 17-CV-1642 , 2017 WL 4535933, at \*1 (E.D.N.Y Oct. 7. 2017).

<sup>483</sup> *Cicel (Beijing) Sci. & Tech. Co. v. Misonix, Inc.*, 581 F. Supp. 3d 454, 460 (E.D.N.Y. 2022). Summary judgment was also granted as to the defamation claim, and it was denied as to the trade secret claim. *Id.* With respect to the defamation claim, which was based on the information Misonix disclosed in its 8-K filing, the court explained that the statement about Cicel could not be defamatory because it was true. *Id.* at 459. As to the trade secret claim, the court denied summary judgment because there were factual disputes as to whether certain activity by Misonix met the elements of such a claim. *Id.* at 459-460.

<sup>484</sup> *Cicel (Beijing) Sci. & Tech. Co. v. Misonix, Inc.*, 581 F. Supp. 3d 454, 457-58 (E.D.N.Y. 2022).

<sup>485</sup> *Cicel (Beijing) Sci. & Tech. Co. v. Misonix, Inc.*, 581 F. Supp. 3d 454, 458 (E.D.N.Y. 2022).

FCPA to target companies that support the Chinese Communist Party's (CCP) propaganda efforts.<sup>486</sup> The bill expands activities prohibited under the FCPA applicable to issuers of securities, domestic concerns, and others. For example, it includes as prohibited corrupt practices actions that excuse China's genocide and "severe human rights abuses with respect to Uyghurs, Kazakhs, Kyrgyz, and members of other predominantly Muslim ethnic groups" in the Xinjiang Autonomous Region of China, actions that support censorship or other activities with respect to Hong Kong, actions that advance the CCP's alleged propaganda efforts, political advocacy in favor of the CCP, and investing in specified Chinese entities.<sup>487</sup>

The bill has been referred to the Committee on Banking, Housing, and Urban Affairs.

### C. Opinion Procedure Releases

#### 1. DOJ Issues FCPA Opinion Procedure Release (22-01)

In January 2022, the DOJ issued a new opinion procedure release interpreting the FCPA's application to "unusual and exigent circumstances" regarding payments made under physical duress in response to extortionate demands by foreign officials.<sup>488</sup> Notably, in light of "the risk of imminent harm to the health and well-being of the individuals noted in the Request," the DOJ issued a preliminary opinion on October 21, 2021 before releasing its full response three months later.<sup>489</sup>

The requestor, a US-based company, owned a ship that inadvertently anchored in an unnamed country's waters while trying to anchor in international waters.<sup>490</sup> The country's navy seized the ship and its crew and jailed the ship's captain, who had serious medical conditions.<sup>491</sup> Shortly thereafter, a party purporting to act on behalf of the country's navy approached the requestor and demanded a \$175,000 payment to effectuate the release of the vessel, its captain, and its crew.<sup>492</sup> After failing to find another way to secure the release—including by contacting the local US embassy—the requestor sought the DOJ's advice regarding the legality of making the payment.<sup>493</sup>

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<sup>486</sup> Countering Corporate Corruption in China Act of 2022, S. 3584, 117th Cong. (2022).

<sup>487</sup> Countering Corporate Corruption in China Act of 2022, S. 3584, 117th Cong. § 2 (2022).

<sup>488</sup> U.S. Department of Justice, FCPA Opinion Proc. Release No. 22-1 (Jan. 21, 2022), <https://www.justice.gov/criminal-fraud/page/file/1466596/download>.

<sup>489</sup> U.S. Department of Justice, FCPA Opinion Proc. Release No. 22-1 (Jan. 21, 2022), <https://www.justice.gov/criminal-fraud/page/file/1466596/download>.

<sup>490</sup> U.S. Department of Justice, FCPA Opinion Proc. Release No. 22-1 (Jan. 21, 2022), <https://www.justice.gov/criminal-fraud/page/file/1466596/download>.

<sup>491</sup> U.S. Department of Justice, FCPA Opinion Proc. Release No. 22-1 (Jan. 21, 2022), <https://www.justice.gov/criminal-fraud/page/file/1466596/download>.

<sup>492</sup> U.S. Department of Justice, FCPA Opinion Procedure Release No. 22-1 (Jan. 21, 2022), <https://www.justice.gov/criminal-fraud/page/file/1466596/download>.

<sup>493</sup> U.S. Department of Justice, FCPA Opinion Procedure Release No. 22-1 (Jan. 21, 2022), <https://www.justice.gov/criminal-fraud/page/file/1466596/download>.

Based on those facts, the DOJ concluded that making the payment would not violate the anti-bribery provisions of the FCPA because any such payment would neither be made “corruptly” nor to “obtain or retain business” pursuant to 15 U.S.C. § 78dd-2(a).<sup>494</sup> First, the payment would not be made corruptly—with an intent to wrongfully influence the recipient—because the primary intent of the payment would be “to avoid imminent and potentially serious harm to the captain and the crew of the Requestor vessel.”<sup>495</sup> Second, the payment would not be made to obtain or retain business because the requestor had no business in the country.<sup>496</sup> Instead, “the entire episode appear[ed] to be the result of an error” made when anchoring the vessel, and the requestor had sought other means of securing its release and that of its crew before seeking to make the payment.<sup>497</sup> The DOJ distinguished this situation from “payments under circumstances that companies may perceive as economically coercive, especially in countries in which they are in historical, pending, ongoing, anticipated, or sought after business relationships with government actors,” which “may well give rise to liability under the FCPA.”<sup>498</sup>

#### D. Other Developments

##### 1. FinCEN Advisory Regarding Kleptocracy and Foreign Public Corruption

In April 2022, the US Department of Treasury’s Financial Crimes Enforcement Network (FinCEN) issued an advisory on kleptocracy and foreign public corruption.<sup>499</sup> As part of the Biden administration’s fight against corruption as a “core national security interest,”<sup>500</sup> the advisory urges financial institutions to focus efforts on identifying the proceeds of foreign public corruption.<sup>501</sup> The advisory provides guidance on kleptocrats and other corrupt public officials and describes Russia as being “of particular concern” as a kleptocracy, given “the nexus between corruption, money laundering, malign influence and armed interventions abroad, and sanctions evasion.”<sup>502</sup>

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<sup>494</sup> U.S. Department of Justice, FCPA Opinion Procedure Release No. 22-1 (Jan. 21, 2022), <https://www.justice.gov/criminal-fraud/page/file/1466596/download>.

<sup>495</sup> U.S. Department of Justice, FCPA Opinion Procedure Release No. 22-1 (Jan. 21, 2022), <https://www.justice.gov/criminal-fraud/page/file/1466596/download>.

<sup>496</sup> U.S. Department of Justice, FCPA Opinion Procedure Release No. 22-1 (Jan. 21, 2022), <https://www.justice.gov/criminal-fraud/page/file/1466596/download>.

<sup>497</sup> U.S. Department of Justice, FCPA Opinion Procedure Release No. 22-1 (Jan. 21, 2022), <https://www.justice.gov/criminal-fraud/page/file/1466596/download>.

<sup>498</sup> U.S. Department of Justice, FCPA Opinion Procedure Release No. 22-1 (Jan. 21, 2022), <https://www.justice.gov/criminal-fraud/page/file/1466596/download>.

<sup>499</sup> U.S. Financial Crimes Enforcement Network, Advisory on Kleptocracy and Foreign Public Corruption FIN-2022-A001 (Apr. 14, 2022), <https://www.fincen.gov/sites/default/files/advisory/2022-04-14/FinCEN%20Advisory%20Corruption%20FINAL%20508.pdf>.

<sup>500</sup> See WilmerHale, *2021 Global Anti-Bribery Year-in-Review*, at 25-27 (Jan. 27, 2022), <https://www.wilmerhale.com/en/insights/client-alerts/20220127-2021-global-anti-bribery-year-in-review>.

<sup>501</sup> U.S. Financial Crimes Enforcement Network, Advisory on Kleptocracy and Foreign Public Corruption FIN-2022-A001, at 1 (Apr. 14, 2022), <https://www.fincen.gov/sites/default/files/advisory/2022-04-14/FinCEN%20Advisory%20Corruption%20FINAL%20508.pdf>.

<sup>502</sup> U.S. Financial Crimes Enforcement Network, Advisory on Kleptocracy and Foreign Public Corruption FIN-2022-A001, at 1-3 (Apr. 14, 2022), <https://www.fincen.gov/sites/default/files/advisory/2022-04-14/FinCEN%20Advisory%20Corruption%20FINAL%20508.pdf>.

The advisory highlights two typologies of kleptocracy and foreign public corruption: (1) wealth extraction and (2) laundering illicit proceeds.<sup>503</sup> Examples of wealth extraction include bribery, extortion, and misappropriation or embezzlement of public assets.<sup>504</sup> Bribery often involves payments to foreign government officials by individuals or entities that seek to obtain or retain business, and extortion occurs when such individuals and entities are coerced into making payments.<sup>505</sup> The advisory defines misappropriation and embezzlement of public assets as “broadly encompass[ing] the theft, diversion, or misuse of public funds or resources for personal benefit or enrichment.”<sup>506</sup> Laundering of illicit proceeds may arise in the form of foreign public officials funneling money through shell companies or offshell financial accounts, or by purchasing high-end assets such as real estate and luxury goods.<sup>507</sup>

The advisory also outlines ten financial red flag indicators of kleptocracy and foreign public corruption to assist financial institutions in detecting, preventing, and reporting suspicious transactions.<sup>508</sup> For purposes of suspicious activity reporting, the advisory emphasizes that financial institutions should consider the relevant facts and circumstances of each transaction,

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<sup>503</sup> U.S. Financial Crimes Enforcement Network, Advisory on Kleptocracy and Foreign Public Corruption FIN-2022-A001, at 3-8 (Apr. 14, 2022), <https://www.fincen.gov/sites/default/files/advisory/2022-04-14/FinCEN%20Advisory%20Corruption%20FINAL%20508.pdf>.

<sup>504</sup> U.S. Financial Crimes Enforcement Network, Advisory on Kleptocracy and Foreign Public Corruption FIN-2022-A001, at 3-6 (Apr. 14, 2022), <https://www.fincen.gov/sites/default/files/advisory/2022-04-14/FinCEN%20Advisory%20Corruption%20FINAL%20508.pdf>.

<sup>505</sup> U.S. Financial Crimes Enforcement Network, Advisory on Kleptocracy and Foreign Public Corruption FIN-2022-A001, at 4-5 (Apr. 14, 2022), <https://www.fincen.gov/sites/default/files/advisory/2022-04-14/FinCEN%20Advisory%20Corruption%20FINAL%20508.pdf>.

<sup>506</sup> U.S. Financial Crimes Enforcement Network, Advisory on Kleptocracy and Foreign Public Corruption FIN-2022-A001, at 5-6 (Apr. 14, 2022), <https://www.fincen.gov/sites/default/files/advisory/2022-04-14/FinCEN%20Advisory%20Corruption%20FINAL%20508.pdf>.

<sup>507</sup> U.S. Financial Crimes Enforcement Network, Advisory on Kleptocracy and Foreign Public Corruption FIN-2022-A001, at 6-8 (Apr. 14, 2022), <https://www.fincen.gov/sites/default/files/advisory/2022-04-14/FinCEN%20Advisory%20Corruption%20FINAL%20508.pdf>.

<sup>508</sup> U.S. Financial Crimes Enforcement Network, Advisory on Kleptocracy and Foreign Public Corruption FIN-2022-A001, at 8-9 (Apr. 14, 2022), <https://www.fincen.gov/sites/default/files/advisory/2022-04-14/FinCEN%20Advisory%20Corruption%20FINAL%20508.pdf>. The ten red flags are: “(1) Transactions involving long-term government contracts consistently awarded, through an opaque selection process, to the same legal entity or entities that share similar beneficial ownership structures; (2) Transactions involving services provided to state-owned companies or public institutions by companies registered in high-risk jurisdictions; (3) Transactions involving official embassy or foreign government business conducted through personal accounts; (4) Transactions involving public officials related to high-value assets, such as real estate or other luxury goods, that are not commensurate with the reported source of wealth for the public official or that fall outside that individual’s normal pattern of activity or lifestyle; (5) Transactions involving public officials and funds moving to and from countries with which the public officials do not appear to have ties; (6) Use of third parties to shield the identity of foreign public officials seeking to hide the origin or ownership of funds, for example, to hide the purchase or sale of real estate; (7) Documents corroborating transactions involving government contracts (e.g., invoices) that include charges at substantially higher prices than market rates or that include overly simple documentation or lack traditional details (e.g., valuations for good and services); (8) Transactions involving payments that do not match the total amounts set out in the underlying documentation, or that involve vague payment details or the use of old or fraudulent documentation to justify transfer of funds; (9) Transactions involving fictitious email addresses and false invoices to justify payments, particularly for international transactions; (10) Assets held in the name of intermediate legal entities whose beneficial owner or owners are tied to a kleptocrat or his or her family member.”

consistent with a risk-based approach to compliance.<sup>509</sup> Finally, the advisory reminds financial institutions of their reporting obligations under the Bank Secrecy Act.<sup>510</sup>

## V. **COLLATERAL ACTIONS**

Throughout 2022, companies undergoing or resolving FCPA investigations also faced related private litigation, most commonly shareholder lawsuits claiming that companies failed to disclose allegedly corrupt practices or that company officers and directors breached their fiduciary duties by failing to prevent bribery, which resulted in harm to investors. In other cases, private plaintiffs brought claims under RICO or the Anti-Terrorism Act to recover damages arising from companies' alleged corrupt foreign practices. An increasing number of private plaintiffs have also used the Mandatory Victims Restitution Act, Crime Victims' Rights Act, or other related statutes, to seek restitution for their injuries after companies pled guilty to or are found guilty of FCPA violations. Below are illustrative examples of the various collateral actions either brought in 2022 or that had important rulings in 2022.

### A. **Shareholder Suits**

#### 1. **Goldman Sachs**

In May 2022, Goldman Sachs Group, Inc. and certain of its current and former officers and directors agreed to settle a shareholder derivate action for \$79.5 million in connection with the company's alleged role in the bribery scandal involving the Malaysian sovereign wealth fund 1Malaysia Development Berhad (1MDB).<sup>511</sup> Prior to the shareholder settlement, the company and its Malaysian subsidiary entered into a DPA with the DOJ and a civil settlement with the SEC in October 2020, agreeing to penalties of more than \$3.3 billion to resolve bribery charges in the US.<sup>512</sup> In the February 2019 shareholder lawsuit, lead plaintiff Fulton County Employees' Retirement System (Fulton County) asserted that the defendants were liable for breaches of their fiduciary duties, violations of Sections 10(b) and 14(a) of the Securities Exchange Act of 1934, and violations of other state laws as a result of the conduct described in the prior FCPA case.<sup>513</sup> Plaintiffs claimed that defendants' actions exposed the company to increased risk, including potential civil and criminal liability, significant damages resulting from the company's repurchases of stock at artificially inflated prices due to materially false or misleading statements, investigations by

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<sup>509</sup> U.S. Financial Crimes Enforcement Network, Advisory on Kleptocracy and Foreign Public Corruption FIN-2022-A001, at 8 (Apr. 14, 2022), <https://www.fincen.gov/sites/default/files/advisory/2022-04-14/FinCEN%20Advisory%20Corruption%20FINAL%20508.pdf>.

<sup>510</sup> U.S. Financial Crimes Enforcement Network, Advisory on Kleptocracy and Foreign Public Corruption FIN-2022-A001, at 9-13 (Apr. 14, 2022), <https://www.fincen.gov/sites/default/files/advisory/2022-04-14/FinCEN%20Advisory%20Corruption%20FINAL%20508.pdf>.

<sup>511</sup> Stip. & Agreement of Settlement, *Fulton Cnty. Employees' Ret. Sys. v. Blankfein*, No. 19-CV-01562 (S.D.N.Y. May 13, 2022) ECF No. 85.

<sup>512</sup> Deferred Prosecution Agreement, *United States v. Goldman Sachs*, No. 20-CR-00437 (E.D.N.Y. Oct. 22, 2020).

<sup>513</sup> Verified Shareholder Derivative Compl., *Fulton Cnty. Employees' Ret. Sys. v. Blankfein*, No. 19-CV-01562, at 6 (S.D.N.Y. Feb. 19, 2019) ECF No. 1.

federal prosecutors and the federal reserve, exposure to lawsuits, and serious damage to the company's reputation.<sup>514</sup>

The parties agreed to apply the settlement funds toward the company's compliance and corporate governance measures agreed upon as part of the settlement, including: (i) extending the Corporate Compliance Program obligations set forth in the DPA with the DOJ for a period of one year following the expiration of the DPA on October 22, 2023; (ii) enhancing the authority of the Chief Compliance Officer (CCO); (iii) maintaining an anonymous employee hotline with reporting to the CCO; and (iv) maintaining of an external monitoring channel to monitor media and industry reports related to compliance concerns.<sup>515</sup> The court approved the settlement on January 20, 2023.<sup>516</sup> According to the court, the resolution represented "the second-largest shareholder derivative settlement ever in the Second Circuit."<sup>517</sup>

## 2. Odebrecht

In July 2022, a judge in the Southern District of New York sanctioned Brazilian construction firm Odebrecht S.A. (Odebrecht) and its affiliates for failure to comply with discovery obligations in a securities fraud action related to Odebrecht's long-running, international bribery scheme.<sup>518</sup> Plaintiff DoubleLine Capital (DoubleLine) moved for sanctions after Odebrecht refused to provide documents responsive to discovery requests for materials produced to the DOJ and other governmental and regulatory agencies in connection with the investigations conducted by those agencies into the bribery scheme.<sup>519</sup> US Magistrate Judge Barbara C. Moses ordered Odebrecht to produce the responsive documents by November 12, 2020.<sup>520</sup> Although Odebrecht initially indicated it would comply with the order compelling production, the company moved for reconsideration of Judge Moses' order two weeks later, arguing that applicable Brazilian law prohibited it from producing any documents or data previously provided to prosecutors in Brazil, the US, or elsewhere.<sup>521</sup> Judge Moses denied the reconsideration motion and Odebrecht did not file

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<sup>514</sup> Verified Shareholder Derivative Compl., *Fulton Cnty. Employees' Ret. Sys. v. Blankfein*, No. 19-CV-01562, at 83 (S.D.N.Y. Feb. 19, 2019) ECF No. 1.

<sup>515</sup> Stip. & Agreement of Settlement, *Fulton Cnty. Employees' Ret. Sys. v. Blankfein*, No. 19-CV-01562 (S.D.N.Y. May 13, 2022), ECF No. 85.

<sup>516</sup> Final Judgment & Order of Dismissal, *Fulton Cnty. Employees' Ret. Sys. v. Blankfein*, No. 19-CV-01562 (S.D.N.Y. Jan. 20, 2023) ECF No. 106.

<sup>517</sup> Pl.'s Memo. of Law in Support of Unopposed Mot. for Preliminary Approval of Settlement, *Fulton Cnty. Employees' Ret. Sys. v. Blankfein*, No. 19-CV-01562, at 1 (S.D.N.Y. May 13, 2022) ECF No. 84.

<sup>518</sup> Op. & Order, *DoubleLine Capital LP v. Odebrecht Fin., Ltd.*, No. 17-CV-04576, at 5 (S.D.N.Y. July 29, 2022) ECF No. 265. See also U.S. Department of Justice Press Release No. 16-1515: Odebrecht and Braskem Plead Guilty and Agree to Pay at Least \$3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History (Dec. 21, 2016), <https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve>.

<sup>519</sup> Op. & Order, *DoubleLine Capital LP v. Odebrecht Fin., Ltd.*, No. 17-CV-04576, at 14 (S.D.N.Y. July 29, 2022) ECF No. 265.

<sup>520</sup> Op. & Order, *DoubleLine Capital LP v. Odebrecht Fin., Ltd.*, No. 17-CV-04576, at 3 (S.D.N.Y. July 29, 2022) ECF No. 265.

<sup>521</sup> Op. & Order, *DoubleLine Capital LP v. Odebrecht Fin., Ltd.*, No. 17-CV-04576, at 2 (S.D.N.Y. July 29, 2022) ECF No. 265.

any further objections.<sup>522</sup> By October 13, 2021, Odebrecht had still not complied with the judge's order and told the court that its position with respect to its inability to produce the requested material had not changed.<sup>523</sup> DoubleLine argued that the discovery compelled by Judge Moses' order was directly relevant to their securities fraud claims and requested that the court sanction Odebrecht.<sup>524</sup>

Odebrecht acknowledged noncompliance with the order compelling production. The company claimed, however, that it promptly updated the court after learning from Brazilian counsel that Brazilian law barred production of the materials and that it had acted in good faith throughout the dispute.<sup>525</sup> Judge Moses rejected Odebrecht's argument that it had acted in good faith, finding that defendants had multiple options short of total noncompliance with her orders. Specifically, the judge noted that Odebrecht could have objected to her orders compelling production of the requested documents but failed to do so.<sup>526</sup> Judge Moses also found that Odebrecht was able to seek authorization from Brazilian authorities to produce the materials but failed to do so.<sup>527</sup> The court further reasoned that the defendants "had it within their power to obey the Order [compelling production] and face the risk of adverse repercussions in Brazil."<sup>528</sup>

In granting DoubleLine's motion for sanctions, Judge Moses concluded that Odebrecht's noncompliance prejudiced DoubleLine's ability to prove that Odebrecht had made material misrepresentations or omissions—a required element of liability under the Securities Exchange Act and Rule 10b-5.<sup>529</sup> Judge Moses found that Odebrecht refused not only to produce relevant documents, but also refused to admit the facts plaintiffs alleged or permit other discovery into them, "claiming, in effect, that 'applicable foreign law' prevents them from divulging any *information* previously shared with a prosecutor."<sup>530</sup> Judge Moses held that a "robust set of findings, coupled with a fee award" would be appropriate sanctions for Odebrecht's discovery misconduct.<sup>531</sup>

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<sup>522</sup> Op. & Order, *DoubleLine Capital LP v. Odebrecht Fin., Ltd.*, No. 17-CV-04576, at 2 (S.D.N.Y. July 29, 2022) ECF No. 265.

<sup>523</sup> Op. & Order, *DoubleLine Capital LP v. Odebrecht Fin., Ltd.*, No. 17-CV-04576, at 14-16 (S.D.N.Y. July 29, 2022) ECF No. 265.

<sup>524</sup> Op. & Order, *DoubleLine Capital LP v. Odebrecht Fin., Ltd.*, No. 17-CV-04576, at 4 (S.D.N.Y. July 29, 2022) ECF No. 265.

<sup>525</sup> Op. & Order, *DoubleLine Capital LP v. Odebrecht Fin., Ltd.*, No. 17-CV-04576, at 4 (S.D.N.Y. July 29, 2022) ECF No. 265.

<sup>526</sup> Op. & Order, *DoubleLine Capital LP v. Odebrecht Fin., Ltd.*, No. 17-CV-04576, at 23 (S.D.N.Y. July 29, 2022) ECF No. 265.

<sup>527</sup> Op. & Order, *DoubleLine Capital LP v. Odebrecht Fin., Ltd.*, No. 17-CV-04576, at 23 (S.D.N.Y. July 29, 2022) ECF No. 265.

<sup>528</sup> Op. & Order, *DoubleLine Capital LP v. Odebrecht Fin., Ltd.*, No. 17-CV-04576, at 23 (S.D.N.Y. July 29, 2022) ECF No. 265.

<sup>529</sup> Op. & Order, *DoubleLine Capital LP v. Odebrecht Fin., Ltd.*, No. 17-CV-04576, at 24-25 (S.D.N.Y. July 29, 2022) ECF No. 265.

<sup>530</sup> Op. & Order, *DoubleLine Capital LP v. Odebrecht Fin., Ltd.*, No. 17-CV-04576, at 25 (S.D.N.Y. July 29, 2022) ECF No. 265.

<sup>531</sup> Op. & Order, *DoubleLine Capital LP v. Odebrecht Fin., Ltd.*, No. 17-CV-04576, at 17, 27 (S.D.N.Y. July 29, 2022) ECF No. 265.

Accordingly, Judge Moses ordered Odebrecht to pay reasonable expenses incurred by DoubleLine in connection with the motion for sanctions and DoubleLine's efforts to seek additional substitute discovery. Judge Moses also established the following facts in favor of DoubleLine: (i) Odebrecht made all of the misrepresentations and omissions alleged by DoubleLine, (ii) those misrepresentations and omissions were material, and (iii) made with scienter.<sup>532</sup> Judge Moses previously sanctioned Odebrecht in 2021 for destroying physical encryption keys that were required to access critical evidence regarding Odebrecht's international bribery scheme.<sup>533</sup> The case remains pending.

### 3. Mobile TeleSystems PJSC

In March 2022, the US Court of Appeals for the Second Circuit affirmed a lower court's dismissal of a federal securities class action against Russian telecommunications company Mobile TeleSystems PJSC (MTS).<sup>534</sup> MTS shareholders brought the lawsuit in 2019, immediately following the company's FCPA settlements with the SEC and DOJ that totaled penalties of \$850 million.<sup>535</sup> Plaintiffs alleged that between 2014 and 2019, MTS made false and misleading statements about the company's involvement in and potential liability for the bribery scheme in Uzbekistan, in violation of Sections 10(b) and 20(a) of the Exchange Act and Rule 10b-5.<sup>536</sup> In particular, plaintiffs argued that applicable accounting principles required MTS to record against its income the likely financial penalty it would incur as a result of the SEC and DOJ investigations, and that the company's failure to do so rendered its financial statements false and misleading.<sup>537</sup> Plaintiffs further claimed that the company's misstatements and omissions artificially inflated MTS's stock price, which caused the plaintiffs to suffer a loss following the company's DPA with the DOJ.<sup>538</sup>

In March 2021, the US District Court for the Eastern District of New York granted MTS's motion to dismiss on the basis that plaintiffs failed to identify any actionable misstatements or adequately allege scienter.<sup>539</sup> The Second Circuit agreed with the district court decision, holding that the plaintiff's complaint was devoid of facts that would establish MTS's "conscious misbehavior" or

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<sup>532</sup> Op. & Order, *DoubleLine Capital LP v. Odebrecht Fin., Ltd.*, No. 17-CV-04576, at 28-29 (S.D.N.Y. July 29, 2022) ECF No. 265.

<sup>533</sup> *DoubleLine Capital LP v. Odebrecht Fin. Ltd.*, No. 17-CV-4576, 2021, US Dist. LEXIS 60959, at \*28-29 (S.D.N.Y. Mar. 30, 2021).

<sup>534</sup> Summary Order & Judgment, *Salim v. Mobile Telesystems PJSC*, No. 21-CV-00839 (2d Cir. Mar. 31, 2022) ECF No. 85.

<sup>535</sup> U.S. Securities and Exchange Commission Press Release No. 2019-27: Mobile TeleSystems Settles FCPA Violations (Mar. 6, 2019), <https://www.sec.gov/news/press-release/2019-27>; U.S. Department of Justice Press Release No. 19-200: Mobile Telesystems Pjsc and Its Uzbek Subsidiary Enter into Resolutions of \$850 Million with the Department of Justice for Paying Bribes in Uzbekistan (Mar. 7, 2019), <https://www.justice.gov/opa/pr/mobile-telesystems-pjsc-and-its-uzbek-subsidiary-enter-resolutions-850-million-department>.

<sup>536</sup> *Salim v. Mobile Telesystems PJSC*, No. 19-CV-1589, 2021 WL 796088, at \*1 (E.D.N.Y. Mar. 1, 2021).

<sup>537</sup> *Salim v. Mobile Telesystems PJSC*, No. 19-CV-1589, 2021 WL 796088, at \*1 (E.D.N.Y. Mar. 1, 2021).

<sup>538</sup> *Salim v. Mobile Telesystems PJSC*, No. 19-CV-1589, 2021 WL 796088, at \*2 (E.D.N.Y. Mar. 1, 2021).

<sup>539</sup> *Salim v. Mobile Telesystems PJSC*, No. 19-CV-1589, 2021 WL 796088, at \*1 (E.D.N.Y. Mar. 1, 2021).

allege with particularity that MTS executives were aware that they could reasonably estimate their potential liability arising from the government investigations but opted not to do so.<sup>540</sup>

## B. RICO Suits

### 1. Odebrecht

In April 2022, a Florida appeals court allowed a civil lawsuit against Odebrecht to proceed after a lower court granted Odebrecht's motion to dismiss civil conspiracy, fraud, and state RICO claims on the basis that the plaintiff failed to plead facts sufficient to support those claims.<sup>541</sup> The civil lawsuit arose from Odebrecht's guilty plea, in which it pleaded guilty to paying more than \$788 million in bribes to various officials around the world to secure government contracts.<sup>542</sup> Ecuadorian manufacturing company Plastiquim alleged that it was pulled into a money laundering scheme orchestrated by an agent of Odebrecht who misled Plastiquim into accepting "loans" from a purported wealthy investor. However, the investor did not exist and Plastiquim unknowingly repaid the loans to shell companies controlled by governmental actors that Odebrecht bribed to obtain business in Ecuador.<sup>543</sup> On appeal, the Florida appellate court reversed the lower court's dismissal of the lawsuit, holding that Plastiquim stated a viable claim for civil conspiracy and sufficiently pleaded the elements of fraud by alleging that they were "pawns in a far-reaching scheme" in which Odebrecht's agent knowingly misrepresented the source of the funds to induce Plastiquim to borrow money to "facilitate a sophisticated money laundering operation."<sup>544</sup> The appellate court affirmed the dismissal of the state RICO claims, agreeing with the trial court's determination that the pleadings were not "facially sufficient" to support the claim.<sup>545</sup> The case remains pending.

## C. Anti-Terrorism Suits

### 1. Certain Pharmaceutical and Medical Device Companies

In 2017, a group of American service members, civilians, and their families, sued various pharmaceutical and medical device companies, alleging that "they were attacked by a terrorist group funded in part by defendants' corrupt sales practices."<sup>546</sup> The complaint alleged that defendants "obtained lucrative contracts from [the Iraqi Ministry of Health] by making corrupt payments" to a militia group that ran the Ministry, Jaysh al-Mahdi. These allegedly corrupt

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<sup>540</sup> Summary Order & Judgment, *Salim v. Mobile Telesystems PJSC*, No. 21-CV-839 (2d Cir. Mar. 31, 2021) ECF No. 85.

<sup>541</sup> See Order Granting Defs'. Mot. to Dismiss, *Plastiquim, S.A. v. Polit*, No. 18-CA-19966 (Fla. Cir. Ct. Jan 19, 2021); *Plastiquim, S.A. v. Odebrecht Constr., Inc.*, 337 So. 3d 1270 (Fl. Dist. Ct. App. 2022).

<sup>542</sup> U.S. Department of Justice Press Release No. 16-1515: Odebrecht and Braskem Plead Guilty and Agree to Pay at Least \$3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History (Dec. 21, 2016), <https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve>.

<sup>543</sup> *Plastiquim, S.A. v. Odebrecht Constr., Inc.*, 337 So. 3d 1270, 1272 (Fl. Dist. Ct. App. 2022).

<sup>544</sup> *Plastiquim, S.A. v. Odebrecht Constr., Inc.*, 337 So. 3d 1270, 1273-74 (Fl. Dist. Ct. App. 2022).

<sup>545</sup> *Plastiquim, S.A. v. Odebrecht Constr., Inc.*, 337 So. 3d 1270, 1274 (Fl. Dist. Ct. App. 2022).

<sup>546</sup> Third Amended Compl., *Atchley v. AstraZeneca UK Ltd.*, No. 17-CV-02136, ¶ 1 (D.D.C. Jan. 21, 2020) ECF No. 124.

payments were worth at least one-fifth of each contract's value. The defendants made alleged illicit payments in two primary forms—"free goods" payments (i.e., the provision of free drugs and equipment) and sham "commission payments" (i.e., commercially unreasonable clauses, or cash bribes and slush funds)—which funded, aided, and abetted terrorist operations in Iraq.<sup>547</sup> By doing so, defendants allegedly violated the Anti-Terrorism Act (ATA).

In July 2020, the District Court for the District of Columbia dismissed the case because plaintiffs: (1) had not sufficiently alleged direct or secondary liability under the ATA; and (2) had not shown that the court had personal jurisdiction over all defendants, some of which were foreign entities.<sup>548</sup> Regarding direct ATA liability, the court held that plaintiffs' allegations did not sufficiently demonstrate that defendants' conduct substantially caused the terrorism because defendants did not pay Jaysh al-Mahdi directly; instead, the complaint alleged that defendants paid the Ministry, which may have passed on payments to Jaysh al-Mahdi.<sup>549</sup> On secondary ATA liability, the court held that the plaintiffs did not allege that a foreign terrorist organization committed or planned the attacks at issue.<sup>550</sup> Regarding personal jurisdiction, the court found that plaintiffs did not establish that "transactions for medical goods with the Ministry [were] substantially connected to, or purposefully directed at, the [US]" because the relevant conduct occurred in Iraq.<sup>551</sup> Lastly, the court found defendants did not purposefully avail themselves of the US' benefits because plaintiffs' allegations (e.g., sourcing products from US manufacturers) centered on practices that themselves were not unlawful and were tangential to the alleged corrupt contracts.<sup>552</sup>

On January 4, 2022, the US Court of Appeals for the District of Columbia reversed the dismissal and remanded the case to the district court.<sup>553</sup> Specifically, the court of appeals decided that: (1) plaintiffs sufficiently alleged direct ATA liability via their allegations that defendants' payments to the Ministry of Health were in essence payments to Jaysh al-Mahdi, which controlled the ministry; (2) plaintiffs sufficiently alleged secondary ATA liability via their allegations that Hezbollah (a designated foreign terrorist organization) planned, trained, and equipped Iraqi fighters involved in

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<sup>547</sup> Third Amended Compl., *Atchley v. AstraZeneca UK Ltd.*, No. 17-CV-02136, ¶¶ 5-6, 115, 120, 142 (D.D.C. Jan. 21, 2020) ECF No. 124.

<sup>548</sup> Memo. Op., *Atchley v. AstraZeneca UK Ltd.*, No. 17-CV-02136, at 1 (D.D.C. July 17, 2020) ECF No. 138. To establish direct ATA liability, a plaintiff must show "(1) a U.S. national suffered injury; (2) an act of intentional terrorism; and (3) the U.S. national's injury occurred by reason of the act of international terrorism." *Id.* at 18; see also 18 U.S.C. § 2333(a). To establish secondary ATA liability, a plaintiff must show "an act of intentional terrorism was committed, planned, or authorized by an organization that had been designated as a foreign terrorist organization . . ." and that the defendant "aid[ed] and abet[ted], by knowingly providing substantially assistance, or conspire[d] with the person who committed such an act of intentional terrorism." Memo. Op., *Atchley v. AstraZeneca UK Ltd.*, No. 17-CV-02136, at 18 (D.D.C. July 17, 2020) ECF No. 138; see also 18 U.S.C. § 2333(d).

<sup>549</sup> Memo. Op., *Atchley v. AstraZeneca UK Ltd.*, No. 17-CV-02136, at 18-22 (D.D.C. July 17, 2020), ECF No. 138.

<sup>550</sup> Memo. Op., *Atchley v. AstraZeneca UK Ltd.*, No. 17-CV-02136, at 23 (D.D.C. July 17, 2020) ECF No. 138.

<sup>551</sup> Memo. Op., *Atchley v. AstraZeneca UK Ltd.*, No. 17-CV-02136, at 8 (D.D.C. July 17, 2020) ECF No. 138 (internal quotations omitted).

<sup>552</sup> Memo. Op., *Atchley v. AstraZeneca UK Ltd.*, No. 17-CV-02136, at 11-12 (D.D.C. July 17, 2020) ECF No. 138.

<sup>553</sup> Op., *Atchley v. AstraZeneca UK Ltd.*, No. 20-7077, at 4 (D.C. Cir. Jan. 4, 2022).

the attacks at issue, and that defendants knowingly provided free goods and cash bribes to the terrorist organization; and (3) the district court's personal jurisdiction analysis was "unduly restrictive" given defendants' "direct, valuable, and ongoing sourcing of medical supplies and drugs . . . from their affiliated manufacturers in the [US]."<sup>554</sup> In February 2022, defendants petitioned for a rehearing *en banc*, arguing that the panel ruled contrary to other circuits on the extent of secondary ATA liability and that personal jurisdiction does not apply to the foreign defendants.<sup>555</sup> Plaintiffs opposed in March 2022, arguing that the panel correctly applied the elements of the ATA and that sufficient contacts with the US exist to exert personal jurisdiction over the foreign defendants.<sup>556</sup> The petition remains pending.

#### D. Restitution

##### 1. FIFA

A May 2015 unsealed indictment revealed that 14 FIFA officials and marketing executives had been charged with various crimes, including racketeering, honest services wire fraud, and money laundering.<sup>557</sup> A superseding indictment detailed similar charges against an additional 16 officials.<sup>558</sup> The scheme involved marketing companies paying bribes and kickbacks to FIFA officials, who then provided the companies with below-market contracts for media and marketing rights for soccer events.<sup>559</sup> To date, over 50 individuals and corporate defendants have been charged in connection with those schemes.<sup>560</sup> In August 2021, the DOJ announced that it would

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<sup>554</sup> Op., *Atchley v. AstraZeneca UK Ltd.*, No. 20-7077, at 4-5 (D.C. Cir. Jan. 4, 2022). For example, the complaint alleged that "Hezbollah's chief terrorist mastermind" helped establish Jaysh al-Mahdi "to inflict mass casualties on Americans in Iraq and recruited many of its first members" and that "Hezbollah has since orchestrated Jaysh al-Mahdi's campaign of terror against Americans in Iraq." Third Amended Compl., *Atchley v. AstraZeneca UK Ltd.*, No. 17-CV-02136, ¶ 237 (D.D.C. Jan. 21, 2020) ECF No. 124.

<sup>555</sup> Pet. for Rehearing En Banc, *Atchley v. AstraZeneca UK Ltd.*, No. 20-7077 (D.C. Cir. Feb. 3, 2022) (for U.S.-based defendants); Pet. for Rehearing En Banc, *Atchley v. AstraZeneca UK Ltd.*, No. 20-7077 (D.C. Cir. Feb. 3, 2022) (for foreign defendants).

<sup>556</sup> Opp. to Pet. for Rehearing En Banc, *Atchley v. AstraZeneca UK Ltd.*, No. 20-7077 (D.C. Cir. March 10, 2022) (regarding U.S.-based defendants' petition); Opp. to Pet. for Rehearing En Banc, *Atchley v. AstraZeneca UK Ltd.*, No. 20-7077 (D.C. Cir. March 10, 2022) (regarding foreign defendants' petition).

<sup>557</sup> U.S. Department of Justice Press Release No. 21-795: Justice Department Approves Remission of Over \$32 Million in Forfeited Funds to Victims in the FIFA Corruption Case (Aug. 24, 2021), <https://www.justice.gov/opa/pr/justice-department-approves-remission-over-32-million-forfeited-funds-victims-fifa-corruption>. Honest services wire fraud includes using wires, radio or television to "devise[] or intending to devise any scheme or artifice to defraud, or [] obtaining money or property by means of false or fraudulent pretenses, representations or promises . . ." 18 U.S.C. §§ 1341, 1343. A "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services." *Id.* § 1346.

<sup>558</sup> U.S. Department of Justice Press Release No. 21-795: Justice Department Approves Remission of Over \$32 Million in Forfeited Funds to Victims in the FIFA Corruption Case (Aug. 24, 2021), <https://www.justice.gov/opa/pr/justice-department-approves-remission-over-32-million-forfeited-funds-victims-fifa-corruption>.

<sup>559</sup> U.S. Department of Justice Press Release No. 21-795: Justice Department Approves Remission of Over \$32 Million in Forfeited Funds to Victims in the FIFA Corruption Case (Aug. 24, 2021), <https://www.justice.gov/opa/pr/justice-department-approves-remission-over-32-million-forfeited-funds-victims-fifa-corruption>.

<sup>560</sup> U.S. Department of Justice Press Release 22-691: Justice Department Announces Additional Distribution of Approximately \$92 Million to Victims in FIFA Corruption Case (June 30, 2022), <https://www.justice.gov/opa/pr/justice-department-approves-remission-over-32-million-forfeited-funds-victims-fifa-corruption>.

remit more than \$201 million to victims of the corruption scheme and approved an initial distribution of \$32.3 million in forfeited funds to victims, which included various international soccer organizations that had jointly submitted a petition for remission.<sup>561</sup> On June 30, 2022, the DOJ announced a further distribution of \$92 million to the victims.<sup>562</sup>

In this instance the US government was unable to pursue charges under the FCPA because bribes were not paid to government officials but to officers of international non-profit organizations. This action demonstrates that the DOJ is nonetheless willing to use statutes beyond the FCPA, including wire fraud and RICO, to combat commercial bribery abroad, especially in situations where the FCPA does not apply.

## 2. Credit Suisse

In July 2022, a judge for the US District Court for the Eastern District of New York ordered Credit Suisse Securities Europe Ltd. to pay a \$500,000 criminal penalty, \$22,619,174, and a \$400 special assessment to 18 investors who were defrauded in connection with the financing of a loan for a tuna-fishing project in Mozambique.<sup>563</sup> The order stemmed from the company's October 2021 guilty plea to one count of conspiracy to commit wire fraud.<sup>564</sup> As part of the plea agreement, the company agreed to pay restitution to investors who helped finance the \$850 million loan to a Mozambique state-owned company.<sup>565</sup> To finance the loan, the company approved the sale of loan participation notes (LPNs).<sup>566</sup> It sent potential investors the loan agreement and marketing materials that falsely "represented that the loan proceeds would be used exclusively" to fund the project and "that none of the proceeds would be used to pay bribes or kickbacks."<sup>567</sup> However, the company, through its two managing directors, knew these statements were false and the two managing directors expected to receive "millions of dollars in kickbacks."<sup>568</sup> As a result, the

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<sup>561</sup> U.S. Department of Justice Press Release No. 21-795: Justice Department Approves Remission of Over \$32 Million in Forfeited Funds to Victims in the FIFA Corruption Case (Aug. 24, 2021), <https://www.justice.gov/opa/pr/justice-department-approves-remission-over-32-million-forfeited-funds-victims-fifa-corruption>.

<sup>562</sup> U.S. Department of Justice Press Release 22-691: Justice Department Announces Additional Distribution of Approximately \$92 Million to Victims in FIFA Corruption Case (June 30, 2022), <https://www.justice.gov/opa/pr/justice-department-approves-remission-over-32-million-forfeited-funds-victims-fifa-corruption>.

<sup>563</sup> Memo. & Order, *United States v. Credit Suisse Sec. (Europe) Ltd.*, No. 21-CR-00520, at 7-8 (E.D.N.Y. July 22, 2022) ECF. No. 21 (citing 18 USC § 3663A); Restitution Order, *United States v. Credit Suisse Sec. (Europe) Ltd.*, No. 21-CR-00520 (E.D.N.Y. July 22, 2022) ECF. No. 20.

<sup>564</sup> Plea Agreement, *United States v. Credit Suisse Sec. (Europe) Ltd.*, No. 21-CR-00520, at 1 (E.D.N.Y. Oct. 19, 2021) ECF No. 11.

<sup>565</sup> Plea Agreement, *United States v. Credit Suisse Sec. (Europe) Ltd.*, No. 21-CR-00520, at 18-19 (E.D.N.Y. Oct. 19, 2021) ECF No. 11; *id.* at Attach. A ¶¶ 2, 26, 34.

<sup>566</sup> Plea Agreement, *United States v. Credit Suisse Sec. (Europe) Ltd.*, No. 21-CR-00520, Attach. A ¶ 41 (E.D.N.Y. Oct. 19, 2021) ECF No. 11.

<sup>567</sup> Plea Agreement, *United States v. Credit Suisse Sec. (Europe) Ltd.*, No. 21-CR-00520, Attach. A ¶ 41 (E.D.N.Y. Oct. 19, 2021) ECF No. 11.

<sup>568</sup> Plea Agreement, *United States v. Credit Suisse Sec. (Europe) Ltd.*, No. 21-CR-00520, Attach. A ¶ 43 (E.D.N.Y. Oct. 19, 2021) ECF No. 11.

company was ordered to pay restitution to each investor who purchased LPNs in reliance on its false statements.<sup>569</sup>

### **3. Glencore and Crusader DRC**

In October 2022, Dr. Ian and Laureth   Hagen requested, on behalf of Crusader Health RDC SARL (“Crusader DRC”), between \$48 and \$50 million in restitution pursuant to the Mandatory Victims Restitution Act and the Crime Victims’ Rights Act after Glencore pleaded guilty to conspiracy to violate the FCPA in connection with conduct in the DRC.<sup>570</sup> The Hagens owned and operated the medical company Crusader DRC, which had filed a lawsuit against a Glencore’s subsidiary in the DRC seeking more than \$16 million for breach of contract. According to Glencore’s plea agreement, employees overseeing Glencore’s subsidiary approved a \$500,000 invoice that was used as a bribe to have the lawsuit dismissed.

On May 24, 2022, the Hagens allegedly learned of the bribe payment after Glencore’s guilty plea became public.<sup>571</sup> As a result, the Hagens alleged that they are entitled to restitution, including the more than \$16 million from the earlier lawsuit, as well as severance costs paid to terminated Crusader DRC employees, legal fees, and “for the loss of the value of Crusader DRC’s remaining business, which ended active operations as a direct result of Glencore’s criminal conduct.”<sup>572</sup> The company filed a response to the claim stating that it is prepared to pay restitution in the amount of any loss directly and proximately caused by its offense, but at most, Crusader is entitled to approximately \$12 million.

## **E. Fraud and Other Actions—IMSS Cases**

### **1. Stryker**

In March 2022, the US Court of Appeals for the Sixth Circuit upheld the lower court’s dismissal of the Instituto Mexicano Del Seguro Social’s (IMSS) claims against Stryker Corporation (Stryker) on the basis of *forum non conveniens*.<sup>573</sup> IMSS’s lawsuit against Stryker stemmed from corruption allegations that resulted in Stryker’s settlement with the SEC—specifically, that between 2003 and 2015 Stryker’s Mexican subsidiary paid tens of thousands of dollars in bribes to government officials to obtain contracts with IMSS.<sup>574</sup> IMSS brought claims under US and Mexican law for

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<sup>569</sup> Restitution Order, *United States v. Credit Suisse Sec. (Europe) Ltd.*, No. 21-CR-00520, (E.D.N.Y. July 22, 2022), ECF No. 20.

<sup>570</sup> Victim Impact Statement & Request for Restitution, *United States v. Glencore Int’l A.G.*, No. 22-CR-00297 (S.D.N.Y. Oct. 25, 2022) ECF No. 18.

<sup>571</sup> Victim Impact Statement & Request for Restitution, *United States v. Glencore Int’l A.G.*, No. 22-CR-00297, at 12 (S.D.N.Y. Oct. 25, 2022) ECF. No. 18.

<sup>572</sup> Victim Impact Statement & Request for Restitution, *United States v. Glencore Int’l A.G.*, No. 22-CR-00297, at 21-22 (S.D.N.Y. Oct. 25, 2022) ECF. No. 18.

<sup>573</sup> Op. & Judgment, *Instituto Mexicano Del Seguro Social v. Stryker Corp.*, No. 21-1112, at 2 (6th Cir. Mar. 17, 2022) ECF No. 45.

<sup>574</sup> Order Instituting Cease-and-Desist Proc., *In the Matter of Stryker Corp.*, Rel. No. 70751, File No. 3-15587 (Oct. 24, 2013); Op. & Judgment, *Instituto Mexicano Del Seguro Social v. Stryker Corp.*, No. 21-1112, at 2 (6th Cir. Mar. 17, 2022) ECF No. 45.

fraud and breach of fiduciary duty, as well as claims under Mexican law for breach of contract and violation of the law of acquisitions, leases, and services of the public sector.<sup>575</sup> The district court granted Stryker's motion to dismiss the lawsuit.<sup>576</sup>

On appeal, IMSS argued that the United Nations Convention Against Corruption (UNCAC) prevented the district court from applying the *forum non conveniens* doctrine.<sup>577</sup> The Sixth Circuit rejected IMSS's argument, holding that UNCAC does not supersede US law and that IMSS failed to identify any implementing statute that would make UNCAC binding federal law.<sup>578</sup> The Sixth Circuit further held that, in accordance with Article 53 of UNCAC, the district court did not foreclose "IMSS's ability to 'initiate an action.'"<sup>579</sup> Rather, IMSS had the opportunity to present its arguments to the district court, which ultimately concluded that Mexico provided a more adequate forum.<sup>580</sup>

IMSS also argued "that the district court abused its discretion in dismissing" the lawsuit for *forum non conveniens*.<sup>581</sup> The Sixth Circuit examined the following factors in rejecting IMSS's assertion: "(1) whether an adequate alternative forum is available; (2) whether a balance of private and public interests suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court; and (3) the amount of deference to give the plaintiff's choice of forum."<sup>582</sup> In concluding that the Mexican courts were adequate and available, the circuit court specifically pointed to several affidavits, including one in which Stryker consented to jurisdiction in Mexico.<sup>583</sup> Regarding the burdensome component, the Sixth Circuit explained that the district court had thoroughly considered private and public factors, such as administrative challenges and the potential of applying Mexican law.<sup>584</sup> On the latter point, the circuit court referred to Stryker's assertion, which the district court agreed with, that "[v]irtually all of the relevant acts—from allegedly paid bribes to IMSS officials, to alleged misconduct by a Mexican law firm—occurred in Mexico,

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<sup>575</sup> Compl., *Instituto Mexicano Del Seguro Social v. Stryker Corp.*, No. 19-CV-00857, ¶¶ 42-57 (W.D. Mich. Oct. 18, 2019).

<sup>576</sup> Op. & Judgment, *Instituto Mexicano Del Seguro Social v. Stryker Corp.*, No. 21-1112, at 2 (6th Cir. Mar. 17, 2022) ECF No. 45.

<sup>577</sup> Op. & Judgment, *Instituto Mexicano Del Seguro Social v. Stryker Corp.*, No. 21-1112, at 3 (6th Cir. Mar. 17, 2022) ECF No. 45.

<sup>578</sup> Op. & Judgment, *Instituto Mexicano Del Seguro Social v. Stryker Corp.*, No. 21-1112, at 4-5 (6th Cir. Mar. 17, 2022) ECF No. 45.

<sup>579</sup> Op. & Judgment, *Instituto Mexicano Del Seguro Social v. Stryker Corp.*, No. 21-1112, at 4 (6th Cir. Mar. 17, 2022) ECF No. 45.

<sup>580</sup> Op. & Judgment, *Instituto Mexicano Del Seguro Social v. Stryker Corp.*, No. 21-1112, at 4 (6th Cir. Mar. 17, 2022) ECF No. 45.

<sup>581</sup> Op. & Judgment, *Instituto Mexicano Del Seguro Social v. Stryker Corp.*, No. 21-1112, at 3 (6th Cir. Mar. 17, 2022) ECF No. 45.

<sup>582</sup> Op. & Judgment, *Instituto Mexicano Del Seguro Social v. Stryker Corp.*, No. 21-1112, at 3, 5 (6th Cir. Mar. 17, 2022) ECF No. 45 (citing *Jones v. IPX Int'l Eq. Guinea, S.A.*, 920 F.3d 1085, 1090 (6th Cir. 2019)).

<sup>583</sup> Op. & Judgment, *Instituto Mexicano Del Seguro Social v. Stryker Corp.*, No. 21-1112, at 6 (6th Cir. Mar. 17, 2022) ECF No. 45.

<sup>584</sup> Op. & Judgment, *Instituto Mexicano Del Seguro Social v. Stryker Corp.*, No. 21-1112, at 7 (6th Cir. Mar. 17, 2022) ECF No. 45.

and almost all of the alleged actors are in Mexico[.]”<sup>585</sup> Accordingly, the Sixth Circuit rejected IMSS’s contention that the lower court abused its discretion in affording less deference to IMSS’s choice of forum, noting that the lower court properly assessed both sides’ arguments and reasoned that Mexico’s interest in the matter was “greater” than that of the US.<sup>586</sup>

## 2. Zimmer Biomet

In March 2022, the Seventh Circuit undertook a similar analysis to that of the Sixth Circuit’s in the *Stryker* case, affirming the lower court’s dismissal of IMSS’s lawsuit against medical device company Zimmer Biomet Holdings, Inc. (Zimmer Biomet) in connection with the company’s alleged role in bribing Mexican government officials to procure sales through IMSS.<sup>587</sup> In its civil complaint, IMSS claimed fraud under Mexican and US law, breach of contract under Mexican law, and a violation of the Mexican law of acquisitions, leases, and services of the public sector.<sup>588</sup> As in the case against Stryker, IMSS argued that the lower court erred in its analysis of the *forum non conveniens* doctrine and failed to factor in the UNCAC when assessing the applicability of the doctrine.<sup>589</sup>

First, the circuit court concluded that Mexican courts offer an alternative forum given that Zimmer Biomet consented to Mexico’s jurisdiction and the laws of Mexico provided a legal remedy.<sup>590</sup> Second, the Seventh Circuit reasoned that the lower court properly balanced private and public interest factors that weighed in favor of dismissal, including the fact that “the bulk of witnesses and evidence” were in Mexico.<sup>591</sup> IMSS argued that the relevant evidence was in Indiana as a result of Zimmer Biomet’s cooperation with the SEC and DOJ investigations in 2017.<sup>592</sup> The Seventh Circuit explained, however, that the extent of overlap between the 2017 investigations and IMSS’s current claims was unclear due to insufficient detail in IMSS’s pleadings.<sup>593</sup> The circuit court also found that although the 2017 DPA with the DOJ referenced that “Zimmer Biomet made its own employees available for interviews,” and that there was no indication that other evidence relevant to IMSS’s

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<sup>585</sup> Op. & Judgment, *Instituto Mexicano Del Seguro Social v. Stryker Corp.*, No. 21-1112, at 7 (6th Cir. Mar. 17, 2022) ECF No. 45.

<sup>586</sup> Op. & Judgment, *Instituto Mexicano Del Seguro Social v. Stryker Corp.*, No. 21-1112, at 7-8 (6th Cir. Mar. 17, 2022) ECF No. 45.

<sup>587</sup> Op., *Instituto Mexicano Del Seguro Social v. Zimmer Biomet Holdings, Inc.*, No. 21-1224, at 1-2 (7th Cir. Mar. 21, 2022) ECF No. 50.

<sup>588</sup> Op., *Instituto Mexicano Del Seguro Social v. Zimmer Biomet Holdings, Inc.*, No. 21-1224, at 2-3 (7th Cir. Mar. 21, 2022) ECF No. 50.

<sup>589</sup> Op., *Instituto Mexicano Del Seguro Social v. Zimmer Biomet Holdings, Inc.*, No. 21-1224, at 4 (7th Cir. Mar. 21, 2022) ECF No. 50.

<sup>590</sup> Op., *Instituto Mexicano Del Seguro Social v. Zimmer Biomet Holdings, Inc.*, No. 21-1224, at 6-7 (7th Cir. Mar. 21, 2022) ECF No. 50.

<sup>591</sup> Op., *Instituto Mexicano Del Seguro Social v. Zimmer Biomet Holdings, Inc.*, No. 21-1224, at 8, 10 (7th Cir. Mar. 21, 2022) ECF No. 50.

<sup>592</sup> Op., *Instituto Mexicano Del Seguro Social v. Zimmer Biomet Holdings, Inc.*, No. 21-1224, at 9 (7th Cir. Mar. 21, 2022) ECF No. 50.

<sup>593</sup> Op., *Instituto Mexicano Del Seguro Social v. Zimmer Biomet Holdings, Inc.*, No. 21-1224, at 9 (7th Cir. Mar. 21, 2022) ECF No. 50.

complaint was located in Indiana.<sup>594</sup> Lastly, the Seventh Circuit found that the district court considered the 2017 investigation materials and concluded that they were “fewer in number and secondary in relevance” to evidence in Mexico.<sup>595</sup>

As for UNCAC, the Seventh Circuit held that it did not prevent the application of the *forum non conveniens* doctrine because the treaty is not self-executing, and thus, absent legislation, it is not binding federal law.<sup>596</sup>

### 3. Olympus Latin America

In August 2022, the Southern District of Florida dismissed with prejudice IMSS’s amended complaint against medical equipment distributor Olympus Latin America Inc. (Olympus).<sup>597</sup> The complaint arose out of Olympus’ March 2016 DPA, which alleged that Olympus “designed and implemented a plan to increase their medical equipment sales in Central and South America by providing . . . [various] things of value to certain health care practitioners . . . employed at government-owned and private health care facilities.”<sup>598</sup> While Olympus paid millions to the US in penalties, none of the funds went to IMSS or Mexico.<sup>599</sup>

IMSS filed an amended complaint on October 20, 2021, asserting one count of fraud in connection with conduct relating to the bribes that Olympus confessed to in the DPA; and conduct that allegedly occurred after Olympus’s confession.<sup>600</sup> Olympus filed a motion to dismiss the amended complaint on November 3, 2021.<sup>601</sup> As to Olympus’s DPA-related conduct, Olympus asserted that the IMSS’s claim was time-barred, but IMSS argued that “the statute of limitations was tolled” as Olympus concealed its scheme.<sup>602</sup> Additionally, IMSS contended that the “fraud claim . . . tolled past March 2016,” because the DPA did not identify them, so they did not realize that they were impacted.<sup>603</sup> Ultimately, the court considered March 2016 as the latest time that the statute of

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<sup>594</sup> Op., *Instituto Mexicano Del Seguro Social v. Zimmer Biomet Holdings, Inc.*, No. 21-1224, at 9 (7th Cir. Mar. 21, 2022) ECF No. 50.

<sup>595</sup> Op., *Instituto Mexicano Del Seguro Social v. Zimmer Biomet Holdings, Inc.*, No. 21-1224, at 9 (7th Cir. Mar. 21, 2022) ECF No. 50.

<sup>596</sup> Op., *Instituto Mexicano Del Seguro Social v. Zimmer Biomet Holdings, Inc.*, No. 21-1224, at 14-15 (7th Cir. Mar. 21, 2022) ECF No. 50.

<sup>597</sup> *Instituto Mexicano Del Seguro Social v. Olympus Latin America Inc.*, No. 20-CV-24558, 2022 WL 6745141, at \*10 (S.D. Fla. Aug. 31, 2022).

<sup>598</sup> Order for Continuance, *United States v. Olympus Latin America, Inc.*, No. 16-MJ-3525, Deferred Prosecution Agreement, at Attach. A ¶6 (D.N.J. Mar. 1, 2016) ECF No. 2.

<sup>599</sup> *Instituto Mexicano Del Seguro Social v. Olympus Latin America Inc.*, No. 20-CV-24558, 2022 WL 6745141, at \*2 (S.D. Fla. Aug. 31, 2022).

<sup>600</sup> *Instituto Mexicano Del Seguro Social v. Olympus Latin America Inc.*, No. 20-CV-24558, 2022 WL 6745141, at \*1, \*3 (S.D. Fla. Aug. 31, 2022).

<sup>601</sup> *Instituto Mexicano Del Seguro Social v. Olympus Latin America Inc.*, No. 20-CV-24558, 2022 WL 6745141, at \*1-2 (S.D. Fla. Aug. 31, 2022).

<sup>602</sup> *Instituto Mexicano Del Seguro Social v. Olympus Latin America Inc.*, No. 20-CV-24558, 2022 WL 6745141, at \*4, \*5 (S.D. Fla. Aug. 31, 2022).

<sup>603</sup> *Instituto Mexicano Del Seguro Social v. Olympus Latin America Inc.*, No. 20-CV-24558, 2022 WL 6745141, at \*5 (S.D. Fla. Aug. 31, 2022).

limitations was tolled for the DPA-related conduct.<sup>604</sup> The court explained that a reasonable company would have examined the “possibility of fraud” once the company heard about a healthcare bribery scheme in the country even if they were not specifically discussed.<sup>605</sup>

Regarding Olympus’s alleged post-DPA conduct, the court explained, “[a] plaintiff may only sue on ‘an otherwise time-barred claim when additional violations of the law occur within the statutory period.’”<sup>606</sup> IMSS did not allege that an additional violation occurred.<sup>607</sup> Rather, IMSS broadly argued that their “reliance lasted longer than the bribes themselves” and they relied on Olympus agents’ materially false representations that they would comply with Mexican law on additional contracts.<sup>608</sup> However, the court said that “[e]ven if Plaintiff could demonstrate that the conduct that occurred after the DPA constitutes an additional violation of law within the statutory period,” the claim would be unsuccessful because the fraud claim does not meet “the heightened pleading standard under Federal Rule of Civil Procedure 9(b).”<sup>609</sup>

## **VI. KEY INTERNATIONAL LEGAL DEVELOPMENTS**

### **A. UK**

#### **1. Legislative and Policy Developments**

##### **a. SFO Faces Recurring Criticism over Disclosure Failures**

###### **i. The Calvert-Smith Report**

In late January 2022, the Attorney-General’s Office asked Sir David Calvert-Smith, a former Director of Public Prosecutions and retired High Court judge, to conduct an independent review of the findings of the Court of Appeal in the case of former UnaOil manager Ziad Akle and make recommendations on the SFO’s policies, practices, procedures, and culture. On July 13, 2020, Mr. Akle had been convicted of conspiring with the owners of UnaOil to bribe foreign officials in Iraq. The High Court judge who appointed Sir Calvert-Smith had found in December 2021 that the SFO’s failure to disclose its extensive contact with David Tinsley, a private investigator acting for the owners of UnaOil, was sufficient grounds for overturning Mr. Akle’s conviction.<sup>610</sup> The independent

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<sup>604</sup> *Instituto Mexicano Del Seguro Social v. Olympus Latin America Inc.*, No. 20-CV-24558, 2022 WL 6745141, at \*6 (S.D. Fla. Aug. 31, 2022).

<sup>605</sup> *Instituto Mexicano Del Seguro Social v. Olympus Latin America Inc.*, No. 20-CV-24558, 2022 WL 6745141, at \*6-7 (S.D. Fla. Aug. 31, 2022) (see *Edward J. Goodman Life Income Tr. v. Jabil Cir., Inc.*, 595 F. Supp. 2d 1253, 1281 (M.D. Fla. 2009)).

<sup>606</sup> *Instituto Mexicano Del Seguro Social v. Olympus Latin America Inc.*, No. 20-CV-24558, 2022 WL 6745141, at \*8 (S.D. Fla. Aug. 31, 2022) (citing *Rager v. Augustine*, 760 F. App’x 947, 951 (11th Cir. 2019)).

<sup>607</sup> *Instituto Mexicano Del Seguro Social v. Olympus Latin America Inc.*, No. 20-CV-24558, 2022 WL 6745141, at \*8-9. (S.D. Fla. Aug. 31, 2022).

<sup>608</sup> Amended Compl., *Instituto Mexicano Del Seguro Social v. Olympus Latin America, Inc.*, No. 20-CV-24558, ¶ 54 (S.D. Fla. Oct. 20, 2021) ECF No. 31.

<sup>609</sup> *Instituto Mexicano Del Seguro Social v. Olympus Latin America Inc.*, No. 20-CV-24558, 2022 WL 6745141, at \*9 (S.D. Fla. Aug. 31, 2022).

<sup>610</sup> Case Information: UnaOil, U.K. SERIOUS FRAUD OFFICE (last updated Apr. 27, 2022), <https://www.sfo.gov.uk/cases/unaoil/>.

review was to focus on the manner in which the SFO engaged in contact with third parties and its failure to disclose such contacts.<sup>611</sup>

The Calvert-Smith Report was delivered to the Attorney-General in June 2022,<sup>612</sup> finding that the SFO's record-keeping in the UnaOil cases was generally incompatible with the requirements of UK law and that SFO personnel's failure to keep notes of their meetings with Mr. Tinsley violated the SFO's disclosure obligations.<sup>613</sup> In relation to third-party contacts specifically, the Report found that the SFO's notes of contacts with Mr. Tinsley were insufficiently shared with the case team, which limited the team's ability to manage related disclosure.

Based on these findings, the Report made recommendations emphasizing: (i) the importance of complying with CPIA disclosure obligations; (ii) the importance of allowing the SFO case team to handle communications with third-parties relevant to ongoing investigations or prosecutions; and (iii) the importance of bolstering mechanisms for the escalation of concerns by case teams. The Attorney-General's Office accepted and is in the process of implementing the Report's recommendations.<sup>614</sup> Two other individuals convicted in the UnaOil case also had their convictions overturned on the same grounds as Mr. Akle, Paul Bond on March 24, 2022 and Stephen Whiteley on July 21, 2022.

## ii. *The Altman Report*

In May 2021, the SFO commissioned Brian Altman KC, a leading criminal barrister, to "examine the circumstances, facts and matters which caused or contributed to the disclosure failures" in the prosecution of two senior managers of Serco Ltd. These disclosure failures had resulted in the SFO being unable to offer any evidence against either defendant, both of whom had been charged with fraud related to contracts for the provision of electronic monitoring services within the criminal

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<sup>611</sup> SFO Independent Review Terms of Reference, ATTORNEY GENERAL'S OFFICE (Feb. 9, 2022) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1053585/Terms\\_of\\_Reference.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1053585/Terms_of_Reference.pdf).

<sup>612</sup> Sir David Calvert-Smith, Independent Review into SFO's Handling of the UnaOil case – R v Akle & Anor (July 2022) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1092872/DC\\_S\\_report\\_-\\_FINAL\\_-\\_21\\_July\\_08.31\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1092872/DC_S_report_-_FINAL_-_21_July_08.31_.pdf).

<sup>613</sup> Specifically, the Report cited the Criminal Procedure and Investigations Act 1996 (CPIA) and the CPIA Code of Practice.

<sup>614</sup> Government Response to the Recommendations of Sir David Calvert-Smith's Independent Review into the Serious Fraud Office's handling of the UnaOil Case – R v Akle & Anor, ATTORNEY GENERAL'S OFFICE (July 2022) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1092876/Government\\_response\\_\\_FINAL\\_21\\_July\\_2022\\_08.31\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1092876/Government_response__FINAL_21_July_2022_08.31_.pdf); Sir David Calvert Smith's Independent Review into the Serious Fraud Office's handling of the UnaOil Case – R v Akle & Anor, ATTORNEY GENERAL'S OFFICE (Nov. 2022) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1120817/AGO\\_GOV.UK\\_November\\_2022\\_update\\_on\\_Sir\\_Davids\\_recommendations.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1120817/AGO_GOV.UK_November_2022_update_on_Sir_Davids_recommendations.pdf) (providing November 2022 update on delivery of the recommendations).

justice system, during the trial against them in April 2021.<sup>615</sup> Two years previously, the SFO had entered a deferred prosecution agreement (DPA) with Serco Geografix Ltd.<sup>616</sup>

The Altman Report, which was published in July 2022, concluded that “a combination of factors” had led to the collapse of the case.<sup>617</sup> These factors included the SFO’s failure: (i) to disclose a report drafted by a Serco employee referring to “backdated management fees”—a central element of the defense case; (ii) to include certain items within the disclosure review; (iii) to maintain adequate guidance on disclosure; and (iv) to carry out Quality Assurance reviews of disclosures. The report also raised concerns about appropriate staffing resources. The Report made several recommendations to the SFO, which focused on the resourcing of cases; the remuneration, incentivization, training and support of disclosure staff; the SFO’s disclosure process and guidance; and the importance of engaging with the defense in a “two-way street” disclosure process. In its response to the Report, the SFO committed to reviewing and/or taking steps to implement the recommendations by early 2023 – implementation is ongoing.<sup>618</sup>

**b. Legislative Changes to Corporate Criminal Liability on the Horizon**

On June 10, 2022, the Law Commission published its long-awaited options paper on reform of corporate criminal liability in the UK, which had been requested by the government in November 2020. The Law Commission was asked, primarily, to look at whether the “identification doctrine” is fit to serve its purpose as the standard doctrine for the attribution of corporate criminal liability in the UK and to propose options for reform. Broadly, the identification doctrine means that only the acts of the “directing will and mind of the company” can be attributed to the company. This applies to, for instance, the offense of bribery under section 1 of the UK Bribery Act. The Law Commission’s review followed longstanding criticism of the doctrine, including from the Director of the SFO.<sup>619</sup>

Rather than recommend that the identification doctrine be abolished or that the standard be substantively altered, the Law Commission suggested moderate reforms such as allowing corporate criminal liability to be established if one of its senior managers “engaged in, consented to or connived in the offense,” with a further suggestion that the CEO and CFO could be automatically

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<sup>615</sup> Report to the Serious Fraud Office on the Collapse of R v Woods & Marshall Annex I - Terms of Reference, U.K. SERIOUS FRAUD OFFICE (July 2022), <https://www.sfo.gov.uk/download/review-of-r-v-woods-marshall-by-brian-altman-qc/>.

<sup>616</sup> A subsidiary of Serco Group plc.

<sup>617</sup> Report to the Serious Fraud Office on the Collapse of R v Woods & Marshall Annex I - Terms of Reference, U.K. SERIOUS FRAUD OFFICE (July 2022), <https://www.sfo.gov.uk/download/review-of-r-v-woods-marshall-by-brian-altman-qc/>.

<sup>618</sup> Brian Aldman, *SFO Response to the Review of R v Woods & Marshall*, U.K. SERIOUS FRAUD OFFICE (July 2022), <https://www.sfo.gov.uk/download/review-of-r-v-woods-marshall-by-brian-altman-qc/>; U.K. Serious Fraud Office News Release: Implementation Update: Altman Review (Nov. 29, 2022) <https://www.sfo.gov.uk/2022/11/29/implementation-update-altman-review/>.

<sup>619</sup> Jemma Slingo, ‘Antiquated’ fraud law thwarting justice, says SFO director, THE LAW SOCIETY GAZETTE (Feb. 5, 2020) <https://www.lawgazette.co.uk/news/antiquated-fraud-laws-thwarting-justice-says-sfo-director/5102972.article>.

included in that category. It also proposed a number of revisions on the basis of “failure to prevent” offenses (i.e., for fraud and human rights abuses, among others).<sup>620</sup> It remains to be seen what action the government will take in this area, if any.<sup>621</sup>

## 2. Enforcement Developments

### a. SFO Favors Prosecution over DPAs

In recent years, the SFO’s approach to resolving corporate bribery and corruption cases has been marked by a reliance on DPAs, but 2022 bucked this trend. Between 2015 and 2021, the SFO concluded 11 DPAs and secured two convictions against corporations for failing to prevent bribery. By contrast, although the SFO secured one corporate conviction in 2022, it is the first year since 2015 in which it concluded no DPAs.

The corporate conviction was against Glencore Energy UK Ltd., which the SFO charged in May 2022 with seven counts of bribery in connection with its oil business in Cameroon, Equatorial Guinea, Ivory Coast, Nigeria, and South Sudan. Glencore pleaded guilty to all counts in June 2022<sup>622</sup> and was ordered to pay £281 million in November 2022.<sup>623</sup> The resolution was coordinated with the US DOJ, which resolved a case with Glencore on the same day.

Glencore is the first company to be convicted of substantive bribery offenses under the UK Bribery Act,<sup>624</sup> pleading guilty to two counts of failing to prevent bribery and five counts of bribery contrary to section 1 of the Act. These charges signal the SFO’s readiness to prosecute corporations for offenses requiring it to prove that “the directing mind and will” of the company was involved in the alleged conduct. The SFO has repeatedly stressed the difficulties that the so-called “identification” doctrine of corporate liability entailed and called for its reform, which is discussed above.<sup>625</sup> There have now been four corporate convictions for failure to prevent bribery, only one of which followed a trial (Skansen), which was not reported. Accordingly there is still no judicial guidance on the

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<sup>620</sup> On November 12, 2022, the House of Lords Fraud Act 2006 and Digital Fraud Committee also published a report recommending the introduction of a failure to prevent fraud offense. *Fighting Fraud: Breaking the Chain* HL Paper 87, FRAUD ACT 2006 AND DIGITAL FRAUD COMMITTEE (Nov. 12, 2022) <https://publications.parliament.uk/pa/ld5803/ldselect/ldfraudact/87/87.pdf>.

<sup>621</sup> *Fighting Fraud: Breaking the Chain* HL Paper 87, FRAUD ACT 2006 AND DIGITAL FRAUD COMMITTEE (Nov. 12, 2022) <https://publications.parliament.uk/pa/ld5803/ldselect/ldfraudact/87/87.pdf>.

<sup>622</sup> Serious Fraud Office secures Glencore Conviction on Seven Counts of International Bribery, U.K. SERIOUS FRAUD OFFICE (June 21, 2022) <https://www.sfo.gov.uk/2022/06/21/serious-fraud-office-secures-glencore-conviction-on-seven-counts-of-international-bribery/>.

<sup>623</sup> Serious Fraud Office v. Glencore Energy UK Ltd, Sentencing Remarks of Mr Justice Fraser, JUDICIARY OF ENGLAND AND WALES (Nov. 3, 2022) [https://www.incegd.com/sites/default/files/2022-11/Sentencing\\_Remarks\\_Glencore\\_3\\_Nov\\_22\\_Final.pdf](https://www.incegd.com/sites/default/files/2022-11/Sentencing_Remarks_Glencore_3_Nov_22_Final.pdf).

<sup>624</sup> Before May 2022, three companies had been prosecuted and convicted of the strict liability corporate offense of failing to prevent bribery contrary to section 7 of the U.K. Bribery Act. *Serious Fraud Office secures third set of Petrofac bribery convictions*, U.K. SERIOUS FRAUD OFFICE (Oct. 4, 2021), <https://www.sfo.gov.uk/2021/10/04/serious-fraud-office-secures-third-set-of-petrofac-bribery-convictions/>; Julian Bubb Humfries, *First CPS prosecution for failing to prevent bribery*, DAC BEACHCROFT (May 29, 2018), <https://www.dacbeachcroft.com/en/gb/articles/2018/may/first-cps-prosecution-for-failing-to-prevent-bribery/>; U.K. Serious Fraud Office News Release: Sweett Group PLC admits to bribery offense (Dec. 2, 2015) <https://www.sfo.gov.uk/2015/12/02/sweett-group-plc-admits-to-bribery-offence/>.

<sup>625</sup> See *supra* at Section VI.A.1.

adequate procedures defense to a charge of failure to prevent bribery, so corporations must rely on the Ministry of Justice's published guidance.<sup>626</sup>

By the SFO's typical case progression standards, the investigation and resolution were concluded swiftly.<sup>627</sup> The SFO opened its investigation into Glencore in the summer of 2019, with sentencing taking place in November 2022, having navigated the difficulties presented by the COVID-19 pandemic in the interim.<sup>628</sup>

The financial penalty is the largest secured by the SFO following a criminal conviction. It consists of a fine of £183 million, a confiscation order of £93.5 million, and SFO costs of £4.5 million. The SFO has obtained larger penalties in other cases, however, involving DPAs.

#### **b. Corporate Enforcement by the UK Financial Conduct Authority (FCA)**

In 2022, the FCA continued to focus on the efficacy of corporations' compliance systems and controls to prevent and detect financial crime, including bribery and corruption. In its 2022-2025 Strategy, launched in April 2022, the regulator vowed to "closely scrutinise firms [...] so they meet our standards for financial crime systems and controls" before authorizing them, and to "be more proactive in [their] supervision of authorized firms."<sup>629</sup>

A few months later, in June 2022, the FCA fined JLT Specialty Ltd. (a UK subsidiary of JLT Group Plc, providing insurance services to the UK) £7.9 million in connection with its systems' failure to prevent bribery.<sup>630</sup> Between 2013 and 2017, it paid \$12.3 million in commissions to a Colombia-based company of the JLT Group, which passed \$10.8 million on to a third-party introducer. The third-party introducer paid, in turn, \$3 million to officials at a state-owned insurance company to secure business in London and Colombia. JLT Specialty was fined for "failures to take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems to counter the risk that it might be used to further financial crime."<sup>631</sup> JLT Specialty had already received a £1.8 million fine in 2013 for similar failures. Despite this previous misconduct, the FCA reduced the original £11.3 million fine by 30% in light of JLT Specialty's self-disclosure,

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<sup>626</sup> *Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)*, Ministry of Justice (Mar. 2011) <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>.

<sup>627</sup> Between 2009 and 2019, the average length of an SFO investigation was four years and seven months. See FOI 2019-113 – Length of SFO Investigations (Sept. 27, 2019) <https://cymraeg.sfo.gov.uk/foi-request/foi-2019-113-length-of-sfo-investigations/>.

<sup>628</sup> In a speech in November 2022, SFO Director Lisa Osofsky cited Glencore as an example where cooperation had resulted in a swift resolution. See Alice Johnson, *Lisa Osofsky: non-cooperating companies won't get DPAs*, GLOBAL INVESTIGATIONS REVIEW (Nov. 29, 2022) <https://globalinvestigationsreview.com/article/lisa-osofsky-non-cooperating-companies-wont-get-dpas>.

<sup>629</sup> Financial Conduct Authority, Our Strategy for 2022 to 2025, at 18 (Apr. 7, 2022), <https://www.fca.org.uk/publication/corporate/our-strategy-2022-25.pdf>.

<sup>630</sup> Financial Conduct Authority, Final Notice to JLT Specialty Ltd., Ref. No. 310428 (June 16, 2022), <https://www.fca.org.uk/publication/final-notices/final-notice-2022-jlt-specialty-limited.pdf>.

<sup>631</sup> Financial Conduct Authority, Final Notice to JLT Specialty Ltd., Ref. No. 310428, at 2.1 (June 16, 2022), <https://www.fca.org.uk/publication/final-notices/final-notice-2022-jlt-specialty-limited.pdf>.

“proactive cooperation” with the FCA’s investigation, and agreement to settle rapidly. The conduct at issue did not overlap with the conduct underlying the DOJ’s declination relating to JLT Specialty in March, 2022, discussed above.<sup>632</sup>

#### **c. Mixed Results Against Individuals for the SFO**

As in 2021, the SFO struggled to retain convictions and advance trials against some individuals in 2022, including the three defendants in the UnaOil case who had their convictions overturned on the basis of the SFO’s conduct during the investigation discussed above.<sup>633</sup>

In 2012, the SFO opened an investigation into GPT Special Project Management Ltd (GPT), a subsidiary of Airbus SE, in relation to bribes that were allegedly paid to Saudi Arabian officials to secure defense communications contracts for the UK government. In 2020, Jeffrey Cook (former GPT managing director) and John Mason (former financial officer at two GPT subcontractors) were both charged with corruption in violation of section 1 of the Prevention of Corruption Act 1906, a charge to which the company pleaded guilty on April 28, 2021.<sup>634</sup> Cook was also charged with misconduct in public office in relation to commissions paid to him.<sup>635</sup> Cook and Mason’s trial began in May 2022 but was stopped on July 14, 2022 for unreported reasons, and the retrial is due to start on January 11, 2023.<sup>636</sup>

#### **d. Ongoing ENRC Litigation**

On May 16, 2022, the High Court handed down judgment in the Eurasian Natural Resource Corp.’s (ENRC) High Court claim against Dechert, Neil Gerrard, and the SFO, following a trial in summer 2021.<sup>637</sup> ENRC was a publicly traded natural resources multinational, and Neil Gerrard was the former head of white collar crime at Dechert, instructed by ENRC in relation to bribery allegations at the company. Mr. Justice Waksman found that Gerrard recklessly breached his duty to ENRC by leaking confidential information to the SFO, which triggered an SFO investigation of the company. The Court also found that Gerrard had provided negligent advice to ENRC and lied continuously in his evidence. The SFO and its director at the time, Richard Alderman, were also heavily criticized. The Court found that various SFO officials (including Alderman) had induced Gerrard’s breaches, for instance by having meetings with him where it was likely that he would volunteer information that he should not have volunteered. Dechert has since made an interim costs payment of £20

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<sup>632</sup> See *supra* at Section III.E.

<sup>633</sup> See *supra* at Section VI.A.1.a.i.

<sup>634</sup> The alleged conduct pre-dated the introduction of the UK Bribery Act 2010.

<sup>635</sup> Terence Dorothy (former U.K. Ministry of Defense official) was charged aiding and abetting that offense, though the charges against Dorothy were dropped in April 2022.

<sup>636</sup> ‘UK judge halts trial of two defendants in Saudi bribery case’, FIN. TIMES (July 14, 2022), <https://www.sfo.gov.uk/cases/gpt-special-project-management-ltd/>.

<sup>637</sup> *ENRC v Dechert and others* [2022] EWHC 1138 (Comm).

million to ENRC,<sup>638</sup> and a further trial is expected to take place in March 2023 to determine causation and quantum.<sup>639</sup>

#### e. International Cooperation Continues in Corporate Enforcement

The UK continued to cooperate with foreign authorities in the fight against bribery and corruption. In evidence to Parliament in March 2022, Ms. Osofsky indicated that most of the SFO's cases had "an international component."<sup>640</sup> Glencore's conviction, discussed above,<sup>641</sup> formed part of a global coordinated resolution—the SFO conducted its investigation in parallel with the US and other foreign authorities, including the Brazilian, Dutch and Swiss, and Ms. Osofsky described the charges against Glencore as "the result of [...] the strength of our partnership with the US and other jurisdictions."<sup>642</sup>

In addition to collaboration in investigations and coordination of resolutions with foreign authorities, the SFO transferred over £210,000 in funds obtained pursuant to a DPA with Amec Foster Wheeler in July 2021 to the government of Nigeria.<sup>643</sup>

### B. France

#### 1. Legislative and Policy Developments

The past year has seen a marked increase in the publication of guidance related to anticorruption compliance from French enforcement authorities. In February 2022, France's anticorruption agency—the Agence Française Anticorruption (AFA)—published its first sector-specific practical

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<sup>638</sup> Alice Johnson, *Dechert to pay £20 million to ENRC in misconduct case*, GLOBAL INVESTIGATIONS REV. (Aug. 3, 2022), <https://globalinvestigationsreview.com/article/dechert-pay-ps20-million-enrc-in-misconduct-case>.

<sup>639</sup> Sam Tobin, *Dechert agrees to £20m interim payment to ENRC*, THE LAW SOCIETY GAZETTE (Aug. 3, 2022), <https://www.lawgazette.co.uk/news/dechert-agrees-20m-interim-payment-to-enrc/5113334.article>; Sam Tobin, *UK fraud watchdog faces 2024 trial over 'leaks' from ENRC criminal probe*, REUTERS (Nov. 23, 2022), <https://www.reuters.com/legal/government/uk-fraud-watchdog-faces-2024-trial-over-leaks-enrc-criminal-probe-2022-11-23/>.

<sup>640</sup> Oral evidence to the Justice Committee of the House of Commons: The work of the Serious Fraud Office, HC 1212, at Q11 (Mar. 29, 2022).

<sup>641</sup> See *supra* at Section III.A.4.c.

<sup>642</sup> U.K. Serious Fraud Office Case Update: Serious Fraud Office secures Glencore Conviction on Seven Counts of International Bribery (June 21, 2022) <https://www.sfo.gov.uk/2022/06/21/serious-fraud-office-secures-glencore-conviction-on-seven-counts-of-international-bribery/>.

<sup>643</sup> U.K. Serious Fraud Office Case Update: SFO investigation delivers over £200,000 compensation for the people of Nigeria (Feb. 21, 2022), <https://www.sfo.gov.uk/2022/02/21/sfo-investigation-delivers-over-200000-compensation-for-the-people-of-nigeria/>. The Amec Foster Wheeler DPA covered ten offenses of bribery involving the use of corrupt agents in the oil and gas sector in Saudi Arabia, Malaysia, India, Brazil, and Nigeria, between 1996 and 2014. U.K. Serious Fraud Office Case Update: SFO Enters Into £103m DPA With Amec Foster Wheeler Energy Ltd. (July 2, 2021), <https://www.sfo.gov.uk/2021/07/02/sfo-enters-into-103m-dpa-with-amec-foster-wheeler-energy-limited-as-part-of-global-resolution-with-us-and-brazilian-authorities/>. The compensation funds are being used to support key infrastructure projects directly benefitting the Nigerian people. U.K. Serious Fraud Office Case Update: SFO investigation delivers over £200,000 compensation for the people of Nigeria (Feb. 21, 2022), <https://www.sfo.gov.uk/2022/02/21/sfo-investigation-delivers-over-200000-compensation-for-the-people-of-nigeria>.

guide for the implementation of a risk-based system to prevent corruption in the construction and public works sector.<sup>644</sup>

In March 2022, the AFA, together with the office of the National Financial Prosecutor (PNF), published its draft guide for anticorruption internal investigations.<sup>645</sup>

On April 1, 2022, Decree No. 2022-207 of 18 February 2022 entered into force, requiring French-domiciled<sup>646</sup> companies that receive document or information requests from outside of France that are potentially covered by the French Blocking Statute<sup>647</sup> to contact the Strategic Intelligence and Economic Security Service (SISSE), a French government body.<sup>648</sup> Companies must provide SISSE with information on the foreign request and their organization<sup>649</sup> and SISSE must issue an opinion on the applicability of the Blocking Statute within one month after receipt of the company's submission.<sup>650</sup> The agency may also assist the company in identifying which information can or cannot be communicated under the Blocking Statute. While no sanctions apply in the event a company fails to declare a foreign authority's request to SISSE, improper disclosure of documents to foreign authorities can lead to fines and, for individuals, imprisonment for up to six months.<sup>651</sup>

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<sup>644</sup> The guide rests on three pillars: (i) commitment by the company's management; (ii) risk mapping; and (iii) prevention and detection measures. It also provides recommendations on the implementation of ethical obligations (e.g. obligations related to lobbying activities, intermediaries, gifts and invitations, political funding, etc.), the adoption of an anticorruption code of conduct and training systems, as well as on how to assess the integrity of third parties, in particular professional project owners, public law entities, and private individuals or entities. Agence Française Anticorruption, Guide pratique sur la mise en place d'un dispositif de prévention des risques de corruption dans le secteur du bâtiment et des travaux publics (Feb. 2022), [https://www.agence-francaise-anticorruption.gouv.fr/files/files/Guide\\_BTP\\_AFA\\_Web.pdf](https://www.agence-francaise-anticorruption.gouv.fr/files/files/Guide_BTP_AFA_Web.pdf).

<sup>645</sup> The draft guide identifies the type of events which could warrant an internal anticorruption investigation and provides recommendations on the conduct of an internal investigation, the implementation of a formalized and legally safe procedure, compliance with the EU General Data Protection Regulation (GDPR), the investigative capacities, and the individuals who should be involved. It also recommends drafting a report at the conclusion of the investigation. If the investigation reveals corruption, disciplinary, organizational and legal actions should be taken; if no corruption is identified, the investigation should be closed. Agence Française Anticorruption, Projet de Guide pratique pour les enquêtes internes anticorruption (Mar. 2022), [https://www.agence-francaise-anticorruption.gouv.fr/files/files/Projet%20de%20guide%20enqu%C3%A9%20interne%20\\_Mise%20en%20consultation.pdf](https://www.agence-francaise-anticorruption.gouv.fr/files/files/Projet%20de%20guide%20enqu%C3%A9%20interne%20_Mise%20en%20consultation.pdf).

<sup>646</sup> This includes any company registered in France.

<sup>647</sup> Loi n° 68-678 du 26 juillet 1968 relative à la communication de documents et renseignements d'ordre économique, commercial, industriel, financier ou technique à des personnes physiques ou morales étrangères.

<sup>648</sup> Alice Johnson, *France sharpens its rules on companies sharing information abroad*, GLOBAL INVESTIGATIONS REV. (Mar. 28, 2022), <https://globalinvestigationsreview.com/news-and-features/in-house/2020/article/france-sharpens-its-rules-companies-sharing-information-abroad>.

<sup>649</sup> Identifying the individuals or legal entities controlling the company concerned, as well as the legal entities controlled by it.

<sup>650</sup> Alice Johnson, *France sharpens its rules on companies sharing information abroad*, GLOBAL INVESTIGATIONS REV. (Mar. 28, 2022), <https://globalinvestigationsreview.com/news-and-features/in-house/2020/article/france-sharpens-its-rules-companies-sharing-information-abroad>.

<sup>651</sup> Alice Johnson, *France sharpens its rules on companies sharing information abroad*, GLOBAL INVESTIGATIONS REV. (Mar. 28, 2022), <https://globalinvestigationsreview.com/news-and-features/in-house/2020/article/france-sharpens-its-rules-companies-sharing-information-abroad>.

Also in April 2022, the AFA issued the final version of its practical guide on anti-corruption accounting controls in companies,<sup>652</sup> which provides tools and identifies best practices to assist large companies in complying with their obligation to implement internal or external accounting control procedures and ensure that their books and records are not used to conceal acts of corruption or influence peddling, in accordance with Article 17 of the French anti-corruption law, the Sapin Law II.<sup>653</sup>

Finally, in June 2022, the AFA issued an updated guide on preventing conflicts of interest in the private sector. This guide was initially published in November 2021,<sup>654</sup> with the aim of helping larger companies<sup>655</sup> understand, identify, and manage the intersection of conflicts of interest and corruption risk.<sup>656</sup>

## 2. Enforcement Developments

In April 2022, a French judge charged and placed under formal investigation Thales, a French company that provides services for the aerospace, defense, transportation and security markets, for “complicity in the active corruption of a foreign agent,” allegedly involving bribery.<sup>657</sup> The charges relate to contracts entered into by Thales Asia and DCN International (a French state-controlled warship builder) for the sale of three submarines to Malaysia in 2002.<sup>658</sup> DCNI was also put under formal investigation for alleged corruption of a foreign agent in relation to the same

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<sup>652</sup> Agence Française Anticorruption, Practical Guide on Corporate Anti-Corruption Accounting Controls (Apr. 2022), [https://www.agence-francaise-anticorruption.gouv.fr/files/files/AFA\\_Guide\\_ControleCompta\\_AN\\_Web.pdf](https://www.agence-francaise-anticorruption.gouv.fr/files/files/AFA_Guide_ControleCompta_AN_Web.pdf).

<sup>653</sup> Loi n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, publiée au Journal officiel n°0287 du 10 Décembre 2016.

<sup>654</sup> Agence Française Anticorruption, Guide on Preventing Conflicts of Interest in the Private Sector (Nov. 2021), English version available at: [https://www.agence-francaise-anticorruption.gouv.fr/files/files/AFA\\_Guide\\_conflits%20interets\\_EN\\_juin%202022.pdf](https://www.agence-francaise-anticorruption.gouv.fr/files/files/AFA_Guide_conflits%20interets_EN_juin%202022.pdf).

<sup>655</sup> Companies with at least 500 employees and which turnover or consolidated turnover exceeds €100 million, i.e. subject to the requirements of Sapin Law II.

<sup>656</sup> Under the AFA’s revised guidelines, a conflict of interest is an existing personal interest that has a level of interference with the activities carried out within the organization such that it influences or appears to influence the impartial, objective and independent execution of the activity on behalf of the company. To tackle such conflicts, the guide recommends that detection and prevention measures extend beyond proven conflicts of interest and advocates for the adoption of gifts and hospitality policies, conflict check processes within the organization, and awareness exercises. Agence Française Anticorruption, Guide on Preventing Conflicts of Interest in the Private Sector (Nov. 2021), English version available at: [https://www.agence-francaise-anticorruption.gouv.fr/files/files/AFA\\_Guide\\_conflits%20interets\\_EN\\_juin%202022.pdf](https://www.agence-francaise-anticorruption.gouv.fr/files/files/AFA_Guide_conflits%20interets_EN_juin%202022.pdf).

<sup>657</sup> France’s Thales under formal probe over Malaysia submarine deal, denies allegations, REUTERS (Apr. 27, 2022), <https://www.reuters.com/business/aerospace-defense/thales-says-under-corruption-investigation-over-malaysia-arms-deal-denies-2022-04-27/>.

<sup>658</sup> Surin Murugiah, French defence group Thales charged over 2002 submarines deal with Malaysia, THE EDGE MARKETS (Apr. 27, 2022), <https://www.theedgemarkets.com/article/report-french-defence-group-thales-charged-over-2002-submarines-deal-malaysia>; See also About Thales, Thales Group, <https://www.thalesgroup.com/en/global/group>.

contracts.<sup>659</sup> The Malaysian government maintains that the contracts were free of corruption. It is not yet clear whether the case will be set for trial.<sup>660</sup>

In addition, several companies suspected of having committed bribery or money laundering entered into negotiated settlements through judicial public interest agreements (*Convention judiciaire d'intérêt public* or CJIP), France's version of a deferred prosecution agreement:

- In June 2022, French engineering company Doris Group SA entered into a CJIP and agreed to pay €3.5 million to resolve an investigation into allegations that it bribed several Angolese state officials linked to Sonangol, the state-owned company formerly overseeing oil and gas production in Angola. Under the CJIP, Doris Group committed to undergo audits and verifications for a period of three years, to be carried out by the AFA, as part of a required compliance program upgrade.<sup>661</sup>
- In July 2022, the identity technologies company Idemia France also agreed to pay a total fine of almost €8 million under a CJIP after the British National Crime Agency provided the PNF with information regarding the bribery of a Bangladesh state official in order to win a contract to manufacture smart identity cards in Bangladesh.<sup>662</sup>
- Finally, in November 2022, Airbus agreed with the PNF to settle a foreign bribery probe relating to bribes paid in Libya and Kazakhstan between 2006 and 2011. This is Airbus' second corruption-related settlement in recent years, after it agreed in 2020 to pay nearly \$4 billion to French, UK, and US authorities to settle allegations of corruption in 16 countries. The matters resolved in November 2022 were not settled at the time of the prior resolutions because of specific procedural requirements under French law.<sup>663</sup>

## C. Germany

### 1. Overview of German Bribery Enforcement Activity

In January 2022, Transparency International (TI) published its annual Corruption Perception Index (CPI), holding Germany in 10<sup>th</sup> place overall. Among other challenges, TI noted that: (i) Germany's legal framework governing corporate criminal liability remained unimplemented; (ii) the principle of

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<sup>659</sup> France's Thales under formal probe over Malaysia submarine deal, denies allegations, REUTERS (Apr. 27, 2022), <https://www.reuters.com/business/aerospace-defense/thales-says-under-corruption-investigation-over-malaysia-arms-deal-denies-2022-04-27/>.

<sup>660</sup> France's Thales charged over 2002 submarines deal with Malaysia involving Najib, THE STRAITS TIMES (Apr. 27, 2022), <https://www.nst.com.my/amp/news/crime-courts/2022/04/792174/frances-thales-charged-over-2002-submarines-deal-malaysia>.

<sup>661</sup> Convention Judiciaire d'Intérêt Public entre le Procureur de la République Financier près le tribunal judiciaire de Paris et la société Doris Group SA.

<sup>662</sup> Convention Judiciaire d'Intérêt Public entre le Procureur de la République Financier près le tribunal judiciaire de Paris et la société Idemia France.

<sup>663</sup> Alice Johnson, *Airbus enters second foreign bribery settlement in France*, GLOBAL INVESTIGATIONS REV. (Nov. 25, 2022), <https://globalinvestigationsreview.com/article/airbus-enters-second-foreign-bribery-settlement-in-france>.

official secrecy still generally applied in the public sector; and (iii) Germany still lacked adequate whistleblower protection. TI also criticized Germany's handling of personal enrichment cases involving Members of the German Federal Parliament (*Bundestag*) during the so-called "Azerbaijan affair" and the "mask-affair."<sup>664</sup> The "Azerbaijan affair" involved alleged bribery of politicians from the former German governing parties by individuals based in Azerbaijan.<sup>665</sup> The "mask-affair" involved alleged corruption in the procurement of masks by members of the German Federal Parliament during the COVID-19 pandemic.<sup>666</sup> In the latter case, the respective Members were not held criminally responsible because the German Federal Court of Justice (*Bundesgerichtshof – BGH*) ruled that the mask affair cases did not fulfil all elements of the bribery offense.<sup>667</sup> TI's view was that the law preventing bribery of Members of the German Federal Parliament has been practically ineffective to date and urgently had to be strengthened.<sup>668</sup> Germany's current government parties have committed to increase transparency and take stronger action against elected officials who accept bribes in the coalition agreement between the parties.<sup>669</sup>

In September 2022, the German Federal Criminal Police Office (*Bundeskriminalamt – BKA*) issued an overview of bribery in Germany in 2021, showing a 35 percent increase in bribery offenses over 2020. The BKA attributes this increase<sup>670</sup> of especially serious cases of taking and giving bribes in commercial practice;<sup>671</sup> giving bribes;<sup>672</sup> and taking and giving bribes in the healthcare sector.<sup>673</sup> The BKA noted that the total amount of damage caused by bribery decreased by 25 percent

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<sup>664</sup> Transparency International, *Korruptionswahrnehmungsindex 2021: Deutschland kommt nicht voran* (Jan. 25, 2022), <https://www.transparency.de/aktuelles/detail/article/korruptionswahrnehmungsindex-2021-deutschland-kommt-nicht-voran/>.

<sup>665</sup> *Razzia gegen Unionspolitiker wegen Bestechungsverdachts*, FRANKFURTER ALLGEMEINE ZEITUNG (Jan. 30, 2020), <https://www.faz.net/aktuell/politik/inland/aserbaischan-lobby-razzia-gegen-unionspolitiker-strenz-und-lintrer-wegen-bestechungsverdachts-16608568.html>.

<sup>666</sup> With respect to the "mask-affair", the relevant Members were not held criminally responsible because the German Federal Court of Justice (*Bundesgerichtshof – BGH*) ruled that the mask affair cases did not meet all elements of the bribery offense. Klaus Ott, *Vermögensarrest in Millionenhöhe bei Sauter*, SÜDDEUTSCHE ZEITUNG (Apr. 18, 2021), <https://www.sueddeutsche.de/bayern/maskenaffaere-sauter-csu-vermoegensarrest-1.5267903>; *Another German conservative snared in masks scandal ahead of election*, REUTERS (Mar. 21, 2021), <https://www.reuters.com/article/us-germany-politics-idUSKBN2BD0ES>.

<sup>667</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] Jul. 5, 2022, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2856, 2022 (Ger.).

<sup>668</sup> Transparency International Press Release: *Korruptionswahrnehmungsindex 2021: Deutschland kommt nicht voran*, (Jan. 25, 2022), <https://www.transparency.de/aktuelles/detail/article/korruptionswahrnehmungsindex-2021-deutschland-kommt-nicht-voran/>.

<sup>669</sup> Coalition agreement between SPD, Bündnis 90/Die Grünen and FDP for the 20th parliamentary term from Oct. 2021 to 2025. Klaus Ott, *Mehr Fortschritt Wagen – Bündnis für Freiheit, Gerechtigkeit und Nachhaltigkeit*, SÜDDEUTSCHE ZEITUNG, at 9 (Apr. 18, 2021), <https://www.sueddeutsche.de/bayern/maskenaffaere-sauter-csu-vermoegensarrest-1.5267903>.

<sup>670</sup> German Federal Criminal Police Office Press Release: Zahl der in Deutschland registrierten Korruptionsstraftaten erneut gestiegen (Sep. 15, 2022), [https://www.bka.de/DE/Presse>Listenseite\\_Pressemitteilungen/2022/Presse2022/220915\\_PM\\_BLB\\_Korruption.html](https://www.bka.de/DE/Presse/Listenseite_Pressemitteilungen/2022/Presse2022/220915_PM_BLB_Korruption.html).

<sup>671</sup> Section 300 German Criminal Code (*Strafgesetzbuch – StGB*).

<sup>672</sup> Section 334 German Criminal Code.

<sup>673</sup> Sections 299a and 299b German Criminal Code.

compared to 2020 emphasizing that large-scale proceedings can cause significant statistic fluctuations in this respect.<sup>674</sup>

## 2. Legislative and Policy Developments

Various legislative developments during 2022 broadly fell within the scope of Germany's fight against bribery:

- Starting in March 2022 and extending through December 2022, the Transparency Register and Financial Information Act (*Transparenzregister- und Finanzinformationsgesetz*) required companies, depending on their legal forms,<sup>675</sup> to provide the federal registration authority<sup>676</sup> with information on beneficial owners for entry into the transparency register.<sup>677</sup> This obligation was implemented to combat money laundering and terrorist financing, as well as to establish transparency on legal entities and their beneficial owners.<sup>678</sup>
- In June 2022, the German competition register (*Wettbewerbsregister*), which contains information on certain criminal court convictions of companies' officers as well as fine orders (including but not limited to bribery and money laundering),<sup>679</sup> became fully operational.<sup>680</sup> Public contracting authorities must consult the competition register if they wish to award a public contract valued at €30.000 or more; if the company has fine orders

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<sup>674</sup> German Federal Criminal Police Office Press Release: Zahl der in Deutschland registrierten Korruptionsstrafaten erneut gestiegen (Sep. 15, 2022), [https://www.bka.de/DE/Presse/Listenseite\\_Pressemeldungen/2022/Presse2022/220915\\_PM\\_BLB\\_Korruption.html](https://www.bka.de/DE/Presse/Listenseite_Pressemeldungen/2022/Presse2022/220915_PM_BLB_Korruption.html).

<sup>675</sup> Requirement as followed: (i) Stock company, SE, partnership limited by shares until March 31, 2022; (ii) limited liability company, cooperative, European cooperative or partnership until June 30, 2022; and (iii) in all other cases latest by December 31, 2022, Section 59 (8) Money Laundering Act (*Geldwäschegesetz*), which was revised according to the *Gesetz zur europäischen Vernetzung der Transparenzregister und zur Umsetzung der Richtlinie (EU) 2019/1153 des Europäischen Parlaments und des Rates vom 20. Juni 2019 zur Nutzung von Finanzinformationen für die Bekämpfung von Geldwäsche, Terrorismusfinanzierung und sonstigen schweren Straftaten (Transparenzregister- und Finanzinformationsgesetz)* in the version published on June 30, 2021 (BGBl. I S. 2083) at 2087 Point 17 c), [https://www.bundesfinanzministerium.de/Content/DE/Gesetzestexte/Gesetze\\_Gesetzesvorhaben/Abteilungen/Abteilung\\_VII/19\\_Legislaturperiode/2021-06-30-TraFinG/3-Verkündetes-Gesetz.pdf?\\_\\_blob=publicationFile&v=2](https://www.bundesfinanzministerium.de/Content/DE/Gesetzestexte/Gesetze_Gesetzesvorhaben/Abteilungen/Abteilung_VII/19_Legislaturperiode/2021-06-30-TraFinG/3-Verkündetes-Gesetz.pdf?__blob=publicationFile&v=2).

<sup>676</sup> The Federal Gazette Publisher GmbH (*Bundesanzeiger Verlag GmbH*), cf. Section 25 (1) German Money Laundering Act.

<sup>677</sup> Section 59 (8) German Money Laundering Act; the option to refer to other registers was previously provided by Section 20 (2) Money Laundering Act in the version valid before January 1, 2020.

<sup>678</sup> German Federal Government, *Entwurf eines Gesetzes zur europäischen Vernetzung der Transparenzregister und zur Umsetzung der Richtlinie 2019/1153 des Europäischen Parlaments und des Rates vom 20. Juni 2019 zur Nutzung von Finanzinformationen für die Bekämpfung von Geldwäsche, Terrorismusfinanzierung und sonstigen schweren Straftaten (Transparenzregister- und Finanzinformationsgesetz)*, BT-Drs 19/28164, at 1 (March 31, 2021).

<sup>679</sup> Cf. Section 2 German Competition Register Law.

<sup>680</sup> Notice by the Federal Cartel Office (*Bundeskartellamt*), *Wettbewerbsregister im vollen Wirkbetrieb – Abfragepflicht und Auskunftsrechte sind anwendbar* (June 06, 2022), [https://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemeldungen/2022/01\\_06\\_2022\\_WebReg.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemeldungen/2022/01_06_2022_WebReg.html).

listed in the register, it will likely be debarred.<sup>681</sup> Further, the register authority, the Federal Cartel Office (*Bundeskartellamt*), is obligated to provide information from the competition register about the entities listed upon request.<sup>682</sup>

- In December 2022, the German Federal Parliament (as the first of two legislative bodies) passed a bill for a Whistleblower Protection Act (*Hinweisgeberschutzgesetz - HinSchG*).<sup>683</sup> Earlier in 2022, the EU Commission had opened an infringement proceeding against Germany and other EU member states for failing to implement the EU Whistleblower Directive<sup>684</sup> by the December 17, 2021 deadline.<sup>685</sup> The bill passed by the German Federal Parliament transposes the EU Whistleblower Directive into German law and intends to protect whistleblowers reporting certain violations not only of EU law<sup>686</sup> but also domestic law,<sup>687</sup> thereby exceeding the intended scope of the EU Whistleblower Directive.<sup>688</sup> The bill requires employers with at least 50 employees, and other specified companies such as investment service providers or holding companies regardless of the number of employees,<sup>689</sup> to establish at least one point of contact for internal complaint reporting (*interne Meldestelle*),<sup>690</sup> available to both employees and temporary workers (*Leiharbeiter*).<sup>691</sup> As a next step, the bill must pass the German Federal Assembly (*Bundesrat*)<sup>692</sup> before the Whistleblower Protection Act can enter into force, presumably in 2023.<sup>693</sup>

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<sup>681</sup> Section 6 (1) German Competition Register Law.

<sup>682</sup> Section 5 (2) German Competition Register Law.

<sup>683</sup> German Federal Parliament, *Besserer Schutz für hinweisgebende Personen im beruflichen Umfeld beschlossen*, <https://www.bundestag.de/dokumente/textarchiv/2022/kw50-de-hinweisgeber-926806>.

<sup>684</sup> Heike Anger, *Überfälliges Whistleblower-Gesetz: Deutschland bekommt „blauen Brief“ aus Brüssel*, HANDELSBLATT (Feb. 10, 2022), <https://www.handelsblatt.com/politik/deutschland/vertragsverletzungsverfahren-ueberfaelliges-whistleblower-gesetz-deutschland-kommt-blauen-brief-aus-brussel/28056780.html>.

<sup>685</sup> Article 26 (1) Directive (EU) 2019/1937.

<sup>686</sup> Cf. Section 2 (1) Nos. 3, 8, (2) Bill for a Whistleblower Protection Act.

<sup>687</sup> Cf. Section 2 (1) Bill for a Whistleblower Protection Act.

<sup>688</sup> Cf. Article 2 (1) Directive (EU) 2019/1937.

<sup>689</sup> Section 12 (2), (3) Bill for a Whistleblower Protection Act.

<sup>690</sup> Section 12 (1) Bill for a Whistleblower Protection Act; in this regard, multiple private employers with 50 to 249 employees can establish and operate a joint operation for receiving complaint reporting, Section 14 (2) Bill for a Whistleblower Protection Act.

<sup>691</sup> Section 16 (1) Bill for a Whistleblower Protection Act.

<sup>692</sup> *Bundestag beschließt besseren Schutz für Hinweisgeber*, FRANKFURTER ALLGEMEINE ZEITUNG (Dec. 16, 2022), <https://www.faz.net/agenturmeldungen/dpa/bundestag-beschliesst-besseren-schutz-fuer-hinweisgeber-18539052.html>; *Bundestag verabschiedet Whistleblower-Gesetz*, SPIEGEL (Dec. 16, 2022), <https://www.spiegel.de/politik/deutschland/bundestag-verabschiedet-whistleblower-gesetz-a-5755f5bf-ddd0-4eb7-aba9-a680d2c74b23>.

<sup>693</sup> The bill is meant to enter into force three month after it has been promulgated, Article 10 BT-Drs 20/4909.

### **3. Enforcement Developments**

In February 2022, the Munich Office of the Public Prosecutor requested legal assistance from the Swiss Federal Prosecutor's Office after a leak within a Swiss bank<sup>694</sup> revealed previously unknown bank accounts of the former head of Siemens in Nigeria, who, in December 2008, admitted to bribing Nigerian officials in connection with the 2007 Siemens bribery scandal. At the time, he was fined €240.000 – which took into account the defendant's assertion that he had never taken the money for himself “directly nor indirectly.” Undermining that narrative, the leak—which included accounts opened between 1985 and 2005, partially covering the period of Nigeria-related misconduct—showed that the defendant had an account with around CHF 54 million in assets in 2006, although he earned €300.000 a year before leaving Siemens in 2004. Siemens itself denied knowledge of the manager's accounts, and the manager's lawyer denied any additional wrongdoing and did not comment on the origin of the funds in the Swiss accounts.<sup>695</sup>

In January and September 2022, the Osnabrück Office of the Public Prosecutor announced charges and penalty orders against subcontractors and former employees of the Elsflether Werft AG, a now liquidated former subsidiary of one of Germany's major shipyards, Lürssen-Group, in connection with the bribery affair involving the German Navy tall ship, the “Gorch Fock.”<sup>696</sup> Between 2013 and 2018, several subcontractors allegedly agreed with executives of the Elsflether Werft AG to include credit notes or invoice corrections of approximately 15% in their bids for supplement services in connection with the repair of various ships of the German navy. The executives were suspected of requesting credits in exchange for the future engagement of several subcontractors.<sup>697</sup> Two separate investigations into subcontractors' conduct are ongoing.<sup>698</sup>

In September 2022, the Frankfurt Office of the Public Prosecutor opened an investigation into T-Systems, a Frankfurt-based subsidiary of Deutsche Telekom, related to potentially improper payments made in connection with deals between T-Systems and the South African railroad company Transnet. T-Systems allegedly received IT-orders including services and deliveries of computers amounting to nearly €300 million through 2019 (start date unknown) from the South African railway company Transnet. T-Systems also supposedly received orders of a similar amount

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<sup>694</sup> Bernhard Odehnal, *Staatsanwaltschaft München bittet die Schweiz um Rechtshilfe*, TAGESANZEIGER (Feb. 21, 2022), <https://www.tagesanzeiger.ch/staatsanwaltschaft-muenchen-bittet-die-schweiz-um-rechtshilfe-974620620939>.

<sup>695</sup> Massimo Bognanni et al., *Neue Spur in Siemens-Schmiergeldskandal*, TAGESSCHAU (Feb. 21, 2022), <https://www.tagesschau.de/investigativ/ndr-wdr/suisse-secrets-siemens-101.html>.

<sup>696</sup> Osnabrück Public Prosecutors Office Press Release: Letzte große Anklage im Ermittlungskomplex „Gorch Fock“ erhoben (Sept. 2, 2022), <https://www.staatsanwaltschaft-osnabrueck.niedersachsen.de/startseite/aktuelles/presseinformationen/letzte-grosse-anklage-im-ermittlungskomplex-gorch-fock-erhoben-215027.html>.

<sup>697</sup> Osnabrück Public Prosecutors Office Press Release: Der Ermittlungskomplex „Gorch Fock“ - Ein Mammutverfahren auf der Zielgeraden (Jan. 17, 2022), <https://www.staatsanwaltschaft-osnabrueck.niedersachsen.de/startseite/aktuelles/presseinformationen/der-ermittlungskomplex-gorch-fock-ein-mammutverfahren-auf-der-zielgeraden-207682.html>.

<sup>698</sup> Osnabrück Public Prosecutors Office Press Release: Letzte große Anklage im Ermittlungskomplex „Gorch Fock“ erhoben (Sept. 2, 2022), <https://www.staatsanwaltschaft-osnabrueck.niedersachsen.de/startseite/aktuelles/presseinformationen/letzte-grosse-anklage-im-ermittlungskomplex-gorch-fock-erhoben-215027.html>.

from the South African energy provider Eskom. At the same time, the South African branch of the German company allegedly provided dubious payments worth millions to an intermediary company till the end of 2017. This intermediary company is attributed to a network of the Gupta Brothers<sup>699</sup> accused of obtaining several South African government orders due to their connections to the president.<sup>700</sup>

In October 2022, the Frankfurt Regional Court opened proceedings for bribery charges against a former senior public prosecutor,<sup>701</sup> who had headed the Central Office for Combating Property Crimes and Corruption in the Healthcare Sector (*Zentralstelle zur Bekämpfung von Vermögensstraftaten und Korruption im Gesundheitswesen*) at the Frankfurt Attorney General's Office and who allegedly engaged in 101 cases of bribery.<sup>702</sup> A friend of the defendant allegedly founded a company in 2005 to provide expert opinions for the Frankfurt Attorney General's Office on the legality of medical invoices and earned approximately €12.5 million in fees on these opinions, €280.000 of which was paid to the defendant between August 2015 and July 2020.<sup>703</sup>

In December 2022, the Frankfurt Regional Court sentenced the former mayor of Frankfurt to a fine<sup>704</sup> after the Frankfurt Public Prosecutors Office had opened proceedings in October 2022<sup>705</sup> on charges of improperly accepting benefits<sup>706</sup> in connection with the "AWO-scandal."<sup>707</sup> AWO

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<sup>699</sup> For additional information about the Gupta-Brothers, see David Hindley, *How three brothers 'captured' a country*, FIN.TIMES (July 6, 2022), <https://www.ft.com/content/0b13099f-a152-45fe-b363-bfd2d6aee056>.

<sup>700</sup> Hans-Martin Tillack, *Die wilden Deals der Telekom-Tochter*, WELT (Sep. 2, 2022), <https://www.welt.de/wirtschaft/article240823545/Staatsanwalt-ermittelt-bei-Telekom-Tochter-wegen-Suedafrika-Geschaeft.html>.

<sup>701</sup> Anna-Sophia Lang, *Anklage gegen Oberstaatsanwalt teilweise zugelassen*, FRANKFURT ALLGEMEINE ZEITUNG (Oct. 20, 2022), <https://www.faz.net/aktuell/rhein-main/frankfurt/korruptionsanklage-gegen-frankfurter-oberstaatsanwalt-18400640.html>; *Korruptionsanklage gegen Staatsanwalt teilweise zugelassen*, ZEIT (Oct. 20, 2022), <https://www.zeit.de/news/2022-10/20/korruptionsanklage-gegen-staatsanwalt-teilweise-zugelassen>.

<sup>702</sup> Anna-Sophia Lang, *645.000 Euro Schaden für Hessen*, FRANKFURT ALLGEMEINE ZEITUNG (June 2, 2022), <https://www.faz.net/aktuell/rhein-main/frankfurt/frankfurter-staatsanwaltschaft-erhebt-klage-gegen-oberstaatsanwalt-18076616.html>.

<sup>703</sup> Additionally, another appraisal company allegedly provided the former senior public prosecutor with at least €66.000 further illicit payments. Volker Siefert, *Anklage gegen Frankfurter Oberstaatsanwalt erhoben*, HESSENSCHAU (June 2, 2022), <https://www.hessenschau.de/panorama/korruptionsverdacht-gegen-alexander-b-anklage-gegen-frankfurter-oberstaatsanwalt-erhoben,anklage-staatsanwalt-100.html>; It is estimated that the damage for the German Federal State of Hesse connected to the case amounts to approximately €10 million. Ewald Hetrodt et al., *Justizskandal zieht Schaden in Millionenhöhe nach sich*, FRANKFURT ALLGEMEINE ZEITUNG (July 1, 2022), <https://www.faz.net/aktuell/rhein-main/frankfurt/justizskandal-in-hessen-schaden-in-millionenhoehoe-18143388.html>.

<sup>704</sup> Anna-Sophia Lang, *Peter Feldmann zu Geldstrafe verurteilt*, FRANKFURTER ALLGEMEINE ZEITUNG (Dec. 23, 2022), <https://www.faz.net/aktuell/rhein-main/urteil-in-prozess-gegen-peter-feldmann-frankfurter-ehemaliger-ob-zu-geldstrafe-verurteilt-18553319.html>.

<sup>705</sup> Gianna Niewel, *50 Seiten Vorwürfe*, SÜDDEUTSCHE ZEITUNG (Oct. 18, 2022), <https://www.sueddeutsche.de/politik/frankfurt-peter-feldmann-oberbuergermeister-prozess-1.5677344?reduced=true>.

<sup>706</sup> Accepting benefits is a criminal offense pursuant to Section 331 German Criminal Code.

<sup>707</sup> Gianna Niewel, *Anklage gegen Frankfurter Oberbürgermeister*, SÜDDEUTSCHE ZEITUNG (Mar. 24, 2022), <https://www.sueddeutsche.de/politik/frankfurt-oberbuergermeister-anklage-1.5553761>; *Feldmanns Fehlritte*, TAGESSCHAU (May 25, 2022), <https://www.tagesschau.de/inland/innenpolitik/frankfurt-feldmann-101.html>.

(*Arbeiterwohlfahrt*)<sup>708</sup> Frankfurt allegedly donated to the mayor's election campaign in 2018 in exchange for a promise to treat AWO Frankfurt interests favorably if elected. Additionally, prosecutors allege that the mayor's wife, who worked at AWO Frankfurt, received employment benefits to curry favor with the mayor, including a salary that was significantly higher than those allocated under the collective bargaining agreement, and a company car, with no business justification.<sup>709</sup> The mayor announced his voluntary resignation in July 2022, to take effect at the end of January 2023.<sup>710</sup> In response, the Frankfurt city council voted by a large majority to remove the mayor from office. The mayor refused to accept this decision, prompting a referendum,<sup>711</sup> through which the mayor was voted out of office in November 2022.<sup>712</sup>

#### D. Sweden

In June 2022, four former employees of the telecommunication company Ericsson<sup>713</sup> were acquitted of aggravated bribery by the Solna District Court, which concluded that the prosecution had failed to plead its case. Between 2011 and 2012, Ericsson employees allegedly paid bribes of more than \$2 million to the president and the attorney general of Djibouti, as well as to the managing director of Djibouti Telecom, to obtain a contract with Djibouti Telecom for the supply of telecommunication devices. The Court acquitted the employees, concluding that the prosecution had neither proven that the president and the attorney general of Djibouti were able to influence the decision to provide the contract to Ericsson nor that the managing director of Djibouti Telecom even received any money from the employees.<sup>714</sup> The prosecution appealed the court ruling.<sup>715</sup>

In November 2022, the Swedish Prosecution Authority closed a separate investigation into suspected bribery against several former employees of Ericsson because it lacked the evidence to

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<sup>708</sup> The AWO is a welfare organization in Germany with the aim to combat social problems and to realize the democratic and social federal state. *Über uns – Die Arbeiterwohlfahrt*, AWO, <https://awo.org/ueber-uns>.

<sup>709</sup> Gianna Niewel, *Anklage gegen Frankfurter Oberbürgermeister*, SÜDDEUTSCHE ZEITUNG (Mar. 24, 2022), <https://www.sueddeutsche.de/politik/frankfurt-oberbuergermeister-anklage-1.5553761>; *Feldmanns Fehlritte*, TAGESSCHAU (May 25, 2022), <https://www.tagesschau.de/inland/innenpolitik/frankfurt-feldmann-101.html>.

<sup>710</sup> *Frankfurter Oberbürgermeister Feldmann kündigt Rücktritt an*, FRANKFURTER ALLGEMEINE ZEITUNG (July 5, 2022), <https://www.faz.net/aktuell/rhein-main/frankfurt/peter-feldmann-kuendigt-ruecktritt-im-januar-2023-an-18150611.html>.

<sup>711</sup> *Umstrittener Oberbürgermeister Feldmann nimmt Abwahl nicht an*, SPIEGEL (July 22, 2022), <https://www.spiegel.de/politik/deutschland/frankfurt-umstrittener-oberbuergermeister-peter-feldmann-nimmt-abwahl-nicht-an-a-998afa1d-dd32-4ec4-8f46-e35475991cdb>.

<sup>712</sup> Thorsten Winter, *Frankfurts Oberbürgermeister Feldmann abgewählt*, FRANKFURTER ALLGEMEINE ZEITUNG (Nov. 06, 2022), <https://www.faz.net/aktuell/rhein-main/oberbuergermeister-feldmann-abgewaehlt-buergerentscheid-in-frankfurt-18440569.html>.

<sup>713</sup> For further discussion of Ericsson's disclosures to the US Department of Justice regarding its DPA, see *supra* at Section III.C.2.

<sup>714</sup> Solna District Court, judgment dated June 21st, 2022, file no. B 5258-21.

<sup>715</sup> Alice Johnson, *Sweden closes China-focused Ericsson bribery investigation*, GLOBAL INVESTIGATIONS REV. (Nov. 15, 2022), <https://globalinvestigationsreview.com/article/sweden-closes-china-focused-ericsson-bribery-investigation>.

establish that improper payments were made.<sup>716</sup> The China-related bribery investigation was opened in 2019 and focused on allegations that Ericsson employees paid tens of millions of dollars in bribes over a longer period of time until 2016.<sup>717</sup> With this investigation's closure, Sweden's National Anti-Corruption Unit and Sweden's National Operational Department's anti-corruption team concluded the last of their four jointly-operated Ericsson-related criminal investigations.<sup>718</sup> In addition to the Djibouti-related investigation discussed above, the two further investigations included investigations focused on Iraq—which was opened in early 2022—and Kuwait; both were closed in August 2022 and no charges were filed.<sup>719</sup>

## E. Italy

### 1. Legislative and Policy Developments

Issued in October 2022, the OECD Working Group on Bribery's report on Italy found that the country had made progress in implementing a strong anti-bribery regime,<sup>720</sup> but also identified remaining weaknesses that could undermine anti-corruption enforcement and made recommendations to remedy such gaps. The Working Group noted concern about the high number of dismissals in litigated foreign bribery cases—six of seven recently litigated cases having been partially or wholly dismissed—due to burdens of proof that set unnecessarily high bars to conviction.<sup>721</sup> The Working Group was also dissatisfied with Italy's corporate accountability legal

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<sup>716</sup> Swedish Prosecution Authority Press Release: Förundersökning om mutbrott läggs ned (Nov. 14, 2022), <https://www.aklagare.se/nyheter-press/pressmeddelanden/2022/november/forundersokning-om-mutbrott-laggs-ned/>.

<sup>717</sup> Alice Johnson, *Sweden closes China-focused Ericsson bribery investigation*, GLOBAL INVESTIGATIONS REV. (Nov. 15, 2022), <https://globalinvestigationsreview.com/article/sweden-closes-china-focused-ericsson-bribery-investigation>.

<sup>718</sup> Swedish Prosecution Authority Press Release: Förundersökning om mutbrott läggs ned (Nov. 14, 2022), <https://www.aklagare.se/nyheter-press/pressmeddelanden/2022/november/forundersokning-om-mutbrott-laggs-ned/>.

<sup>719</sup> Alice Johnson, *Sweden closes China-focused Ericsson bribery investigation*, GLOBAL INVESTIGATIONS REV. (Nov. 15, 2022), <https://globalinvestigationsreview.com/article/sweden-closes-china-focused-ericsson-bribery-investigation>.

<sup>720</sup> The report praised various changes implemented by Italy, including adopting longer applicable statutes of limitations, establishing longer prison terms and disqualification sanctions, providing protections for whistleblowers, and setting up a unit specializing in investigating foreign bribery in the Milan Public Prosecutor's Office in 2018. OECD, Implementing the OECD Anti-Bribery Convention: Phase 4 Report: Italy, at 6, 49 (Oct. 13, 2022), <https://www.oecd.org/corruption/anti-bribery/italy-phase-4-report.pdf>. The Working Group also praised Italy's efforts to date to implement the anti-bribery Convention and assist other countries, noting: "Italy has commendably promoted the Convention, significantly contributed to anti-corruption efforts in multiple international fora, and led capacity building programmes." Organization for Economic Co-operation and Development Press Release: Despite notable achievements, concerning issues impede Italy's further progress in fighting foreign bribery, says OECD Working Group on Bribery (Oct. 18, 2022), <https://www.oecd.org/newsroom/despite-notable-achievements-concerning-issues-impede-italy-s-further-progress-in-fighting-foreign-bribery-says-oecd-working-group-on-bribery.htm>.

<sup>721</sup> OECD, Implementing the OECD Anti-Bribery Convention: Phase 4 Report: Italy, at 6 (Oct. 13, 2022), <https://www.oecd.org/corruption/anti-bribery/italy-phase-4-report.pdf>.

framework, pointing out several areas in need of legislative fixes.<sup>722</sup> In addition to legislative remedies, the Working Group recommended less formal policy reforms, including closely monitoring domestic and foreign media sources for corruption news, and increased training.<sup>723</sup>

## 2. Enforcement Developments

In July 2022, the Milan Court of Appeal upheld a 2021 court decision to throw out charges against both Shell and Eni relating to alleged bribery in Nigeria.<sup>724</sup> The alleged bribery scheme involved paying \$1.1 billion in bribes to Nigeria's former oil minister and other officials in order to secure rights to an offshore oilfield called OPL 245.<sup>725</sup> The two companies were acquitted, along with numerous individual executives and Nigerian officials, after the court concluded that the prosecutors failed to prove their case and did not turn over potentially favorable evidence to the defense.<sup>726</sup> Some anti-corruption NGOs denounced the dismissal of the charges at the time, arguing that the court's decision set the bar too high for proving foreign bribery.<sup>727</sup>

## F. European Union

### 1. Legislative and Policy Developments

In her State of the Union address in September, European Commission (EC) President Ursula von der Leyen announced that the EC would present measures to update the EU's legislative anti-corruption framework in 2023 on offenses such as abuse of power, beyond more "classic offences"

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<sup>722</sup> OECD, Implementing the OECD Anti-Bribery Convention: Phase 4 Report: Italy, at 6 (Oct. 13, 2022), <https://www.oecd.org/corruption/anti-bribery/italy-phase-4-report.pdf>. The Working Group noted that corporate fines "are so low as to be unfit for purpose;" Italy's statute of limitations for corporations is shorter than for individuals; "confiscation" is not used frequently enough and does not always disgorge all ill-gotten gains; and "interdictive sanctions" that impose various punishments like revocations of licenses or restrictions on funding are available but rarely imposed. *Id.*

<sup>723</sup> OECD, Implementing the OECD Anti-Bribery Convention: Phase 4 Report: Italy, at 6 (Oct. 13, 2022), <https://www.oecd.org/corruption/anti-bribery/italy-phase-4-report.pdf>.

<sup>724</sup> Sam Fry, *Italy court upholds Shell and Eni acquittals in Nigeria bribery case*, GLOBAL INVESTIGATIONS REV. (July 19, 2022), <https://globalinvestigationsreview.com/article/italy-court-upholds-shell-and-eni-acquittals-in-nigeria-bribery-case>.

<sup>725</sup> James Thomas, *Shell-Eni judgment reveals gaffes by the prosecution*, GLOBAL INVESTIGATIONS REV. (June 17, 2021), <https://globalinvestigationsreview.com/news-and-features/in-house/2020/article/shell-eni-judgment-reveals-gaffes-the-prosecution>.

<sup>726</sup> James Thomas, *Shell-Eni judgment reveals gaffes by the prosecution*, GLOBAL INVESTIGATIONS REV. (June 17, 2021), <https://globalinvestigationsreview.com/news-and-features/in-house/2020/article/shell-eni-judgment-reveals-gaffes-the-prosecution>.

<sup>727</sup> James Thomas, *Shell-Eni judgment reveals gaffes by the prosecution*, GLOBAL INVESTIGATIONS REV. (June 17, 2021), <https://globalinvestigationsreview.com/news-and-features/in-house/2020/article/shell-eni-judgment-reveals-gaffes-the-prosecution>.

like bribery.<sup>728</sup> The proposals are expected to add corruption to the EU's human rights sanction regime as a new tool to protect EU values abroad.<sup>729</sup>

Fighting corruption remained a main legislative agenda item for the EC in 2022. In May 2022 the EC proposed a new directive on asset recovery and confiscation of the proceeds of crimes to implement a series of international conventions, including the United Nations Convention on Organized Crime (UNTOC) and its protocols and the United Nations Convention Against Corruption (UNCAC).<sup>730</sup> The proposed directive aims to strengthen the capabilities of competent authorities to freeze assets and reinforce their confiscation capabilities, with an eye towards effectively enforcing the EU's restrictive measures against Russia and Belarus in light of Russia's invasion of Ukraine.<sup>731</sup>

In November 2022, the EC concluded that Hungary had not progressed enough in its rule of law reforms—including improving its domestic anti-corruption framework—to have access to its share of the €800 billion Recovery and Resilience Fund (RRF) meant to support investments and reforms across the EU in response to the COVID-19 crisis.<sup>732</sup> The EC will disburse €5.8 billion in grants to Hungary only when it has fulfilled all the relevant milestones and targets outlined in its RRF plan.<sup>733</sup>

Also in November 2022, the Council of the EU (Council) gave its final approval on the Corporate Sustainability Reporting Directive (CSRD), which aims to achieve more complete and transparent sustainability reporting by requiring large companies and listed small and medium-sized enterprises ("SMEs") to disclose information, among other things, on anti-corruption and bribery matters.<sup>734</sup> Based on revised standards, the CSRD's reporting requirements will apply to a larger number of

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<sup>728</sup> Ursula von der Leyen, President, European Comm'n, 2022 State of the Union Address (Sept. 14, 2022), [https://ec.europa.eu/commission/presscorner/detail/ov/speech\\_22\\_5493](https://ec.europa.eu/commission/presscorner/detail/ov/speech_22_5493). The European Parliament may have the new EU Anti-Money Laundering Regulation ready early next year, including a new EU authority against money laundering. Kathryn Carlson, *EU money-laundering rules won't see parliament agreement before next year, lead lawmaker says*, MLEX (Nov. 15, 2022), <https://content.mlex.com/#content/1425495>.

<sup>729</sup> Ursula von der Leyen, President, European Comm'n, 2022 State of the Union Address (Sept. 14, 2022), [https://ec.europa.eu/commission/presscorner/detail/ov/speech\\_22\\_5493](https://ec.europa.eu/commission/presscorner/detail/ov/speech_22_5493).

<sup>730</sup> The proposal will strengthen the capabilities of competent authorities to identify, freeze and manage assets, as well as reinforce and extend their confiscation capabilities. The directive will improve the cooperation between all involved authorities. Proposal for a Directive of the European Parliament and the Council on Asset Recovery and Confiscation (COM/2022/245), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022PC0245&from=EN>.

<sup>731</sup> See Proposal for a Directive of the European Parliament and the Council on Asset Recovery and Confiscation, Explanatory Memorandum (COM/2022/245), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022PC0245&from=EN>.

<sup>732</sup> European Commission Press Release IP/22/7273: Commission finds that Hungary has not progressed enough in its reforms and must meet essential milestones for its Recovery and Resilience funds (Nov. 30, 2022). [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_7273](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7273)

<sup>733</sup> Hungary's RRF plan includes 17 remedial measures, among them combatting corruption by setting up independent bodies—an Integrity Authority (Intégritás Hatóság) and within the Authority an Anti-Corruption Task Force (Korrupcióellenes Munkacsoport)—to intervene when public authorities fail to take anti-corruption measures and to improve anti-corruption measures, by significantly increasing the amount of information required from public officials when making asset declarations, by improving competition and transparency in public procurement, etc.

<sup>734</sup> Council of the European Union Press Release: Council gives final green light to corporate sustainability reporting directive (Nov. 28, 2022), <https://www.consilium.europa.eu/en/press/press-releases/2022/11/28/council-gives-final-green-light-to-corporate-sustainability-reporting-directive/>.

companies and organizations than the previous disclosure regime.<sup>735</sup> However, the Council also provided for a transition period until 2028, during which time listed SMEs will be able to opt-out of the CSRD's reporting requirements.<sup>736</sup>

## 2. Enforcement Developments

### a. General

During the FIFA World Cup in Qatar in December 2022, Belgian authorities brought corruption charges against certain officials within the European Parliament.<sup>737</sup> Belgian police detained Greek Member of the European Parliament (MEP) Eva Kaili and at least three other suspects and searched 16 homes as part of an investigation into "criminal organization, corruption and money laundering" involving Qatar and Morocco.<sup>738</sup> Pier Antonio Panzeri, the president of Fight Impunity and an Italian MEP between 2004 and 2019, was also charged in the case.<sup>739</sup> The European Parliament voted to remove Kaili from a leadership role following the charges<sup>740</sup> and her assets have been frozen by Greek authorities.<sup>741</sup> President of the European Parliament Roberta Metsola

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<sup>735</sup> Smaller companies will be covered by the CSRD than were covered under the EC's prior directive, as will certain *non-EU companies* with a significant presence in the EU. The CSRD will apply to non-EU companies that have more than €150 million in turnover in the EU and have at least one subsidiary or branch within the EU above "certain thresholds." Council of the European Union Press Release: Council gives final green light to corporate sustainability reporting directive (Nov. 28, 2022). <https://www.consilium.europa.eu/en/press/press-releases/2022/11/28/council-gives-final-green-light-to-corporate-sustainability-reporting-directive/>.

<sup>736</sup> Council of the European Union Press Release: Council gives final green light to corporate sustainability reporting directive (Nov. 28, 2022), <https://www.consilium.europa.eu/en/press/press-releases/2022/11/28/council-gives-final-green-light-to-corporate-sustainability-reporting-directive/>.

<sup>737</sup> Hannah Brenton, *EU Parliament VP Kaili charged with corruption in Qatar scandal probe*, POLITICO (Dec. 11, 2022), <https://www.politico.eu/article/mep-kaili-charged-with-corruption-by-belgian-prosecutors-reports>. Joshua Askew, *Eva Kaili: What led to the MEP corruption scandal at the European Parliament?*, EURONEWS (Jan. 2, 2023), <https://www.euronews.com/2022/12/19/mep-corruption-scandal-what-weak-spots-has-it-exposed-in-the-european-parliament>.

<sup>738</sup> In the events leading to the charges, MEPs passed a softer-than-expected resolution on human rights in Qatar ahead of the World Cup, and Kaili praised Qatar as a "frontrunner" of labor rights and voted in favor of granting Qataris visa-free travel to Europe and sought to influence other MEPs. See Silvia Sciorilli Borrelli et al., *Suitcases of cash, luxury holidays and secret accounts: Qatar bribery scandal rocks Europe*, FIN. TIMES (Dec. 16, 2022), <https://www.ft.com/content/e3bfd079-5cc7-4f64-9db6-941ca9d5c3d0>. See also Vincent Manancourt et al., *Qatargate: Italian ex-MEP's wife and daughter arrested*, POLITICO (Dec. 10, 2022), <https://www.politico.eu/article/qatar-gate-pier-antonio-panzeri-italian-ex-meps-wife-and-daughter-arrested>; Hannah Brenton, *EU Parliament VP Kaili charged with corruption in Qatar scandal probe*, POLITICO (Dec. 11, 2022), <https://www.politico.eu/article/mep-kaili-charged-with-corruption-by-belgian-prosecutors-reports>; Andy Bounds et al., *Brussels to question ex-commissioner over Qatar scandal*, FIN. TIMES (Dec. 21, 2022), <https://www.ft.com/content/23f27ce6-b12e-4426-aea7-36c1b58cee76>.

<sup>739</sup> Hannah Brenton, *EU Parliament VP Kaili charged with corruption in Qatar scandal probe*, POLITICO (Dec. 11, 2022), <https://www.politico.eu/article/mep-kaili-charged-with-corruption-by-belgian-prosecutors-reports>.

<sup>740</sup> European Parliament Press Release: Eva Kaili no longer Vice-President of the European Parliament (Dec. 13, 2022), <https://www.europarl.europa.eu/news/en/press-room/20221213IPR64610/eva-kaili-no-longer-vice-president-of-the-european-parliament>.

<sup>741</sup> European Parliament corruption scandal: MEP Eva Kaili pre-trial hearing postponed, EURONEWS (Dec. 14, 2022), <https://www.euronews.com/my-europe/2022/12/14/corruption-scandal-eva-kaili-and-three-other-suspects-face-pre-trial-hearing>.

also promised reforms to promote transparency and to prevent bribery in the European Parliament by countries or lobbies.<sup>742</sup>

#### **b. Update on European Public Prosecutor's Office**

Following its launch in 2021 as an independent EU body, the European Public Prosecutor's Office (EPPO), now has the participation of 22 of the 27 EU countries.<sup>743</sup> The primary responsibility of the EPPO is to investigate and prosecute criminal offenses affecting the EU's financial interests, including Value Added Tax (VAT) fraud with damages above €10 million, money laundering, corruption, and other types of fraud.

Since starting its operations, the EPPO has registered more than 4,000 crime reports from participating EU countries and private parties, and as of June 2022 launched over 929 investigations.<sup>744</sup> In its 2021 annual report, released in March 2022 and covering the first 7 months of its activity, the EPPO estimated the damage to the EU budget in active investigations at €5.4 billion.<sup>745</sup> The most frequent types of crimes affecting the EU budget in 2021 were non-procurement expenditure fraud, VAT revenue fraud, customs and anti-dumping duties fraud as well as procurement expenditure fraud. According to the report, only 4% of 515 active investigations from 2021 concerned corruption of public officials.<sup>746</sup>

In 2022, though, the EPPO continued its enforcement activities in corruption and bribery cases.<sup>747</sup> For example, measures were taken against 22 high-level public officials in Sicily, Italy in an investigation focusing on the application procedures for EU and domestic public funding for

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<sup>742</sup> *EU Parliament President Roberta Metsola promises reforms to prevent corruption*, EURONEWS (Dec. 15, 2022), <https://www.euronews.com/2022/12/15/eu-parliament-president-roberta-metsola-promises-reforms-to-prevent-corruption>.

<sup>743</sup> Out of the remaining 5 EU countries, Hungary, Poland and Sweden decided not to join the EPPO. Denmark and Ireland have an opt-out from the area of freedom, security and justice.

<sup>744</sup> *Mission and Tasks*, EUROPEAN PUBLIC PROSECUTOR'S OFFICE (Dec. 1, 2022), <https://www.eppo.europa.eu/en/mission-and-tasks>.

<sup>745</sup> European Public Prosecutor's Office Press Release: The EPPO investigates €5.4 billion worth of loss to the EU budget in its first 7 months of activity (Mar. 24, 2022), <https://www.eppo.europa.eu/en/news/eppo-investigates-eu54-billion-worth-loss-eu-budget-its-first-7-months-activity>; European Public Prosecutor's Office Press Release: Operation Admiral: EPPO uncovers organised crime groups responsible for VAT fraud estimated at €2.2 billion (Nov. 29, 2022), <https://www.eppo.europa.eu/en/news/operation-admiral-eppo-uncovers-organised-crime-groups-responsible-vat-fraud-estimated-eu22>.

<sup>746</sup> European Public Prosecutor's Office Press Release: The EPPO investigates €5.4 billion worth of loss to the EU budget in its first 7 months of activity (Mar. 24, 2022), <https://www.eppo.europa.eu/en/news/eppo-investigates-eu54-billion-worth-loss-eu-budget-its-first-7-months-activity>.

<sup>747</sup> European Public Prosecutor's Office Press Release: Ten Croatians indicted, including 2 mayors, for corruption and abuse of function (May 25, 2022), <https://www.eppo.europa.eu/en/news/ten-croatians-indicted-including-2-mayors-corruption-and-abuse-function>; European Public Prosecutor's Office Press Release: Corruption and fraud regarding agricultural funds in Sicily: measures taken against 22 high-level public officials and citizens (June 28, 2022), <https://www.eppo.europa.eu/en/news/corruption-and-fraud-regarding-agricultural-funds-sicily-measures-taken-against-22-high-level>; European Public Prosecutor's Office Press Release: Update: Three arrested in Croatia on suspicion of receiving and giving bribes in multi-million euro infrastructure project (July 15, 2022) <https://www.eppo.europa.eu/en/news/update-three-arrested-croatia-suspicion-receiving-and-giving-bribes-multi-million-euro>.

agriculture.<sup>748</sup> Similarly, the mayor of Nova Gradiška, Croatia was indicted for allegedly accepting two bribes in the amount of €15,000 in exchange for the manipulation of procurement procedures.<sup>749</sup>

In an important development for international enforcement cooperation, the EPPO, the US Department of Justice, and the US Department of Homeland Security signed a Memorandum of Understanding and Working Arrangement on Cooperation (“MoU”) on July 26, 2022.<sup>750</sup> The MoU aims to achieve cooperation in investigations and prosecutions relating to criminal offences within “their respective competences, with respect to the exchange of strategic and operational information and evidence, extradition and other forms of cooperation.”<sup>751</sup> Among other things, the MoU regulates and permits cooperation in gathering information and evidence and provides for participation in joint investigation teams between the agencies pursuant to the US-EU mutual legal assistance agreement.<sup>752</sup>

## G. Switzerland

In July 2022, the late President of Uzbekistan’s daughter, Gulnara Karimova, prevailed in an appeal over frozen funds held in a Geneva bank account.<sup>753</sup> Karimova’s case is connected to 2012 investigations into bribery in the Uzbek telecommunications market (including VimpelCom and MTS).<sup>754</sup> A previous court had determined Karimova was a de facto public official who was able to influence the Uzbek telecommunications market because she was the president’s daughter.<sup>755</sup> However, the Swiss appeals court found that was an overly broad interpretation and

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<sup>748</sup> European Public Prosecutor’s Office Press Release: Corruption and fraud regarding agricultural funds in Sicily: measures taken against 22 high-level public officials and citizens (June 28, 2022), <https://www.eppo.europa.eu/en/news/corruption-and-fraud-regarding-agricultural-funds-sicily-measures-taken-against-22-high-level>.

<sup>749</sup> European Public Prosecutor’s Office Press Release: Ten Croatians indicted, including 2 mayors, for corruption and abuse of function (May 25, 2022), <https://www.eppo.europa.eu/en/news/ten-croatians-indicted-including-2-mayors-corruption-and-abuse-function>.

<sup>750</sup> European Public Prosecutor’s Office Press Release: EPPO signs working arrangement with the United States Department of Justice and the United States Department of Homeland Security (July 26, 2022), <https://www.eppo.europa.eu/en/news/eppo-signs-working-arrangement-united-states-department-justice-and-united-states-department>.

<sup>751</sup> *Memorandum of Understanding and Working Arrangement on Cooperation between the European Public Prosecutor’s Office, on the one side, and the United States Department of Justice and Department of Homeland Security, on the other side*, EUROPEAN PUBLIC PROSECUTOR’S OFFICE (July 26, 2022), Section 1, <https://www.eppo.europa.eu/sites/default/files/2022-07/WA%20EPPO-US-signed-EPPO.pdf>.

<sup>752</sup> *Memorandum of Understanding and Working Arrangement on Cooperation between the European Public Prosecutor’s Office, on the one side, and the United States Department of Justice and Department of Homeland Security, on the other side*, EUROPEAN PUBLIC PROSECUTOR’S OFFICE (July 26, 2022), <https://www.eppo.europa.eu/sites/default/files/2022-07/WA%20EPPO-US-signed-EPPO.pdf>.

<sup>753</sup> Hugo Miller, *Ex-Uzbek Leader’s Daughter Wins Case Over Frozen \$303 Million*, BLOOMBERG LAW (July 22, 2022), <https://news.bloomberglaw.com/white-collar-and-criminal-law/ex-uzbek-leaders-daughter-wins-case-over-frozen-303-million>.

<sup>754</sup> Hugo Miller, *Ex-Uzbek Leader’s Daughter Wins Case Over Frozen \$303 Million*, BLOOMBERG LAW (July 22, 2022), <https://news.bloomberglaw.com/white-collar-and-criminal-law/ex-uzbek-leaders-daughter-wins-case-over-frozen-303-million>.

<sup>755</sup> Hugo Miller, *Ex-Uzbek Leader’s Daughter Wins Case Over Frozen \$303 Million*, BLOOMBERG LAW (July 22, 2022), <https://news.bloomberglaw.com/white-collar-and-criminal-law/ex-uzbek-leaders-daughter-wins-case-over-frozen-303-million>.

that she was not a public official and that, because she was not, “the existence of the crime of money laundering and bribery [was] not demonstrated.”<sup>756</sup> This decision paves the way for Karimova, who is currently serving a 13 year sentence in Uzbekistan for money laundering and extortion, to try to recover the 293 million Swiss francs held in a Swiss account.<sup>757</sup>

On December 2, 2022, the Office of the Attorney General of Switzerland (OAG) issued a penalty order against ABB Management Services Ltd., requiring the company to pay a fine of four million Swiss francs for its failure to take necessary steps to prevent the payment of bribes to South African officials.<sup>758</sup> In this matter, the Swiss authorities coordinated with the DOJ, SEC, and prosecutorial authorities in South Africa. In total, this coordination resulted in a multi-jurisdictional resolution with a penalty of over \$315 million.<sup>759</sup> According to the OAG, starting in 2013, various ABB employees paid at least 1.3 million Swiss francs in bribes which allowed ABB South Africa to secure over \$200 million dollars of business.<sup>760</sup> While the maximum penalty for this conduct is set at five million Swiss francs, the OAG considered ABB’s cooperation with its investigation and reduced the fine to four million.<sup>761</sup> Additionally, ABB Management Services AG was ordered to cover the costs of the proceedings, totaling 50,000 Swiss francs.<sup>762</sup>

## H. The Russian Federation

### 1. Legislative and Regulatory Developments

On March 6, 2022, President Vladimir V. Putin signed an amendment to a Russian banking law and the federal anti-corruption law, allowing the government to seize funds from bank accounts of state-owned entities or government officials, their spouses, or minor children where the legality of the source of funds cannot be confirmed and the sum of deposits exceeds the individual’s declared

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<sup>756</sup> Hugo Miller, *Ex-Uzbek Leader’s Daughter Wins Case Over Frozen \$303 Million*, BLOOMBERG LAW (July 22, 2022), <https://news.bloomberglaw.com/white-collar-and-criminal-law/ex-uzbek-leaders-daughter-wins-case-over-frozen-303-million>.

<sup>757</sup> Hugo Miller, *Ex-Uzbek Leader’s Daughter Wins Case Over Frozen \$303 Million*, BLOOMBERG LAW (July 22, 2022), <https://news.bloomberglaw.com/white-collar-and-criminal-law/ex-uzbek-leaders-daughter-wins-case-over-frozen-303-million>.

<sup>758</sup> Office of the Attorney General of Switzerland Press Release: The Office of the Attorney General of Switzerland resolves criminal investigation against ABB (Dec. 2, 2022), <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-92020.html>.

<sup>759</sup> U.S. Department of Justice Press Release No. 22-1296: ABB Agrees to Pay Over \$315 Million to Resolve Coordinated Global Foreign Bribery Case (Dec. 2, 2022), <https://www.justice.gov/opa/pr/abb-agrees-pay-over-315-million-resolve-coordinated-global-foreign-bribery-case>; see also *supra* at Section III.A.4.g.

<sup>760</sup> Office of the Attorney General of Switzerland Press Release: The Office of the Attorney General of Switzerland resolves criminal investigation against ABB (Dec. 2, 2022), <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-92020.html>.

<sup>761</sup> Office of the Attorney General of Switzerland Press Release: The Office of the Attorney General of Switzerland resolves criminal investigation against ABB (Dec. 2, 2022), <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-92020.html>.

<sup>762</sup> Office of the Attorney General of Switzerland Press Release: The Office of the Attorney General of Switzerland resolves criminal investigation against ABB (Dec. 2, 2022), <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-92020.html>.

incomes by a certain amount.<sup>763</sup> The amendment also empowers prosecutors to send inquiries to officials' financial institutions, commercial lenders and digital financial asset issuers to determine the legality of funds.

On April 25, 2022 Putin signed a decree establishing Poseidon State Information System (Poseidon SIS), a digital anti-corruption information system that uses artificial intelligence to "prevent corruption and other offenses."<sup>764</sup> The system is designed to detect violations of anti-corruption laws by cross-referencing government agency databases with property registries, photos and connections on social media networks, and other open-source information.<sup>765</sup>

## 2. Enforcement Developments

The Russian Prosecutor General's Office estimated that around 8,700 corruption-related cases went to court in 2022, a ten percent increase from last year, and about 5,700 people were convicted of corruption-related crimes.<sup>766</sup> In the first nine months of 2022, 340 government officials were reportedly dismissed from office for convictions based on violations of anti-corruption laws, 70% of whom worked for the Interior Ministry including 11 officials from the Prosecutor General's office. The total damages from corruption-related convictions amounted to USD 598 million for the first nine months of 2022, which was less than half of last year's total of USD 1.016 billion. The average bribe in Russia in 2022 was around USD 8,000.

In May 2022, a Moscow court sentenced Dmitry Zakharchenko, the former Deputy Head of the Interior Ministry's economic security and anti-corruption office, to 16 years in prison on charges of soliciting and receiving bribes and abuse of power for receiving money, restaurant discounts, gifts, and trips from various Russian businessmen.<sup>767</sup> Zakharchenko was arrested in 2016 after police found more than USD 125 million in various currencies in boxes and plastic bags in his Moscow

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<sup>763</sup> Federal Law No. 44-FZ "On Amendments to Article 26 of the Federal Law 'On Banking and Banking Activities' and Federal Law 'On Countering Corruption,'" PRAVO (Mar. 6, 2022) <http://publication.pravo.gov.ru/Document/View/0001202203060014>; President of Russia Press Release: Introduction of legislative amendments aiming to fight corruption among officials (Mar. 6, 2022), <http://en.kremlin.ru/catalog/keywords/93/events/67922>.

<sup>764</sup> Decree No. 232 of the President of the Russian Federation, dated April 25, 2022, On the Poseidon State Information System in the Field of Countering Corruption and Amendments to Certain Acts, <http://www.kremlin.ru/acts/bank/47769>; President of Russia Press Release: Executive Order on introducing information technology to prevent corruption and other offenses (Apr. 25, 2022), <http://en.kremlin.ru/acts/news/68280>. Poseidon is coordinated by the Presidential Executive Office and operated by the Federal Guard Service, an agency tasked with protecting high-ranking state officials, while the Ministry of Labor renders methodological and consultative support." CITATION: President of Russia Press Release: Executive Order on introducing information technology to prevent corruption and other offenses (Apr. 25, 2022), <http://en.kremlin.ru/acts/news/68280>.

<sup>765</sup> According to Kirill Kabanov, the Chairman of the Russian National Anti-Corruption Committee, Poseidon could be used to identify, for example, an instance in which the wife of a government official won a large government tender. Evgeny Belyakov & Oleg Adamovich, *Setting Artificial Intelligence on Bribe-Takers: How the Poseidon anti-corruption system will work*, KOMSOMOLSKAYA PRAVDA (Apr. 25, 2022), <https://www.kp.ru/daily/27383/4578300/>.

<sup>766</sup> Igor Krasnov, "We slap hands" over corruption and continue to do so, TASS (Dec. 9, 2022), <https://tass.ru/interviews/16540865>.

<sup>767</sup> Information on Case No. 01-0007/2022, Zakharchenko D.V., Presnensky District Court of Moscow, <https://mos-gorsud.ru/rs/presnenskij/services/cases/criminal/details/740e1340-5ca9-11eb-be78-d7b75611b955>.

apartment.<sup>768</sup> In 2019, he was sentenced to 13 years in a maximum security penal colony and stripped of his Colonel rank.<sup>769</sup> This year, the Presensky district court in Moscow delivered a new verdict with an extended sentence after police discovered an additional \$21.6 million USD in funds in legal entities under Zakharchenko's control, alleged to have been received from the same sources.<sup>770</sup>

In August 2022, State Duma deputy Vadim Belousov was placed on the Russian Ministry of Internal Affairs' "Most Wanted" List after being sentenced in absentia to 10 years in a penal colony for his alleged role in a large-scale bribery scheme in Chelyabinsk, a city in Eastern Russia.<sup>771</sup> According to prosecutors, from 2010 to 2014, Belousov, together with Mikhail Yurevich, the former governor of Chelyabinsk, and Margarita Butakova, Belousov's 80 year-old mother-in-law, received RUB 3.2 billion in bribes from the head of a construction company in exchange for granting the company contracts for the construction, repair and maintenance of roads in the region.<sup>772</sup> In December 2018, the Duma stripped Belousov of parliamentary immunity to initiate criminal proceedings against him; the criminal prosecution of an acting parliamentarian is unprecedented in Russia.<sup>773</sup>

### 3. Other Legal Developments

In June, as a result of Russia's invasion of Ukraine, the Financial Action Task Force, a 39-member organization responsible for setting international anti-money laundering standards, announced that it would severely limit Russia's role and influence in the organization.<sup>774</sup> In a statement, FATF said that Russia "can no longer hold any leadership or advisory roles or take part in decision-making on standard-setting, FATF peer review processes, governance and membership matters."<sup>775</sup>

In October, a lawyer for jailed Russian opposition leader Alexei Navalny confirmed that the Investigative Committee opened a new criminal case against Navalny for promoting terrorism and

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<sup>768</sup> *Former Russian Anti-Corruption Official Sentenced to 13 Years for Bribery*, THE MOSCOW TIMES (June 10, 2022), <https://www.themoscowtimes.com/2019/06/10/former-russian-anti-corruption-official-sentenced-to-13-years-for-bribery-a65949>.

<sup>769</sup> David Brennan, *Russian Anti-corruption Officer Jailed After Police Find \$139 Million in Cash Bribes in His Apartments*, NEWSWEEK (June 11, 2022),

<sup>770</sup> Court sentences ex-Colonel Zakharchenko to 16 years in prison for corruption, INTERFAX (May 17, 2022), <https://www.interfax.ru/russia/841333>.

<sup>771</sup> Olesya Pavlenko, *Deputy Belousov sentenced to ten years for bribery put on wanted list*, KOMMERSANT (Aug. 19, 2022), <https://www.kommersant.ru/doc/5515670>.

<sup>772</sup> Sergei Mashkin, *The deputy left for the verdict and did not return*, KOMMERSANT (Aug. 3, 2022), <https://www.kommersant.ru/doc/5492679>.

<sup>773</sup> Russian Lawmaker Put On Most-Wanted List After Failing To Attend Hearing Giving Him 10-Year Sentence, RADIO FREE EUROPE RADIO LIBERTY (Aug. 4, 2022), <https://www.rferl.org/a/russia-lawmaker-belousov-most-wanted-list-bribery/31973606.html>; MAKFA's positions in Russia, [https://makfahealth.com/about\\_makfa/](https://makfahealth.com/about_makfa/).

<sup>774</sup> Financial Action Task Force Publication: FATF Statement on the Russian Federation (June 17, 2022), <https://www.fatf-gafi.org/publications/fatfgeneral/documents/ukraine-june-2022.html>.

<sup>775</sup> Financial Action Task Force Publication: FATF Statement on the Russian Federation (June 17, 2022), <https://www.fatf-gafi.org/publications/fatfgeneral/documents/ukraine-june-2022.html>.

extremism.<sup>776</sup> As we reported in last year's Year-in-Review,<sup>777</sup> Navalny is already serving consecutive prison terms of eleven and a half years for fraud, contempt of court and parole violations, and a conviction on the new charges could more than double his sentence. In a statement on Twitter, Navalny said, "You all thought I had been isolated in prison for two years, but it turns out I was actively committing crimes. Luckily, the Investigative Committee was vigilant and didn't miss a thing."<sup>778</sup>

## I. Ukraine

### 1. Legislative and Policy Developments

On June 17, 2022, the EU Commission awarded Ukraine with candidate status for EU membership in an Opinion that established seven obligations the country must fulfill, including completing the appointment of a new head of the Specialized Anti-Corruption Prosecutor's Office (SAPO) and the appointment of a new director of the NABU.<sup>779</sup> In July, President Volodymyr Zelenskyy appointed Andriy Kostin the Prosecutor General and Kostin in turn appointed Oleksandr Klymenko as the head of SAPO.<sup>780</sup>

In July 2022, President Zelensky signed a law setting out the country's anti-corruption strategy through 2025.<sup>781</sup> The policy includes the elimination of duplicative authority by different bodies and digitizing data to enhance transparency among state and local authorities.<sup>782</sup> Oleksandr Novikov, the head of the NACP, noted that the law was "especially important in the context of Ukraine's accession to the EU and the future recovery of the country after the war."<sup>783</sup>

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<sup>776</sup> A criminal case was opened against Navalny for calling for terrorism and rehabilitating Nazism, INTERFAX (Oct. 20, 2022), <https://www.interfax.ru/russia/868820>.

<sup>777</sup> WilmerHale, *Global Anti-Bribery Year-in-Review: 2020 Developments and Predictions for 2022*, at 108-09 (Jan. 27, 2022), <https://www.wilmerhale.com/en/insights/client-alerts/2020127-2021-global-anti-bribery-year-in-review>.

<sup>778</sup> Alexei Navalny (@navalny), TWITTER (Oct. 20, 2022, 9:47 AM), <https://twitter.com/navalny/status/1583092591049859072?lang=en>.

<sup>779</sup> Communication from the Commission to the European Parliament, the European Council and the Council: Opinion on Ukraine's application for membership of the European Union, EUROPEAN COMM'N (June 17, 2022), [https://neighbourhood-enlargement.ec.europa.eu/opinion-ukraines-application-membership-european-union\\_en](https://neighbourhood-enlargement.ec.europa.eu/opinion-ukraines-application-membership-european-union_en).

<sup>780</sup> National Anti-Corruption Bureau of Ukraine Press Release: Nomination of SAPO Head to boost fight against corruption (July 28, 2022), <https://nabu.gov.ua/en/novyny/nomination-sapo-head-boost-fight-against-corruption>.

<sup>781</sup> *Law on Ukraine's anti-corruption strategy for period until 2025 takes effect*, INTERFAX (July 11, 2022), <https://interfax.com/newsroom/top-stories/81145/>.

<sup>782</sup> Law on Ukraine's Anti-Corruption Strategy until 2025 comes into force, INTERFAX-UKRAINE (July 11, 2022), <https://en.interfax.com.ua/news/general/845222.html>.

<sup>783</sup> National Agency on Corruption Prevention of Ukraine Press Release: The Verkhovna Rada adopted the Anti-Corruption Strategy for 2021-2025 (June 20, 2022), <https://nazk.gov.ua/en/news/the-verkhovna-rada-adopted-the-anti-corruption-strategy-for-2021-2025/>.

## 2. Enforcement Developments

SAPO reported 109 indictments in 42 public corruption-related cases in 2022. Prosecutors also reported that 25 public corruption-related convictions were handed down in 2022.<sup>784</sup>

In October 2022, Kyrylo Shevchenko, the former Governor of the Central Bank of Ukraine, was charged with large-scale embezzlement over his alleged involvement in a scheme to enter into fictitious contracts with fake legal entities to siphon over USD 5.42 million from Ukrgasbank from 2014 to 2020, when he was the Chairman of the Board of the bank.<sup>785</sup> NABU placed Shevchenko on Ukraine's most-wanted list after he failed to appear in response to summons by the investigative body.<sup>786</sup> The same month, he resigned as the Governor of the National Bank in October, citing "health concerns."<sup>787</sup>

In November 2022, Andriy Pavelko, president of Ukraine's Football Association (UFA), and Yuri Zapisotsky, UFA's general secretary, were arrested on fraud and money-laundering charges related to the construction of an artificial soccer grass factory in the country in anticipation of Ukraine's joint bid with Spain and Portugal to co-host the 2030 World Cup. Prosecutors allege that Pavelko and Zapisotksy embezzled USD 743,000 during the purchase of equipment for the construction of the factory.<sup>788</sup>

In January 2023, fifteen senior Ukrainian officials resigned or were fired from President Zelenskyy's administration over corruption concerns raised by journalists or Ukrainian anti-corruption authorities.<sup>789</sup> These actions were prompted in part by an article in a Ukrainian newspaper alleging that the Ministry of Defense had paid an inflated \$350 million to a catering company for food going to Ukrainian troops.<sup>790</sup> The officials that resigned or were fired included the Deputy Defense Minister allegedly involved in the signing of the inflated food procurement contract, the Deputy Head of President Zelenskyy's administration, who used a sport utility vehicle donated for

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<sup>784</sup> Dan Peleschuk, *Ukraine's parallel war on corruption to unlock door to West*, REUTERS (Dec. 23, 2022), <https://www.reuters.com/world/europe/ukraines-parallel-war-corruption-unlock-door-west-2022-12-23/>.

<sup>785</sup> Ukrgasbank Press Release: The official statement on the information about putting the former Chairman of the Management Board Kyrylo Shevchenko and two employees of UKRGASBANK on the wanted list (Oct. 25, 2022), [https://www.ukrgasbank.com/en/press\\_center/announcement/13349-](https://www.ukrgasbank.com/en/press_center/announcement/13349-).

<sup>786</sup> Ukrinform, *Ukraine's Former Central Bank Chief Placed on International Wanted List*, KYIV POST (Nov. 9, 2022), <https://www.kyivpost.com/ukraine-politics/ukraines-former-central-bank-chief-placed-on-international-wanted-list.html>.

<sup>787</sup> *Ukraine's central bank governor resigns, citing health reasons*, REUTERS (Oct. 4, 2022), <https://www.reuters.com/world/europe/ukraines-central-bank-governor-tenders-resignation-citing-health-reasons-2022-10-04/>.

<sup>788</sup> Daniel Boffey, *Ukraine's 2030 World Cup bid likely dead after country's FA chief arrested*, THE GUARDIAN (Nov. 29, 2022), <https://www.theguardian.com/world/2022/nov/29/ukraine-fa-head-arrested-over-and-money-laundering-allegations>.

<sup>789</sup> Isobel Koshy, *Zelenskiy ramps up anti-corruption drive as 15 Ukrainian officials exit*, THE GUARDIAN (Jan. 24, 2023); <https://www.theguardian.com/world/2023/jan/24/zelenskiy-anti-corruption-drive-15-ukrainian-officials-exit>; Christopher Miller, *Anatomy of a scandal: why Zelenskyy launched a corruption crackdown in Ukraine*, FIN. TIMES (Jan. 27, 2023), <https://www.ft.com/content/80a0a3e0-e9e4-45bc-b601-615a676e2637>.

<sup>790</sup> Yurii Nikolov, *Paper Pushers from the MoD 'Syphon Off Money' on Food for the Armed Forces More Than During Peaceful Life*, ZN.UA (Jan. 23, 2023), <https://zn.ua/eng/paper-pushers-from-the-mod-syphon-off-money-on-food-for-the-armed-forces-more-than-during-peaceful-life-.html>.

humanitarian needs, and the Deputy Prosecutor General who took a holiday abroad in the middle of the war.<sup>791</sup> Amid calls from some US politicians to audit or curb aid to Ukraine as a result of the corruption allegations,<sup>792</sup> Valerii Zaluzhnyi, the Commander-in-Chief of Ukraine's armed forces, published a statement on Facebook that the military has "zero tolerance for corruption" and called for a thorough investigation.<sup>793</sup>

## J. Mexico

Mexico's anti-corruption enforcement efforts slowed significantly over 2022 due to the COVID-19 pandemic recovery, rising inflation, and a lack of support for anti-corruption enforcement at the highest levels of the Mexican government.<sup>794</sup>

### 1. Legislative and Policy Developments

Throughout 2022, Mexican President Andrés Manuel López Obrador has criticized the judicial branch, independent public institutions, as well as the press, and put forth proposals that would undermine Mexico's current anti-corruption program. Early in 2022, López Obrador sought to modify Mexico's National Anti-Corruption System by eliminating its Executive Secretariat, which is responsible for coordinating with various other institutions in Mexico's anti-corruption infrastructure, including the Ministry of Public Administration, the National Institute of Transparency, the Federal Auditor's Office, and the Anti-Corruption Prosecutor's Office. Critics expressed concern that the change would undermine Mexico's anti-corruption efforts, and progress on the proposal appears to have stalled.<sup>795</sup>

Congress will also vote on a presidential proposal to put the Ministry of Public Administration (SFP), a key anti-corruption institution, in charge of both government procurement and supervising public spending.<sup>796</sup> This could undermine transparency and accountability, as the SFP would audit itself rather than be audited by independent bodies.<sup>797</sup>

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<sup>791</sup> James Waterhouse, *Ukraine war: Zeleksy's government launches anti-corruption drive*, BBC (Jan. 27, 2023), <https://www.bbc.com/news/world-europe-64401190>; Roman Olearchyk, *Ukraine officials resign as Volodymyr Zelenskyy moves to ease corruption concerns*, FIN. TIMES (Jan. 24, 2023), <https://www.ft.com/content/9b5da3fc-d408-4df2-84ca-48bdcbde594e>

<sup>792</sup> Michael Schwirtz & Maria Varenikova, *Ukraine Fires Officials Amid Corruption Scandal, as Allies Watch Closely*, N.Y. TIMES (Jan. 24, 2023), <https://www.nytimes.com/2023/01/24/world/europe/ukraine-corruption-firing-western-aid.html>.

<sup>793</sup> Commander-in-Chief Valerii Zaluzhnyi, FACEBOOK (Jan. 25, 2023), <https://www.facebook.com/CinCAFU/posts/pfbid0263miW2rXEk4zM7dyquzEfuoFc1r1m7mmCRUEuvDoCApNVj8SUGwdMmjJhJArsqnl>.

<sup>794</sup> Carrie Kahn, *Mexico's president attacks journalists*, NPR (Feb. 17, 2022) <https://www.npr.org/2022/02/17/1081569489/mexicos-president-attacks-journalists>.

<sup>795</sup> MDN Staff, *Lopez Obrador moves to eliminate key component of anti-corruption system*, MEXICO DAILY NEWS (Jan. 28, 2022), <https://mexiconewsdaily.com/news/amlo-anti-corruption-mechanism/>.

<sup>796</sup> MDN Staff, *Lopez Obrador moves to eliminate key component of anti-corruption system*, MEXICO DAILY NEWS (Jan. 28, 2022), <https://mexiconewsdaily.com/news/amlo-anti-corruption-mechanism/>.

<sup>797</sup> Brian Winter et al., *The Capacity to Combat Corruption (CCC) Index*, AMERICAS SOCIETY AND THE COUNCIL OF THE AMERICAS (June 2022), [https://www.americasquarterly.org/wp-content/uploads/2022/06/CCC\\_Report\\_2022.pdf](https://www.americasquarterly.org/wp-content/uploads/2022/06/CCC_Report_2022.pdf).

## **2. Enforcement Developments**

The Mexican General Prosecutor's Office's probe into Emilio Lozoya, the former CEO of Mexico's state oil company Pemex, for bribery, criminal association, and money laundering charges remains ongoing. In January 2022, Mexico's Attorney General reportedly asked for a 39-year prison sentence for the latest allegations against Lozoya, including that Lozoya allegedly received bribes from Odebrecht (now Novonor), the Brazilian construction firm.<sup>798</sup> Odebrecht has already settled matters in multiple jurisdictions for paying bribes to gain contracts and influence<sup>799</sup> and is now engaged in Mexico, where the company is accused of paying multiple bribes to companies including Pemex.<sup>800</sup> Lozoya, who was extradited from Spain to Mexico in 2020, has himself been the target of corruption allegations beyond the Odebrecht scandal, having been the subject of a prior investigation in Mexico into potential bribes paid to him by Spanish construction company OHL.<sup>801</sup>

In July 2022, Pemex disclosed the names of two former managers that allegedly received bribes from Vitol, the world's largest independent commodity trader.<sup>802</sup> Vitol settled foreign bribery cases with US and Brazilian authorities in December 2020, admitting to paying bribes to officials in Mexico, Brazil, and Ecuador.<sup>803</sup> President Lopez Obrador said earlier in 2022 that he had received the names of the managers who received bribes from Vitol but declined to disclose details at that time, calling for Vitol to also name the individuals responsible in Mexico.<sup>804</sup>

### **K. Brazil**

#### **1. Legislative and Policy Developments**

In January 2022, Brazil (along with Argentina and Peru) received a formal invitation from the Organization for Economic Co-operation and Development (OECD) to start accession

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<sup>798</sup> Diego Oré, *Mexico attorney general seeks up to 39 years prison for ex-Pemex boss – sources*, REUTERS (Jan. 5, 2022), <https://www.reuters.com/markets/commodities/mexico-attorney-general-seeks-up-39-years-prison-ex-pemex-boss-sources-2022-01-05/>.

<sup>799</sup> U.S. Department of Justice Press Release No. 16-1515: Odebrecht and Braskem Plead Guilty and Agree to Pay at Least \$3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History (Dec. 21, 2016), <https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve>.

<sup>800</sup> Diego Oré, *Mexico attorney general seeks up to 39 years prison for ex-Pemex boss – sources*, REUTERS (Jan. 5, 2022), <https://www.reuters.com/markets/commodities/mexico-attorney-general-seeks-up-39-years-prison-ex-pemex-boss-sources-2022-01-05/>.

<sup>801</sup> James Thomas, *Mexico investigates new bribery allegations against Lozoya*, GLOBAL INVESTIGATIONS REV. (Feb. 3, 2021), <https://globalinvestigationsreview.com/article/mexico-investigates-new-bribery-allegations-against-lozoya>.

<sup>802</sup> Aida Pelaez-Fernandez, *Pemex releases names of managers allegedly bribed by Vitol, report says*, REUTERS (July 17, 2022), <https://www.reuters.com/business/energy/pemex-releases-names-managers-allegedly-bribed-by-vitol-report-2022-07-15/>.

<sup>803</sup> U.S. Department of Justice Press Release No. 20-1310: Vitol Inc. Agrees to Pay over \$135 Million to Resolve Foreign Bribery Case (Dec. 3, 2020), <https://www.justice.gov/opa/pr/vitol-inc-agrees-pay-over-135-million-resolve-foreign-bribery-case>.

<sup>804</sup> Aida Pelaez-Fernandez, *Pemex releases names of managers allegedly bribed by Vitol, report says*, REUTERS (July 17, 2022), <https://www.reuters.com/business/energy/pemex-releases-names-managers-allegedly-bribed-by-vitol-report-2022-07-15/>.

discussions.<sup>805</sup> The accession process for Brazil and other candidate countries is likely to take several years.<sup>806</sup>

Various statutes and policies relevant to Brazil's anti-corruption efforts were modified or were under review in 2022. In July 2022, then-President Jair Bolsonaro announced changes to regulations governing how the Office of the Comptroller General (CGU)—which has jurisdiction to bring actions for bribery under Brazil's Clean Company Act—may utilize corporate anti-corruption settlement tools.<sup>807</sup> These changes will require a designated corporate monitor and change how civil penalties in corruption cases can be calculated. The new rules also allow "break clauses," making it possible for settlement agreements to conclude early or be amended part-way through, and will allow for the appointment of third-party monitors, such as law firms or non-CGU consultants.<sup>808</sup>

In public statements in October 2022, the CGU stated that it would be increasing its efforts to detect corruption committed overseas where such conduct violates Brazilian laws.<sup>809</sup> One recent example of this expanded focus is a September 2022 enforcement action the CGU brought against a Chinese medical device company called Medprin Regenerative Medical Technologies (Medprin). The CGU imposed a \$11.4 million dollar fine against Medprin for allegedly attempting to bribe Brazilian officials during an on-site visit in China in 2018.<sup>810</sup>

Also of note, Brazil's Supreme Federal Court took up a case on whether October 2021 amendments to the Administrative Impropriety Act, an anti-corruption law, could be applied retroactively; if the court had held that it could apply retroactively, a higher burden of proof would have applied to more cases, and a more stringent statute of limitations could have required the dismissal of cases brought before 2014.<sup>811</sup> In August 2022, however, the court held that the amendments cannot be applied retroactively.<sup>812</sup>

In November 2022, the Brazilian Federal Prosecution Service's (MPF) confirmed that it had stopped assisting its Peruvian counterparts with Operation Car Wash (*Operação Lava Jato*), the

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<sup>805</sup> AQ Editors, *OECD: Still a Long Road Ahead for Argentina, Brazil and Peru*, AMERICAS QUARTERLY (Feb. 2, 2022), <https://www.americasquarterly.org/article/oecd-still-a-long-road-ahead-for-argentina-brazil-and-peru/>.

<sup>806</sup> AQ Editors, *OECD: Still a Long Road Ahead for Argentina, Brazil and Peru*, AMERICAS QUARTERLY (Feb. 2, 2022), <https://www.americasquarterly.org/article/oecd-still-a-long-road-ahead-for-argentina-brazil-and-peru/>.

<sup>807</sup> Ana de Liz, *Brazil modifies CGU's corporate settlement tool*, GLOBAL INVESTIGATIONS REV. (Jul. 18, 2022), <https://globalinvestigationsreview.com/article/brazil-modifies-cgus-corporate-settlement-tool> .

<sup>808</sup> The changes impact CGU settlements only, and do not apply to leniency agreements with federal prosecutors or the Attorney General.

<sup>809</sup> Ana de Liz, *Brazil boosts focus on corruption beyond its borders*, GLOBAL INVESTIGATIONS REV. (Oct. 20, 2022), <https://globalinvestigationsreview.com/article/brazil-boosts-focus-corruption-beyond-its-borders>.

<sup>810</sup> Ana de Liz, *Brazil boosts focus on corruption beyond its borders*, GLOBAL INVESTIGATIONS REV. (Oct. 20, 2022), <https://globalinvestigationsreview.com/article/brazil-boosts-focus-corruption-beyond-its-borders>.

<sup>811</sup> Ana de Liz, *Brazil to vote on retroactive application of administrative misconduct law*, GLOBAL INVESTIGATIONS REV. (Aug. 12, 2022), <https://globalinvestigationsreview.com/article/brazil-vote-retroactive-application-of-administrative-misconduct-law>.

<sup>812</sup> Rogério Taffarello et al., *Bribery & Corruption Laws and Regulations 2023 | Brazil*, GLOBAL LEGAL INSIGHTS (last visited Jan. 30, 2023), <https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/brazil>.

high-profile corruption investigation at Petrobras that resulted in charges against and a settlement with the Brazilian construction firm Odebrecht (now, Novonor).<sup>813</sup> The decision to end intergovernmental cooperation allegedly resulted from a breach by Peruvian authorities of the portion of an evidence-sharing agreement that apparently prevented Peru from using evidence obtained from Brazil against Odebrecht itself. However, on December 27, 2022, Peruvian officials announced that cooperation between the two countries would resume.<sup>814</sup> The MPF closed down its own unit dedicated to Operation Car Wash in early 2021.<sup>815</sup> Nevertheless, the ramifications of Operation Car Wash have continued to spread: as noted above,<sup>816</sup> Emilio Lozoya, the former CEO of Mexico's state oil company Pemex, now faces charges in Mexico relating to alleged bribes he received from Odebrecht.

## 2. Enforcement Developments

In January 2022, Brazilian pharmaceutical company Hypera entered into a leniency agreement with Brazil's CGU and the Advocacy General of the Union (AGU), related to investigations into bribes made by former company executives.<sup>817</sup> Hypera agreed to an 18-month monitorship by the CGU and a fine of approximately \$20 million.<sup>818</sup>

In July 2022, the Inter-American Development Bank (IDB) announced a settlement with Brazilian construction company Construcap CCPC Engenharia e Comércio (Construcap) for fraud and corruption. Construcap admitted to paying \$1 million in bribes to a public official related to a road construction project over a two-year period.<sup>819</sup> Construcap concealed these illicit payments by misrepresenting other project expenses and activities. Under the terms of the settlement, Construcap will be debarred for 18 months, and will pay restitution and fines of approximately \$707,000. In its announcement, the IDB noted that the settlement amount was "significantly"

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<sup>813</sup> Ana de Liz, *Cooperation between Peru and Brazil suspended on Operation Car Wash*, GLOBAL INVESTIGATIONS REV. (Nov. 9, 2022), <https://globalinvestigationsreview.com/article/cooperation-between-peru-and-brazil-suspended-operation-car-wash>.

<sup>814</sup> Ana de Liz et al., *ICYMI: News developments over the holidays*, GLOBAL INVESTIGATIONS REV. (Jan. 3, 2023), <https://globalinvestigationsreview.com/article/icymi-news-developments-over-the-holidays>.

<sup>815</sup> Ricardo Brito et al., *After Seven Years, Brazil Shuts Down Car Wash Anti-Corruption Squad*, REUTERS (Feb. 3, 2021), <https://www.reuters.com/article/us-brazil-corruption/after-seven-years-brazil-shuts-down-car-wash-anti-corruption-squad-idUSKBN2A4068>.

<sup>816</sup> See *supra* at Section VI.J.2.

<sup>817</sup> *Hypera bate máxima após acordo de leniência com CGU e AGU*, ESTADAO (Jan. 6, 2022), <https://einvestidor.estadao.com.br/ultimas/hypera-maxima-acordo-leniencia-cgu-agu>.

<sup>818</sup> This \$20 million fine will be paid by Hypera's founding shareholder. *Brazil's Hypera shares jump after leniency agreement with authorities*, DEVDISCOURSE (Jan. 6, 2022), <https://www.devdiscourse.com/article/headlines/2058045-brazils-hypera-shares-jump-after-leniency-agreement-with-authorities>.

<sup>819</sup> Inter-American Development Bank Press Release: IDB Announces Settlement with Construcap Regarding Prohibited Practices (July 5, 2022), <https://www.iadb.org/en/news/idb-announces-settlement-construcap-regarding-prohibited-practices>.

reduced in light of Construcap's proactive investigation of the allegations, self-disclosure of the findings, and full cooperation with the IDB's investigation.<sup>820</sup>

In August 2022, the IDB announced a settlement with Brazilian construction company, Sociedad Autonoma de Obras y Servicios Copasa do Brasil (Copasa do Brasil).<sup>821</sup> Copasa do Brasil allegedly worked with a consortium of construction companies to bribe a public official supervising the construction of a highway to avoid delays in approvals for certain contract-related disbursements. Like Construcap, Copasa do Brasil was debarred for 18 months. As part of the settlement, Copasa do Brasil agreed to have an independent compliance "consultant" report on its compliance program. The IDB also noted that, based on Copasa do Brasil's settlement with Brazilian authorities and cooperation with the IDB's investigation, the IDB's sanctions were "significantly reduced."<sup>822</sup>

In December 2022, the CGU and AGU entered into a leniency agreement with Keppel Offshore & Marine (Keppel), a Singaporean marine engineering company, in which Keppel agreed to pay \$65 million in fines and damages to the Brazilian authorities.<sup>823</sup> This settlement relates to the same conduct at issue in Keppel's 2017 settlement with US, Brazilian, and Singaporean authorities wherein the company agreed to pay \$422 million in fines to resolve allegations that a company employee, with the knowledge of senior company officials, paid approximately \$55 million in bribes to officials at Petrobras and the then-governing political party of Brazil in exchange for over \$350 million in corruptly-obtained business with Petrobras and another Brazilian entity.<sup>824</sup> According to a statement issued by Keppel, this recent settlement is the result of a separate negotiation process with the CGU and AGU that the company entered into following its 2017 settlement with the MPF.<sup>825</sup>

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<sup>820</sup> Inter-American Development Bank Press Release: IDB Announces Settlement with Construcap Regarding Prohibited Practices (July 5, 2022), <https://www.iadb.org/en/news/idb-announces-settlement-construcap-regarding-prohibited-practices>.

<sup>821</sup> Inter-American Development Bank Press Release: IDB Announces Settlement with Copasa do Brasil Regarding Prohibited Practices (Aug. 11, 2022), <https://www.iadb.org/en/news/idb-announces-settlement-copasa-do-brasil-regarding-prohibited-practices>.

<sup>822</sup> Inter-American Development Bank Press Release: IDB Announces Settlement with Copasa do Brasil Regarding Prohibited Practices (Aug. 11, 2022), <https://www.iadb.org/en/news/idb-announces-settlement-copasa-do-brasil-regarding-prohibited-practices>.

<sup>823</sup> Keppel Offshore & Marine Press Release: Keppel Offshore & Marine Reaches Joint Resolution With Brazilian Attorney-General And Comptroller General (Dec. 19, 2022), <https://www.keppelom.com/en/news-item.aspx?sid=2605&aid=17289&title=keppel-offshore--marine-reaches-joint-resolution-with-brazilian-attorney-general-and-comptroller-general>.

<sup>824</sup> Ana de Liz, *Keppel settles foreign bribery allegations with Brazil's CGU, AGU*, GLOBAL INVESTIGATIONS REV. (Dec. 20, 2022), <https://globalinvestigationsreview.com/just-anti-corruption/article/keppel-settles-foreign-bribery-allegations-brazils-cgu-agu>; Deferred Prosecution Agreement, *United States v. Keppel Offshore & Marine Ltd.*, No. 17-CR-00697, ¶¶ 19-20 (E.D.N.Y. Dec. 22, 2017).

<sup>825</sup> Keppel Offshore & Marine Press Release: Keppel Offshore & Marine Reaches Joint Resolution With Brazilian Attorney-General And Comptroller General (Dec. 19, 2022), <https://www.keppelom.com/en/news-item.aspx?sid=2605&aid=17289&title=keppel-offshore--marine-reaches-joint-resolution-with-brazilian-attorney-general-and-comptroller-general>.

Also in December 2022, the CGU, AGU, and MPF announced two additional large settlements: a \$108 million settlement by the CGU and AGU with food company BRF settling charges related to allegations that the company bribed Brazilian food inspectors so that it could sell expired meat; and a \$202 million settlement by the CGU, AGU, and MPF with a subsidiary of Honeywell over alleged bribes paid to Petrobras officials—this conduct was likewise covered by settlements with the US DOJ and SEC.<sup>826</sup>

## L. Canada

In May 2022, SNC Lavalin became the first company to enter into a remediation agreement with the Canadian authorities pursuant to the 2018 amendments to Part XXII.1 of Canada's *Criminal Code*.<sup>827</sup> The Agreement covered conduct that occurred between 1997 and 2004 and related to alleged bribes paid by the company to win a bridge refurbishment contract in Montreal.<sup>828</sup> The Agreement included: (i) a CAD 29,558,777 fine to be paid over a three-year period; and (ii) a requirement that the company be monitored by an independent compliance Monitor for three years.

<sup>829</sup>

Five months after the SNC Lavalin Agreement was finalized, in September 2022, Ultra Electronics, a British defense and security company, entered into the second remediation agreement in Canada's history. Three weeks before the Agreement was announced, Prosecutors filed charges against a Montreal-based subsidiary of the company and four former executives for allegedly directing local agents in the Philippines to pay public officials in an effort to influence decision about

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<sup>826</sup> Ana de Liz, Sam Fry & Alice Johnson: *ICYMI: News developments over the holidays*, GLOBAL INVESTIGATIONS REV. (Jan. 3, 2023), <https://globalinvestigationsreview.com/article/icymi-news-developments-over-the-holidays>; Anna Bianca Roach, *Honeywell to pay \$202.7 million for Brazilian, Algerian bribery schemes*, GLOBAL INVESTIGATIONS REV. (Dec. 19, 2022), <https://globalinvestigationsreview.com/just-anti-corruption/article/honeywell-pay-2027-million-brazilian-algerian-bribery-schemes>.

<sup>827</sup> In September 2022, the Interim Head of the RCMP international corruption team, Stéphanie Rousseau, publicly commented on a lack of widespread knowledge about the benefits of self-reporting. Although remediation agreements do not require the potential wrongdoer to have self-reported the misconduct, self-reporting is an element considered both in the government's decision to offer a remediation agreement and in the Court's decision to approve such an agreement. Rousseau's team has continued to promote the availability of remediation agreements through public addresses and in other official statements. Royal Canadian Mounted Police News Release: Statement: Remediation agreement approved in Project Agrafe (May 11, 2022), <https://www.rcmp-grc.gc.ca/en/news/2022/statement-remediation-agreement-approved-project-agrafe>; see also Alice Johnson et al., *RCMP official urges companies to turn themselves in*, GLOBAL INVESTIGATIONS REV. (Sept. 15, 2022), <https://globalinvestigationsreview.com/article/rcmp-official-urges-companies-turn-themselves-in>.

<sup>828</sup> WilmerHale, *2021 Global Anti-Bribery Year-in-Review*, at 109 (Jan. 27, 2022), <https://www.wilmerhale.com/en/insights/client-alerts/20220127-2021-global-anti-bribery-year-in-review> (quoting SNC-Lavalin Press Release: SNC-Lavalin acknowledges the charges relating to alleged events that took place nearly two decades ago and welcomes the Directeur des poursuites criminelles et pénales (DPCP) invitation to negotiate a remediation agreement (Sept. 23, 2021), <https://www.snc-lavalin.com/en/media/press-releases/2021/23-09-2021>); Alice Johnson, *SNC-Lavalin reaches \$29m criminal settlement over bridge contract*, GLOBAL INVESTIGATIONS REV. (May 9, 2022), <https://globalinvestigationsreview.com/article/snc-lavalin-reaches-29m-criminal-settlement-over-bridge-contract>.

<sup>829</sup> SNC-Lavalin Press Release: SNC-Lavalin announces having reached a remediation agreement with the Quebec Crown Prosecutor's Office concerning charges laid in September 2021 in connection with the Jacques Cartier Bridge project for events that occurred between 1997 and 2004 (May 6, 2022), <https://www.snc-lavalin.com/en/media/press-releases/2022/06-05-2022>.

who would win a multi-million dollar contract.<sup>830</sup> Both the Government and the company asked that the hearing be held behind closed doors, and there is not yet any indication about whether or when the settlement terms will become public.<sup>831</sup>

## M. South Africa

### 1. Legislative and Policy Developments

#### a. Completion of the Zondo Commission Investigation

On June 22, 2022, the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector (the “Zondo Commission”<sup>832</sup>) issued its final report and recommendations into allegations of state capture, corruption and fraud by former President Jacob Zuma during his presidency from 2009 to 2018.<sup>833</sup> As we explained in last year’s Year-in-Review, the Commission’s review had been ongoing since January 2018.<sup>834</sup> From January through June, 2022, the Commission issued six reports totaling over 5,000 pages detailing its investigation into the embezzlement of billions of dollars from the state during Zuma’s presidency.<sup>835</sup>

At the core of the reports was the Gupta family—in particular, brothers Atul, Rajesh “Tony,” and Ajay—who used their connection to former president Zuma to bribe senior officials in the African National Congress, win lucrative contracts, and launder nearly USD 1 billion of state funds through a network of shell companies and consulting firms.<sup>836</sup> According to the reports, global banks including HSBC enabled the Guptas to use their electronic banking channels to transfer money to jurisdictions with fewer regulations like Dubai, Hong Kong and the Caribbean, launder the money

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<sup>830</sup> Royal Canadian Mounted Police News Release: RCMP foreign corruption investigation results in charges against Montreal-based company (Sept. 21, 2022), <https://www.rcmp-grc.gc.ca/en/news/2022/rcmp-foreign-corruption-investigation-results-charges-montreal-based-company>.

<sup>831</sup> Paul Cherry, *Lawyers seek closed-door hearing in case involving renowned Montreal tech firm*, MONTREAL GAZETTE (Oct. 18, 2022), <https://montrealgazette.com/news/local-news/lawyers-seek-closed-door-hearing-in-case-involving-renowned-montreal-tech-firm>; Ana de Liz, *Ultra Electronics agrees foreign bribery settlement in Canada*, GLOBAL INVESTIGATIONS REV. (Sept. 30, 2022) <https://globalinvestigationsreview.com/article/ultra-electronics-agrees-foreign-bribery-settlement-in-canada>.

<sup>832</sup> The Zondo Commission is so named as it was led by Chief Justice Raymond Zondo.

<sup>833</sup> Commission of Inquiry into State Capture, Part VI, Vol. 3: The Public Funds Diverted to the Gupta Enterprise through State Capture, The Dissipation of State Capture-Derived Funds through Local and International Money Laundry Networks and The Acquisition of the Optimum Coal Mine (June 22, 2022), <https://www.statecapture.org.za/site/files/announcements/671>.

<sup>834</sup> WilmerHale, *Global Anti-Bribery Year-in-Review: 2021 Developments and Predictions for 2022*, at 111-12 (Jan. 27, 2022), <https://www.wilmerhale.com/en/insights/client-alerts/20220127-2021-global-anti-bribery-year-in-review>.

<sup>835</sup> Commission of Inquiry into State Capture, Part VI, Vol. 3: Public Funds Diverted to Gupta Enterprise through State Capture, The Dissipation of State Capture Derived Funds, The Proceeds from the Acquisition of the Optimum Coal Mine and Various Individuals and Topics (June 22, 2022), <https://www.statecapture.org.za/site/files/announcements/671>.

<sup>836</sup> Commission of Inquiry into State Capture, Part VI, Vol. 3: The Public Funds Diverted to Gupta Enterprise, The Dissipation of State Capture Derived Funds, The Proceeds from the Acquisition of the Optimum Coal Mine and Various Individuals and Topics (June 22, 2022), <https://www.statecapture.org.za/site/files/announcements/671>; David Hindley, *how three brothers ‘captured’ a country*, FIN. TIMES (July 6, 2022), <https://www.ft.com/content/0b13099f-a152-45fe-b363-bfd2d6aee056>; Khadija Sharife et al., *Down the Guptas’ Financial Rabbit Hole*, ORGANIZED CRIME AND CORRUPTION REPORTING PROJECT (Sept. 18, 2019), <https://www.occrp.org/en/investigations/down-the-guptas-financial-rabbit-hole>.

by mingling it with other funds, and in some cases, transfer it back into South Africa.<sup>837</sup> Atul and Rajesh fled to Dubai shortly after Zuma's resignation in February 2018, and were arrested on June 2, 2022 following an extradition request from South African prosecutors.<sup>838</sup>

South Africa's National Prosecuting Authority has opened 89 investigations and filed 26 cases related to the Commission's findings.<sup>839</sup> As detailed below,<sup>840</sup> several international companies were implicated by the Zondo Commission's findings.

## 2. Enforcement Developments

### a. Transnet

In 2022, South Africa's National Prosecuting Agency charged 13 co-defendants with fraud, corruption, money laundering and violations of the Public Finance Management Act for their alleged role assisting Transnet, South Africa's state-owned freight rail and port operator, in the procurement of freight locomotives in 2012.<sup>841</sup> The defendants include Siyabonga Gama, the former CEO of Transnet, and a global consulting firm.<sup>842</sup> The charges stem in part from findings by the Zondo Commission that the consulting firm had been hired by Transnet without having gone through the bidding process to work on the train procurement, and that Transnet "irregularly made" payments to the firm.<sup>843</sup> As discussed above,<sup>844</sup> in September 2022, German authorities launched an investigation into T-Systems International GmbH, a South African subsidiary of Deutsche Telekom,

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<sup>837</sup> Peter Hain, *Corporate corruption in South Africa demands global action in response*, FIN. TIMES (Feb. 6, 2022), <https://www.ft.com/content/29e192d3-a8dc-4be7-a80f-b006fa4091f1>.

<sup>838</sup> Malak Harb & Jon Gambrell, *Dubai arrests 2 Gupta brothers over South African fraud case*, ASSOCIATED PRESS (June 7, 2022), <https://apnews.com/article/politics-united-arab-emirates-middle-east-south-africa-dubai-c323649ff0f1799247dca4c4b6671976>. Charges against Ajay Gupta were dropped in 2019 due to a lack of conclusive evidence. See *Lack Of Evidence Behind Dropping Ajay Gupta's Fugitive Status: Official*, NDTV (Feb. 16, 2019), <https://www.ndtv.com/world-news/lack-of-evidence-behind-dropping-ajay-guptas-fugitive-status-official-1994575>.

<sup>839</sup> South African Government Press Release: President Cyril Ramaphosa: Response to the Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector (Oct. 23, 2022), <https://www.gov.za/speeches/president-cyril-ramaphosa-response-president-cyril-ramaphosa-commission-inquiry-allegations>.

<sup>840</sup> See *infra* at Section VI.M.2.a. and Section VI.M.2.b.

<sup>841</sup> *Transnet Ex Group Ceo Brian Molefe And Former Cfo Anoj Singh And Others Arrested On Transnet Related R398.4 Million Fraud And Corruption Charges*, NATIONAL PROSECUTING AUTHORITY OF SOUTH AFRICA (Aug. 29, 2022), <https://www.npa.gov.za/index.php/media/transnet-ex-group-ceo-brian-molefe-and-former-cfo-anoj-singh-and-others-arrested-transnet>; see also Alexander Winning, *South Africa arrests former Transnet executives for alleged graft*, REUTERS (May 28, 2022), <https://www.reuters.com/world/africa/south-africa-arrests-former-transnet-executives-alleged-graft-2022-05-28>; Perkin Amalaraj, *South Africa arrests five over Transnet corruption allegations*, GLOBAL INVESTIGATIONS REV. (May 30, 2022), <https://globalinvestigationsreview.com/article/south-africa-arrests-five-over-transnet-corruption-allegations>.

<sup>842</sup> Michael Forsythe & Walt Bogdanich, *McKinsey Charged in South African Corruption Case*, N.Y. TIMES (Sept. 30, 2022), <https://www.nytimes.com/2022/09/30/world/africa/mckinsey-corruption-case-south-africa.html>.

<sup>843</sup> Commission of Inquiry into State Capture, Part II: Vol. 1: Transnet (Feb. 1, 2022), [https://www.statecapture.org.za/site/files/announcements/674/OCR\\_version\\_-\\_State\\_Capture\\_Commission\\_Report\\_Part\\_II\\_Vol\\_I.pdfs](https://www.statecapture.org.za/site/files/announcements/674/OCR_version_-_State_Capture_Commission_Report_Part_II_Vol_I.pdfs).

<sup>844</sup> See *supra* at Section VI.C.3.

for making irregular payments to companies linked to the Gupta family in connection with an IT data contract between T-Systems and Transnet.

**b. South African Revenue Service**

Another finding from the Zondo Commission led to South Africa's National Treasury banning the global management and consulting company Bain & Company (Bain) from bidding on public contracts in South Africa for 10 years in September 2022. According to the National Treasury, Bain "engaged in corrupt and fraudulent practices in competing" for a contract with the South African Revenue Service (SARS) to restructure the agency from the ground up.<sup>845</sup> According to the Zondo Commission, Bain planned and coordinated directly with President Zuma to "seize and restructure" SARS when, with Bain's knowledge, Zuma appointed his ally Tom Moyane to weaken the agency by firing key officials and hindering it from investigating tax evaders.<sup>846</sup> In the first Zondo Commission report, Chief Justice Zondo described the restructuring of SARS as "one of the few instances where President Zuma was himself directly and personally involved."<sup>847</sup>

**c. Fraud allegations against President Ramaphosa**

On December 1, 2022, an independent panel appointed by Nosiviwe Mapisa-Nqakula, the Speaker of the National Assembly of South Africa, found preliminary evidence that President Ramaphosa breached his oath of office by committing misconduct in connection to cash found at his game farm, Phala, in 2020. This finding stemmed from a June 2022 police affidavit filed by the former head of South Africa's State Security Agency, alleging that Ramaphosa violated the Constitution and anti-corruption laws after USD 4 million was found stuffed into the furniture at Phala.<sup>848</sup> Ramaphosa claimed the money was the proceeds from the sale of buffaloes to a Sudanese businessman, but the parliamentary panel report found no evidence of such a sale.<sup>849</sup>

The panel's investigation was a Section 89 inquiry, a term that refers to a process to impeach a sitting president of South Africa for wrongdoing.<sup>850</sup> It is the first Section 89 inquiry since the impeachment law was adopted by parliament in 2018. In December 2022, Mr. Ramaphosa survived a parliamentary vote on whether to proceed with an impeachment hearing after the

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<sup>845</sup> Database of Restricted Suppliers, South African National Treasury, <https://www.treasury.gov.za/publications/other/database%20of%20restricted%20suppliers.pdf>; *South Africa bans consultancy Bain from state contracts for 10 years*, REUTERS (Sept. 29, 2022), <https://www.reuters.com/article/safrica-treasury-bain/south-africa-bans-consultancy-bain-from-state-contracts-for-10-years-idUSL8N3103Q>.

<sup>846</sup> Joseph Cottrell, *Bain & Co, tax and Jacob Zuma: a tale of 'state capture' in South Africa*, FIN. TIMES (Jan. 13, 2022), <https://www.ft.com/content/b1bb5dd0-e7ce-4e15-ac48-05d2d990f6c7>.

<sup>847</sup> Commission of Inquiry into State Capture, Part 1, Vol. 1: South African Airways and its Associated Companies (Jan. 4, 2022), <https://www.statecapture.org.za/site/files/announcements/638>.

<sup>848</sup> Nobuhle Simelane, *Cyril Ramaphosa: Arthur Fraser accuses South Africa president of kidnapping and bribery*, BBC (June 2, 2022), <https://www.bbc.com/news/world-africa-61673594>.

<sup>849</sup> Mogomotsi Magome, *More calls for South Africa leader to quit over theft probe*, ASSOCIATED PRESS (Dec. 1, 2022), <https://apnews.com/article/africa-theft-south-cyril-ramaphosa-a5790f00ebaff36c8c7cc8de41ccf3aa>.

<sup>850</sup> Wendell Roelf, *Explainer: The Phala farmgate scandal hanging over South Africa's Ramaphosa*, REUTERS (Dec. 1, 2022), <https://www.reuters.com/world/africa/phala-phala-farmgate-scandal-hanging-over-south-africas-ramaphosa-2022-12-01/>.

Executive Committee of the African National Congress, South Africa's ruling party headed by Mr. Ramaphosa, asked its members to vote against it. He was re-elected as leader of the ANC days later.<sup>851</sup> Also in December 2022, President Ramaphosa appealed to South Africa's Constitutional Court, seeking an order that the panel findings are "unlawful and invalid."

## N. Nigeria

At a presentation of the 2021 Chartered Institute of Forensics and Certified Fraud Examiners of Nigeria, Abdulrasheed Bawa, the Executive Chairman of the Economic and Financial Crimes Commission (EFCC)<sup>852</sup> called on all Nigerian anti-corruption agencies to focus on the implementation of President Mohammadu Buhari's National Anti-corruption Strategy (NACS).<sup>853</sup> Speaking through his Chief of Staff, Bawa stressed that each agency must develop its own strategic plan based on the pillars of the NACS,<sup>854</sup> and commended the cooperation between the National Assembly and the Attorney General in developing and sending the NACS to President Buhari for his approval.<sup>855</sup> As part of this strategic plan, according to the EFCC, between January and November 2022, it recorded 3,440 convictions on financial and cybercrimes.<sup>856</sup>

In November 2022, Nigeria's Independent Corrupt Practices and Other Related Offences Commission (ICPC)<sup>857</sup> announced at a meeting of the Nigerian House of Representatives that it had recovered 117 billion Nigerian Naira (approximately \$260 million USD) from corruption cases within the government from January through August 2022.<sup>858</sup> According to the head of the ICPC,

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<sup>851</sup> Sharon Braithwaite, *Cyril Ramaphosa re-elected as leader of South Africa's governing African National Congress*, CNN (Dec. 19, 2022), <https://www.cnn.com/2022/12/19/africa/cyril-ramaphosa-re-election-african-national-congress-intl/index.html>.

<sup>852</sup> Established in 2004, the EFCC is one of Nigeria's specialized anti-corruption agencies whose mandate is prosecuting and investigating economic and financial crimes with a focus on individuals and corporate entities. See Deborah D. Adeyemo, *Fragmenting Anti-Corruption Agencies: An Assessment of the Emergence of State-Based Anti-Corruption Agencies in Nigeria*, at 7 AFRICAN J. OF CRIM. L. & JURIS. 62, 65 (2022), <https://www.nigerianjournalsonline.com/index.php/AFJCLJ/article/view/2738/2662>.

<sup>853</sup> Michael Adesina, *EFCC charges other anti-graft agencies on implementation of NACS*, PM NEWS (June 24, 2022), <https://pmnewsnigeria.com/2022/06/24/efcc-charges-other-anti-graft-agencies-on-implementation-of-nacs/>.

<sup>854</sup> The five pillars of 2017's NACS are: prevention, public engagement, ethical re-orientation in the public and private sectors, enforcement and sanctions, and recovery and management of proceeds of corruption. See Casmir Igbokwe, *Evaluating national anti-corruption strategy*, THE SUN (Dec. 20, 2021), <https://www.sunnewsonline.com/evaluating-national-anti-corruption-strategy/>.

<sup>855</sup> Michael Adesina, *EFCC charges other anti-graft agencies on implementation of NACS*, PM NEWS (June 24, 2022), <https://pmnewsnigeria.com/2022/06/24/efcc-charges-other-anti-graft-agencies-on-implementation-of-nacs/>.

<sup>856</sup> Abdulmumin Murtala, *EFCC records 3440 convictions in 2022*, VANGUARD NEWS NIGERIA (Dec. 1, 2022), <https://www.vanguardngr.com/2022/12/efcc-records-3440-convictions-in-2022/>.

<sup>857</sup> The ICPC was founded in 2000 with three core mandates: enforcing the provisions of the ICPC Act, preventing and eliminating corruption in public agencies, and promoting public education and enlightenment on anti-corruption measures. See Deborah D. Adeyemo, *Fragmenting Anti-Corruption Agencies: An Assessment of the Emergence of State-Based Anti-Corruption Agencies in Nigeria*, 7 AFRICAN J. OF CRIM. L. & JURIS. 62, 64 (2022), <https://www.nigerianjournalsonline.com/index.php/AFJCLJ/article/view/2738/2662>.

<sup>858</sup> Chinedu Okafor, *Nigeria recovers a total of N117 billion linked to corruption cases within the government*, BUSINESS INSIDER AFRICA (Nov. 18, 2022), <https://africa.businessinsider.com/local/markets/nigeria-recovers-n117-billion-linked-to-corruption-cases-within-government/q3|pb4>.

Professor Bolaji Owasanoye, 15 convictions were secured and 672 investigations were successfully conducted thanks to proper funding.<sup>859</sup>

Relatedly, the ICPC was among the first agencies to commence a process to dispose of assets forfeited to the government according to the Proceeds of Crime (Recovery and Management) Act (POCA), by carrying out an auction.<sup>860</sup> Signed into law on May 12, 2022 by President Muhammadu Buhari, POCA seeks to provide for an effective framework for the recovery and management of the proceeds of a crime.<sup>861</sup>

## O. Malaysia

Malaysia continues to deal with the fallout stemming from recent court decisions and settlements related to 1Malaysia Development Berhad (1MDB), which found that certain senior government officials and their associates siphoned billions of dollars from the sovereign wealth fund between 2009 and 2015.<sup>862</sup>

Former Malaysian Prime Minister Najib Razak, who was sentenced to 12 years in prison by a five-judge federal court panel for multiple charges of abuse of power, breach of trust, and money laundering connected with the 1MDB corruption scheme in 2020, began serving his sentence in August 2022 after two years of failed appeals and a denied request for a delayed sentence.<sup>863</sup>

In October 2018, Razak's wife, Rosmah Mansor, was also charged with money laundering and tax evasion linked to 1MDB in another trial that is set to begin on May 12, 2023.<sup>864</sup> In September 2022, in an unrelated matter, Mansor was sentenced to ten years in prison for bribery charges

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<sup>859</sup> Chinedu Okafor, *Nigeria recovers a total of N117 billion linked to corruption cases within the government*, BUSINESS INSIDER AFRICA (Nov. 18, 2022), <https://africa.businessinsider.com/local/markets/nigeria-recovers-n117-billion-linked-to-corruption-cases-within-government/q3lpbg4>.

<sup>860</sup> Fortune Eromosele, *ICPC probes 712 projects in 20 states*, VANGUARD NEWS NIGERIA (Nov. 7, 2022), <https://www.vanguardngr.com/2022/11/icpc-probes-712-projects-in-20-states/>.

<sup>861</sup> Chinedu Okafor, *Nigeria recovers a total of N117 billion linked to corruption cases within the government*, BUSINESS INSIDER AFRICA (Nov. 18, 2022), <https://africa.businessinsider.com/local/markets/nigeria-recovers-n117-billion-linked-to-corruption-cases-within-government/q3lpbg4>.

<sup>862</sup> WilmerHale, *2021 Global Anti-Bribery Year-in-Review*, at 110 (Jan. 27, 2022), <https://www.wilmerhale.com/en/insights/client-alerts/2020127-2021-global-anti-bribery-year-in-review>; see also WilmerHale, *Global Anti-Bribery Year-in-Review: 2020 Developments and Predictions for 2021*, at 120 (Jan. 28, 2021), <https://www.wilmerhale.com/insights/client-alerts/20210126-2020-global-antibribery-yearinreview>.

<sup>863</sup> See WilmerHale, *Global Anti-Bribery Year-in-Review: 2020 Developments and Predictions for 2021*, at 120 (Jan. 28, 2021), <https://www.wilmerhale.com/en/insights/client-alerts/20210126-2020-global-antibribery-yearinreview>; see also Melissa Zhu, *Najib Razak: Malaysia's ex-PM starts jail term after final appeal fails*, BBC NEWS (Aug. 23, 2022), <https://www.bbc.com/news/world-asia-62642643>; see also Richard C. Paddock, *Najib Razak, Malaysia's Former Prime Minister, is Headed to Prison*, N.Y. TIMES (Aug. 23, 2022), <https://www.nytimes.com/2022/08/23/world/asia/najib-razak-malaysia-1mdb-prison.html>.

<sup>864</sup> Rahmat Khairulrijal, *Court fixed 15 days for Rosmah Mansor's second corruption trial, starts on May 12 next year*, NEW STRAITS TIMES (Nov. 30, 2022), <https://www.nst.com.my/news/crime-courts/2022/12/856565/court-fixed-15-days-rosmah-mansors-second-corruption-trial-starts>; see also *Former Malaysian first lady ordered to serve 10 years in prison for graft*, CNBC (Sept. 1, 2022), <https://www.cnbc.com/2022/09/02/former-malaysian-first-lady-ordered-to-serve-10-years-in-prison-for-graft.html>; see also Bernama, *Rosmah's money laundering, tax evasion trial to begin next May*, MALAYSIA NOW (Dec. 1, 2022), <https://www.malaysianow.com/news/2022/12/01/rosmahs-money-laundering-tax-evasion-trial-to-begin-next-may>.

alleging that she had solicited and received bribes to help a company win a USD 279 million solar power supply contract during her husband's tenure in office.<sup>865</sup> She is currently appealing the decision.<sup>866</sup>

In developments unrelated to 1MDB, the Malaysian Anti-Corruption Commission (MACC) is investigating allegations that Aker Solutions—Norway's largest oil services provider—made false statements in order to obtain a license renewal from Petronas, Malaysia's state-owned energy company.<sup>867</sup> By law, Petronas was required to award a number of licenses to companies that are made up of a certain number of Malay employees and Aker Solutions allegedly provided false reports on its Malaysian unit's makeup to win a contract with Petronas.<sup>868</sup> In January 2022, Mohd Yusof Ab Rahman, a director of the Malaysian office of Aker Solutions was charged in the Kuala Lumpur Sessions Court with using a forged document to procure the renewal lease in connection with this investigation.<sup>869</sup>

In April 2022, Petronas announced that one of its junior-level executives had been arrested by the MACC for suspected graft in a matter unrelated to Aker Solutions.<sup>870</sup> In addition to the junior executive of Petronas, eight senior officials of contractor companies and vendors were also detained and accused of carrying out corrupt projects with Petronas.<sup>871</sup> In its official statement, Petronas reaffirmed its commitment to full cooperation with the MACC and condemned all forms of misconduct amongst its employees.

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<sup>865</sup> Kuala Lumpur, *Malaysian court sentences former first lady Rosmah to jail for bribery*, REUTERS (Sept. 1, 2022), <https://www.reuters.com/world/asia-pacific/malaysian-court-sentences-former-first-lady-rosmah-jail-bribery-2022-09-01/>.

<sup>866</sup> *Former Malaysian first lady ordered to serve 10 years in prison for graft*, CNBC (Sept. 1, 2022), <https://www.cnbc.com/2022/09/02/former-malaysian-first-lady-ordered-to-serve-10-years-in-prison-for-graft.html>.

<sup>867</sup> Alice Johnson, *Aker solutions manager charged with using false documents*, GLOBAL INVESTIGATIONS REV. (Jan. 26, 2022), <https://globalinvestigationsreview.com/article/aker-solutions-manager-charged-using-false-documents>.

<sup>868</sup> Michael Griffiths, *MACC investigating Aker Solutions*, GLOBAL INVESTIGATIONS REV. (Dec. 1, 2022), <https://globalinvestigationsreview.com/article/macc-investigates-aker-solutions>.

<sup>869</sup> Hafiz Yatim, *Aker director claims trial to using forged document to procure renewal licence*, THE EDGE MARKETS (Jan. 26, 2022), <https://www.theedgemarkets.com/article/aker-director-claims-trial-using-forged-document-procure-renewal-licence>.

<sup>870</sup> Petronas Press Release: Arrest of PETRONAS' Employee By MACC (Apr. 9, 2022), <https://www.petronas.com/media/media-releases/arrest-petronas-employee-macc-0>; see also *Petronas confirms arrest of junior executive by MACC for graft*, DAYAK DAILY (Apr. 11, 2022), <https://dayakdaily.com/petronas-confirms-arrest-of-junior-executive-by-macc-for-graft/>.

<sup>871</sup> Bernama, *Petronas Carigali exec among 9 nabbed over RM2.3 billion graft*, MALAYSIA NOW (Apr. 11, 2022), <https://www.malaysianow.com/news/2022/04/11/petronas-carigali-exec-among-9-nabbed-over-rm2-3-billion-graft>.

## P. China

### 1. Legislative and Policy Developments

The Communist Party of China (CPC or the Party) convened its 20<sup>th</sup> National Congress in Beijing from October 16 to October 22 and anti-corruption was one of the key topics emphasized by the Party leadership.

Sun Yeli, a spokesperson for the 20<sup>th</sup> Congress, said at a press conference<sup>872</sup> that in the period between the Party's 18<sup>th</sup> National Congress in 2012 to June 2022, disciplinary and inspection commissions at all levels of government had investigated 4.52 million corruption cases and punished about 4.44 million people.

#### a. Public Corruption

On April 6, 2022, the Supreme People's Procuratorate (SPP) and the Ministry of Public Security (MPS) jointly promulgated the Regulations on the Standards for Acceptance of Criminal Cases by Public Security Organs for Investigation and Prosecution II (Prosecution Standards II),<sup>873</sup> which reduce the monetary thresholds for prosecuting crimes of (i) accepting bribes by non-state functionaries; and (ii) offering bribes to non-state functionaries from RMB60,000 (approximately USD8,400) to RMB30,000 (approximately USD4,200), thus making it easier to prosecute lower value public corruption. The lowering of these monetary thresholds for prosecution follows the 2021 implementation of new penalty clauses under Amendment XI to the Criminal Law which raised the penalty for bribery in the private sector to the same level as that for bribery in the public sector.

### 2. Enforcement Developments

According to Xinhua News, a leading State news agency in China, the Chinese government continues to step up anti-corruption enforcement in 2022, and has disciplined forty eight senior government officials at the provincial/ministerial level in 2022, a significant increase from twenty two in 2021.<sup>874</sup>

In January 2022, the CCDI and NSC publicly stated that they would take more robust action to crack down on corruption in sectors such as finance, infrastructure construction and public resource trading and would also intensify anti-graft efforts with respect to state-owned

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<sup>872</sup> Spokesperson of the 20th National Congress: Anti-corruption is a major political struggle that we cannot afford to lose and must not lose, CHINA NEWS NETWORK <https://www.chinanews.com.cn/gn/2022/10-15/9873770.shtml>.

<sup>873</sup> SPP and MPS jointly issued the Regulations on the Standards for Acceptance of Criminal Cases Under the Jurisdiction of the Public Security Organs for Investigation and Prosecution II (关于印发《最高人民检察院公安部关于公安机关管辖的刑事案件立案追诉标准的规定（二）》的通知), promulgated Apr. 6, 2022, effective May 15, 2022, [https://www.spp.gov.cn/spp/xwfbh/wsfbt/202204/t20220429\\_555906.shtml#1](https://www.spp.gov.cn/spp/xwfbh/wsfbt/202204/t20220429_555906.shtml#1).

<sup>874</sup> CCDI and NSC reported supervision, inspection, and investigation work of discipline inspection and supervision agencies from January to September 2021, XINHUA News (Oct. 26, 2021), [http://www.news.cn/2021-10/26/c\\_1127995115.htm](http://www.news.cn/2021-10/26/c_1127995115.htm).

enterprises.<sup>875</sup> Between January and September 2022, CCDI and NCS<sup>876</sup> report that disciplinary inspection and supervision agencies across the country received about 2.647 million petition letters and reports about corruption and related cases, handled about 454,000 cases and sanctioned about 407,000 officials (of which 338,000 were disciplined under Party rules), including 48 officials at the ministerial and provincial level, 1,850 officials at the sub-provincial level, 15,000 officials at the county level, 5,000 officials at the township level, 57,000 officials at the lower level, and 283,000 other types of officials (e.g., officials of state-owned enterprises).

A series of high-profile cases were reported in 2022, including some announced on the eve of the 20<sup>th</sup> National Party Congress. For example, Fu Zhenghua, former Minister of Justice and former Vice Minister of the Ministry of Public Security, was convicted of accepting bribes of more than RMB117 million (approximately USD16 million) and received a suspended death sentence without parole.<sup>877</sup> Changchun Intermediate People's Court, the court of first instance, found that Fu had engaged in abuse of power and corruption while serving various government roles between 2005 to 2021, including Chief of the Beijing Municipal Public Security Bureau, Vice Minister of the Ministry of Public Security, member of the Central Political and Legal Affairs Commission and Minister of Justice. He corruptively helped others in their business transactions, job promotions and legal proceedings in exchange for bribes of more than RMB117 million accepted directly and indirectly through his family members.

Shen Deyong, former Director of the Social and Legal Affairs Committee of Chinese People's Political Consultative Conference (CPPCC) and former Vice President of the Supreme People's Court, who presided over trials of some of the most influential political figures in China, was arrested for suspected bribe-taking.<sup>878</sup> This investigation is ongoing and no detailed information has been publicly disclosed to date.

Several senior officials in large State-owned enterprises, especially in the financial sector, were also subject to disciplinary action, criminal investigation, and prosecution. Tian Huiyu, former President of the State-owned China Merchants Bank (CMB), was arrested in October 2022 for suspected bribe-taking, abuse of power, and insider trading.<sup>879</sup> Wang Bin, former Party Secretary

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<sup>875</sup> Communiqué of the 6<sup>th</sup> Plenary Session of the 19<sup>th</sup> Central Commission for Discipline Inspection of the Communist Party of China, CENTRAL COMM'N FOR DISCIPLINE INSPECTION (Jan. 20, 2022), [https://www.ccdi.gov.cn/toutiaon/202201/t20220120\\_165948.html](https://www.ccdi.gov.cn/toutiaon/202201/t20220120_165948.html).

<sup>876</sup> CCDI and NSC reported supervision, inspection, and investigation work of discipline inspection and supervision agencies from January to September 2022, CENTRAL COMM'N FOR DISCIPLINE INSPECTION (Oct. 30, 2022), [https://www.ccdi.gov.cn/toutiaon/202210/t20221030\\_227581.html](https://www.ccdi.gov.cn/toutiaon/202210/t20221030_227581.html).

<sup>877</sup> Zhang Yu, *Fu Zhenghua is Given a Suspended Death Sentence, Which Can Be Reduced to Life In Prison, But No Further Reduction or Parole Shall Be Afforded*, BEIJING NEWS (Sept. 22, 2022), <https://news.sina.com.cn/c/2022-09-22/doc-imqqsmrp0056170.shtml>.

<sup>878</sup> Yu Hui, *Ministerial-level "Tiger" Shen Deyong Arrested! Participated in The Trials of Bo Xilai, Zhou Yongkang, Ling Jihua, Su Rong and Other Cases*, BEIJING YOUTH DAILY (Sept. 28, 2022), [https://www.sohu.com/a/588729997\\_137462](https://www.sohu.com/a/588729997_137462).

<sup>879</sup> An Yi, *Former President of CMB Tian Huiyu, Who Was Dismissed from Public Office and Expelled from the Party at the Beginning of The Month Was Arrested! He's Engaged in Collusion Between Official and Capital*, STCN (Oct. 27, 2022), <http://www.stcn.com/article/detail/709137.html>.

and Chairman of the State-owned China Life Insurance, was arrested by the Supreme People's Procuratorate (SPP) in September 2022 for suspected bribe-taking and concealing overseas assets.<sup>880</sup> Wang had been subject to a Party disciplinary investigation before his case was handed over to SPP for criminal investigation. Li Guohua, former General Manager of the Chinese telecom giant China Unicom, was arrested in November 2022 for suspected bribe-taking and abuse of power.<sup>881</sup> Sheng Guangzu, former Party Secretary and General Manager of China Railway Corporation (currently known as China State Railway Group), was arrested in October 2022 for suspected bribe-taking and using influence to seek bribes.<sup>882</sup> Sheng was subject to a Party disciplinary investigation before his case was transferred to SPP for criminal investigation.

#### a. Outbound Data Transfer

China's Data Security Law<sup>883</sup> (DSL) and Personal Information Protection Law<sup>884</sup> (PIPL) both provide that, absent Chinese government approval, no individuals or organizations in China may provide any data collected or generated within the territory of China to foreign law enforcement or judicial agencies.

Over the course of 2022, the Chinese government has further tightened the regulatory regime for outbound data transfer. On July 7, 2022, the Cybersecurity Administration of China (CAC) issued the Outbound Data Transfer Security Assessment Measures<sup>885</sup> (Security Assessment Measures) effective September 1, 2022. The Security Assessment Measures defines "outbound activities" to include: (1) the transfer (or storage) outside of China of relevant data collected or generated within the territory of China; and (2) data that, while collected or generated within the territory of China and stored in China, can be accessed by overseas entities or persons. Importantly, under the Security Assessment Measures access to data stored in China by foreign entities or persons will now be treated as outbound data activity.

Under the Security Assessment Measures, a government-led security assessment will be required in cases of outbound transfer of important data (data related to national security, economic security and social stability), data of operators of critical information infrastructure (data on critical sectors

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<sup>880</sup> Qiao Nan, *Former China Life Insurance chairman Wang Bin Arrested*, CHINA NEWS SERVICE (Sept. 14, 2022), [http://m.legaldaily.com.cn/Company/content/2022-09/14/content\\_8780911.htm](http://m.legaldaily.com.cn/Company/content/2022-09/14/content_8780911.htm).

<sup>881</sup> Li Guohua, *Former Deputy Party Secretary and General Manager of China Unicom Arrested*, JIEMIAN (Nov. 4, 2022), <https://www.163.com/dy/article/HLBKV1I0534A4SC.html>.

<sup>882</sup> Chen Wentao, *Former Party Secretary and General Manager of China Railway Corp. Sheng Guangzu Arrested*, CHINA NEWS SERVICE (Oct. 8, 2022), <https://www.chinanews.com.cn/gn/2022/10-08/9868666.shtml>.

<sup>883</sup> *Data Security Law* (中华人民共和国数据安全法) NATIONAL PEOPLE'S CONGRESS, enacted June 10, 2021, effective Sept. 1, 2021, <http://www.npc.gov.cn/npc/c30834/202106/7c9af12f51334a73b56d7938f99a788a.shtml>.

<sup>884</sup> *Personal Information Protection Law* (中华人民共和国个人信息保护法) NAT'L PEOPLE'S CONG., adopted Aug. 20, 2021, effective Nov. 1, 2021, <http://www.npc.gov.cn/npc/c30834/202108/a8c4e3672c74491a80b53a172bb753fe.shtml>.

<sup>885</sup> *Outbound Data Transfer Security Assessment Measures* (数据出境安全评估办法) CYBERSPACE ADMIN. OF CHINA, effective Sept. 1, 2022, [http://www.cac.gov.cn/2022-07/07/c\\_1658811536594644.htm](http://www.cac.gov.cn/2022-07/07/c_1658811536594644.htm).

and network facilities and systems affecting national security, economic security, public interest and people's livelihood) and personal data that exceeds certain volume thresholds (data of a processor who processes personal data of 1 million or more individuals and outbound transfer of personal data of 100,000 or more individuals or sensitive personal data of 10,000 or more individuals). All outbound data transfer activities related to data in these categories must undergo a two-phase government security assessment led by CAC before such data can be transferred outside China. This creates a burdensome compliance requirement on cross-border transfer of data originated from China and failure to comply will result in severe penalties. On September 12, 2022, CAC circulated a draft Amendment to the Cybersecurity Law for public comments (Draft Amendment),<sup>886</sup> which substantially raises the penalty for violation the Cybersecurity Law (CSL)<sup>887</sup> to a level in line with those under the PIPL and DSL. This is the first amendment since the CSL came into effect in June 2017.

The Draft Amendment incorporates penalties for breaching data localization and data export requirements under the DSL and PIPL and substantially increases the fines for violations. For example, with respect to illegal data publication or transmission, the Draft Amendment raises the fine from RMB1 million (approximately USD140,000) to RMB50 million (approximately USD7 million) or 5% of the data processor's turnover in the preceding year. Given the complicated assessment process and the fact that CAC does not appear to have adequate resources to handle the large number of pending applications, so far there are no public examples of a multinational corporation in China that has successfully completed this assessment process.

## **Q. International Organizations**

### **1. The World Bank**

In the fiscal year 2022, the World Bank Group's Integrity Vice Presidency (INT) continued to send the "clear message" that "corruption has no place in development."<sup>888</sup> According to the World Bank Group's Sanctions System Annual Report for Fiscal Year 2022 (the 2022 Report), INT received 3,380 complaint submissions, opened 330 preliminary external investigations<sup>889</sup> and 48 external investigations, and closed 31 existing external investigations.<sup>890</sup> It submitted 18 sanction cases

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<sup>886</sup> *Decision on Amendment to the Cybersecurity Law (Draft for Public Comments)* (关于修改《中华人民共和国网络安全法》的决定 (征求意见稿)) CYBERSPACE ADMIN. OF CHINA, circulated Sept. 12, 2022, [http://www.gov.cn/xinwen/2022-09/14/content\\_5709805.htm](http://www.gov.cn/xinwen/2022-09/14/content_5709805.htm).

<sup>887</sup> *Cybersecurity Law* (中华人民共和国网络安全法) NAT'L PEOPLE'S CONG., adopted Dec. 7, 2016, effective June 1, 2017, [http://www.cac.gov.cn/2016-11/07/c\\_1119867116.htm](http://www.cac.gov.cn/2016-11/07/c_1119867116.htm).

<sup>888</sup> World Bank Group, *Sanctions System Annual Report for Fiscal Year 2022*, Message from the World Bank Group President, at iv (2022), <https://documents1.worldbank.org/curated/en/099015010072236926/pdf/BOSIB0e55589950540afa70abefa9afb38a.pdf>.

<sup>889</sup> An initial fact-finding step to determine whether there is sufficient credible evidence and supporting information to warrant an investigation. World Bank Group, *Guide to the Staff Rule 8.01: Investigative Progress* (Aug. 2016), <https://thedocs.worldbank.org/en/doc/206451544726861592-0240022018/original/INTGuidetotheStaffRule801InvestigativeProcessAugust2016.pdf>.

<sup>890</sup> World Bank Group, *Sanctions System Annual Report for Fiscal Year 2022*, at 2 (2022), <https://documents1.worldbank.org/curated/en/099015010072236926/pdf/BOSIB0e55589950540afa70abefa9afb38a.pdf>.

and 12 settlements to the Office of Suspension and Debarment (OSD),<sup>891</sup> and a further three settlements to the International Finance Corporation's Evaluation Officer.<sup>892</sup>

The OSD reviewed 15 sanction cases and 12 settlements (some of which were submitted in the previous fiscal year). Of these cases and settlements, 70% involved fraud allegations and 30% involved corruption allegations (with some cases involving both fraud and corruption and/or other sanctionable practices).<sup>893</sup> The OSD ultimately sanctioned 20 respondents, including 14 companies and six individuals.<sup>894</sup> Nine of the 20 respondents contested the determination of the OSD, appealing to the Sanctions Board.<sup>895</sup> The Sanctions Board issued decisions in four contested cases involving six respondents. The 2022 Report indicates that between fiscal year 2018 and fiscal year 2022, approximately a third of the conduct sanctioned by the OSD and the Sanctions Board took place in the East-Asia and Pacific region, and approximately a quarter in the Middle East and North Africa region.<sup>896</sup>

One of the settlements entered by INT involved the debarment of two hydropower equipment manufacturers for collusive and corrupt practices in connection with hydropower generation and supply projects in Pakistan and the Democratic Republic of Congo (DRC).<sup>897</sup> In Pakistan, Voith Hydro GmbH & Co KG (VHH) and Voith Hydro Shanghai Ltd (VHS), German and Chinese subsidiaries of parent company Voith Hydro Holding GmbH & Co KG, arranged to gain improper advantages in a tender through a commercial agent (collusive practices) and made improper payments to the agent to secure favorable decisions from public officials (corrupt practices). Parent Voith Hydro Holding GmbH & Co KG failed to adequately supervise its subsidiaries. In the DRC, VHH also failed to disclose intended payments to a commercial agent in its bid (a fraudulent practice).

As part of the settlement, the three companies received reduced sanctions in exchange for their cooperation and remedial actions. VHS was debarred for 34 months, followed by a 6-month conditional non-debarment, while VHH was debarred for 15 months, followed by a 6-month conditional non-debarment. VHZ received a 21-month conditional non-debarment. Conditions for

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<sup>891</sup> The OSD carries out a first-tier review of all sanction cases.

<sup>892</sup> The International Finance Corp. is a global development institution that focuses on the growth of the private sector in developing countries. It is a member of the World Bank Group.

<sup>893</sup> World Bank Group, *Sanctions System Annual Report for Fiscal Year 2022*, at 29 (2022), <https://documents1.worldbank.org/curated/en/099015010072236926/pdf/BOSIB0e55589950540afa70abefa9afb38a.pdf>.

<sup>894</sup> World Bank Group, *Sanctions System Annual Report for Fiscal Year 2022*, at 28 (2022), <https://documents1.worldbank.org/curated/en/099015010072236926/pdf/BOSIB0e55589950540afa70abefa9afb38a.pdf>.

<sup>895</sup> The Sanctions Board carries out a second and final review of contested sanctions cases.

<sup>896</sup> World Bank Group, *Sanctions System Annual Report for Fiscal Year 2022*, at 30 (2022), <https://documents1.worldbank.org/curated/en/099015010072236926/pdf/BOSIB0e55589950540afa70abefa9afb38a.pdf>.

<sup>897</sup> World Bank Group Press Release: World Bank Group Sanctions German and Chinese Hydropower Companies (Apr. 14, 2022), <https://www.worldbank.org/en/news/press-release/2022/04/14/world-bank-group-sanctions-german-and-chinese-hydropower-companies>.

release include the development of an integrity compliance program, continued cooperation with INT, and the payment of EUR 1,766,198 in restitution to affected countries. Other settlements concluded in 2022 included similar conditions of continued cooperation and implementation of compliance programs.<sup>898</sup> The 2022 Report indicates that, between 2010 and 2022, the SDO applied “assistance and ongoing cooperation” as a mitigating factor in relation to 219 of 472 respondents.<sup>899</sup>

The World Bank also continued to promote supranational cooperation in the fight against corruption. In the fiscal year 2022, the World Bank recognized 72 cross-debarments from other multilateral development banks (MDBs): 41 from the Inter-American Development Bank, 14 from the African Development Bank, and 17 from the Asian Development Bank.<sup>900</sup> In parallel, 30 debarments by the World Bank were eligible for recognition by these MDBs. In April, the OSD organized, in collaboration with the Anti-Corruption Division of the OECD and other institutions, a symposium on Supranational Responses to Corruption in Vienna, Austria.<sup>901</sup> The OSD also organized several events focusing on the Global Suspension & Debarment Directory launched in the fiscal year 2021.

## **2. The Organisation for Economic Co-operation and Development (OECD)**

In 2022, the OECD’s Working Group on Bribery (WGB) continued to provide guidance on the amended Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions that was adopted in November 2021 (the 2021 Anti-Bribery Recommendation). In February 2022, WGB Chair Drago Kos noted that in the past few years, the private sector had evolved from “the bad guys” to “a partner” in the fight against foreign bribery.<sup>902</sup> He stressed that the 2021 Anti-Bribery Recommendation had “raised the bar” for compliance programs: corporations were trusted to adopt the measures described in the Good Practice

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<sup>898</sup> See for instance the World Bank Group’s settlement with AIM Consultants Ltd., which was debarred for 34-month for corrupt practices in connection with a soil erosion and watershed management project in Nigeria (World Bank Group Press Release: World Bank Group Debars AIM Consultants Ltd. and its Managing Director (Feb. 23, 2022), <https://www.worldbank.org/en/news/press-release/2022/02/23/world-bank-group-debars-aim-consultants-limited-and-its-managing-director>), or the World Bank Group’s settlement with SoftTech IT Solutions and Services Ltd., which was debarred for 50 months in connection with corrupt practices in connection with the National Social Safety Nets Project in Nigeria (World Bank Group Press Release: World Bank Group Debars SoftTech IT Solutions and Services Ltd. and its Managing Director (Mar. 30, 2022), <https://www.worldbank.org/en/news/press-release/2022/03/30/world-bank-group-debars-softtech-it-solutions-and-services-ltd-and-its-managing-director>).

<sup>899</sup> World Bank Group, *Sanctions System Annual Report for Fiscal Year 2022*, at 32 (2022), <https://documents1.worldbank.org/curated/en/099015010072236926/pdf/BOSIB0e55589950540afa70abefa9afb38a.pdf>.

<sup>900</sup> World Bank Group, *Sanctions System Annual Report for Fiscal Year 2022*, at 58 (2022), <https://documents1.worldbank.org/curated/en/099015010072236926/pdf/BOSIB0e55589950540afa70abefa9afb38a.pdf>.

<sup>901</sup> World Bank Group, *Sanctions System Annual Report for Fiscal Year 2022*, at 32-34 (2022), <https://documents1.worldbank.org/curated/en/099015010072236926/pdf/BOSIB0e55589950540afa70abefa9afb38a.pdf>.

<sup>902</sup> International Bar Ass’n Anti-Corruption Committee, The 2021 OECD Anti-Bribery Recommendation and what it (could) mean for the private sector and enforcers (webinar), INTERNATIONAL BAR ASS’N (Feb. 7, 2022), <https://www.ibanet.org/conference-details/CONF2176>.

Guidance on Internal Controls, Ethics and Compliance in Annex II of the 2021 Anti-Bribery Recommendation, or “functionally equivalent” measures that reached the same goal of preventing and detecting foreign bribery.

In parallel, the OECD pursued its country monitoring work. The WGB published its Phase 4 Report on Greece<sup>903</sup> in March 2022 and its Phase 4 Report on Portugal<sup>904</sup> in November 2022. The WGB observed that there had been no convictions for foreign bribery since the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Anti-Bribery Convention) had come into force in both countries over twenty years ago. In the Greek report, the WGB expressed concern that Greece lacked an effective legal framework for holding corporations liable for foreign bribery or related offenses. In particular, the WGB noted that a recent legislative amendment requiring an individual to be convicted of an offense before a corporation could be sanctioned was “deeply regrettable.”<sup>905</sup>

The WGB made similar observations in the Portuguese report, noting that while the Portuguese Criminal Code did not require an individual to be convicted of an offense for a corporation to be convicted of an offense, a judgment from the Court of Appeal of Lisbon expressly stated that a company “c[ould] only be held liable insofar as the agent is also liable.” This amounted to a breach of Annex 1.B.2. of the 2021 Anti-Bribery Recommendation, which provides that countries’ systems for the liability of legal person for foreign bribery “should not restrict the liability to cases where the natural person or persons who perpetrated the offense are prosecuted or convicted.”

In July 2022, the WGB also urged Switzerland to implement the recommendations of its 2011 Phase 3 Report, 2018 Phase 4 Report, and 2020 Follow-Up Report, notably concerning the protection of whistle-blowers and the need to increase the statutory maximum fine for companies convicted of foreign bribery (currently CHF5 million).<sup>906</sup> In the same month, the WGB expressed serious concern about recent legislative amendments in Korea which seriously restricted the Prosecution’s Office ability to investigate and prosecute foreign bribery offenses.<sup>907</sup>

Finally, in March 2022, the WGB announced that it had elected Daniëlle Goudriaan as its new Chair. Ms. Goudriaan, who took over from Drago Kos on January 1, 2023, is a Dutch prosecutor with over 20 years’ experience currently serving at the European Public Prosecutor’s Office

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<sup>903</sup> OECD, *Implementing the OECD Anti-Bribery Convention: Phase 4 Report – Greece* (Mar. 10, 2022), <https://www.oecd.org/daf/anti-bribery/Greece-Phase-4-Report-EN.pdf>.

<sup>904</sup> OECD, *Implementing the OECD Anti-Bribery Convention: Phase 4 Report – Portugal* (Oct. 14, 2022), <https://www.oecd.org/corruption/anti-bribery/portugal-phase-4-report.pdf>.

<sup>905</sup> OECD, *Implementing the OECD Anti-Bribery Convention: Phase 4 Report – Greece*, at 5 (Mar. 10, 2022), <https://www.oecd.org/daf/anti-bribery/Greece-Phase-4-Report-EN.pdf>.

<sup>906</sup> OECD Working Group on Bribery statement: Switzerland should urgently take concrete steps to adopt key legislative reforms, OECD (July 20, 2022), <https://www.oecd.org/newsroom/oecd-working-group-on-bribery-statement-switzerland-should-urgently-take-concrete-steps-to-adopt-key-legislative-reforms.htm>.

<sup>907</sup> OECD Working Group on Bribery statement: Recent legislative reforms raise serious concerns over Korea’s capacity to investigate and prosecute foreign bribery, OECD (July 20, 2022), <https://www.oecd.org/newsroom/oecd-working-group-on-bribery-statement-recent-legislative-reforms-raise-serious-concerns-over-korea-s-capacity-to-investigate-and-prosecute-foreign-bribery.htm>.

(EPPO).<sup>908</sup> In April 2022, Ms. Goudriaan said in interview that she would like the OECD to take initiatives to accelerate mutual legal assistance. She suggested that the WGB might take inspiration from the cross-border information-sharing system used by EPPO.<sup>909</sup>

## VII. CONCLUSION

As we look ahead to 2023, the DOJ and SEC will continue to prioritize FCPA enforcement. We expect that we will continue to see large cross-border investigations and coordinated resolutions. We expect that DOJ and SEC will continue to encourage cooperation and coordination among international authorities by crediting penalties paid to foreign authorities.

We also expect to see a sustained focus on individual prosecutions linked to large corporate investigations given the DOJ's continued guidance this year that individual accountability is the "first priority" in corporate enforcement.<sup>910</sup>

US authorities also will likely continue to turn to the accounting and recordkeeping provisions or increasingly look to the wire fraud or money laundering statutes in order to pursue enforcement actions in cases where FCPA jurisdiction cannot be established over substantive bribery.

As reflected in the DOJ's recent hire of Matthew Galvin, FCPA enforcement authorities will continue to focus on the use of data within corporate compliance programs as a means of detecting and preventing misconduct.

Corporate resolutions in 2023 will provide greater clarity on DOJ's implementation of its recent amendments to the Corporate Enforcement Policy,<sup>911</sup> including further detail on "extraordinary" cooperation and remediation.

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<sup>908</sup> Statement of OECD Working Group on Bribery Electing New Chair, OECD (Mar. 16, 2022), <https://www.oecd.org/newsroom/statement-of-oecd-working-group-on-bribery-electing-new-chair.htm>.

<sup>909</sup> Alice Johnson, *Future OECD bribery group chair: mutual legal assistance needs to be faster*, GLOBAL INVESTIGATIONS REV. (Apr. 8, 2022), <https://globalinvestigationsreview.com/article/future-oecd-bribery-group-chair-mutual-legal-assistance-needs-be-faster>.

<sup>910</sup> Lisa O. Monaco, Deputy Att'y Gen., DOJ, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group, at 3 (Sept. 15, 2022), <https://www.justice.gov/opa/speech/file/1535301/download>.

<sup>911</sup> See Kenneth A. Polite, Jr., Assistant Att'y Gen., DOJ, Remarks on Revisions to the Criminal Division's Corporate Enforcement Policy, (Jan. 17, 2023) <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-georgetown-university-law>.

There will likely be further clarification on the US government's enforcement policies, including guidance from DOJ relating to ephemeral messaging and compensation claw back policies.<sup>912</sup>

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<sup>912</sup> See Nicole M. Argentieri, Acting Principal Deputy Assistant Att'y Gen., DOJ, Remarks at the 39th International Conference on the Foreign Corrupt Practices Act (Dec. 1, 2022), <https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-nicole-m-argentieri-delivers-remarks> (stating "the Criminal Division is also considering what additional guidance may be warranted on how we evaluate compensation claw back policies."); Kenneth A. Polite, Jr., Assistant Att'y Gen., DOJ, Remarks at the University of Texas Law School (Sept. 16, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-delivers-remarks-university-texas-law-school> (stating, "the Criminal Division will then provide further guidance on how prosecutors will consider and reward corporations that develop and apply compensation claw back policies.").

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