SHEARMAN & STERLING

# FCPA DIGEST

## RECENT TRENDS AND PATTERNS IN THE ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT

JUNE 2023

## EXECUTIVE SUMMARY

In 2022, the DOJ and the SEC resolved a total of ten corporate enforcement actions under the FCPA, more than double the number in the previous year. While the average corporate penalties only slightly increased to $168 million from last year's $164 million, the total penalties reached $1.68 billion, a notable increase from the prior year's $658 million. Four out of the ten resolutions were paired enforcement actions, and the largest resolution of the year, Glencore, was a collaboration between the DOJ and the CFTC.

However, in 2022, the DOJ charged or unsealed charges against only eighteen individuals in FCPA-related cases and the SEC again charged none. This number is even lower than the twenty-three individuals charged in 2021 during the COVID pandemic. As a pre-COVID benchmark, U.S. officials charged (or unsealed charges against) thirty-two and forty-six individuals in 2020 and 2019, respectively. Despite this downward trend in individual enforcement, both agencies continued to publicly affirm their intent to hold culpable individuals accountable for corporate malfeasance. For example, Attorney General Merrick Garland reiterated this commitment at an ABA event in early 2022, noting that prosecuting individuals involved in corporate wrongdoing remained the DOJ's "first priority." This priority was reiterated at the 39th International Conference on the FCPA in Washington D.C. in December and also specifically in the revisions to the Corporate Criminal Enforcement Policies published in September 2022: To be eligible for any cooperation credit, corporations must promptly disclose all relevant, non-privileged facts about individual misconduct.

As the corporate enforcement efforts increase, it is possible that a wave of prepared indictments and charges will be released in 2023.

As we explain in this 2022 Trends & Patterns, among the highlights from the year were:

- ten combined DOJ and SEC corporate enforcement actions with total sanctions of approximately $1.68 billion—a notable increase from the prior year;
- two DOJ declination and disgorgement letters;
- revisions announced by the DOJ to its corporate criminal enforcement policies, focusing on individual accountability, voluntary self-disclosure, effective compliance programs, and retroactive discipline;
- DOJ's potential requirement for CEO and CCO compliance certifications;
- a DOJ opinion release regarding the extortion affirmative defense/exception;
- judicial decisions continuously challenging the DOJ's jurisdictional assertion of agency status to haul defendants with limited interaction with the U.S. into court;
- the growing coordination between the FCPA enforcement agencies and other U.S. regulatory entities, including the CFTC;
- the additional compliance challenges due to COVID-19 and Russia's invasion of Ukraine;
- a number of private lawsuits filed in the aftermath of corruption-related investigations and enforcement actions, including securities fraud and restitution cases; and
- the ongoing criticisms faced by the U.K. Serious Fraud Office's for its questionable conduct in the Unaoil case and the ENRC dispute.

With special thanks to the editorial partners Paula Howell Anderson, Emily Westridge Black, Patrick Hein, and Jonathan Swil, editorial associates Zhaohua Huang, James Matthews, Justin Meshulam, Susanah Naushad, and Marcela Schaefer, and former partner Philip Urofsky.

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# ENFORCEMENT ACTIONS & STRATEGIES

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## 2022 STATISTICS

The DOJ and the SEC resolved a total of ten corporate FCPA enforcement actions during 2022, yielding approximately $1.68 billion in corporate penalties. This is a notable increase from the prior year's four corporate resolutions and approximately $658 million in corporate penalties. More specifically:

- The SEC separately resolved three corporate FCPA actions (*KT Corporation*, *Oracle,* and *Tenaris*);
- The DOJ likewise separately resolved three corporate FCPA actions (*Glencore, Jardine,* and *Safran*); and
- The DOJ and SEC jointly resolved four corporate FCPA actions (*ABB, GOL*, *Honeywell,* and *Stericycle*).

In addition to corporate resolutions, the DOJ charged or unsealed charges against eighteen individuals for FCPA-related violations during 2022, extending the downward trend since the peak in 2019 when the DOJ prosecuted 41 individuals. This decline appears to undercut the agency's stated vow to focus on prosecuting individuals, as articulated in the *Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies* and *Further Revisions to Corporate Criminal Enforcement Policies* memoranda.[1] The SEC did not file any new FCPA charges against individuals during 2022, consistent with the prior year.

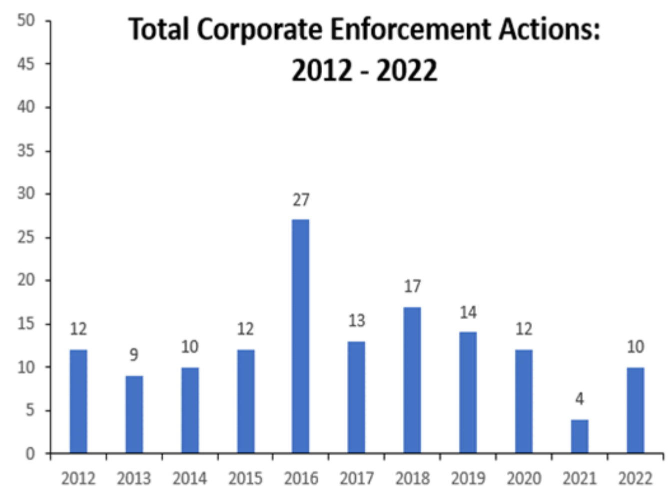
We discuss the 2022 corporate enforcement actions, followed by individual enforcement actions, in greater detail below.

### CORPORATE ENFORCEMENT ACTIONS

In February 2022, the SEC announced FCPA charges against KT Corporation, one of South Korea's largest telecommunications operators and a U.S.-listed company. According to the SEC, KT Corporation engaged in multiple schemes to make improper payments to government officials in South Korea and Vietnam between 2009 and 2018. In South Korea, the schemes allegedly involved a slush fund that executives used to provide entertainment and gifts to government officials, to make payments to charitable foundations at the request of government officials, and to make illegal campaign contributions. In Vietnam, the company's employees allegedly sent money to third parties connected to government officials in exchange for contracts to construct a solar cell power system and to supply hardware, software, and training for vocational colleges. The SEC did not allege a violation of the FCPA's anti-bribery provisions, likely because it is unclear whether certain bribes were paid to government officials and also because the alleged bribery clearly lacks a U.S. nexus. As a classic example of using the accounting provisions to reach foreign conduct, the SEC based its enforcement action on KT Corporation's alleged mischaracterization of the payments in its books and records and its failure to maintain adequate internal accounting controls in violation of the FCPA. It is unclear what position the SEC would take if all the relevant payments were made publicly and correctly recorded.

In the settled administrative proceeding, KT Corporation agreed to pay disgorgement of $2,263,821, pre-judgment interest of $536,457, and a civil penalty of $3,500,000—for a total of $6,300,279. The company is also required to report the status of its anti-corruption compliance to the SEC for the next two years. The company consented to the SEC's order without admitting or denying the alleged misconduct.

In March 2022, the DOJ announced its decision to decline to prosecute Jardine Lloyd Thompson Group Holdings Ltd., a London-based professional services firm that was acquired by Marsh McLennan in 2019. The DOJ alleged that an employee and certain agents of Jardine paid approximately $10.8 million to a Florida-based intermediary between 2014 and 2016 while knowing that over $3.0 million of that amount would be used to bribe Ecuadorian public officials to obtain contracts with Seguros Sucre S.A., Ecuador's state-owned insurance company. The U.K. Serious Fraud Office ("SFO") ended its own probe into the same alleged misconduct after the Financial Conduct Authority ("FCA") fined Jardine $9.7 million in June 2022 for its lapses in financial crime control.

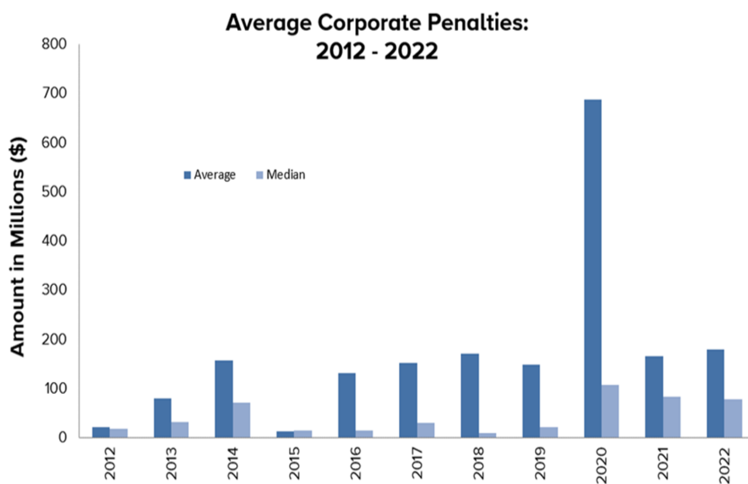



[1] U.S. DEP'T OF JUST., CORPORATE CRIME ADVISORY GROUP AND INITIAL REVISIONS TO CORPORATE CRIMINAL ENFORCEMENT POLICIES (2021); U.S. DEP'T OF JUST., FURTHER REVISIONS TO CORPORATE CRIMINAL ENFORCEMENT POLICIES FOLLOWING DISCUSSIONS WITH CORPORATE CRIME ADVISORY GROUP (2022).

In announcing the declination—the first one since August 2020—the DOJ noted that Jardine voluntarily self-reported, cooperated with the DOJ, remediated the conduct, and will disgorge $29,081,951 in a resolution with U.K. authorities. The DOJ agreed to credit Jardine's disgorgement, provided that the company makes full payment to the U.K. authorities within 12 months.

In April 2022, the DOJ and SEC announced a coordinated resolution involving Stericycle, a U.S.-listed company that provides specialized disposal services for regulated substances, including medical and hazardous waste. The DOJ alleged that Stericycle—through its foreign subsidiaries—caused bribes to be paid to government officials in Brazil, Mexico, and Argentina to obtain waste management contracts, secure priority release of payments under existing government contracts, and avoid certain fines. Under the terms of the deferred prosecution agreement ("DPA"), Stericycle accepted responsibility for the misconduct, agreed to pay a criminal fine of $52.5 million, and agreed to enhance its anti-corruption controls, including engaging an independent compliance monitor for two years followed by one year of self-reporting. The DOJ agreed to offset up to one-third of the criminal fine for amounts that Stericycle will pay to Brazilian authorities. The DOJ acknowledged Stericycle's cooperation and remediation; however, because the company did not self-report, it received no credit for voluntary disclosure.

In a related civil proceeding, the SEC alleged that Stericycle violated the FCPA by mischaracterizing the above-referenced payments in its books and records and by failing to maintain adequate accounting controls. To settle the SEC's charges, Stericycle agreed to pay disgorgement of $22,184,981 plus pre-judgment interest of $5,999,259 and to retain an independent compliance monitor for a term of two years followed by one year of self-reporting. The SEC agreed to offset up to $4,196,719 in disgorgement payments that Stericycle makes to Brazilian authorities. Like the DOJ, the SEC noted Stericycle's cooperation and remediation.




The joint DOJ/SEC requirement that Stericycle retain an independent compliance monitor for (at least) two years is notable, particularly for such a relatively small case. If the monitorship was not imposed to address a unique situation, it might signal the government's intent to make good on prior statements to impose monitorships after several years of trending in the other direction, including two recent DOJ memoranda renouncing a presumption against monitorships.[2]

By far the largest corporate FCPA resolution in 2022 was the DOJ's action against Glencore, which was part of a coordinated settlement with authorities in the U.S., U.K., and Brazil. Glencore, a multinational commodity trading and mining company headquartered in Switzerland, agreed to pay over $1.1 billion to resolve charges of FCPA violations and price manipulation by the DOJ and U.S. Commodity Futures Trading Commission ("CFTC").

On May 24, 2022, the DOJ filed a single count information against Glencore alleging a conspiracy to violate the anti-bribery provisions of the FCPA. The same day, the company entered into a plea agreement with the DOJ in which Glencore agreed to pay a criminal fine of $428,521,173 and forfeiture of $272,185,792. The DOJ agreed to offset $165,930,959 of the criminal fine for payments made to U.K. and Swiss authorities in parallel enforcement actions, and the DOJ further agreed to offset $90,728,597 of the forfeiture total for disgorgement paid in a parallel CFTC enforcement action. Glencore also agreed to an independent compliance monitorship for three years as part of the plea agreement with the DOJ.

Notwithstanding the billion-dollar penalty ($700 million for the alleged FCPA violation), an even more notable feature of the *Glencore* resolution is the requirement that, 30 days prior to the end of the monitorship, Glencore's chief compliance officer ("CCO") certify that the company's post-resolution compliance program is "reasonably designed to prevent anti-corruption violations." Although we saw similar certification requirements for CEOs and CFOs in the past, for example, in the UniCredit Bank AG's Iran-sanction DPA in 2019, this is the first, but likely not the last, requirement of this kind for CCOs and it sent shockwaves throughout the compliance community, as discussed further below.

In June 2022, the SEC initiated a settled administrative proceeding against Tenaris, a global manufacturer and supplier of steel pipe products and services, for alleged

[2] U.S. Dep't of Just., Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group (2022); *see also* U.S. Dep't of Just., Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies (2021).

misconduct by the company's Brazilian subsidiary. According to the SEC, between 2008 and 2013 Tenaris's subsidiary, Confab Industrial S.A., paid approximately $10.4 million in bribes through its local agent to a high-ranking manager at Petroleo Brasileiro S.A. ("Petrobras"), Brazil's state-owned oil company, to obtain more than $1.0 billion in contracts from Petrobras. Tenaris agreed to pay a civil fine of $25,000,000 and disgorgement of $42,842,497 plus prejudgment interest of $10,257,841. Moreover, the company agreed to self-report to the SEC on the status of its enhanced anti-corruption compliance policies and related remedial measures for a two-year term.

On September 15, 2022, GOL Linhas Aereas Inteligentes, Brazil's second largest domestic airline, also known as GOL Intelligent Airlines ("GOL"), settled FCPA charges by the DOJ and SEC. According to the charging documents, between 2012 and 2013 GOL allegedly conspired to offer or pay around $3.8 million in bribes to Brazilian officials; in exchange, GOL sought to secure the passage of two favorable pieces of legislation involving payroll and fuel taxes. GOL entered into a three-year DPA with the DOJ under which GOL agreed to pay a criminal penalty of $17 million, reduced from $87 million due to GOL's inability to pay. The DOJ further noted that GOL received full credit for its cooperation and for promptly engaging in remedial measures. GOL agreed to pay $24.5 million to resolve the SEC's charges relating to the same alleged conduct, reduced from $70 million due to GOL's inability to pay.

On September 27, 2022, Oracle agreed to pay $23 million to settle FCPA-related charges brought by the SEC. According to the SEC, between 2016 and 2019 Oracle's foreign subsidiaries in Turkey, UAE, and India allegedly bribed foreign officials in return for business. Specifically, Oracle sales employees allegedly issued excessive discounts and sham marketing reimbursements to generate funds used for bribes and extravagant trips to influence officials.

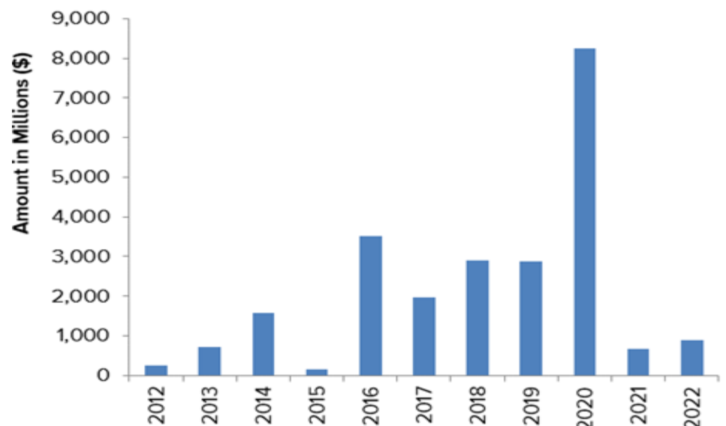
In December 2022, ABB Ltd., a Swiss technology and manufacturing company, agreed to pay $315 million and $75 million to settle FCPA-related charges brought by the DOJ and SEC, respectively. According to the government, between 2015 and 2017 ABB executives allegedly paid approximately $37 million in bribes to officials at Eskom, South Africa's state-owned electricity utility. In exchange, ABB allegedly obtained a $160 million contract to provide and install cabling at an Eskom power plant. The DOJ agreed to credit up to half of the criminal penalty for amounts the company will pay to authorities in South Africa in related proceedings. Of note, this is the DOJ's first coordinated resolution with authorities in South Africa. Also of note, this is the third time that ABB was charged with FCPA violations.

Also in December 2022, Honeywell UOP, a multinational company providing aerospace, sensing, and security technologies and solutions, agreed to pay over $160 million to resolve investigations by authorities in the U.S. and Brazil. According to the DOJ and SEC, between 2010 and 2014 Honeywell allegedly conspired to give approximately $4.0 million to a senior executive of Brazil's state-owned oil company, Petrobras, to win a $425 million contract. Honeywell allegedly entered into an agreement with a sales agent for the purpose of making the payment to the Petrobras executive.

On December 21, 2022, the French aerospace defense company Safran obtained a declination from the DOJ for alleged conduct of a U.S. subsidiary, Monogram Systems, that occurred before it was acquired by Safran. According to the DOJ, from 1999 until 2015 Monogram and its German subsidiary allegedly paid millions of dollars to a China-based consultant who was a close relative of a then-senior Chinese government official knowing that the consultant would, in turn, use some of those funds to pay bribes to the government official to obtain contracts with the Chinese government. The DOJ declined to prosecute based on Safran's timely and voluntary self-disclosure, its cooperation in the matter, and the timely and full remediation, including termination and withholding deferred compensation of employees who were involved in the alleged misconduct. Safran also agreed to disgorge approximately $17 million. This was the second announced DOJ declination in 2022, after Jardine. Notably, instead of crediting the foreign fine or suspending the penalty amount pending foreign settlement, which usually happens in coordinated settlements, here the DOJ stated that it would defer to German authorities in imposing any amount Safran owes resulting from the German subsidiary's involvement in the same alleged scheme.

**TAKEAWAY FROM 2022 MONETARY PENALTIES**

While 2022 saw increased monetary penalties compared to 2021, it was still a good deal shy of levels observed in previous years. To illustrate, the Glencore enforcement



action—the largest of 2022—sits just ninth on the list of the ten largest FCPA monetary penalties (after accounting for payments to foreign regulators).

The DOJ and SEC announced a total of ten FCPA resolutions in 2022 garnering approximately $1.68 billion. This outpaced last year's total of four but still fell short of the ten-year average of twelve resolutions per year and is the fewest since 2015, excluding the outlier years of 2016 (27 resolutions) and 2021 (4 resolutions). Nevertheless, a total of ten actions is more than double the number from the previous year and brings the average corporate penalty for 2022 up slightly from $164 million in 2021 to $168 million in 2022. This is a large dip compared to the peak of $686 million in 2020. Meanwhile, the average corporate penalty in 2019 was $147 million. As we have noted in previous Trends and Patterns, however, we continue to view the median—i.e., the figure for which half of the values are larger and half are smaller—as a more accurate measure of the "average" corporate FCPA penalty to minimize the influence of outliers.

Finally, as in the past several years, a sizeable portion of the total figure will be paid to foreign governments. For example, the entirety of the Jardine disgorgement will be paid to the U.K. government; Stericycle will pay approximately $17.5 million to Brazilian authorities; and Glencore will pay $165 million to U.K. and Swiss enforcement authorities. These payments to non-U.S. authorities naturally impact the amounts actually paid to the SEC and/or DOJ in U.S.-announced actions.

## INDIVIDUAL ENFORCEMENT ACTIONS

While the SEC did not bring any FCPA-related charges against individuals in 2022, the DOJ brought or unsealed FCPA-related charges against eighteen individuals in relation to twelve enforcement actions: (i) *Hobson*; (ii) *Antonio and Enrique Ycaza*; (iii) *Faggioni*; (iv) *Golindano* and *Rangel*; (v) *Yan* and *Zhou*; (vi) *Oropeza*; (vii) *Berko*; (viii) *Hidalgo*, *Garcia, and Matute*; (ix) *Steinmann and Vuteff*; (x) *Sanguino*; (xi) *Gomez*; and (xii) *Hanst*.[3]

Five of the individuals had been charged in sealed indictments that were filed in earlier cases, including an investigation into a purported bribery scheme in Egypt related to the Cushmore enforcement action (*Hobson*); the Sargeant Marine guilty plea (*Ycaza*); the PetroEcuador corruption scheme (*Ycaza*); the Odebrecht corruption scheme (*Faggioni)*; and the PDVSA corruption scheme (*Golindano* and *Rangel*).

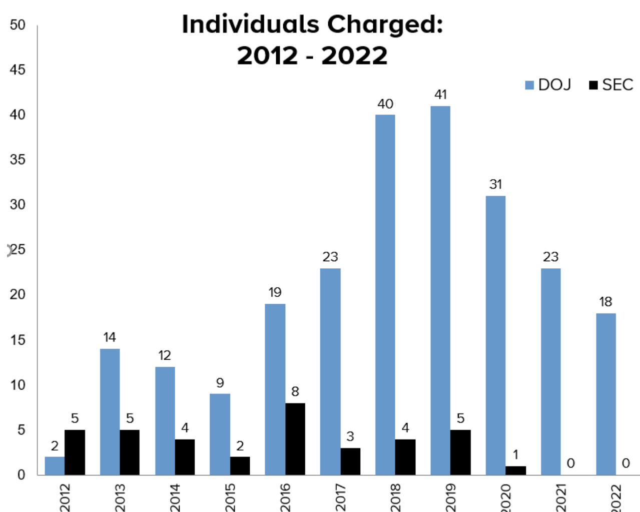
**DOJ ACTIONS**

On March 8, 2022, the DOJ charged Daniel D'Andrea Golindano and Luis Javier Sanchez Rangel, two former senior Venezuelan prosecutors, with money laundering for their alleged receipt of bribes in exchange for agreeing not to pursue criminal charges against certain individuals in Venezuela. According to the DOJ, in or around 2017 D'Andrea Golindano and Sanchez Rangel, in their official roles as prosecutors within the Venezuelan Attorney General's Office, were investigating an individual, identified as Contractor 1 in the indictment, for alleged corruption relating to contracts obtained with subsidiaries of Venezuela's state-owned oil company, PDVSA. The DOJ alleged that D'Andrea Golindano and Sanchez Rangel took bribes of more than $1 million in exchange for not pursuing criminal charges against a third-party contractor and others. To conceal the payments, D'Andrea Golindano and Sanchez Rangel allegedly created false invoices from a Florida corporation.

In connection with the *Vitol* case discussed in a prior Trends & Patterns edition, the DOJ filed a single-count information against Lionel Hanst, a Dutch citizen living in Curacao, on March 16, 2022, alleging conspiracy to commit money laundering for his role in the *Vitol* bribery scheme. The DOJ alleged that between 2014 and 2020, Hanst formed and used shell companies to conceal and disguise approximately $19.9 million in bribe payments made by and on behalf of Vitol, Inc., a U.S. company, to officials in Ecuador, Mexico, and Venezuela.

On March 24, 2022, the DOJ filed an indictment against Carlos Ramon Polit Faggioni, the former Comptroller General of Ecuador, for allegedly engaging in a scheme to use the U.S. financial system to launder money to promote and conceal an illegal bribery scheme in Ecuador. According to the indictment, between 2010 and 2016 Polit Faggioni allegedly solicited over $10 million in bribe payments from Odebrecht S.A., the Brazil-based construction conglomerate. Further, he directed the bribes to be paid to an associate located in the United States who then used the funds to buy and renovate real estate that was held for the benefit of Faggioni. In exchange, Polit Faggioni used his official position to benefit Odebrecht and its business in Ecuador. The DOJ also alleged Polit Faggioni received a bribe from an Ecuadorian businessman in 2015 in exchange for assisting the businessman and his company to obtain certain contracts from an Ecuadorian state-owned insurance company.

[3] On December 2, 2022, the DOJ added two substantive FCPA charges against Javier Aguilar, a former Vitol Group oil trader for allegedly funneling bribes to Ecuadorian and Mexican officials. As discussed in our January 2021 edition, Aguilar was previously charged with conspiracy to violate the FCPA and money laundering conspiracy in connection with the *Vitol* bribery scheme in 2020. Therefore, we do not include Aguilar again in the 2022 statistics.




On March 24, 2022, Fernando Martinez Gomez, a U.S.-Ecuadorian dual citizen residing in Florida, pled guilty to conspiring to commit money laundering and wire fraud. According to a two-count information filed the same day as the guilty plea, between 2013 and 2017 Martinez Gomez allegedly laundered bribes intended for Juan Ribas Domenec, then-chairman of Ecuadorian state-owned insurance companies Seguros Sucre S.A. and Seguros Rocafuerte S.A., and diverted funds of his financial advisory clients to sham investments to facilitate the bribery scheme.

In relation to the DOJ's case against Frederick Cushmore Jr. (as discussed in a previous edition), Charles Hunter Hobson, a vice president of a Pennsylvania-based coal company, was charged on March 29, 2022 with FCPA violations, money laundering, and wire fraud for his alleged role in a bribery scheme involving Egyptian officials. Hobson and his co-conspirators allegedly used their Pennsylvania-based coal company to funnel money through a sales intermediary to pay bribes to foreign officials at Al Nasr company for Coke and Chemicals, an Egyptian SOE, to obtain approximately $143 million in coal contracts.

In connection with the Ecuadorian bribery scheme related to the *Sergeant Marine* and *Vitol* cases (as discussed in a previous edition), the DOJ announced guilty pleas by brothers Enrique Pere Ycaza and Antonio Pere Ycaza to FCPA-related charges on April 26, 2022. Enrique Ycaza, a dual Ecuadorian and Spanish citizen, worked as a consultant involved in the trading of asphalt—the industry specialty of Sargeant Marine. Antonio Ycaza, a citizen of Ecuador, Spain, and the U.S., also worked as a consultant in asphalt trading. According to the DOJ, between January 2013 and 2019 Vitol and Sergeant Marine made payments of more than $70 million to bank accounts controlled by the Ycaza brothers, who allegedly made and caused to be made bribery payments totaling approximately $22 million to Ecuadorian officials and others on behalf of the companies.

On June 23, 2022, Jhonnatan Teodoro Marin Sanguino, mayor of Guanta, Venezuela, pled guilty to one count of conspiring to commit money laundering. Guanta is a port city that controls PDVSA's oil shipments. According to a one-count information filed in April 2022, between 2013 and 2017 Marin Sanguino received approximately $3.8 million in bribes in exchange for using his official capacity as mayor to influence PDVSA officials to award contracts to co-conspiring contractors. Marin Sanguino was ordered to forfeit the $3.8 million in bribes and sentenced to 27 months in prison followed by one year of supervised release.

Also, in connection with PDVSA, the DOJ announced an indictment on July 12, 2022, charging Ralph Steinmann and Luis Fernando Vuteff with money laundering for their alleged role in the bribery scheme to obtain contracts with PDVSA subsidiaries. According to the DOJ, between 2014 and 2018 Steinmann, a Swiss citizen, and Vuteff, an Argentinian citizen, allegedly conspired to use a corrupt foreign currency exchange to launder proceeds of the bribery scheme and to open bank accounts for Venezuelan officials to receive bribe payments.

In July 2022, the DOJ brought charges against Esteban Eduardo Merlo Hidalgo, Cristian Patricio Pintado Garcia, and Luis Lenin Maldonado Matute for bribing officials of Ecuador's state-owned insurance companies to obtain public contracts. The seven-count indictment alleges one count of conspiring to violate the FCPA, one substantive FCPA violation, one count of conspiring to commit money laundering, and four substantive money laundering violations. Specifically, between 2013 and 2018 Merlo Hidalgo, Pintado Garcia, and Maldonado Matute allegedly coordinated with U.K.-based reinsurance agencies to pay approximately $542,000 in bribes to Ecuadorian officials to obtain approximately $2.1 million in public insurance contracts, using false contracts to disguise bribe payments as investments in companies controlled by Seguros Sucre S.A. chairman Juan Ribas Domenec. Merlo Hidalgo is a dual Ecuadorian-U.S. citizen, Pintado Garcia is a dual Ecuadorian-Italian citizen, and Maldonado Matute is an Ecuadorian citizen.[4]

In August 2022, a grand jury returned a six-count indictment charging Venezuelan citizen and businessman Rixon Rafael Moreno Oropeza with conspiring to commit money laundering and substantive money laundering. The DOJ alleged that between 2014 and 2019 Moreno Oropeza used Florida-based bank accounts to pay approximately $1 million in bribes to senior officials at

[4] In March 2023, Hidalgo pled guilty in U.S. court to four counts of engaging in transactions in criminally derived property.

Petropiar, a joint venture between PDVSA and an American oil company. The purpose of the bribery was to replace high-ranking Petropiar procurement officials and to pay millions more in bribes to obtain approximately $30 million in procurement contracts, which were substantially inflated—up to 100 times the actual cost.

In November 2022, the DOJ unsealed an August 2020 indictment charging Asante Berko with FCPA-related violations for an alleged bribery scheme aimed at Ghanian officials. Before resigning in December 2016, Berko served as a vice president at a foreign subsidiary of a U.S. financial institution, where he advised a Turkish energy company on building a power plant in Ghana. The DOJ alleged that between 2014 and 2017, Berko and his co-conspirators paid approximately $700,000 in bribes to Ghanian officials to obtain approvals for the Turkish client's power plant. In 2021, Berko paid approximately $329,163 to settle similar charges from the SEC over the same conduct in an Eastern District of New York lawsuit commenced in 2020.

Finally, in December 2022, Cary Yan and Gina Zhou, both citizens of the Republic of the Marshall Islands ("RMI"), pled guilty to FCPA-related charges for an alleged bribery scheme to influence RMI officials to pass certain legislation. Yan and Zhou allegedly used a New York-based NGO to offer and pay tens of thousands of dollars to elected RMI officials in exchange for their support for legislation that would create a semi-autonomous region within RMI, which would benefit Yan and Zhou's business interests. Yan and Zhou were extradited to the U.S. in September 2022 after being arrested in Thailand in November 2020. The indictment charged Yan and Zhou with one count of conspiring to violate the FCPA, two counts of substantive FCPA violations, and two counts of money laundering. On December 1, 2022, Yan and Zhou pled guilty to one count of conspiracy to violate the FCPA anti-bribery provisions.

**SEC ACTIONS**

The SEC did not charge any individuals for FCPA-related conduct in 2022.

**TAKEAWAY FROM INDIVIDUAL ACTIONS IN 2022**

The DOJ charged or unsealed charges against eighteen individuals in FCPA-related cases in 2022. This contrasts with the twenty-three individual enforcement actions brought in 2021. Despite the slight decrease, the DOJ continues to publicly affirm its dedication to pursuing culpable individuals in anti-corruption actions as part of the Biden Administration's enforcement objectives (discussed in depth in the Unusual Developments section below). The SEC last charged an individual in an FCPA enforcement action in June 2020, although the agency also continues to publicly affirm its intent to pursue culpable individuals.

Further, the trend of bringing money laundering charges in simultaneous (or nearly simultaneous) actions against both alleged bribe payers and takers continued in 2022, capturing both the supply and demand sides of alleged bribery transactions. The DOJ filed conspiracy to commit money laundering counts related to alleged bribery schemes for seventeen of the defendants charged this year (everyone except Berko), four of whom were current or former government officials. This has been the DOJ's routine practice due to the long-standing precedent establishing that a foreign official may not be prosecuted under the FCPA for receiving bribes (a legislative gap that a bill pending in Congress seeks to address, as we discuss further below). For example, D'Andrea Golindano and Sanchez Rangel, both former senior prosecutors in Venezuela, were charged with money laundering and conspiracy to commit money laundering. Similarly, Polit Faggioni, a former Comptroller General of Ecuador, and Marin Sanguino, a former mayor of Guanta, Venezuela, were charged with money laundering and conspiracy to commit money laundering.

*Last,* almost all of the individual actions were filed in the Southern District of Florida (*United States. v. Jhonnatan Teodoro Marin Sanguino; United States v. Rixon Rafael Moreno Oropeza; United States. v. Esteban Eduardo Merlo Hidalgo, Christian Patricio Pintado Garcia, Luis Lenin Maldonado Matute; United States. v. Ralph Steinmann and Luis Fernando Vuteff; United States v. Daniel D'Andrea Golindano and Luis Javier Sanchez Rangel*). Given Florida's close business and tourism connections to Latin America, this concentration of cases tracks the relatively high number of FCPA-related cases arising from Latin America and the Biden Administration's initiative to combat corruption in that region, as discussed below.

## GEOGRAPHY & INDUSTRIES

In 2022, the geographic focus of FCPA enforcement actions was relatively diverse, though overall still largely centered on Latin America, with most of the actions arising from alleged conduct in Venezuela, Ecuador, Brazil, and Mexico. As we discussed in a previous edition, under the Biden Administration, the DOJ launched an initiative to combat corruption in a select group of Central American countries—El Salvador, Guatemala, and Honduras, although these particular countries have seen limited FCPA-related actions thus far, with only one such case in the last decade (*Odebrecht*).

The enforcement actions relating to Africa arose from Nigeria, Cameroon, Ivory Coast, Equatorial Guinea, the Democratic Republic of the Congo (all related to *Glencore*), Egypt (*Hobson*), and South Africa (*ABB*). Asia also drew attention with enforcement actions relating to South Korea and Vietnam (*KT Corporation*), India, Turkey, the United Arab Emirates (all related to *Oracle*), and China (*Safran*).

The FCPA corporate enforcement actions in 2022 arose from a diverse set of industries, most of which are perennial targets, including oil and gas, mining, financial services, transportation, and telecommunications.

# TYPES OF SETTLEMENTS

During 2022, the SEC and DOJ continued to use DPAs and administrative proceedings to resolve most FCPA matters against corporate entities.

## SEC

The SEC continued to rely on administrative proceedings to resolve corporate FCPA enforcement actions during 2022. As noted in a prior publication, the SEC has not utilized a civil settlement before an independent Article III court since 2016.

## DOJ

While recent pronouncements from DOJ officials suggest that DPAs will face increasing scrutiny and may be less favored in the future (as discussed below in the Unusual Developments section), in 2022, of the DOJ's seven corporate enforcement actions, the DOJ resolved four matters with DPAs (*Stericycle, GOL, ABB*, and *Honeywell*) and two with declinations (*Jardine* and *Safran*), meaning that only one matter resulted in a formal conviction after a guilty plea (*Glencore*).

One of the most notable DOJ actions in March 2022 was its announced declination to pursue charges against the multinational insurance company Jardine Lloyd Thompson Group Holdings Ltd. for its self-disclosed payment of bribes through intermediaries to Ecuadorian government officials. This was the DOJ's first "declination with disgorgement" FCPA resolution in nearly two years. A little bit unexpectedly, only nine months later, in late December the DOJ also declined to prosecute Safran S.A.

The list below sets out the various settlement devices the DOJ has at its disposal, of which it has used three in its 2022 FCPA enforcement actions against corporate entities:

- Plea Agreements – *Glencore*
- Deferred Prosecution Agreements – *Stericycle*, *GOL*, *ABB*, and *Honeywell*
- Non-Prosecution Agreements – *None*
- Public Declinations with Disgorgement – *Jardine, Safran*

# ELEMENTS OF SETTLEMENTS

## SELF-DISCLOSURE, COOPERATION, AND REMEDIATION

Of the companies that settled FCPA charges with the DOJ in 2022, two received credit for voluntary disclosure (*Jardine* and *Safran*). While some of the other companies did not receive such credit because they failed to voluntarily and timely disclose to the DOJ the misconduct, they nonetheless received credit for their cooperation and remediation, in some cases up to a 25% discount (e.g., *Stericycle*, *GOL*, and *ABB*).

## SENTENCING GUIDELINES AND DISCOUNTS

In each of the seven DOJ corporate enforcement actions in 2022, the company received sanctions that were based on the U.S. Sentencing Guidelines. In *Stericycle*, *GOL*, and *ABB*, the companies received a 25% sentencing discount for their cooperation with the DOJ investigation, acceptance of responsibility, and subsequent remedial actions. Notably, Glencore received a 15% discount as the DOJ cited shortcomings in Glencore's cooperation and remediation efforts, including alleged delays to produce certain relevant evidence and a failure to timely and appropriately remediate with respect to certain employees involved in the misconduct.

## MONITORS AND REPORTING REQUIREMENTS

In the last five or more years, the DOJ has trended away from imposing corporate monitorships as part of FCPA settlements, but 2022 could represent a turning point. In keeping with revised guidance on corporate monitorships issued by the DOJ in October 2021 and its further statements in a September 15, 2022 memorandum, the DOJ imposed a two-year compliance monitorship in *Stericycle* and ordered the company to report annually for a term of three years regarding its remediation efforts and the implementation of the compliance measures described in its DPA. In publicly filed documents, the DOJ noted that the company's rapid and significant expansion into major markets in Latin America through small business acquisitions failed to consider the need to implement and scale its internal accounting controls to match the company's heightened risk profile and ultimately prevent and detect unlawful conduct.

The imposition of a monitor in *Stericycle*, in particular, is a marked departure from recent practice, where monitors, which can be quite costly and intrusive on a company's business, appeared to have been reserved for the largest and most widespread infractions. The DOJ's message in *Stericycle* is a renewed emphasis on the quality and effectiveness of a company's compliance program, which must be routinely evaluated and updated to meet the company's evolving business needs and risk profile.

The DOJ went even further in *Glencore*, imposing a three-year monitorship in connection with the company's plea agreement, which noted an independent monitor was necessary to reduce the company's risk of recurrence of misconduct. In addition, the DOJ imposed specific reporting duties on some of Glencore's highest-ranking executives during the term of the DPA. Near the end of the monitorship, the company's CEO and CCO will be required to certify to the DOJ that Glencore has fully met its compliance obligations pursuant to the agreement and

that the company's compliance program is "reasonably designed to prevent anti-corruption violations." Similarly, both Glencore's CEO and Chief Financial Officer (CFO) will be required to certify that the company has met its obligation to disclose any future evidence or allegation of conduct that may constitute a violation of the FCPA's anti-bribery provisions.

Of course, we cannot rule out the possibility that the DOJ imposed these two monitorshps based on its specific concerns about Glencore's willingness to fully cooperate and Stericycle's ability to successfully implement a remedial compliance program. Nonetheless, recent statements by the DOJ have further emphasized the importance of robust compliance programs. Companies should be aware that the DOJ may increasingly use monitorships to achieve this objective—particularly if a company's existing compliance infrastructure proves to be deficient. This trend suggests that earlier FCPA cases in which the DOJ did not require monitors (e.g., *Airbus*) are less indicative going forward. Even in those cases in 2022 where an independent monitor was not required, the DOJ and the SEC imposed self-reporting requirements ranging from two to three years on remediation efforts and implementation of compliance-related enhancements (e.g., *GOL* and *ABB*).

### SANCTIONS PAID TO OTHER AUTHORITIES

While neither new nor particularly remarkable, the trend of the SEC and DOJ taking account of criminal fines paid to other authorities in and outside of the U.S. continued throughout 2022. In *Stericycle*, $4.2 million of the SEC's penalty and $17.5 million of the DOJ's penalty was offset against the company's payments to Brazilian authorities. The DOJ reduced the penalty against Glencore by $256 million in consideration of payments to the CFTC and authorities in the U.K., Brazil, and Switzerland. Likewise, the DOJ reduced GOL's total penalty by crediting its payment of $1.7 million to Brazilian authorities. The DOJ also credited up to approximately $39.6 million of another company's criminal penalty against amounts the company has agreed to pay to authorities in Brazil.

However, in the *Safran* declination, after securing the $17 million disgorgement payment, the DOJ chose to defer to German authorities to impose an additional fine for Safran's German subsidiary's involvement in the same alleged scheme. This appears to deviate from the usual approach discussed above.

## UPDATES TO PREVIOUSLY DISCUSSED INDIVIDUAL ENFORCEMENT ACTIONS

We discuss below developments during 2022 for FCPA enforcement actions against individuals. For a description of the case developments from the prior year, please see our previous edition.

#### ALEX NAIN SAAB MORAN

In June 2022, the U.S. Court of Appeals for the Eleventh Circuit declined to address the merits of Alex Nain Saab Moran's appeal and remanded the matter to the district court to address claims of diplomatic immunity. Saab Moran is a dual citizen of Colombia and Venezuela who was charged with money laundering offenses in connection with a $350 million construction-related bribery scheme in Venezuela. Regarding Saab Moran's claim that he was a foreign diplomat immune from prosecution, the Eleventh Circuit remanded the case. It also ruled that since Saab Moran had been extradited, the issue of fugitive disentitlement had become moot.

In December, the district court determined that the evidence does not support that Saab Moran is a Venezuelan diplomat and therefore he is not immune from U.S. prosecution on the money laundering charge.

#### BONCY AND BAPTISTE

On June 27, 2022, U.S. prosecutors dropped all charges against Richard Boncy and Joseph Baptiste. The two had been expected to be retried in July after their previous convictions related to violations of the Travel Act and the FCPA were vacated due to the ineffective assistance of Baptiste's counsel. However, they filed a joint motion to dismiss arguing that the FBI destroyed exculpatory evidence consisting of recorded calls. The DOJ first responded in opposition that the audio recordings were mistakenly destroyed and that the lost recordings were not exculpatory. However, while the audio recordings of the phone calls that were the subject of the motion did not resurface, the FBI released a set of text messages which exculpated the defendants by directly clarifying that the sum of money in question would not be used to pay bribes in Haiti. Thereafter, the DOJ moved to dismiss the case with prejudice on the ground that exculpatory evidence previously thought to have been lost was found by the FBI. Both defendants consented to the dismissal.

#### CHATBURN RIPALDA

On May 6, 2022, Chatburn Ripalda received a sentence of time served and six months of house arrest, followed by three years of supervised release. Ripalda was originally sentenced to 42 months when he pled guilty to one count of conspiracy to commit money laundering as part of the PetroEcuador bribery scheme. Prosecutors had advocated for a reduction in his sentence for his cooperation in related investigative matters. Ripalda served slightly more than two years of his original three-and-a-half-year sentence.

#### DÍAZ GUILLÉN

On December 13, 2022, Claudia Patricia Díaz Guillén was found guilty of money laundering conspiracy and laundering of a monetary instrument, following a jury trial in U.S. District Court for the Southern District of Florida.

The former-nurse-turned-national-treasurer-of-Venezuela was charged in December 2020, along with her husband, for allegedly accepting tens of millions of dollars from Raúl Gorrín Belisario, owner of a major Venezuelan television network. Díaz Guillén was previously extradited from Spain—despite Spanish authorities conducting a concurrent investigation—after a court found that the U.S. investigation was broader in scope. Her husband, Adrián Velásquez Figueroa, was also found guilty on a money laundering conspiracy count and two counts of laundering of monetary instruments.[5]

#### GORDON COBURN AND STEPHEN SCHWARTZ

A New Jersey federal district court ruled that Cognizant Technology Solutions Corporation must turn over complete internal investigation documents to former executives Gordon Coburn and Stephen Schwartz in connection with their pending Indian bribery charges. Cognizant previously revealed portions of the more detailed accounts in its settlement with the SEC to receive a declination with disgorgement of its own bribery charges. The court found that Cognizant's disclosure had waived attorney-client privilege not only for those disclosed portions but also for any "documents and communications that were reviewed and formed any part of the basis of any presentation" to the government. Coburn and Schwartz are currently facing 12 counts relating to conspiracy to violate and actual violation of the anti-bribery, accounting, and internal controls provisions of the FCPA. The trial has been scheduled for October 2, 2023.

#### INNISS

Donville Inniss, a former Minister of Industry and member of Parliament in Barbados, was convicted in January 2020 of money laundering proceeds from a bribery scheme. The Insurance Corporation of Barbados Limited reportedly paid Innis approximately $36,000 in bribes in exchange for help obtaining two insurance contracts from the Barbados government. On April 27, 2021, Inniss was sentenced to two years in prison and ordered to forfeit $36,536. In May 2021, he appealed his conviction in the Second Circuit, arguing that his conviction and sentence should be overturned because even though he had received bribes in his position as a government official, he did not independently launder those proceeds. The Second Circuit rejected those arguments and upheld the conviction against Inniss in October 2022.

#### LAMBERT

On November 22, 2019, Mark Lambert, a former co-president of Transport Logistics International Inc., was convicted by a jury on four counts of violating the FCPA, two counts of wire fraud, and one count of conspiracy to violate the FCPA and commit wire fraud. The violations emerged from his alleged role in a scheme to bribe an official at a subsidiary of Russia's State Atomic Energy Corporation. Lambert filed an appeal with the Fourth Circuit, which upheld his conviction in July 2022. He had been sentenced to 48 months in prison and three years of supervised release.

#### LUZURIAGA AGUINAGA

On February 2, 2022, John Robert Luzuriaga Aguinaga pled guilty to one count of conspiracy to commit money laundering in connection to a scheme to bribe officials from ISSPOL, the Ecuadorian public police pension fund. Luzuriaga Aguinaga served as the ISSPOL risk director and admitted to receiving approximately $1.4 million in corrupt payments from Jorge Cherrez Miño, a co-conspirator. On December 21, Luzuriaga Aguinaga was sentenced to 58 months of imprisonment, followed by three years of supervised release. A related case, *U.S. v. Jorge Cherrez Miño*, is ongoing.

#### MARTINELLI BROTHERS

Brothers Ricardo Alberto and Luis Enrique Martinelli Linares were sentenced on May 20 to 36 months in prison for conspiring to launder money for their father, former Panamanian President Ricardo Martinelli. Additionally, the brothers were fined $250,000 each and ordered to forfeit $18.8 million. The brothers had previously pled guilty for their role as intermediaries in the Odebrecht bribery scheme. While the sentences imposed were longer than what the defendants argued for, the sentences were still only a fraction of the 11 years sought by the prosecution.

#### MURILLO PRIJIC

Arturo Carlos Murillo Prijic, the former Minister of the Government of Bolivia, and Sergio Rodrigo Mendez Mendizabol, Murillo's chief of staff, pled guilty to conspiracy to launder money. According to court documents, Murillo Prijic received at least $532,000 from Bravo Tactical Solutions LLC to secure a $5.6 million contract with the Bolivian Ministry of Defense for the sale of tactical equipment. Murillo Prijic and his co-conspirators laundered the proceeds of the bribery scheme, and Murillo Prijic himself received about $130,000 in cash bribe payments. In October, Murillo Prijic entered into a plea agreement with the DOJ, and was facing a maximum penalty of 10 years in prison.[6]

#### ROGER NG

Roger Ng, former investment banker involved in the 1MDB corruption matter, was found guilty on all three charges

[5] In April 2023, Diaz Guillen and her husband were each sentenced to 15 years in prison.

[6] On January 4, 2023, Murillo Prijic was sentenced to 70 months in prison.

by a jury in April 2022: (1) conspiracy to violate the anti-bribery provisions of the FCPA; (2) conspiracy to violate the internal controls provisions of the FCPA; and (3) conspiracy to commit money laundering.[7] Ng argued he could not be found to have conspired to "circumvent" his employer's internal accounting controls because there was no allegation that any books or records had been falsified. The court rejected his argument and noted that "circumvention" of accounting controls "does not depend on the falsification of a book or record" because that conduct is addressed in the "Books and Records" provision of the FCPA. By withholding accurate information and providing inaccurate information regarding his co-defendant, Ng had fallen under the FCPA, and it was not necessary that the government prove falsification of accounting records. As this issue of statutory interpretation was one of first impression, it is likely the Second Circuit will want to address the question on appeal.

#### SHIERA AND CASTILLO

Abraham Jose Shiera Bastidas was sentenced to one year in prison after pleading guilty for his role in a corrupt scheme to secure energy contracts from PDVSA, Venezuela's state-run oil company. Juan Carlos Castillo Rincon, a co-conspirator who also pled guilty, was sentenced on October 12, 2022, to two years in prison in addition to two years of supervised release and a $1,061,000 money judgment.

#### URBANO FERMÍN

Carlos Enrique Urbano Fermín was sentenced to five years of probation and intermittent confinement from 2023 to 2026 by the United States District Court for the Southern District of Florida. In pleading guilty, Urbano Fermín admitted to having paid approximately $1 million in bribes to a prosecutor in Venezuela to shield his company against investigations into corrupt dealings with PDVSA, Venezuela's state-run oil company. Urbano Fermín was granted probation in exchange for his cooperation with the U.S. in exposing corruption throughout Venezuela's judiciary.

#### YANLING LI AND HONGWEI YANG

In November 2019, the DOJ announced criminal charges against Yanliang "Jerry" Li and Hongwei "Mary" Yang, both Chinese citizens. Li was the former Managing Director and Yang was the former head of the external affairs department of a Chinese subsidiary of Herbalife. They were charged for their roles in a scheme to violate the anti-bribery and the internal controls provisions of the FCPA. From 2007 to 2017, Li, Yang, and others agreed to pay bribes to Chinese officials to retain licenses for the Chinese subsidiary to operate as a direct-selling enterprise throughout China. Li was charged with one count of conspiring to violate the FCPA, one count of perjury, and one count of destruction of records in a federal investigation. Yang was also charged with one count of conspiracy to violate the FCPA. Separately, the SEC charged Li with violating the FCPA's anti-bribery provisions and aiding and abetting books and records and internal controls violations. In June 2022, Judge J. Paul Oetken (S.D.N.Y.) granted the SEC's motion for a $550,092 default judgment against Li.

## NEW INVESTIGATIONS

The following companies disclosed anti-bribery investigations in their public securities filings during 2022:

- *Millicom International Cellular*: On April 27, 2022, Millicom received a subpoena from the DOJ requesting information concerning the company's business in Guatemala. The subpoena included requests for information related to the 2021 purchase of Millicom's former joint venture partner's interest in Tigo Guatemala and information related to any contacts with certain Guatemalan government officials. The DOJ also requested information concerning the company's operations in other countries in Latin America. Millicom stated in its Form 6-K, filed in May, that it is cooperating with the DOJ on this matter.
- *Leidos Holding Inc.*: In February 2022, Leidos, a Virginia-based science and technology company, disclosed that it had discovered unspecified activities by its employees, third party representatives, and subcontractors relating to its international operations that raised concerns. Leidos disclosed that it had hired outside counsel to conduct an internal investigation into whether such activities may have violated the FCPA, other potentially applicable laws, or the company's code of conduct. Leidos voluntarily self-reported the investigation to the DOJ and the SEC and is working with both entities.[8]
- *Boston Scientific Corp.*: In its August 2022 quarterly report to the SEC, Boston Scientific Corporation, a Massachusetts-based medical devices company, disclosed that the company had received a whistleblower letter alleging FCPA violations in Vietnam. The company is cooperating with government agencies while investigating these allegations.

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[7] On March 9, 2023, an Eastern District of New York judge sentenced Ng to 10 years in prison. He was orderd to forfeit $35.1 million on March 24.

[8] In a May 2023 securities filing, Leidos disclosed that an employee terminated amid an internal investigation was indicted in February 2023 on wire fraud and other charges by a federal grand jury in the U.S. District Court for the Southern District of California.

- *Albemarle Corp.*: In its August 2022 quarterly report to the SEC, Albemarle Corporation, a Virginia-based chemicals manufacturing company, disclosed that it had "commenced discussions" with the SEC and DOJ about a potential resolution. The company first reported potential improper payments being made by its third-party sales representatives in 2018. The company retained outside counsel and forensic accountants to investigate the potential violations of the company's code of conduct, the FCPA, and other potentially applicable laws. The company has voluntarily self-reported the potential issues it has uncovered to the DOJ, the SEC, and the Dutch Public Prosecutor. The company has also implemented the appropriate remedial measures.

- *Arthur J. Gallagher & Co.*: In its 2022 Q3 SEC filings, Arthur J. Gallagher & Co., an Illinois-based insurance broker, disclosed that it had received a subpoena from the DOJ's FCPA unit. The subpoena asked for information related to its insurance business with public entities in Ecuador. The company stated that it is fully cooperating with the investigation and that, based on the current status of the investigation, it does not believe a material loss is probable.

## UPDATES ON CORPORATE ENFORCEMENT ACTIONS

- *Mobile Telesystems PJSC*: In March 2022, Russia's biggest mobile phone company disclosed that it had agreed to extend its two-year DPA and monitorship another year until September 2023. The company disclosed that the extension was meant to (1) provide it with adequate time to implement necessary enhancements to critical components of its anti-corruption compliance and ethics program and (2) to allow the monitor sufficient time to complete review of the company's remedial efforts, including the company's implementation of the monitor's recommendations and an assessment of the sustainability of the company's remedial actions. The company originally entered into a DPA in March 2019 and agreed to pay $850 million to resolve FCPA charges stemming from bribes paid to a relative of Uzbekistan's former president to win business.

- *Telefonaktiebolaget LM Ericsson*: In March 2022, the DOJ determined that Ericsson, a Swedish telecom company, breached its DPA by failing to make subsequent disclosures related to its conduct in Iraq. The DOJ also informed Ericsson that the disclosure made prior to the DPA about its internal investigation into the conduct in Iraq was insufficient. The company, which is under a monitorship as part of the DPA, reported that it is cooperating with the DOJ to resolve the matter. The company had entered into a DPA with the DOJ in December 2019 and agreed to pay over $1 billion to resolve probes into corruption, including the bribing of government officials in Djibouti, China, Vietnam, Indonesia, and Kuwait.[9]

- *Cisco Systems*: In February 2022, Cisco disclosed that it had completed its investigation into self-enrichment actions involving now-former employees in China. According to the company, some of those employees allegedly used funds to pay various third parties, including employees of state-controlled businesses. Because Cisco had voluntarily disclosed the results of its internal investigation, both the DOJ and SEC have decided not to pursue enforcement actions.

- *KPMG*: The Netherlands-based audit firm agreed to pay a settlement of 333 million ringgit (approximately $80.11 million USD) to resolve all claims related to their fiduciary duties regarding the auditing of 1Malaysia Development Berhad (1MDB) accounts from 2010 to 2012.

[9] On March 21, 2023, Ericsson pled guilty to breaching its 2019 settlement and agreed to pay $206.7 million for violating the terms of the DPA.

# PERENNIAL STATUTORY ISSUES

**JURISDICTION**
**MODES OF PAYMENT**

We discuss in detail some of the substantive statutory-related issues presented within the FCPA context in 2022.

## JURISDICTION

### LEGAL ISSUES

As discussed in our January 2022 Trends & Patterns, the DOJ was dealt a significant blow in its continued aggressive FCPA enforcement efforts in November 2021 when Judge Kenneth Hoyt of the Southern District of Texas ruled that there was no jurisdiction to support FCPA charges against Daisy Rafoi-Bleuler, a Swiss citizen. According to the DOJ's indictment, Rafoi-Bleuler allegedly opened Swiss bank accounts and facilitated financial transactions to various individuals at PDVSA (Venezuela's state-owned oil company) to carry out an illicit bribery scheme. Judge Hoyt noted that none of the alleged conduct took place in the U.S. and rejected the DOJ's position that communications that travel through the U.S. could, by themselves, confer jurisdiction. The court stated that, unless a person falls within an enumerated relationship to a domestic concern, the FCPA only criminalizes the conduct of a foreign person if the conduct occurs while the person is present in or has previously established ties to the U.S. For similar reasons, in a related case, Judge Hoyt granted the defendant Paulo Jorge Da Costa Casqueiro Murta's motion to dismiss for lack of jurisdiction.

The DOJ immediately appealed the Rafoi-Bleuler dismissal and moved to stay the dismissal of Casqueiro Murta. In its briefs filed with the Fifth Circuit in the spring of 2022, the DOJ asked the court to reject the analysis of the Second Circuit in *Hoskins I* in 2018 (on which Judge Hoyt relied), which held that liability under the FCPA could not extend to individuals who fall outside the enumerated categories of potential violators set forth in the Act The DOJ specifically argued that Rafoi-Bleuler did in fact fall under a defined category of the FCPA and was culpable as "an agent of domestic concern." The DOJ's argument on appeal underscores the agency's aggressive approach to extra-jurisdictional FCPA enforcement, even where the factual record on jurisdiction is highly attenuated. On October 6, a three-judge panel of the Fifth Circuit heard oral arguments from both sides.[10]

In August 2022, the Second Circuit resolved the pending issue of who could fall under the purview of an "agent of a domestic concern" in *Hoskins II* and upheld the district court's acquittal of former Alstom SA executive Lawrence Hoskins on FCPA charges relating to bribery of Indonesian government officials. Ending Hoskins' twenty-year FCPA saga, this is the second time the Second Circuit has concluded that Hoskins fell outside the scope of the FCPA's extraterritorial jurisdiction. As factual background, the *Hoskins* cases involved a scheme by subsidiaries of Alstom S.A., a French multinational company, to bribe Indonesian government officials into giving Alstom a $118 million power contract. Employees at Alstom's U.S.-based subsidiary, Alstom Power Inc. ("API"), orchestrated the scheme by paying two consultants in Indonesia to execute the bribe. Employees at other Alstom affiliates, including its French subsidiary, facilitated API's scheme.

In 2013, Hoskins was charged with violating the FCPA for his involvement in allegedly approving and authorizing the payments to the two consultants that API had retained, knowing that a portion of the payments would be used to bribe Indonesian officials. At the time, Hoskins was a U.K. citizen employed by the U.K.-based subsidiary of Alstom S.A., and he did not travel to the U.S. at the time of the alleged offense. In 2018, the Second Circuit held in *Hoskins I* that a foreign national who does not fit into one of the enumerated categories of the FCPA cannot be held liable for violations of the statute under accomplice or co-conspirator liability theories. In response, in *Hoskins II*, the DOJ reformulated its conspiracy charge to allege that Hoskins acted as an agent of a domestic concern.

A divided Second Circuit held that Hoskins was not an agent of Alstom's U.S. subsidiary; merely rendering support services—even if significant—does not constitute agency absent the common law requirement of control. The court held that there was no evidence that the U.S. subsidiary controlled Hoskins, as they "didn't hire Hoskins, had no authority to fire him and lacked any say in setting his compensation."

*Hoskins I* and *II* offer, at least in the Second Circuit, guidance in determining the FCPA's application to conduct by foreign actors and suggest in particular that the formalities of organizational structures can play a significant role in determining the FCPA's application abroad.

### TYPICAL JURISDICTIONAL HOOKS

Setting aside the Second Circuit's *Hoskins* saga and the legal quagmire in *Daisy Rafoi-Bleuler* recently resolved by the Fifth Circuit, there are several other notable FCPA actions in which the government relied on the typical jurisdictional hooks.

The DOJ charged the Ycaza brothers under the FCPA's anti-bribery provisions and money laundering. A dual citizen of Spain and Ecuador, Enrique Pere Ycaza and his

[10] The Fifth Circuit reversed the dismissal on February 8, 2023, finding that the lower court erred in concluding that it lacked subject-matter jurisdiction over the claims, "because extraterritoriality concerns the merits of the case, not the court's power to hear it" and the term "agent" is not unconstitutionally vague. On May 17, 2023, for the second time, Judge Hoyt dismissed all charges against Murta on grounds that the DOJ violated Murta's right to a speedy trial. The DOJ then asked the court to stay the dismissal to allow it to appeal against the decision in the Fifth Circuit.

brother Antonio Pere Ycaza, a citizen of Ecuador, Spain, and the U.S., provided consulting services, incorporated consulting businesses, and opened bank accounts in the U.S. and elsewhere to facilitate approximately $22 million in bribes to Ecuadorian officials on behalf of companies Sargeant Marine and Vitol. Enrique Pere Ycaza and his co-conspirators allegedly took acts in furtherance of the bribery and money laundering schemes, including by communicating by email, telephone, and in person while in the territory of the U.S. They also sent wires and caused them to be sent through the U.S., which became the jurisdictional hook for Enrique Pere Ycaza, who was charged as an "agent of domestic concern." Antonio Pere Ycaza also allegedly exercised control over companies and bank accounts in the U.S. and elsewhere that were used to facilitate the payment of bribes to Ecuadorian officials. The Ycaza brothers have pled guilty and await sentencing.

More recently, in December, Cary Yan and Gina Zhou, both Marshallese nationals, were extradited from Thailand and charged with FCPA violations for allegedly engaging in a multi-year scheme to bribe elected officials in the Marshall Islands and to corrupt the legislative process. Specifically, the indictment states that the defendants carried out the bribery and money laundering scheme using a New York-based NGO, including the physical use of its headquarters in Manhattan, to meet with and communicate with Marshallese officials, which became the basis of the FCPA jurisdiction.

The DOJ charged Esteban Eduardo Merlo Hidalgo (Ecuadorian and U.S. dual citizen and Miami resident), Christian Patricio Pintado Garcia (Ecuadorian citizen and Costa Rica resident), Luis Lenin Maldonado Matute (Ecuadorian and Italian dual citizen and resident of Costa Rica), with FCPA and money laundering violations for allegedly conspiring to pay bribes to officials of Ecuador's state-owned insurance companies Seguros Sucre S.A. and Seguros Rocafuerte S.A. to obtain and retain business for themselves, an intermediary company, and reinsurance clients. As per the indictment, the co-conspirators laundered funds related to the bribery scheme to and from bank accounts in Florida and used the proceeds for their personal benefit, which became the jurisdictional hook. The indictment states that the defendants sought to accomplish the conspiracy "while in the Southern District of Florida and otherwise," which implies physical presence of the defendants in U.S. Based on the allegations in the indictment, however, only Esteban Eduardo Merlo Hidalgo was physically present in the U.S. for the overt acts. Both Christian Patricio Pintado Garcia and Luis Lenin Maldonado Matute were charged on the basis of wire transfers to and from bank accounts in the U.S. (as "agents of domestic concern").

#### USING THE MONEY LAUNDERING CONTROL ACT TO REACH BRIBE GIVERS

The DOJ continued to use 18 U.S. Code § 1956 to reach conduct it cannot (or is not confident that it can) reach under the FCPA, because of either jurisdictional or substantive infirmities. In the case of Lionel Hanst, the DOJ charged Dutch citizen and former Vitol trader Lionel Hanst with conspiracy to commit money laundering, alleging that Hanst laundered bribes from and on behalf of Vitol for the benefit of officials at Ecuadorian, Mexican, and Venezuelan state oil companies. Neither the defendants nor the shell companies that were involved in the transfer of funds are domestic concerns. The indictment also does not indicate that Lionel Hanst was physically present in the U.S. during the time the alleged transactions occurred. But the wire transfers passed through U.S., which became the jurisdictional hook. Hanst has pled guilty and is awaiting sentencing before the U.S. District Court for the Eastern District of New York.

The DOJ charged Rixon Rafael Moreno Oropeza (a citizen of Venezuela) with money laundering offenses for engaging in a scheme to obtain substantially inflated multimillion-dollar procurement contracts from Petropiar (a joint venture between Venezuela's state-owned and state-controlled energy company and an American oil company) by paying bribes to senior officials at Petropiar. Although the indictment does not allege that Moreno Oropeza was physically present in the U.S. during the relevant time, the bribes were paid from Florida accounts controlled by Moreno Oropeza and wire transfers of alleged tainted money were made to and from accounts in Florida, which could establish the necessary jurisdictional hook. However, Moreno Oropeza was not charged with any FCPA violations despite the clear allegations of bribe payment to officials at Petropiar.

#### USING THE MONEY LAUNDERING CONTROL ACT TO REACH FOREIGN OFFICIALS

In 2022, the DOJ continued to use money laundering counts to charge foreign officials, who are typically bribe recipients outside the reach of the FCPA as it only targets the bribe givers. As discussed above, in late March the DOJ indicted Carlos Ramon Polit Faggioni, the former Comptroller General of Ecuador, for allegedly engaging in a scheme to use the U.S. financial system to launder money to promote and conceal an illegal bribery scheme in Ecuador with Odebrecht S.A., the Brazil-based construction conglomerate, which pled guilty to FCPA violations in 2016. Similarly, the DOJ charged Jhonnatan Marin Sanguino, a Venezuelan citizen and former mayor of a port city, Guanta, with conspiracy to commit money laundering, related to his improperly using official position to influence officials at subsidiaries of PDVSA to award contracts to the co-conspirator's companies. The co-conspirator allegedly wired the proceeds obtained from these tainted contracts with PDVSA to bank accounts in South Florida controlled and maintained by Marin Sanguino, which became the jurisdictional hook. Also in connection with the PDVSA scandal, the DOJ charged Daniel D'Andrea Golindano and Luis Javier Sanchez Rangel, two former senior Venezuelan prosecutors, with money laundering for their alleged receipt of bribes in

exchange for agreeing not to pursue criminal charges against certain individuals in Venezuela.

Notably, in the case against the former Venezuelan National Treasurer Claudia Patricia Díaz Guillen, who was charged with money laundering, the defendant argued she did not commit any relevant offense while she was physically present in the U.S. and thus the charges should be dismissed based on Judge Kenneth Hoyt's decisions in *U.S. v. Rafoi-Bleuler* and *U.S. v. Murta*. Judge Dimitrouleas denied her motion to dismiss by upholding the DOJ's position that physical presence is not required to establish jurisdiction under the Money Laundering Control Act. Judge Dimitrouleas expressly stated that "the Court is not necessarily persuaded by the opinions in" the two Southern District of Texas cases.

## MODES OF PAYMENT

In February 2022, the KT Corporation, the South Korean telecommunications giant, paid $6.3 million dollars to resolve an SEC action that alleged that the company had paid bribes in violation of the FCPA. The mode of payment in the alleged scheme came in the form of inflated company bonuses which were then partially returned to the CEO to create a slush fund. KT executives would allegedly then use the slush fund, which comprised of both off-the-books accounts and physical stashes of cash, to pay bribes to South Korean and Vietnamese officials. Other forms of transfer of value included charitable contributions, hiring, and entertainment, but it is notable that the SEC did not label all of these as bribes.

Slush funds were also allegedly used by Oracle's subsidiaries in Turkey, India, and the UAE to pay for foreign officials to attend technology conferences in exchange for business.

In March, the DOJ declined to prosecute Jardine Lloyd Thompson Group Holdings Ltd, the British multinational corporation that provided insurance, reinsurance, employment benefits advice, and brokerage services. From 2014 to 2016, Jardine, through its employee and agents, is alleged to have paid approximately $10,800,000 to a Florida-based third-party intermediary that the employee and agents knew would be used, in part, to pay approximately $3,157,000 in bribes to Ecuadorian government officials to obtain and retain contracts with Seguros Sucre, the Ecuadorian state surety company. Approximately $1.2 million of these bribe payments were laundered through and into bank accounts in the U.S.

In May, Glencore, a Swiss multinational commodity trading and mining company, entered guilty pleas for violating the FCPA. The company paid $100 million in bribes to officials in Nigeria, Cameroon, the Ivory Coast, Equatorial Guinea, Brazil, Venezuela, and the Democratic Republic of the Congo (DRC). Through employees, agents, and subsidiaries, Glencore allegedly made payments to intermediary companies through sham consulting agreements and inflated invoices with the intent that a portion of these payments would be paid as bribes to state-controlled entities in Nigeria, Cameroon, the Ivory Coast and Equatorial Guinea. When communicating with intermediary companies, employees at Glencore subsidiaries used coded language to conceal their discussion of bribe payments like "newspapers," "journals," or "pages." In Brazil, Glencore made bribe payments to Petrobras officials through consultants in exchange for the opportunity to buy an oil cargo from Petrobras. The bribe payment was disguised as an inflated service fee of $0.50 per barrel of the purchased cargo. In Venezuela, Glencore hired and paid an intermediary company with the intent that a portion of these payments be used as bribes for the benefit of PDVSA officials to obtain priority payments from PDVSA. In DRC, Glencore's mining company used an agent to pay a tax consultant, knowing that a portion of these payments would be used to pay bribes for the benefit of DRC officials. The tax consultant created fraudulent invoices that billed Glencore's mining company for purported professional services, disguising that these payments were intended to be bribes.

Stericycle, a medical waste management service, agreed to pay the DOJ and SEC $80.7 million in penalties and disgorgement to resolve FCPA offenses in Argentina, Brazil, and Mexico, after being charged with anti-bribery provisions of the FCPA and one count of conspiracy to violate the books and records provisions. During the relevant period, Stericycle's employees in Brazil, Mexico, and Argentina allegedly paid bribes to government officials to obtain and retain business and to secure improper advantages in connection with providing waste management services. These bribes, typically in cash, were calculated as a percentage of the underlying contract payments owed to Stericycle from government customers. The bribes were tracked through spreadsheets and given code words and euphemisms, such as "CP" or "commission payment" in Brazil; "IP" or "incentive payment" in Mexico; and "alfajores" (a popular cookie) or "IP" in Argentina.

The Brazilian low-cost airline GOL Linhas Aéreas Inteligentes agreed to pay $70 million to the SEC to settle charges that it violated the anti-bribery, books and records, and internal accounting controls provisions of the FCPA, by allegedly bribing prominent Brazilian government officials in exchange for certain favorable payroll tax and aviation fuel tax reductions, with the bribes being characterized as legitimate business expenses in GOL's recordkeeping.

Related to the DOJ's case against Frederick Cushmore Jr., covered previously in our January 2022 edition, Charles Hunter Hobson, a vice president of the same Pennsylvania-based coal company, was charged on March 29, 2022, with FCPA violations, money laundering, and wire fraud for his alleged role in a bribery scheme involving Egyptian officials. Hobson and his co-

conspirators allegedly used their Pennsylvania-based coal company to funnel money through a sales intermediary to pay bribes to government officials at Al Nasr Company for Coke and Chemicals, an Egyptian SOE, to obtain approximately $143 million in coal contracts.

The DOJ brought charges against Esteban Eduardo Merlo Hidalgo, Cristian Patricio Pintado Garcia, and Luis Lenin Maldonado Matute for bribing officials of Ecuador's state-owned insurance companies to obtain public contracts. Specifically, between 2013 and 2018, the trio allegedly coordinated with U.K.-based reinsurance agencies to pay approximately $542,000 in bribes to Ecuadorian officials to obtain approximately $2.1 million in public insurance contracts, using false contracts to disguise bribe payments as investments in companies controlled by Seguros Sucre S.A. chairman Juan Ribas Domenec.

# COMPLIANCE GUIDANCE


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## MONACO MEMO: FURTHER REVISIONS TO CORPORATE CRIMINAL ENFORCEMENT POLICIES

On September 15, 2022, Deputy Attorney General Lisa Monaco released a memorandum on "Further Revisions to Corporate Criminal Enforcement Policies," which focused on four key issues:

1. Individual accountability: The DOJ describes this as a top enforcement priority and expects companies to make timely disclosure to the DOJ of individual misconduct. Companies might receive full cooperation credit by promptly providing the DOJ with information on culpable individuals;

2. Historical misconduct: The new guidance recognizes that "[n]ot all instances of prior misconduct, however, are equally relevant or probative" and that prosecutors should deprioritize dated misconduct, though the involvement of the same management or executive team in the wrongdoing would make misconduct more relevant. The DOJ notes that it would disfavor multiple NPAs or DPAs, but would not discourage self-disclosure;

3. Voluntary self-disclosure by corporations: Prosecutors should not seek a guilty plea where companies disclose and cooperate fully, and companies that can show an "effective compliance program" may avoid the imposition of a monitor; and

4. Evaluation of corporate compliance programs: These programs should go beyond the policies and procedures and must include leadership at the executive level. Companies should develop incentives for employees to act ethically and impose financial deterrents to criminal conduct such as compensation claw backs.

The key takeaway is that, for a company to receive full cooperation credit, it must do more than merely disclose. The DOJ will look at the company's compliance programs, history of misconduct, and the timeliness of the company's investigation and disclosure to the DOJ.[11]

## PRIOR MISCONDUCT UNDER THE UPDATED DOJ POLICY

When announcing the above updated corporate criminal enforcement policy during her September 15, 2022, speech at NYU School of Law, Monaco addressed the issue of corporate recidivism, offering additional guidance on how the DOJ will evaluate companies with alleged prior misconduct. In cautioning that not all instances of prior misconduct are created equal, the Deputy AG stated that the most noteworthy types of prior misconduct are criminal resolutions, as well as prior wrongdoing involving the same personnel or management as the current misconduct. Specifically, the criminal resolutions that occurred more than 10 years before the conduct currently under investigation, and any civil or regulatory resolutions that took place more than five years before the current conduct, will be given less weight. The DOJ will also look to whether prior misconduct "shared the same root causes as the present misconduct." Monaco noted that the DOJ will disfavor multiple, successive NPAs and DPAs with the same company.

It remains unclear how the updated policy or Monaco's statements will affect the DOJ's future enforcement actions on companies with prior alleged misconduct. The DOJ has a history of questioning whether pretrial diversion—NPAs and DPAs—is appropriate for certain companies with prior alleged misconduct, especially if prior settlements involved the same type of misconduct. However, there appears to exist a discrepancy between the DOJ's stated position and its actual position on multiple violations—particularly given recent DOJ settlements that were relatively lenient.

In 2022, Oracle and Tenaris both encountered their second FCPA enforcement action. In 2012, Oracle settled with the SEC for $2 million related to its conduct in India. In 2022, Oracle settled with the SEC for a second time, agreeing to pay approximately $8 million in disgorgement and a $15 million penalty in connection with its conduct in Turkey, the United Arab Emirates, and India. In 2011, Tenaris entered into a NPA with the DOJ and a DPA with the SEC as a result of alleged bribes the company paid to obtain business from a state-owned entity in Uzbekistan. Tenaris agreed to pay $5.4 million in disgorgement and a $3.5 million criminal penalty. In 2022, Tenaris settled with the SEC for over $78 million in connection with a bribery scheme involving its Brazilian subsidiary.

More notably, on December 2, 2022, ABB became the only company to have three separate FCPA settlements. In 2004, the company settled for $5.9 million in disgorgement with the SEC and pled guilty to bribery charges and agreed to pay $10.6 million to the DOJ, in connection with its conduct in Nigeria, Angola, and Kazakhstan. In 2010, ABB settled for $39.3 million in disgorgement with the SEC and entered into a DPA for bribery and conspiracy charges, while agreeing to $19

[11] On January 17, 2023, the DOJ published a revised version of the Corporate Enforcement and Voluntary Self-Disclosure Policy, articulating three factors—immediate self-disclosure, extraordinary cooperation, and effective compliance program and internal accounting controls—that could allow a company to qualify for increased penalty reductions or a declination, even in the presence of aggravating circumstances, such as recidivism. These revisions are in line with the DOJ's stated goal to offer companies that discover misconduct "new, significant, and concrete incentives to self-disclose." The DOJ announced on February 22, 2023 that the new policy will apply across all 93 U.S. Attorney's Offices.

million in criminal penalties to the DOJ related to ABB's conduct in Mexico and Iraq. In its most recent settlement, ABB entered into a DPA and agreed to pay $72.5 million in criminal penalties to the DOJ and $75 million in disgorgement to the SEC, in connection with its conduct in South Africa. DOJ noted that ABB "voluntarily disclosed the misconduct to the Department of Justice and have cooperated fully with the investigation." ABB agreed to a DPA for the second time, while also avoiding the requirement of hiring an independent monitor. The DOJ's latest DPA with ABB signals that—despite the DOJ's strong language against successive NPAs and DPAs—the DOJ continues to prioritize self-disclosure even when dealing with companies that have faced multiple FCPA allegations.

One day prior to the announcement of the ABB settlement, at the 39th International Conference on the FCPA, Acting Principal Deputy Assistant Attorney General Nicole Argentieri emphasized 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. This statement, coupled with the ABB settlement, might signal that the DOJ is still favoring disclosure and cooperation, despite multiple FCPA allegations.

## RETROACTIVE DISCIPLINE AND CLAWBACKS

The SEC finalized its rules on clawbacks in October 2022, requiring listed companies to now adopt their own clawback policies in the event of an accounting restatement. Under the new rules, listed companies must file their written clawback policies with the annual reports and indicate whether the financial statements reflect a correction of an error to previously issued statements and whether any of those error corrections are restatements requiring a recovery analysis of incentive-based compensation under companies' clawback policies.

Not only are companies threatened to be delisted if they do not comply with these policies, but some SEC and DOJ officials also recently gave public remarks suggesting that they might require clawbacks more frequently and scrutinize companies' clawback policies in future enforcement actions. Monaco's recent policy memorandum appears to echo this position—in assessing a company's compliance program, the DOJ will reward companies if the program "allows for retroactive discipline, including through the use of clawback measures, partial escrowing of compensation, or equivalent arrangements." Companies that tie compensation to compliance demonstrate to regulators that they are serious about mitigating risk and rewarding positive behavior. Conversely, this could pose as a major vulnerability for those companies without such "retroactive discipline" measures in their compensation programs.[12]

## CEO AND CCO COMPLIANCE CERTIFICATIONS AND *GLENCORE*

In March 2022, Assistant Attorney General Kenneth A. Polite Jr. delivered remarks at the Association of Certified Anti-Money Laundering Specialists' Annual International AML and Financial Crime Conference in Hollywood, Florida and again at NYU Law's Program on Corporate Compliance and Enforcement, in which he asked his team of DOJ prosecutors to consider requiring CEOs and CCOs to certify statements their companies make to the DOJ regarding the compliance programs. Specifically, Polite indicated that the DOJ may require the CEOs and CCOs making corporate resolutions certifying that the company's compliance program is "reasonably designed and implemented to detect and prevent violations of the law (based on the nature of the legal violation that gave rise to the resolution, as relevant)." Moreover, when an independent monitor has not been imposed and a company is required to self-report on the state of its compliance program, Polite indicated that the DOJ may require CEOs and CCOs to "certify that all compliance reports submitted during the term of the resolution are true, accurate, and complete." Polite's recommendation became an actual DOJ enforcement policy two months later in *Glencore*, in which the DOJ required its CEO and CCO to make these certifications.

While CEOs have been subject to liability via the Sarbanes-Oxley Act and similar certification requirements for CFOs and other senior executives exist in other settlements, CCOs have not been the specific subject of similar provisions. Notwithstanding Polite's assurances that this certification requirement is not meant to be viewed as a punitive measure, it is a valid concern that such a policy unnecessarily opens up CCOs to liability—and even criminal exposure for making a false statement to the government—and can have a deterrent effect. For instance, the DOJ has left open the question of a CCO's liability for misconduct that occurred during the period covered by the certification that the company or government only uncovered after they ratified the certification.

Requiring CEO and CCO compliance certifications will also likely chill the presence of high-quality CCOs in the applicant pool for multinational corporations. This might lead to more violations down the line, as the DOJ is pursuing a policy that has potential to snowball—rather

[12] In a speech at the American Bar Association's annual National Institute of White Collar Crime on March 2, 2023, Monaco said that the DOJ will require corporate criminal resolutions to include a directive that companies implement a compensation system that promotes compliance. Furthermore, the DOJ will reward corporations that make a good faith effort to claw back payments to law-breaking executives and employees, even if the attempt is unsuccessful.

than curtail—wrongdoing. Nonetheless, the DOJ notes that a CCO certification requirement will force companies to pay more attention to the internal compliance function, thereby ensuring a more consistent and robust compliance framework. There is no doubt that CEO/CCO compliance certifications will augment the compliance function of a company. But it remains to be seen whether the intended benefits to the compliance function are worth the cost of such certifications, including the potential cost of losing out on top tier CCO talent.

## THE DOJ INCREASES SCRUTINY OF BREACHES OF DPAs

In 2022, the DOJ asserted at least two breaches of DPAs. In one case, the DOJ charged an investment bank for allegedly failing to proactively report a whistleblower complaint alleging that the bank overstated its investments in environmental, social and governance (ESG) initiatives and operations to the tune of hundreds of billions of dollars. The alleged breach caused the bank to extend its current monitor and monitorship for nearly a full year.

In December, Ericsson, a Swedish networking and telecom company, agreed to a one-year monitorship extension for breaching its 2019 DPA that was entered into with the DOJ in connection with alleged bribery in Djibouti, China, Vietnam, Indonesia, and Kuwait. The DOJ accused Ericsson of failing to make post-DPA disclosures related to Ericsson's investigation into the potential misconduct in Iraq between 2011 and 2019, which is arguably unrelated to the DPA.

The DOJ's allegations underscore how critical it is for companies to rigorously observe their affirmative disclosure obligations related to both post-resolution conduct and pre-resolution conduct (of which DOJ is potentially unaware). It also underscores the importance of internal investigations and potential self-disclosures to a monitor and/or the DOJ while under a DPA. Accordingly, companies subject to DPAs and monitorships should remain vigilant in proactively and diligently investigating allegations of misconduct and in self-disclosing misconduct to the monitor and/or the DOJ as required by the DPA.

## AG GARLAND SIGNALS FOCUS ON PROSECUTING INDIVIDUALS AND FORCE-MULTIPLIERS FOR DOJ AGENTS TO BETTER DETECT FRAUD

At the ABA Institute on White Collar Crime on March 3, 2022, Attorney General Merrick Garland emphasized the importance of prosecuting individuals to thwart corporate criminal conduct and reiterated that "to be eligible for any cooperation credit, companies must provide the Justice Department with all non-privileged information about individuals involved in or responsible for" misconduct. Garland made clear that this applies to "all individuals, regardless of their position, status, or seniority, and regardless of whether a company deems their involvement as 'substantial.'"

Garland also noted that the DOJ would be "bolstering" the financial resources at the disposal of its prosecutors and agents by adding "force-multipliers." Specifically, Garland said the DOJ would be sharing data with other agencies and expanding their data analytics framework by enlisting a squadron of FBI agents for the Criminal Division's Fraud Section to better detect fraud. Garland finally reiterated that the DOJ would continue to focus on prosecuting individuals involved in corporate malfeasance as their "first priority," maintaining that the DOJ ensuring that penalties are felt by wrongdoers rather than shareholders, provides the greatest deterrent to corporate crime, and it is "essential to Americans' trust in the rule of law."

## THE DOJ CONTINUES TO INCREASE FOCUS ON INDIVIDUAL ENFORCEMENT ACTIONS AND PAIRED ENFORCEMENT

In 2022, the DOJ brought and unsealed twelve individual enforcement actions against eighteen individuals, representing a marked increase from last year. This increase in individual enforcement corresponds with the DOJ's purported posture of prosecuting individuals. This figure is likely lower than the actual figure, given that certain 2022 actions likely remain sealed. Notwithstanding the DOJ's increased individual enforcement fervor, we have not yet seen a similar move from the SEC which has continued to hew largely to corporate enforcement actions in recent years. The SEC's last FCPA individual enforcement action was on October 14, 2020.

Another ongoing enforcement trend seen in 2022 is the continuing use of paired enforcement with sister agencies, which might become the new normal. For example, the DOJ and the CFTC in *Glencore* brought separate enforcement actions against the company for related FCPA violations and a commodity price manipulation scheme. Notably, the facts of the *Glencore* case are more attenuated than in the paired enforcements brought against Vitol in 2020, which may signal that enforcement agencies are doing a better job of working in tandem even in instances lacking clear factual overlap. Looking forward, cooperation between agencies will likely breed more cooperation on anti-corruption enforcement actions as agencies grow more comfortable sharing information and bringing paired actions.

## TWO DOJ DECLINATION AND DISGORGEMENT LETTERS

As discussed earlier, in March 2022, the DOJ released its first "declination and disgorgement letter" since August 2020, declining to prosecute Jardine Lloyd Thompson Group Holdings Ltd. for alleged violations of the FCPA. Further, in December, the French aerospace defense company Safran S.A. received a declination from the DOJ

for the alleged bribery committed by its U.S. subsidiary before Safran's acquisition. Given there may have been other traditional declinations which were not disclosed by the DOJ, *e.g.*, as refleced in the recent Cisco disclosure discussed above, the announcement of the two declination letters appear to demonstrate the DOJ's aspiration to encourage more voluntary disclosures of wrongdoing despite its public remarks of being tough on corporate crime.

## NEW DOJ GUIDANCE REGARDING BRIBERY IN INSTANCES OF PHYSICAL DURESS

In January, the DOJ issued its first Opinion Procedure Release in two years, providing a rare discussion of the common law extortion defense, or an exception, to the FCPA.

According to the opinion, a ship owned by a U.S.-based company was traveling to Country B to undergo required maintenance. Shortly before arriving, the captain and crew received a message that all Country B ports were fully occupied. The shipping agent relayed the wrong anchoring coordinates to the captain, and the ship arrived in Country A's waters. Subsequently, Country A's Navy intercepted the ship and directed it into Country A's harbor. The captain was detained and jailed onshore without being questioned and in conditions which posed a serious and imminent threat to his health, safety, and well-being.

Shortly after the captain's detention, a third-party intermediary, holding itself out to be a representative of Country A's Navy, contacted the company and stated that to obtain the release of the ship, the captain, and the crew, the company must imminently pay the third-party intermediary $175,000 in cash, which the company believed was intended for one or more Country A government officials. The intermediary threatened that the alternative was a longer period of detention for the captain and crew, and the vessel would be seized. While efforts to work with the intermediary continued, the company also sought assistance from various U.S. agencies and requested that such agencies contact the relevant authorities in the detaining country, but to no avail.

As stated in its opinion, the DOJ determined that, under this fact pattern, the proposed payment would not trigger an enforcement action for violation of the FCPA because the company would not be making payment "corruptly" or with "an intent to obtain or retain business." The DOJ affirmed its prior statements that there is no corrupt intent when the primary reason for payment is to avoid imminent and potentially serious harm to the captain and the crew. *United States v. Kozeny*, 582 F. Supp. 535, 540 n.31 (S.D.N.Y. 2008) ("an individual who is forced to make [a] payment on threat of injury or death would not be liable under the FCPA . . . [because federal] criminal law provides that actions taken under duress do not ordinarily constitute crimes.").

Additionally, the DOJ concluded that there was no business purpose of the payment because the company considered making the payment only when none of its efforts to engage both U.S. and non-U.S. government officials in the situation bore fruit, and the company was told that the only way to secure the safe and prompt release of the captain and crew was through a payment of $175,000 in cash. Notably, in an analysis that largely ignores the significant cost to the company of having one of its ships effectively out of commission, the DOJ determined that the company was not faced with severe economic or financial consequences in the absence of a payment because the company was not facing a situation where the payment was demanded on the part of a government official as a price for gaining entry into a market or to obtain a contract. This suggests the DOJ may have come out differently on this case if there was ongoing or sought-after business in the detaining country, which is a far more typical fact pattern.

The DOJ opinion suggests the agency is willing to consider narrow duress or extortion exceptions to the FCPA when a company has taken steps to remedy the matter that have proven fruitless and there is no corrupt intent or business purpose for the payment. Note, however, that DOJ opinion releases are not binding precedent for anyone but the requestor of the opinion and are applicable only to their specific facts. Finally, although this scenario would not qualify for prosecution under the anti-bribery provisions of the FCPA as set forth in the DOJ opinion, the SEC could still charge a violation of the FCPA's accounting provisions if the payments are inaccurately described in the company's books and records.

## FINCEN ISSUES KLEPTOCRACY ADVISORY WARNING TARGETING RUSSIAN CORRUPTION

In April, the Financial Crimes Enforcement Network (FinCEN) issued a public advisory recommending businesses to ensure that they are not facilitating overseas corruption, particularly in Russia, by permitting illicit funds to enter the U.S. economy. As FinCEN noted, the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) has expanded the U.S. sanctions regime targeting Russian corruption.

FinCEN stated that transactions linked to Russia are "of particular concern" for the U.S. government because of the "nexus" between corruption in the Kremlin and Russia's aggressive foreign policy, as illustrated by its invasion of Ukraine. FinCEN further noted that bad actors may seek to evade sanctions through various means, including through non-sanctioned Russian financial institutions and financial institutions in third countries.

Building on its 2020 cybercrime advisory statements, FinCEN noted that sanction evasion activities can be

conducted by a variety of actors, both within and outside of Russia, who retain access to the international financial system. Specifically, FinCEN said in the advisory that businesses should be vigilant for ten potential red flags that their clients are trying to launder corrupt funds. The ten red flags are:

- Use of corporate vehicles (i.e., legal entities, such as shell companies, and legal arrangements) to obscure (i) ownership, (ii) source of funds, or (iii) countries involved, particularly sanctioned jurisdictions.
- Use of shell companies to conduct international wire transfers, often involving financial institutions in jurisdictions distinct from company registration.
- Use of third parties to shield the identity of sanctioned persons and/or political exposed persons (PEPs) seeking to hide the origin or ownership of funds, for example, to hide the purchase or sale of real estate.
- Accounts in jurisdictions or with financial institutions that are experiencing a sudden rise in value being transferred to their respective areas or institutions, without a clear economic or business rationale.
- Jurisdictions previously associated with Russian financial flows that are identified as having a notable recent increase in new company formations.
- Newly established accounts that attempt to send or receive funds from a sanctioned institution or an institution removed from the Society for Worldwide Interbank Financial Telecommunication (SWIFT).
- Non-routine foreign exchange transactions that may indirectly involve sanctioned Russian financial institutions, including transactions that are inconsistent with activity over the prior 12 months.
- A customer's transactions are initiated from or sent to the following types of Internet Protocol (IP) addresses: non-trusted sources; locations in Russia, Belarus, FATF-identified jurisdictions with AML/CFT/CP deficiencies, and comprehensively sanctioned jurisdictions; or IP addresses previously flagged as suspicious.
- A customer's transactions are connected to convertible virtual currency (CVC) addresses listed on OFAC's Specially Designated Nationals and Blocked Persons List.
- A customer uses a CVC exchanger or foreign-located money service business (MSB) in a high-risk jurisdiction with AML/CFT/CP deficiencies, particularly for CVC entities and activities, including inadequate "know-your-customer" or customer due diligence measures.

## REPORT BY THE U.S. STATE DEPARTMENT TO CONGRESS ON ANNUAL REPORT ON ADVANCING FREEDOM AND DEMOCRACY PURSUANT TO 22 U.S.C. § 8221

The recent annual report by the U.S. State Department to Congress pursuant to 22 U.S.C. § 8221 demonstrates a targeted focus of the U.S. government on strengthening its anti-corruption efforts worldwide. According to the report, the Biden administration has "elevated the fight against corruption to a core U.S. national security interest." To this end, in December 2021, the U.S. launched the first ever "United States Strategy on Countering Corruption." This strategy outlines "a whole-of-government approach, with a particular emphasis on better understanding and responding to the threat's transnational dimensions." To implement this strategy, the Biden administration has introduced a series of initiatives as part of the Presidential Initiative for Democratic Renewal, i.e., PIDR, which entails programs "to protect anticorruption activists and journalists, build the capacity of partner governments, close loopholes in the financial and regulatory system that corrupt actors exploit, develop innovative approaches with new partners, and expand flexibility to respond to political openings." These recent developments indicate that anti-corruption enforcement is a top priority of the current U.S. administration.

## CENTER FOR INTERNATIONAL PRIVATE ENTERPRISE AND THE EUROPEAN RESEARCH CENTER FOR STATE BUILDING LAUNCH NEW CORRUPTION RISK FORECAST

In April, a new Corruption Risk Forecast was released as a collaboration between the European Research Centre for Anti-Corruption and State-Building (ERCAS), which is led by Professor Alina Mungiu-Pippidi, and the Anti-Corruption & Governance Center (ACGC) at the Center for International Private Enterprise (CIPE). The new Corruption Risk Forecast involves three indices: a corruption index (the Index for Public Integrity, or IPI), a new country-by-country indicator for transparency (the Transparency Index), and the forward-looking Corruption Risk Forecast.

As the ACGC explains, the Index for Public Integrity, or IPI, provides a snapshot of how each country controls corruption based on public data from over 120 countries. The IPI collects data points on issues such as administrative burden, press freedom, and judicial independence and scores each country based on an average of six subcomponents, three of which represent "corruption constraints" while the other three represent "corruption opportunities."

The newly launched Transparency Index computes a score for over 130 countries based on how much public data each government has promised to share and how much data they actually share, i.e., the extent of the country's available public data sources versus its transparency commitments.

Finally, the Corruption Risk Forecast predicts the directional trend of each country's corruption risk in the next two years. As the ACGC explains, the prediction is derived from a country's performance in five of the six IPI components during the past twelve years, moderated by citizen demand for good governance and recent political turning points. Using data from 2008 to 2020, the Corruption Risk Forecast provides a comparison of the absolute and relative performance of countries across six global regions using the five integrity indicators in the forecast. The Corruption Risk Forecast could be a useful tool to provide comparative information to help guide the agendas of civil society organizations, alert businesses to investment risks and opportunities, and show where government anti-corruption policies are lacking.

# UNUSUAL DEVELOPMENTS

**COVID-19 RESPONSE PROVIDES ENVIRONMENT FOR INCREASED CORRUPTION**

**POTENTIAL FCPA ENFORCEMENT ACTION RELATED TO EMPLOYEE OFF-CHANNEL COMMUNICATION MEHTODS AND RECORDKEEPING FAILURES**

**SEC'S GREWAL URGES DEFENSE COUNSEL TO AVOID DELAY TACTICS AND ENCOURAGES COOPERATION WITH REGULATORS**

**INCREASES IN WHISTLEBLOWER REPORTS MAY HAVE LED TO MORE RIGOROUS STANDARDS IN DETERMINING ELIGIBILITY FOR A WHISTLEBLOWER REWARD**

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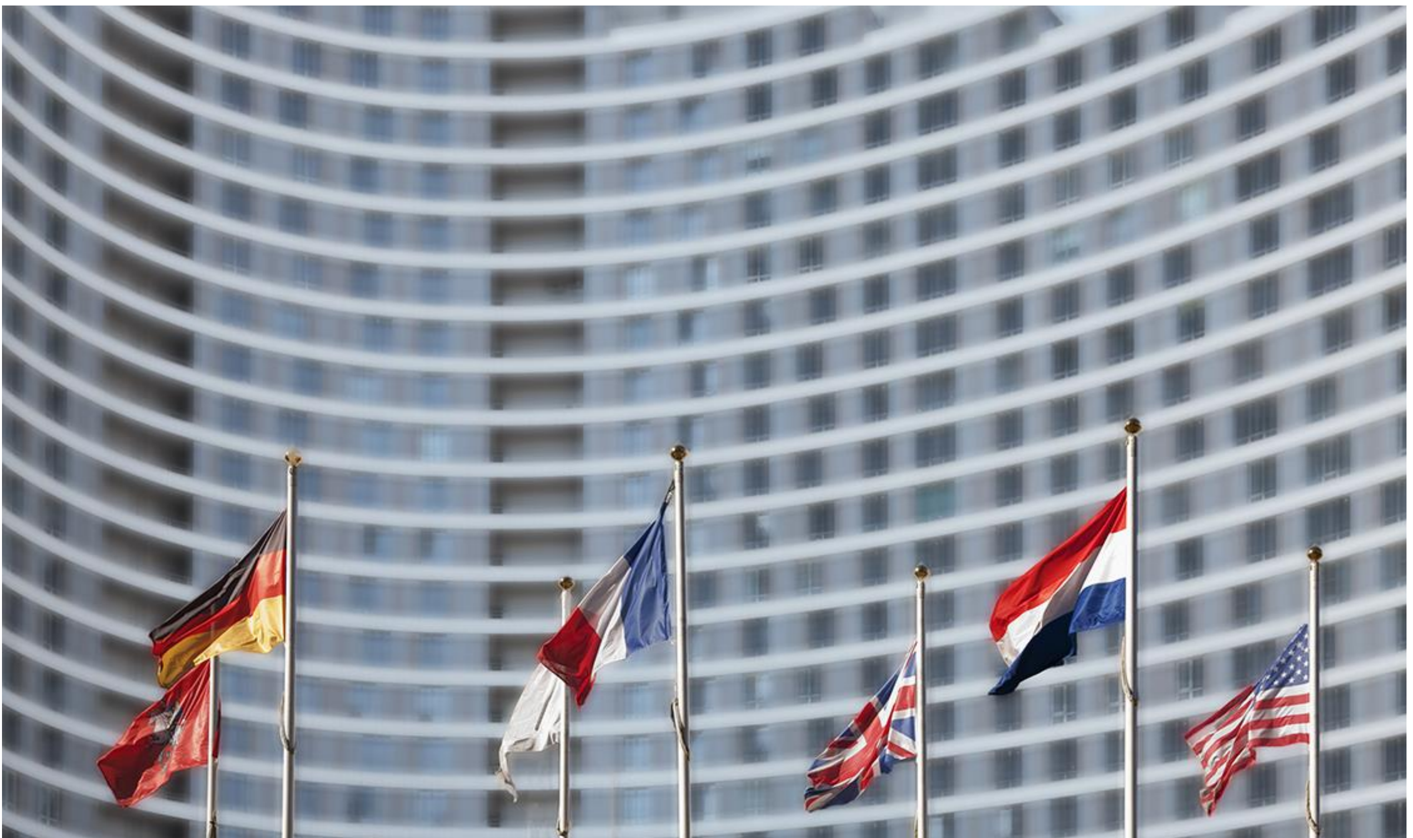

## COVID-19 RESPONSE PROVIDES ENVIRONMENT FOR INCREASED CORRUPTION

As the impact of the COVID-19 pandemic continues to ripple through world markets, pandemic-specific issues present new challenges for corruption enforcement. We describe several of these unique challenges below.

*Aid rollouts*: Foreign aid has often facilitated environments ripe for corruption. Indeed, it is for that reason that many U.S. government grants and contracts for foreign aid contain non-negotiable FCPA compliance provisions, and an organization's ability to guard against fraud and corruption-related risk is frequently a factor that the U.S. government considers when evaluating prospective grantees and contractors. The COVID-19 pandemic has simply exacerbated the risks that aid organizations and donors face in the implementation of foreign aid programs. For instance, the distribution of vaccines and medical equipment in response to the pandemic offers opportunities for grifters and corrupt government officials to capitalize on weak state institutions with overwhelming demand for foreign assistance. Recipients of foreign aid should be cautious to ensure they exercise diligence in the implementation of FCPA compliance mechanisms, as well as mitigating against the risks of fraud and corruption more broadly.

*Supply Chain Issues*: Risks of bribery are increased hand-in-glove with the demand that results from shortages in supplies. Simply put, companies tend to forego their ordinary compliance protocols in the interest of their bottom line when supplies are low. The supply shortages triggered by the pandemic—whether ships, cargo vessels, energy, or commodities—have in turn escalated risks of bribery. History suggests that companies engaged in commerce in industries experiencing supply shortages will be susceptible to these risks. For example, in 2010, five oil-services companies and a freight forwarder settled with the SEC and DOJ on charges relating to bribery of customs agents at a time when oil prices were at their highest-ever level in 2008. Of course, economies throughout the world are seeing surging oil and natural gas prices today. Similarly, shortages in supply triggered by sanctions relating to Russia's ongoing invasion of Ukraine will offer plentiful opportunities for unscrupulous businesspersons to pay bribes to protect their interests. As shortages and supply chain issues continue to pervade economies throughout the globe, companies will be at increasing risk of involvement in bribery and related crimes.

*Strain on Compliance Personnel*: The pandemic has significantly altered the compliance landscape by increasing the risks of financial crimes, in turn driving up demand for the services of compliance professionals. Compliance officers have benefited accordingly. Entry-level salaries for compliance staff have risen, while their unemployment rates have dropped. However, the fast-paced labor market for compliance officers is having its effect on many in the industry. Burnout levels are high, contributing in turn to oversight gaps due to compliance personnel shortage.

*Adaptation of Compliance Programs to the Long-Term Remote Context*: The remote work dynamic that has become commonplace has caused compliance departments to rethink their approaches as the pandemic continues to increase risks for financial crimes. Compliance teams have thus found themselves forced to adapt to both the setting where they operate and the ever-evolving issues they prioritize for their companies. For instance, many compliance professionals have had to adapt in-person training to the Zoom context and consider alternative ways to engage employees, such as through smaller, more focused training programs offered remotely. Similarly, new issues—such as risks associated with increased levels of charitable giving or decreases in hotline reports—have generated a host of new challenges for compliance departments to consider.

## POTENTIAL FCPA ENFORCEMENT ACTION RELATED TO EMPLOYEE OFF-CHANNEL COMMUNICATION METHODS AND RECORDKEEPING FAILURES

In the Monaco memo, the Deputy AG laid out how a company's policies related to the use of personal devices and third-party applications can potentially figure into a prosecutor's evaluation of a corporation's compliance program and culture. As a general rule, the DOJ advises all corporations to (i) implement effective policies governing the use of personal devices and third-party messaging platforms for corporate communications, (ii) provide clear training to employees about such policies, and (iii) enforce such policies when violations are identified. Moreover, in determining cooperation credit in connection with an investigation, prosecutors are advised to consider whether a corporation has "instituted policies to ensure that it will be able to collect and provide to the government all non-privileged responsive documents relevant to the investigation, including work-related communications . . . and data contained on phones, tablets, or other devices that are used by its employees for business purposes."

Given the risk associated with off-channel employee communications as well as the growing use of personal devices and third-party applications, companies will be well advised to ensure compliance in this area to avoid any potential FCPA enforcement action.

## SEC'S GREWAL URGES DEFENSE COUNSEL TO AVOID DELAY TACTICS AND ENCOURAGES COOPERATION WITH REGULATORS

Regulators have also expressed concern about defense tactics to stymie investigations. For example, at the Securities Enforcement Forum West on May 12, the Director of the SEC's Division of Enforcement Gurbir Grewal urged defense counsel to stop using tactics to

delay the investigatory process. He maintained that these tactics—including rolling productions, gratuitous objections during witness testimony, witness coaching, and questionable privilege claims—undermine public trust in the investigatory process and impose unnecessary costs on shareholders. Grewal noted that, in some cases, by engaging in these tactics, defense counsel may even forfeit their clients' opportunity to obtain cooperation credit. He also warned about the "potential monetary and reputational costs" incurred when the SEC is forced to pursue subpoena enforcement litigation because defense counsel frivolously assert privilege.

Grewal emphasized the "tangible benefits" of not only avoiding obstructionist behavior but proactively cooperating with regulators. He asked defense counsel to make efforts at "good cooperation," such as expediting witness availability and document productions, and highlighting key documents for regulators to review.

However, companies should also keep in mind the collateral consequences of any disclosures they may make to the government for cooperation, such as broad waivers of privilege. For example, in February 2022, Judge Kevin McNutty of the District Court of New Jersey issued a ruling where he found that a company, broadly waived privilege in summarizing the findings of its internal investigation of potential FCPA violations to the DOJ.

## INCREASES IN WHISTLEBLOWER REPORTS MAY HAVE LED TO MORE RIGOROUS STANDARDS IN DETERMINING ELIGIBILITY FOR A WHISTLEBLOWER REWARD

The U.S. Court of Appeals for the District of Columbia Circuit ruled in May that the SEC correctly refused a whistleblower award to a former broker of Bear Stearns Companies, Inc. The former broker claimed that he was entitled to an award under the Dodd-Frank Act's whistleblower provision after submitting information to the SEC that resulted in a successful enforcement action in 2005 against Amerindo Investment Advisors Inc. and two of its executives. The court held that the former broker's cooperation with the SEC did not amount to the voluntary provision of "original information" required under the Dodd-Frank Act because he made the submission to the SEC prior to July 21, 2010, when the statute was enacted. While the SEC made use of the former broker's formal whistleblower disclosures submitted in 2011, those disclosures incorporated the same information by reference as submitted before July 21, 2010. Thus, all of the information contained therein was already known to the government.

In March 2022, the D.C. Circuit similarly held that the SEC properly denied whistleblower applications of twelve individuals who sought bounties in the wake of a $25 million settlement with Novartis relating to an FCPA enforcement action. The applicants provided information to the SEC regarding the misconduct of two of Novartis' competitors and later to the news media. The SEC's Claims Review Staff (CRS) denied their claims for bounties on the grounds that the information provided by the whistleblowers did not result in the opening or reopening of an investigation against Novartis because the reports were of misconduct of Novartis' competitors. While the media coverage of the whistleblowers' reports caused Novartis to conduct an internal investigation, the CRS found that the whistleblowers' submission of information to the media, and not to Novartis, failed to comply with the Dodd-Frank Act. The D.C. Circuit held that the provision of the Dodd-Frank Act prescribing circumstances for whistleblower bounty eligibility was ambiguous and therefore granted deference to the SEC. The court found that the SEC's application of the Dodd-Frank Act was its "authoritative" and "official position," and that the SEC's interpretation of the statute implicated its substantive expertise in the implementation of the whistleblower program. Finally, the court held the agency's interpretation of the statute to be reasonable.

In October 2022, Victor Hong, a former investment banker, asked the U.S. Supreme Court to review SEC's denial of a whistleblower award in connection with Hong's reporting of alleged misconduct related to his employer's sales of mortgage-backed securities and role in the 2008 financial crisis. The Supreme Court rejected Hong's cert petition a month later without stating a reason.

In November 2022, the Second Circuit affirmed the SEC's denial of a whistleblower award to John Doe who assisted in a successful agency enforcement action with respect to an international bribery scheme, on the grounds that Doe himself pled guilty of taking part in the crime that he exposed. More specifically, the court ruled that the SEC may not present an award to a whistleblower "who is convicted of a criminal violation related to judicial or administrative action for which the whistleblower otherwise could receive an award."[13]

## CONSTITUTIONALITY OF SEC'S ENFORCEMENT ACTIONS

### *JARESKY V. SEC* FINDS LACK OF INTELLIGIBLE PRINCIPLE GUIDING CIVIL MONETARY PENALTIES IN SEC ADMINISTRATIVE PROCEEDINGS

The Fifth Circuit recently found in *Jarkesy v. SEC* that the SEC's practice of imposing civil monetary penalties in administrative proceedings was unconstitutional because Congress, in delegating its legislative power to the SEC, failed to articulate an intelligible principle by which the

[13] On May 30, 2023, the U.S. Supreme Court passed on reviewing the Second Circuit's decision.

SEC could exercise such power. No. 20-61007 (5th Cir. May 18, 2022). While *Jarkesy* was not an FCPA enforcement action, the decision could have a significant impact on the FCPA world because, since 2010, a large portion of FCPA enforcement actions have been administrative proceedings in which the SEC has imposed a monetary penalty. *Jarkesy* could signify more forthcoming hurdles for the SEC's use of its in-house enforcement mechanism.

**SEC'S "NO ADMIT, NO DENY" POLICY RAISES CONSTITUTIONAL CONCERNS, SAYS NEW YORK FEDERAL JUDGE**

Further, Judge Ronnie Abrams of the Southern District of New York wrote in *SEC v. Fernando Motta Moraes* that the SEC's "no admit, no deny" policy, which bars defendants from publicly denying the agency's allegations pursuant to a settlement, raises constitutional concerns. No. 22-cv-8343 (RA) (S.D.N.Y. Oct. 18, 2022). Specifically, according to Judge Abrams, the policy challenges First Amendment rights and has historically and continues to force courts to turn a blind eye to its constitutional risk. In *Moraes,* the Chief Operating Officer and Controller of Worth Capital, allegedly traded on insider information about a 2018 take-private deal of Dun & Bradstreet. Ultimately, the defendant entered into a consent decree with the SEC, including a "no admit, no deny" provision, which Judge Abrams authorized but characterized doing so "with reluctance in light of the SEC's continued and misguided practice of restraining speech."

According to Judge Abrams, the SEC's policy "has all the hallmarks of a prior restraint on speech, which the Supreme Court has characterized as 'the most serious and the least tolerable infringement on First Amendment rights.'" While the SEC has argued that as individuals can waive their constitutional rights the provision is in fact not a prior restraint. Judge Abrams contended that merely because individuals have the right to waiver does not mean that the government "should be in the business of demanding that they do so."

*Moraes* is a critical development for the future of the FCPA enforcement. The SEC routinely deploys its "no admit, no deny" policy and overall regulatory authority when entering settlements with entities and individuals for FCPA-related misconduct. If as a result of this decision the SEC begins requiring admissions, this may chill settlements out of fear of the collateral consequences. Alternatively, the agency might simply demand a low-bar admission such as "respondent admits that the SEC has sufficient evidence to meet its burden of proof," without affirmatively admitting to the alleged facts.

## FOREIGN DEVELOPMENTS

**OECD SIGNALS INCREASINGLY SOPHISTICATED AND ACTIVE ENFORCEMENT FRAMEWORKS**

In the spring of 2022, the head of anti-corruption at the Organization for Economic Cooperation and Development ("OECD") stated that of the 44 countries signed up to the OECD's Anti-Bribery Convention, 19 had failed to bring any cases that resulted in either a sanction or acquittal since its inception in 1999. Germany currently leads all European countries signed to the convention with over half of the continent's foreign bribery convictions. Greece, on the other hand, has been urged to take major steps to investigate and prosecute foreign bribery. In making these recommendations, the OECD's head of anti-corruption warned against implementing such changes too hastily, as rushed laws can ultimately create hurdles for enforcement.

On November 10, 2022, the OECD's Working Group on Bribery issued a statement questioning Turkey's commitment to the Convention. The Working Group expressed concerns over Turkey's whistleblower protections, prosecutorial independence, and poor enforcement. If these concerns remain unaddressed, the Working Group could issue a "due diligence warning" to advise companies to perform additional due diligence when working with any Turkish entity.

The OECD recently released highlights from the 2021 data on enforcement of the Anti-Bribery Convention. Since its inception on February 15, 1999, through December 31, 2020, the member countries have (1) convicted or sanctioned, collectively, at least 687 natural and 264 legal persons for foreign bribery through criminal proceedings (U.S.: 122 and 155) and have sanctioned at least 88 natural and 121 legal persons through administrative or civil proceedings (U.S.: 88 and 121); (2) convicted or sanctioned, collectively, at least 76 natural and 109 legal persons for related offenses (e.g., false accounting, money laundering, embezzlement, tax evasion) through criminal proceedings (U.S.: 29 and 102); and (3) have sanctioned at least 76 natural and 192 legal persons for related offenses through administrative or civil proceedings (U.S.: 74 and 190). While the majority of these cases, as indicated by the numbers in the parentheses, were brought by the U.S., Columbia, Latvia, and the Russian Federation imposed foreign bribery sanctions for the first time either through criminal or non-criminal proceedings.

The OECD continues to hold a significant and vital role in helping eradicate corporate corruption in the global landscape. As member countries continue to further their commitments, the future of the OECD signals greater international cooperation and active enforcement efforts.

**WORLD BANK DEBARS FIRMS AND INDIVIDUALS ACCUSED OF FRAUDULENT ACTIVITIES**

In 2022, the World Bank's Office of Suspension and Debarment (OSD) continued to issue debarments against

firms and individuals found to have engaged in fraudulent conduct relating to the projects financed by the World Bank.

For example, in January, the World Bank announced a two-year debarment of a Madagascar construction company, Colas Madagascar S.A., for collusive and fraudulent conduct in its engagement of the Airports Madagascar Project. The project, supported by the International Finance Corporation, provided financing for the development and design of the expansion and renovation of two prime Madagascar airports. Colas Madagascar S.A. allegedly arranged improper meetings with government officials between February 4, 2015, and May 4, 2015, to facilitate collusive behavior and did not disclose such meetings to the International Finance Corporation. Pursuant to the debarment and a settlement agreement, the company is ineligible to participate in any projects and operations financed by institutions of the World Bank for two years. Colas Madagascar S.A. acknowledges responsibilities and commits to meeting certain compliance requirements, including adoption of a group-wide corporate integrity compliance project, as a condition for release from debarment.

In November of 2022, Carlos Barberán Diez, a Spanish consultant in the oil and gas industry, and his controlled affiliates, AC Oil & Gas SL and AC Oil & Gas Emirates LLC, were debarred for three years for a fraudulent activity in Guyana. According to the World Bank, Diez used his authority to solicit unlawful payments from four oil and gas consulting companies, in exchange for influencing the project procurement process in their favor. Diez agreed to meet required integrity compliance conditions, including participating in corporation ethics training, for release from debarment. In addition, affiliates that are within Diez's indirect or direct control, are required to implement integrity compliance measures in consultation with the World Bank Group Integrity Compliance Officer.

More recently, on December 5, 2022, the World Bank announced a three-year debarment of Lotte Data Communications Company Limited, a South Korean information technology services company, for allegedly preventing the World Bank investigators from accessing documents and witnesses related to the Da Nang Sustainable City Development Project in Vietnam, during an on-site audit. On December 12, the World Bank also announced an 18-month debarment of Joshua Chalapan Nari, a Vanuatu national, in connection with an allegedly fraudulent practice as part of the Vanuatu Rural Electrification Project.

As is evident in the above, the World Bank has an increasingly significant and robust role in both corruption enforcement and the promotion of high integrity standards. Debarments play a critical function in ensuring that entities and individuals that engage in fraudulent practices are inhibited from fair play in international financing and development.

**CHINA'S CENTRAL COMMISSION FOR DISCIPLINE INSPECTION (THE CCDI) RELEASES A NEW ANTI-BRIBERY GUIDELINE**

In late 2021, China's Central Commission for Discipline Inspection (the CCDI) released a new Anti-Bribery Guideline, advancing stricter enforcement on individuals and corporations committing bribery in China. The new apparatus, titled "Opinions on Further Promoting the Investigation of Bribery and Acceptance of Bribes," is primarily focused on multinational individuals and corporations that pay bribes in China, as opposed to bribe recipients. The innovation provides three key developments: (a) a new blacklist system, (b) allowance of carbon copy prosecutions (as explained further below), and (c) a prudent approach towards mitigation and confiscation.

The new guideline provides that companies and individuals will be blacklisted for any bribery payments in China, whether to public officials or private persons. Inclusion in the list would prevent a person or entity from conducting any future business in China. The guidance does not provide a time-period for the blacklisting or any materiality threshold for the seriousness of wrongdoing. However, the CCDI flagged detailed provisions regarding the blacklisting apparatus. Notably, the CCDI has already begun implementing the system. For example, in March 2022, six companies and 106 individuals, primarily engaged in the finance and construction industries, from the Hunan province, were blacklisted for corruption-related conduct. The companies and individuals are prohibited from bidding for any government contracts and are subject to limited access to government subsidies and increased inspections by Chinese government agencies.

Secondly, the guideline suggests the potential allowance of carbon copy prosecutions in case a company or individual enters a settlement with an overseas authority concerning bribery allegations in China. As a result, an entity or person may be subjected to duplicative prosecutions in multiple jurisdictions for the same misconduct. For instance, a company's admission to the DOJ or SEC of paying bribes in China could result in a similar carbon copy prosecution in China. Notably, since the implementation of the FCPA, more United States enforcement actions have involved bribery investigations in China than any other country.

Lastly, according to the new guideline, authorities will be more prudent in giving credit for mitigating circumstances. Currently, mitigation is routinely applied if a bribe payer actively cooperates in the investigation or self-reports the wrongful conduct. Now, the guideline suggests a more aggressive approach. Property obtained through bribery will be confiscated and any derived advantages, such as positions or qualifications obtained, will also be canceled or revoked.

China is now part of a growing list of nation-states, including Germany, France, and the U.K., that have

passed anti-corruption laws and developed local frameworks of liability for multinational corporations. The CCDI's new guideline appears to signal China's commitments to curtailing the risks and challenges that bribery presents.

### SINGAPORE INTRODUCES NEW GOVERNANCE REQUIREMENTS TO FIGHT MONEY LAUNDERING

In an effort to combat money laundering and terrorism financing, as well as to strengthen its corporate governance apparatus, in 2022, Singapore passed two fundamental requirements into law under the Corporate Register (Miscellaneous Amendments) Act: (1) local and foreign companies will have to maintain a non-public register of nominee shareholders and their nominators and (2) local and foreign companies will need to identify all individuals with executive control over a company as registrable controllers. Companies had to comply with the new requirements by December 5, 2022.

Previously, companies were not required to determine whether a shareholder was holding shares on behalf of a nominator. Now, nominee shareholders are obligated to inform a company of their nominee status within 60 days after October 4, 2022, and those appointed after October 4, 2022, must notify the company within 30 days of becoming a nominee shareholder. After receiving such information, a company must update its non-public register within seven days. The purported objective of this new requirement is to mitigate the risk of companies operating in Singapore being controlled by illicit actors. Non-compliance with this requirement can result in a fine of up to S$5,000 (US $3,578).

Entities are also required to identify any registrable controllers—executives, directors, partners, or other entities that exercise executive control over the daily activities of the company. This new requirement seeks to pierce the corporate veil to improve the transparency of companies established in and operating in Singapore. A non-compliance with this requirement can also be fined up to S$5,000 (US $3,578).

Singapore's efforts demonstrate its robust commitment to furthering corporate enforcement in its own backyard and taking legislative action to curtail money laundering through international standards. Singapore's Ministry of Finance stated that the amendments are in line with the international standards of the Financial Action Task Force.

### FORMER ERICSSON EXECUTIVES ACQUITTED IN SWEDISH BRIBERY TRIAL – THE FUTURE OF THE FOREIGN CORRUPT PRACTICES ACT

The validity and legitimacy of FCPA enforcement actions may be called into question by foreign courts, as is evident in the case study of Swedish telecommunications company Ericsson. In December of 2019, Ericsson resolved a $1.06 billion FCPA enforcement action concerning its alleged misconduct in Djibouti and several other countries. Specifically, the DOJ and SEC found that the company failed to adequately implement a compliance program and that certain employees, including executives, entered into fraudulent trades.

However, on June 21, 2022, four former Ericsson executives were acquitted in a Swedish bribery trial on charges of bribing officials in Djibouti with $2 million via a consulting firm in order to obtain a nearly $20 million 3G network contract. The executives were acquitted after the Swedish District Court found that prosecutors failed to establish that the Djiboutian officials in fact received the money. This example highlights the often-present disconnect between the U.S. law, which does not require actual receipt of a bribe to impose liability, and the laws of other jurisdictions where there is such a requirement.

# PRIVATE LITIGATION

**SECURITIES FRAUD CLAIMS**
**RESTITUTION CLAIMS**
**OTHER CLAIMS**

2022 brought a few updates to private litigation actions that followed the conclusion, or even commencement, of FCPA investigations. Particularly prevalent were follow-on securities fraud claims and Mandatory Victims Restitution Act claims. Notably, 2022 has not seen private restitution actions or civil RICO claims. Nonetheless, the continued threat of such civil litigation by private third parties in the aftermath of an FCPA investigation augments the uncertainty and financial risk related to FCPA violations. We describe below the developments in 2022.

## SECURITIES FRAUD CLAIMS

### $79.5 MILLION SETTLEMENT OF INVESTOR SUIT FOLLOWING FCPA ENFORCEMENT

In addition to its October 2020 resolution of a $1.66 billion DOJ/SEC FCPA enforcement action tied to its alleged role in the corruption surrounding the Malaysian Sovereign Wealth Fund (1MDB), a major financial institution faced shareholder derivative suits alleging that the investment bank's officers and directors breached their fiduciary duties to stockholders during the same set of events. On September 16, 2022, Judge Vernon Broderick of the United States District Court for the Southern District of New York granted plaintiffs' unopposed motion for preliminary approval of a $79.5 million settlement. The shareholder derivative settlement is divided into two parts: a set of corporate governance measures purportedly designed to strengthen internal controls and prevent future wrongdoing, and a $79.5 million "cash recovery" that is to be used to bolster compliance and implement the settlement's corporate governance measures. The corporate measures include extending the corporate compliance program that was developed in the relevant DPA, enhanced authority for a CCO, the maintenance of an anonymous employee hotline to report suspicious activities to the CCO, and external monitoring for media or industry reports that raise compliance concerns. The settlement underlines the risk of potential derivative suits accompanying alleged FCPA violations, in addition to the significant costs of DPAs with the DOJ or SEC.

### AIRBUS $340 MILLION SUIT

Airbus investors sued the company and its current and former executives for $340 million over its alleged failure to disclose an investigation into its bribery practices that led to a $4 billion settlement with French, U.S., and U.K. authorities in 2020. The lawsuit was filed in the Netherlands and claims that Airbus failed to adequately inform investors of the events leading to the bribery probe, and further did not adequately disclose details of the potential settlement, allegedly leading investors to overpay for Airbus stock between 2014 and February 2020 and suffer damages when those eventual disclosures caused the stock price to fall. Separately, in the U.S., a group of Airbus investors reached a $5 million settlement in a New Jersey federal court in May 2022 over the same alleged failures.

### ERICSSON AND OFFICERS SUED BY INVESTORS FOLLOWING DISCLOSURE TO DOJ OF POTENTIAL ISIS BRIBE

On March 3, 2022, Ericsson, its CEO Borke Ekholm, and CFO Carl Mellander were named as defendants in an investor class action lawsuit in the U.S. for allegedly making materially misleading statements about Ericsson's role in paying bribes to ISIS members to gain access to transport routes in Iraq. Ericsson had previously paid $1 billion to the U.S. DOJ in 2019 to settle a corruption probe. The DOJ subsequently claimed that Ericsson violated its 2019 DPA by failing to disclose the details of its operations in Iraq and conducted an insufficient internal investigation into those activities. These allegations are being leveraged in the investor suit, which further alleges that Ericsson's market value declined as a result of Ericsson's wrongful acts and omissions.[14]

### INVESTOR ACTION AGAINST COGNIZANT DIRECTORS AND OFFICERS RELATED TO ALLEGED BRIBES IN INDIA DISMISSED

On September 27, 2022, Judge Kevin McNulty of the U.S. District Court for the District of New Jersey granted a motion to dismiss a consolidated derivative action brought by Cognizant Technology Solutions Corporation investors against certain of the company's current and former directors and officers. The claims alleged breach of fiduciary duty, corporate waste, unjust enrichment, and contribution and indemnification, arising from Cognizant's internal investigation into whether illegal bribes were made to officials in India. Specifically, plaintiffs allege that the director defendants failed to stop the company's President Gordon J. Coburn and Chief Legal Counsel Steven E. Schwartz from engaging in a bribery scheme involving construction permits in India, which allegedly caused the company's stock to plummet when criminal and regulatory charges were filed. Judge McNulty found that plaintiffs failed to properly make a demand on the company's board before filing the derivative action. The judge also found that the plaintiffs failed to plead with particularity that the director defendants failed to implement reporting systems or controls, or that controls were in place but went unmonitored, because the complaint did not allege that directors were informed of any actual corruption incidents or the Indian bribery scheme.

[14] In May 2023, the federal district court dismissed the lawsuit in its entirety without giving investors an opportunity to amend their claims.

## RESTITUTION CLAIMS

### CRUSADER HEALTH ASKS U.S. JUDGE FOR COMPENSATION AS VICTIM OF GLENCORE BRIBERY SCHEME

On October 12, 2022, Judge Lorna G. Schofield of the United States District Court for the Southern District of New York granted a request by Ian Hagen and Laurethé Hagen, who together own 90% of Crusader Health RDC SARL, which was a medical provider for Congolese miners, to appear in an action by the U.S. DOJ against Glencore PLC. As discussed earlier, the Anglo-Swiss commodities company Glencore agreed to pay at least $1.1 billion in May 2022 following investigations by U.S., U.K., and Brazilian authorities into the alleged bribery of public officials and market manipulation by Glencore. After their appearance request was granted, the Hagens, on behalf of Crusader Health, moved the court to find that the company was the victim of Glencore's alleged bribery scheme in the Democratic Republic of Congo. Specifically, they alleged that Glencore's Congolese subsidiary bribed government officials to receive a favorable ruling in a contract dispute between the two parties in 2010, resulting in the shutdown of Crusader Health's operations in Congo. Crusader Health demanded $50 million in compensation under the U.S. Mandatory Victims Restitution Act.[15]

## OTHER CLAIMS

### ICSID PANEL REJECTS BSG RESOURCES' $5 BILLION EXPROPRIATION CLAIM AGAINST GUINEA

On May 18, 2022, a three-arbitrator tribunal of the International Centre for Settlement of Investment Disputes (ICSID) rejected Israeli billionaire Benny Steinmetz's mining company BSG Resources' $5 billion expropriation claims against the Republic of Guinea. The claims surrounded the Guinean government's 2014 decision to strip BGS of its rights to the Simandou and Zogota iron ore deposits, which are among the largest in the world. BSG claimed the action was impermissible expropriation by Guinea, but the ICSID panel found that BSG used an extensive bribery scheme to win the rights between 2006 and 2010 and paid at least $9.4 million in bribes during the relevant period to the wife of a former Guinean president. The details of the decision remain confidential. Steinmetz was previously convicted by a Swiss criminal court of corruption and forgery in connection with this bribery, and other claims have been brought against BSG by its former partners, including a $2 billion award to Brazilian mining company Vale S.A.

### TEXAS SUPREME COURT RULES THAT $820 MILLION SETTLEMENT BLOCKS PETROBRAS CLAIMS

On April 29, 2022, the Texas Supreme Court ruled unanimously that the Brazilian state-controlled oil company Petrobras could not sue Belgian company Transcor Astra Group S.A. for breach of fiduciary duty based on Astra's failure to disclose bribes allegedly paid to Petrobras employees when the companies reached an $820 million settlement agreement in 2012. The bribes, which were discovered as part of the Brazilian government's Operation Car Wash investigation, were tied to a partnership between the companies in a Texas oil refinery. The court was unpersuaded by Petrobras' arguments, first, that the settlement agreement was invalid and unenforceable, and second, that the breach of fiduciary duty claims fell beyond the scope of the general release in the agreement. The court gave great weight to the text of the agreement, under which the release should be "the broadest type of general release," and reinstated the ruling of a Houston district court, which had been reversed in part by an appeals court.[16]

[15] In February 2023, the court awarded Crusader Health restitution of approximately $29.7 million.

[16] The U.S. Supreme Court withheld certiorari in May 2023, leaving the Texas Supreme Court decision intact.

# ENFORCEMENT IN THE UNITED KINGDOM

## SERIOUS FRAUD OFFICE

## SERIOUS FRAUD OFFICE

*In keeping with the focus of this publication, this section will focus on the U.K. Serious Fraud Office's (SFO) efforts to tackle bribery and corruption since our last edition.* Lisa Osofsky, the SFO's Director, described 2022 as "the year of the trial," with a total of eight SFO trials heard. However, in some respects, it may seem that the SFO is itself on trial given the public scrutiny and criticism it has been under recently. Notably, Osofsky herself was subject to scrutiny within two high-profile investigation reports in relation to SFO cases (see below). The reviews of Brian Altman QC and Sir David Calvert-Smith were largely critical of Osofsky's conduct. Not long after their publication, it was announced that she would be stepping down from her directorship in the summer of 2023. The SFO's processes for initiating investigations and its relationship with outside counsel were also exposed to intense scrutiny during ENRC's high-profile claim against its former lawyers, and the SFO. The long-awaited judgment in that case was handed down earlier in the year and we discuss it, together with other developments below.

### SFO INVESTIGATIONS

As mentioned in our previous edition, there has recently been an uptick in SFO activity and the past twelve months or so have seen the SFO continue to increase its investigations activity, including through a series of raids and information-gathering exercises. The SFO continues to investigate allegations of bribery and corruption in relation to certain insurance firms. Of particular note is the SFO's bribery and corruption probe into insurance company Jardine Lloyd Thompson Ltd. in connection with retained contracts in Ecuador. In March 2022, it appeared that the SFO was close to reaching a settlement with Jardine, based on correspondence from the DOJ to Jardine's U.S. lawyers (confirming that the DOJ was declining to prosecute Jardine), in which reference was made to Jardine reaching a resolution with the SFO. The FCA subsequently fined Jardine $9.7 million in June 2022 for its lapses in financial crime control, at which point reports emerged that, in light of the FCA fine, the linked SFO probe had been concluded.

### SFO OUTCOMES

The SFO has secured a number of bribery convictions against Glencore Energy (U.K.) Ltd, a 100% owned Glencore subsidiary.

On June 21, 2022, Glencore Energy was convicted on seven counts of bribery in connection with its oil operations in Africa, including five substantive bribery charges, and two offenses of corporate failure to prevent bribery under the Bribery Act 2010, having indicated that it would plead guilty to all charges at an earlier hearing in May. Sentencing took place during a two-day hearing in November 2022. The court imposed a financial penalty of over $400 million, which is the largest ever for the SFO. During sentencing, Justice Fraser noted: "Other companies tempted to engage in similar corruption should be aware that similar sanctions lie ahead."

Glencore's convictions under the Bribery Act included the corporate offense of failure to prevent bribery (section 7) as well as the first ever instance of a corporation being convicted of the substantive offense of bribery (section 1). The operation of the "identification doctrine"—the principle that a corporate body can only be held liable for the acts or omissions of individuals if they represent its "directing mind and will"—is generally seen as making corporate convictions for the substantive bribery offense particularly difficult to obtain in practice. The fact that Glencore entered guilty pleas meant that the principle did not need to be tested in court in this case.

This follows the SFO's long-running investigation into Glencore, which began in 2019. The investigation concerned allegations that Glencore agents and employees, with the company's approval, paid bribes in relation to its oil operations in Nigeria, Cameroon, Ivory Coast, Equatorial Guinea, and South Sudan. Bribes worth over $25 million were paid to officials for preferential access to oil, including increased cargoes, valuable grades of oil, and preferable dates of delivery between 2011 and 2016.

The SFO has also obtained several confiscation orders during the past year. On April 28, 2022, in connection with the much-publicized Petrofac investigation (asreported in our previous editions), the SFO secured three court orders recovering almost £600,000 obtained as a result of bribery, from personal bank accounts linked to Basim Al Shaikh. Al Shaikh worked as an agent for Petrofac's business in the U.A.E. and allegedly paid bribes to secure oil contracts for the Petrofac group, using certain UAE companies to launder these bribes. His personal bank accounts were frozen by the SFO on February 3, 2021, on suspicion of containing the proceeds of crime. The investigation into the conduct of a number of individual suspects in the Petrofac investigation continues.

We reported on the SFO's July 2021 Deferred Prosecution Agreement with Amec Foster Wheeler Energy Limited ("AFWEL") in our July 2021 edition. AFWEL accepted responsibility for ten corruption offenses relating to the use of corrupt agents in the oil and gas industry. As a result, it agreed to pay a financial penalty, compensation and costs totalling £103 million, as part of a wider $177 million settlement with U.K., U.S., and Brazilian authorities.

In a further development in the AFWEL probe, following a Memorandum of Understanding signed between the U.K. and Nigeria on February 21, 2022, over £200,000 in funds obtained from AFWEL were ordered to be paid in compensation to the people of Nigeria for tax revenues lost as a result of AFWEL's conduct. The compensation was to be made through investment into key infrastructure projects. It is understood that this was only the second

time that an SFO DPA has included or resulted in compensation to victims of corruption overseas.

## OTHER DEVELOPMENTS

In our previous edition, we noted the criticisms that the SFO continues to face, including questions that go to its credibility and that of its Director personally, in light of the agency's failure to disclose key evidence in its prosecution of a bribery case against a former Unaoil executive, and a similar disclosure failure in a trial of two former Serco executives. Those failures resulted in the conviction of Zaid Akle (in respect to Unaoil) being quashed and the jury returning not guilty verdicts for Nicholas Woods and Simon Marshall (formerly directors of Serco).

The fallout continued on March 24, 2022, and July 21, 2022, when the Court of Appeal quashed the convictions of Paul Bond and Stephen Whiteley, two of Zaid Akle's co-defendants in the Unaoil trial. The Unaoil failures, including Osofsky's personal contact with David Tinsley, a private investigator acting for the Ahsani family, the prominent British-Iranian family who founded and ran Unaoil, was the subject of an independent review by former Director of Public Prosecutions and High Court judge Sir David Calvert-Smith, which was published in July 2022.

In brief, the report is highly critical of the SFO and in particular of Osofsky's conduct, including her meetings with David Tinsley in private, without taking legal advice from the SFO's general counsel, and without taking notes. The report also criticizes Osofsky for using her personal mobile phone to communicate with Tinsley, and the fact that this contact continued despite subordinates being "clearly uncomfortable" with Tinsley's involvement. According to the report, this led to "a damaging culture of distrust" between SFO investigators and senior managers.

The report also flagged several other case management issues, such as poor record keeping, a lack of case progression checks, and teams being short-staffed or underqualified.

A separate review by Brian Altman QC into the collapse of the trial of the Serco executives was also critical of the SFO. In particular, the review found that the "inexperience" of the designated Disclosure Officer for the case "should have disqualified him" from that job. The SFO responded to the reports by acknowledging that implementing their recommendations would be a priority. The government department also noted positive changes to the SFO's working practices and culture under Osofsky that had already happened and that are intended to improve the organization's efficiency, including investment in technology and a case prioritization system.

Perhaps the biggest development since our last update is in relation to the civil proceedings brought by Eurasian Natural Resources Corporation (ENRC), a multinational natural resources company headquartered in London, against the SFO, the law firm Dechert, and one of its former partners, Neil Gerrard.

On May 16, 2022, Justice Waksman handed down his highly anticipated judgment following a lengthy trial, which took place between May and September 2021. To recap, the case arose as part of a wider set of proceedings and as a result of Gerrard's advice to ENRC in relation to an internal whistleblowing investigation and subsequently its engagement with the SFO under a self-reporting process.

That process began following the publication of an article damaging to ENRC in August 2011, which was based on leaked and in part legally privileged documents. ENRC terminated Dechert's retainer in April 2013, while the SFO's investigation into allegations of fraud, bribery, and corruption around the acquisition of substantial mineral assets by ENRC continued.

The core allegation against Gerrard is that he acted in breach of his duties as a solicitor. In particular, he acted without ENRC's authority and plainly against its interests, including in relation to up to 30 unauthorized contacts with the SFO. As against the SFO, ENRC alleged that various representatives (including its then-Director Richard Alderman) who had contact with Gerrard were complicit in knowing or being reckless as to the fact that Gerrard was acting without authority and plainly against his client's own interests in his communication with the SFO.

While Justice Waksman found against Gerrard, including that he was the instigator of leaks to the press and sent confidential material to the SFO, he largely dismissed the claims against the SFO itself. That said, while the SFO's conduct did not amount to misfeasance in a public office, some elements of the tort were established. In particular, the SFO's representatives, including Alderman, were in serious breach of duty in relation to 15 out of the 30 unauthorized contacts with ENRC, which were said to be "plainly" unauthorized and against ENRC's interest and which, subject to proof of causation and loss, apparently induced Gerrard's breach of contract. These actions were found to have been out of "bad faith opportunism" on the part of the SFO. Justice Waksman accepted that "the essential driver for all this was Mr. Gerrard," but noted that the SFO clearly played its part.

It is worth noting that Justice Waksman refused to grant ENRC's request to either bar the SFO from using any confidential material disclosed by Dechert (and Gerrard) or remove any officers who saw the information from the ongoing investigation. The court concluded that it was bound by previous authority that prevented it, as a civil court, from granting an injunction to stop the use of privileged information in criminal proceedings.

A further trial will take place to determine causation and loss, in which the SFO's role will likely continue to come

under scrutiny, including as to the extent to which its actions induced or contributed to Gerrard's breach of contract. We will continue to follow this case with interest.

While recent headlines arising from the ENRC judgment will have made very uncomfortable reading for the SFO's current Director and senior management, the extent of the long-term damage to its credibility remains unclear. It might be that it is able to regain some lost luster by securing further high-profile convictions in its ongoing and forthcoming trials. However, the findings of the independent investigations into Lisa Osofsky's more recent conduct (which she herself conceded were "sobering") were instructive.

Perhaps as a reflection of the high-profile failures that have peppered her tenure, it was announced in November 2022 that Osofsky would be stepping down from her role in the summer of 2023. It remains to be seen who will be appointed as her replacement. There have now been two court judgments that have been highly critical of two SFO Directors; one past, one present. Further censure of the SFO's current Director may have created reputational concerns that may be more difficult for Osofsky's successor to dislodge.

## LEGISLATIVE DEVELOPMENTS

Finally, we reported in our July 2021 edition that the U.K. Government had asked the Law Commission to carry out a detailed review of the "identification doctrine" mentioned above and, in light of the high bar it creates in practice for prosecuting corporations for bribery offenses, to prepare an Options Paper setting out where improvements might be made. The Law Commission published its Options Paper on June 10, 2022, setting out three options for reforming the regime:

- Option 1: Retention of the existing identification doctrine.
- Option 2A: Allowing conduct to be attributed to a corporation if a member of senior management engaged in, consented to, or connived in the offense. A member of senior management would be any person who plays a significant role in decision making about a substantial part of a company's activities or manages a substantial part of the activities themselves.
- Option 2B: Option 2A, but with "senior management" always including the CEO and CFO.

It was also considered that the "failure to prevent" regime, found at section 7 of the Bribery Act, could be expanded to encompass certain fraud offenses. This appears to acknowledge and reflect the tendency under the current regime to prosecute corporations under the section 7 offense rather than under the substantive bribery offenses themselves, in light of the difficulties created by the "identification doctrine" as it currently stands.

The U.K. Government is addressing the Law Commission's proposals in the Economic Crime and Corporate Transparency Bill, which was introduced to Parliament on September 22, 2022, and is currently progressing through the Parliamentary scrutiny and amendment processes. There are ongoing discussions about whether the Bill will ultimately include provisions relating to corporate criminal liability and to what extent. The initial draft of the Bill which did not include any such provisions drew criticism, including from the prominent anti-corruption industry publication Spotlight on Corruption, for failing to address "crucial measures that the U.K. needs to tackle its dirty money problem."[17]

If the Bill ultimately enacts provisions which reflect either of Options 2A or 2B of the Law Commission's proposals, they would clearly place a greater burden on company CEOs, CFOs, and responsible senior managers, than is currently the case, to ensure 'top-down' compliance with the Bribery Act. It would also further increase the scrutiny on executive decision making and conduct during SFO investigations, given the potential to secure a primary conviction against a company and where only one senior manager need be implicated (on the basis of the Bill as it currently stands).

Another notable feature of the Bill is that it includes provisions to allow the SFO's section 2 powers, used to compel suspected criminals and financial institutions to disclose information or documents in relation to a suspected crime, to be used at the pre-investigative stage: i.e., before an investigation has been formally opened. Currently, this is permitted only in international bribery and corruption cases. John Kielty, Chief Intelligence Officer at the SFO, welcomed the measures, claiming that they would have a "positive impact on [the SFO's] operating capability, not only shortening the length of our cases, meaning justice for victims is delivered more quickly but also reducing the number of potential investors at risk and helping us secure key evidence at pace."

We will be following the passage of the Bill through Parliament with interest. By the time we publish our next edition, we ought to know whether these fundamental changes to the corporate criminal liability regime in the U.K. will come to pass.

[17] See Commons Library, "Economic Crime and Corporate Transparency Bill 2022-2023," January 20, 2023.

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