Steptoe

FCPA/Anti-Corruption Developments

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Introduction

I.

Introduction

This past year saw a significant dip in the number of Foreign Corrupt Practices Act (FCPA) enforcement actions, but at the same time a series of new and important policy initiatives emanating from the White House and from the Department of Justice (DOJ) that signal a substantial commitment to investigating and prosecuting corruption-related crimes and to holding both individual and corporate actors accountable for such crimes. The FCPA enforcement docket for 2021 also reflects continuing efforts, and successes, by US enforcement authorities in achieving coordinated, multi-national investigations and resolutions, as well as a continued emphasis by DOJ on prosecuting individuals.

New policy initiatives included, but were not limited to, the Biden administration's National Security Strategy Memorandum, issued in June, and the subsequent United States Strategy for Countering Corruption, issued in December. Under these documents, the fight against corruption is designated as a "core" national security interest. Also, the DOJ announced important policies with respect to how it will evaluate companies who are seeking credit for cooperation and remediation in corporate white-collar matters, and with respect to the scrutiny it will apply to companies' compliance with the terms of deferred and non-prosecution agreements.

There were four corporate prosecutions in 2021, three of which involved both DOJ and the Securities and Exchange Commission (SEC), and one of which was an SEC-only matter. Two out of the four corporate prosecutions also involved coordination with authorities from other jurisdictions, specifically, the UK and Brazil. The aggregate dollar value of monetary sanctions imposed in corporate resolutions by the DOJ and SEC was approximately $670 million, of which $434 million ultimately was paid to the US Treasury after offsetting for amounts paid to foreign authorities. None of the corporate resolutions in 2021 appear to have involved voluntary disclosures, and DOJ granted no formal declinations under its Corporate Enforcement Policy—instead, all were resolved with deferred or non-prosecution agreements. As for individual prosecutions, while there were only five cases brought under the FCPA itself, DOJ charged more than 20 individuals with crimes related to bribery of foreign officials when cases involving other statutes are included, most importantly US anti-money laundering laws, for alleged involvement in foreign bribery schemes.

In sum, despite the low number of enforcement actions, 2021 was significant in terms of the stage set by current US authorities for enforcement efforts and priorities going forward, as well as a stated commitment to assessing companies and individuals who become ensnared in corruption schemes under very exacting standards. DOJ and SEC leadership moreover have insisted in various public pronouncements that both agencies have large pipelines of cases in all phases of the investigation process; that voluntary disclosures remain a strong source for corporate matters, but in addition, referrals from foreign authorities, whistleblower complaints, and leads identified through data-mining and other monitoring and investigative techniques are all being utilized more than ever; and that partnering with foreign governments and an emphasis on coordinated resolutions will continue.

In this Year in Review, we discuss these developments, as well as key developments and trends in the international arena with respect to anti-corruption enforcement and also compliance standards. For a number of reasons, it appears reasonable to expect substantial enforcement activity going forward, and we will be closely monitoring activity by both US and foreign authorities in 2022.

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Enforcement Statistics and Trends

II.

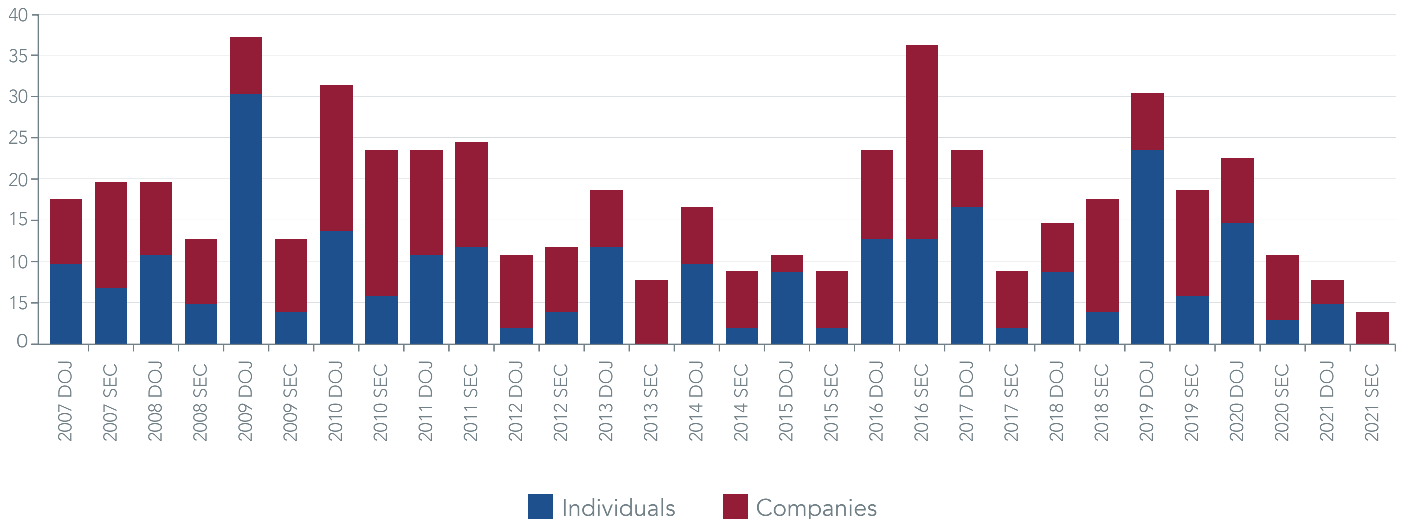
Enforcement Statistics and Trends

A. NUMBER OF ENFORCEMENT ACTIONS

2021 brought a significant drop in reported FCPA-related actions against corporations and individuals from both the DOJ and the SEC. The actions total 12 this year, and stand in contrast to the 34 reported FCPA-related actions in 2020 and 50 in 2019.[1] In 2021, the DOJ brought only eight actions against corporations and individuals, while it brought 23 in 2020 and 31 in 2019. Meanwhile, the SEC brought four actions against corporations, and no actions against individuals in 2021.[2] In 2020, the SEC brought 11 enforcement actions against corporations and individuals, and in 2019, it brought 19.

Four companies faced charges from the DOJ, the SEC, or both in 2021. Again, this is a marked decrease from 2020, in which 12 companies faced charges, and 2019, in which 14 companies faced charges. These companies included two banks, an engineering company, and an advertising agency. The DOJ and SEC brought three parallel corporate enforcement actions, compared to four in 2020 and six in 2019. Notably, all four of the companies facing charges in 2021 were foreign firms.[3]

Number of Reported Prosecutions, 2007-2021



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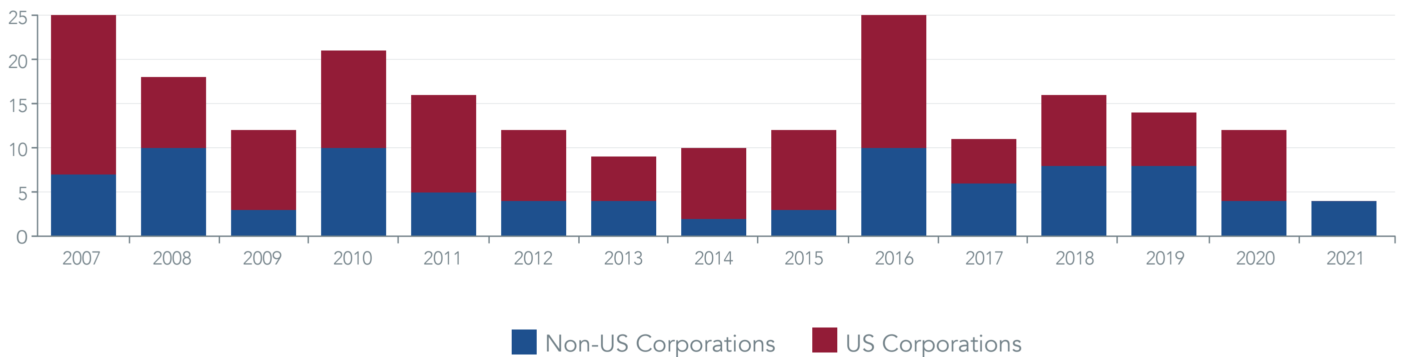
1 Steptoe's methodology accounts for charges brought in 2021 or unreported prior to 2021. With respect to charges brought against companies and individuals, the methodology counts charges involving violations of the FCPA and conspiracy to violate the FCPA (both the anti-bribery and accounting provisions). These statistics do not include non-FCPA foreign corruption-related charges against individuals (such as money laundering charges against corrupt foreign officials, although we discuss such cases herein in the Case Summaries Appendix, *infra*). With one exception, this is true of the corporate enforcement actions as well. The one exception is regarding the DOJ enforcement action against Credit Suisse AG and Credit Suisse Securities (Europe) Limited (collectively, *Credit Suisse*), which involved charges of conspiracy to commit wire fraud and did not include an FCPA charge. The concurrent SEC enforcement action did involve FCPA charges, however, and we have included both the DOJ and SEC actions in these statistics.

2 The DOJ and SEC brought a total of seven corporate FCPA enforcement actions in 2021 (counting actions against more than one member of the same corporate family, such as those against Credit Suisse AG and its subsidiary, as a single action). The seven corporate enforcement actions include three parallel actions by the DOJ and SEC against the same corporate groups (*Credit Suisse, Amec Foster Wheeler Energy Limited (Amec Foster Wheeler*), and *Deutsche Bank Aktiengesellschaft (Deutsche Bank)*, and one separate action by the SEC (*WPP plc (WPP)*).

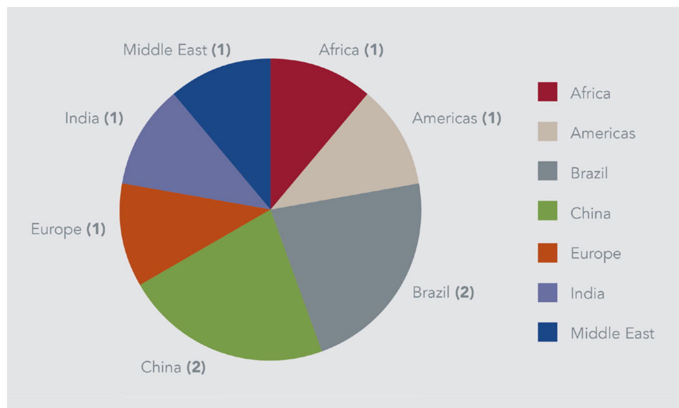
3 Although the SEC noted that WPP has dual-headquarters in London and New York City in its Cease-and-Desist Order, the accompanying press release identifies that company as "London-based," as does public information about the company. We have considered WPP a foreign firm for the purposes of these statistics.

FCPA Actions Against US and Non-US Companies, 2007-2021



The DOJ brought five new FCPA-related charges against individuals this year, while the SEC brought none. As with 2021's number of actions against corporations, this is a significant decrease from past years. In 2020, the DOJ brought 15 new FCPA-related enforcement actions against individuals, while the SEC brought three, and in 2019 US enforcement authorities brought a total of 30 cases. The DOJ did not bring any formal declinations in 2021 under the FCPA Corporate Enforcement Policy.

2021 Locus of Corrupt Conduct Cited in Corporate Cases



B. GEOGRAPHY OF CONDUCT CHART

Although the number of enforcement actions brought by US authorities in 2021 was significantly lower than past years, the alleged conduct still occurred in diverse jurisdictions, consistent with trends in past years. 2021 saw a continued focus on the Americas, including Brazil, and China.[4]

C. MONETARY SANCTIONS[5]

The aggregate dollar value of monetary sanctions imposed by the DOJ and SEC[6] for FCPA-related offenses in 2021 was approximately $670 million, with $434 million of that ultimately paid to the US Treasury.[7] This aggregate is lower than past years—for example, 2020 brought a record-breaking $6 billion in penalties, with $3 billion paid to the US. The lower aggregate is primarily explained by the fact that US authorities brought so few actions in 2021, but this year was also notable in that it did not involve the type of record-breaking billion dollar fines that past years have.

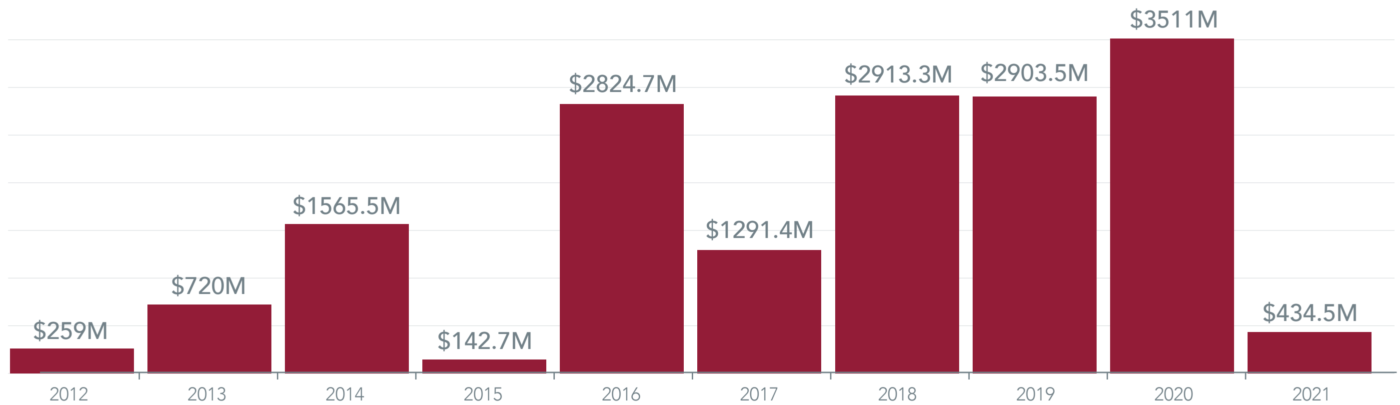
4 We have considered two of the four corporate enforcement actions brought by US authorities in 2021 to involve conduct in more than one location. The alleged conduct in *Deutsche Bank* occurred in China, Europe, and the Middle East, and the alleged conduct in *WPP* occurred in the Americas, Brazil, China, and India. Our methodology counts only one enforcement action per region where misconduct occurred in more than one country per region. In *Deutsche Bank*, for example, the alleged conduct occurred in Abu Dhabi, China, Italy, and Saudi Arabia. Accordingly, our methodology treats this alleged misconduct as occurring in three regions reflected in the graph (China, Europe, and the Middle East).

5 All values are reported in US dollars, unless otherwise specified.

6 The DOJ Deferred Prosecution Agreement against Deutsche Bank involved a factually-unrelated commodities fraud charge that included a penalty on top of that associated with the FCPA-related resolution. These statistics only include the FCPA-related resolution amount.

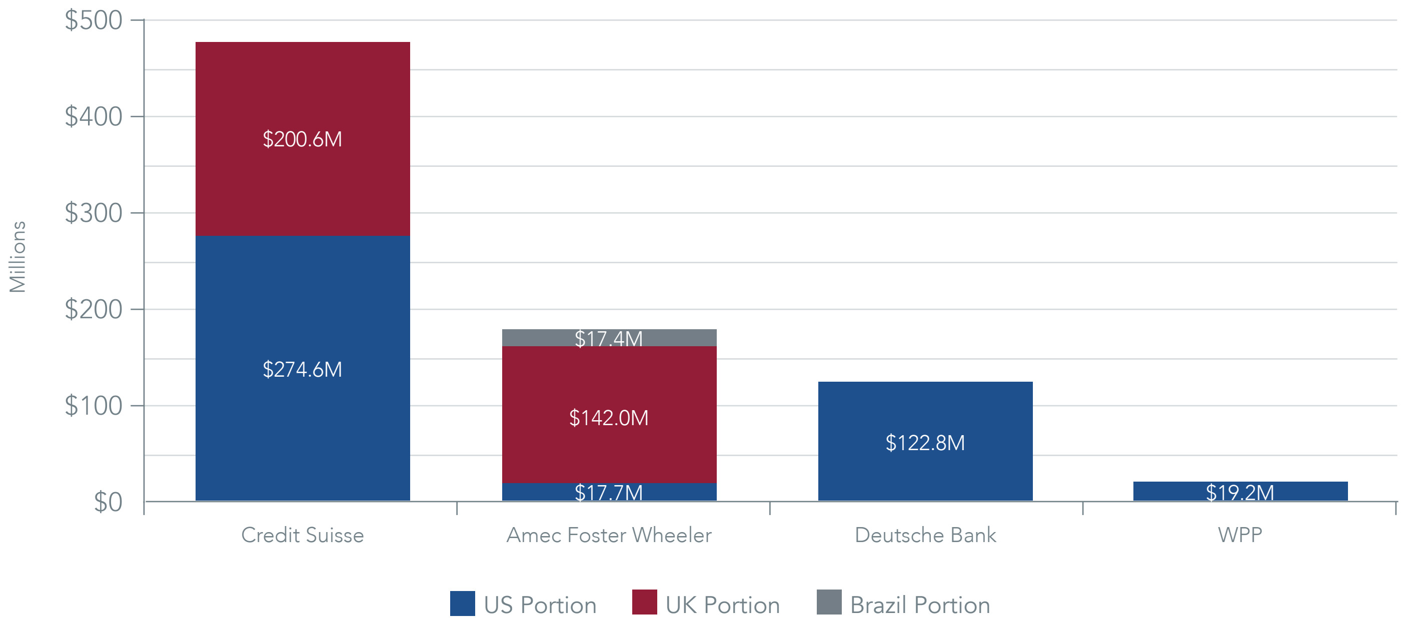
7 The totals include penalties, disgorgement and interest. Discrepancies in fines imposed versus those payable to the US Treasury reflect payments to other enforcement authorities which are credited towards the total fine.

FCPA Corporate Fines Paid to US Treasury 2012-2021



Two of the four corporate enforcement actions (*Credit Suisse* and *Amec Foster Wheeler*) brought in 2021 involved parallel enforcement with foreign authorities, resulting in penalties payable to foreign authorities on top of those paid to the United States. In both instances, the penalties to the United States were partially offset by those paid to the foreign authorities.

2021 Corporate Enforcement Actions

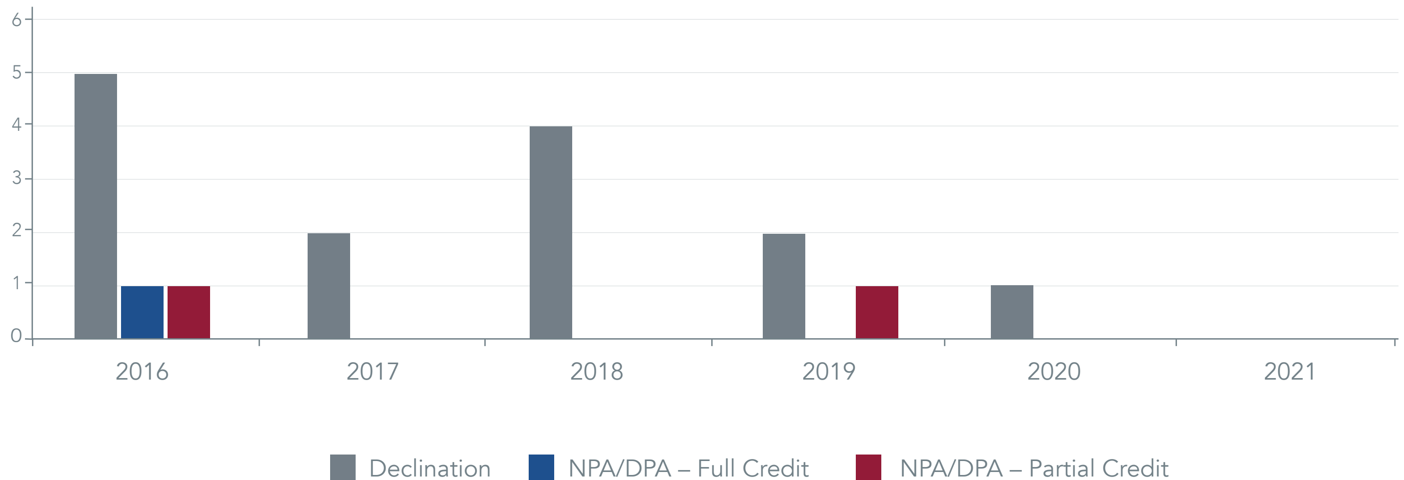


D. NATURE OF DOJ RESOLUTION

In 2016, the DOJ announced its Pilot Program, which is now called the Corporate Enforcement Policy. The Corporate Enforcement Policy, which we have discussed at length in prior Year in Reviews,[8] affords different levels of "credit" for actions by a company, which directly affects the penalty amount a corporation pays in resolving an FCPA enforcement action. "Credit" is primarily based on whether or not the company voluntarily disclosed the conduct and whether or not the DOJ found the company fully cooperated during the course of the DOJ's investigation, in addition to whether it engaged in remedial actions. Where the company has voluntarily disclosed the conduct and has fully cooperated and remediated, there is a presumption that the DOJ will decline to bring an enforcement action.

If the DOJ instead brings an enforcement action—e.g., a non-prosecution agreement (NPA), a deferred prosecution agreement (DPA), or a guilty plea—it will afford some level of "credit" against the otherwise applicable Sentencing Guidelines. In the context of a voluntary disclosure, a criminal resolution with 50% off of the low end of the Sentencing Guidelines is considered "full credit." Anything less than that is considered "partial credit." In 2021, none of the three companies against which DOJ brought enforcement actions voluntarily disclosed the conduct, in contrast to all other years since the launch of the Corporate Enforcement Policy.[9]

Voluntary Disclosure

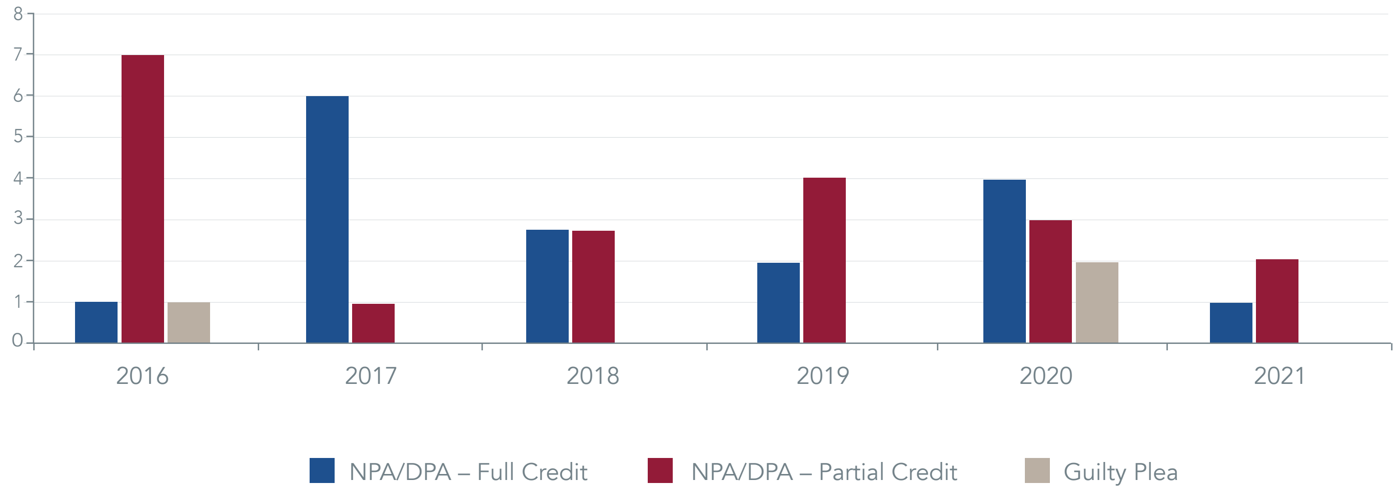


8 *See, e.g.*, 2016 FCPA YIR; 2017 FCPA YIR.

9 Where DOJ brought actions against a parent company and a subsidiary, these statistics only take into account the resolution reached with the parent company.

Under the Corporate Enforcement Policy, where a company has not voluntarily disclosed the conduct at issue, but where the DOJ found there is full cooperation and remediation, a resolution reflecting "full credit" is a criminal resolution with 25% off the low end of the Sentencing Guidelines. Anything less than that is considered "partial credit." Enforcement actions in 2021 included one deferred prosecution agreement for which DOJ awarded full credit for cooperation and remediation (*Amec Foster Wheeler*) and two deferred prosecution agreements for which DOJ awarded partial credit (*Credit Suisse* and *Deutsche Bank*).[10] As in 2020, no resolutions included the imposition of a monitor.

No Voluntary Disclosure



E. DOJ/SEC PRIORITIES AND TRENDS

Although 2021 saw a significant dip in the number of enforcement cases, particularly on the corporate side, there are a number of signs that enforcement levels may rebound significantly going forward. Both DOJ and SEC leadership have insisted in public pronouncements that we should expect increased enforcement of the FCPA and related laws, and have stated that there is a large pipeline of cases working their way through the investigation process at both agencies. They have also stated that while voluntary disclosures remain a strong source of corporate matters, they are able increasingly to rely on referrals from foreign authorities, whistleblower complaints, and leads identified through data-mining and other monitoring and investigative techniques. Moreover, as discussed below in Section III.A.1, the Biden administration has made clear and detailed policy announcements regarding its commitment to combating corruption and corporate crime, such as the US Strategy on Countering Corruption, including enforcement of the FCPA, and has indicated that this commitment will be backed up with meaningful resourcing.

With respect to DOJ, we highlight the following points relating to that agency's recent enforcement activity:

◊ **Significant efforts to prosecute individuals.** The DOJ only brought FCPA charges against five individuals in 2021, an initially surprising figure given the priority reportedly given to individual accountability. However, this figure is deceiving. As reflected in the summary of individual actions contained in the Appendix to this guide, the DOJ also used other statutes, in particular anti-money laundering laws, to bring charges in corruption-related matters against more than 20 individuals for alleged involvement in paying bribes to foreign officials or laundering the proceeds of bribery. The DOJ is also actively litigating several cases against individuals who are, to date, fighting the charges against them, including, among others: the highly publicized case against Roger Ng, former Managing Director of Goldman Sachs and Head of Investment Banking for Goldman Malaysia (*1MDB* matter); and appellate litigation in the Second and Fifth Circuits (*Hoskins* and *Rafoi-Bleuler* matters, respectively) over issues of extraterritorial jurisdiction and the scope of the principal-agent relationship in connection with defendants who are not US persons. Historically,

10 Where DOJ brought actions against a parent company and a subsidiary, these statistics only took into account the resolution reached with the parent company.

individual cases have been a major source for construction of key elements of the statute, with repercussions for both corporate and individual enforcement.

- **Making use of the full panoply of laws available to prosecute corrupt conduct.** In addition to the FCPA, the DOJ continues utilizing other statutes, including anti-money laundering laws, conspiracy, and wire/mail fraud. While historically, the DOJ has focused on bringing anti-bribery charges under the FCPA, we also continue to see the DOJ making use of the internal controls/books and records provisions, which can be the basis for criminal charges where the conduct is "knowing."[11]
- **Continued attention to calibrating the type of disposition and the fine amount to disclosure, cooperation and remediation under DOJ's Corporate Enforcement Policy.** The three corporate resolutions reached by DOJ in 2021 all had slightly different outcomes in this regard. None of the companies were credited with voluntary disclosure. With respect to credit for cooperation and remediation, we saw one case in which the company was afforded a discount of 25% off the low end of the Sentencing Guidelines; one in which the company was afforded 15% off of the low end of the Sentencing Guidelines; and one in which the company was afforded a 25% discount off the mid-point of the Sentencing Guidelines. While reasonable minds may disagree as to whether these types of discounts are adequate to recognize the level of corporate effort, time, and money required to achieve credit under the Corporate Enforcement Policy, there is little doubt that whether or not credit is given, and the extent to which it is given, do result in significant differences in fine amounts, and the amount given, does result in significant differences in fine amounts. For example, in the 2021 Amec Foster Wheeler resolution, the company's fine would have been at least $24.5 million (low end of the Sentencing Guidelines) absent a discount, but instead was fixed at $18.375 million with the 25% discount. Conversely, if the same discount had been granted, but off the mid-point rather than the low end, the fine would have been $27.6 million.

  In 2021, DOJ did not agree to any declinations under the Corporate Enforcement Policy, however this is not surprising because voluntary disclosure is essentially a prerequisite to obtain that result. Looking back to the inception of the Corporate Enforcement Policy, which began as the DOJ's "Pilot Program" in 2016, we see since that policy came into place, DOJ did agree to declinations in most cases that involved voluntary disclosure and, conversely, did not agree to a declination in any cases lacking voluntary disclosure.[12] In making this observation, we should be clear that voluntary disclosure does not guarantee receipt of a declination. Moreover, the decision as to whether to make a voluntary disclosure in any particular case requires a careful analysis of the facts and balancing of the potential risks and benefits.

With respect to the SEC, we note:

- **SEC Whistleblower Program sets records.** In FY2021 the SEC's whistleblower program broke its past records in terms of both the number of individuals receiving awards, and the total dollar amount awarded. A total of 108 individuals received awards and a total of $564 million was awarded; these totals were greater than the number of individuals, and the amount of money awarded, for the entire prior history of the program from FY2011 to FY2020.[13] Moreover, while FCPA-related tips typically represent a small proportion of the total number of tips received by the SEC, FY2021 saw a significant increase in such tips in comparison with the number received each year between FY2018-FY2020.[14]

  Two recent whistleblower-related matters are of particular interest in terms of how the SEC interprets and applies its regulations in this area. In one matter, in May 2021, the SEC awarded a whistleblower $28 million for a tip that led the agency to investigate Panasonic Avionics, which settled FCPA charges with DOJ and SEC in 2018. The award was made even though the allegations made by the whistleblower were different, as to the geographies involved, from the ones that ultimately formed the basis for the corporate settlement.[15]

  In the second matter, the SEC has been litigating the denial of an award to two whistleblowers who claim they made allegations that led to the agency's investigation and settlement in 2016 of FCPA charges

11 15 U.S.C. § 78m(b)(5).

12 *See* Section II.D.

13 SEC, *2021 Annual Report to Congress: Whistleblower Program* (Nov. 15, 2021), https://www.sec.gov/files/owb-2021-annual-report.pdf at 1-2.

14 *Id.* at 40.

15 SEC Press Release, *SEC Awards More Than $28 Million to Whistleblower Who Aided SEC and Other Agency Actions* (May 19, 2021), https://www.sec.gov/news/press-release/2021-86?utm_medium=email&utm_source=govdelivery; *SEC Whistleblower Award Proceeding, In re Claim for an Award*, Exchange Act Release No. 91933 (May 19, 2021) (order determining whistleblower award claim (redacted)), https://www.sec.gov/rules/other/2021/34-91933.pdf.

with pharmaceutical company, Novartis. That case is currently pending before the US Court of Appeals for the District of Columbia, and the court's ruling will be an important one to watch.[16]

- **Constraints imposed by prior administration on SEC staff investigation powers reversed.** In February 2021, the SEC reversed a Trump-era decision to require SEC staff to obtain authority from the full commission or the Enforcement Division's director in order to issue document subpoenas and take sworn testimony. With this decision, senior SEC officials regained the delegated authority they had previously enjoyed to authorize staff to take these investigative steps.[17]

F. MULTI-JURISDICTIONAL DEVELOPMENTS AND TRENDS

Of the four corporate settlements in 2021, two of them involved multi-jurisdictional settlements, continuing the trend of the last few years of cooperation among various national authorities. This past year, those authorities cooperating with the United States included Brazil and the United Kingdom. In both these settlements, credit was given by DOJ and SEC for payments made to other authorities, in accordance with their "no piling on" policy.

In June 2021, UK-based engineering firm Amec Foster Wheeler entered into a global resolution with authorities in the United States, the United Kingdom, and Brazil, agreeing to payments of about $177 million.[18] The company was alleged to have paid approximately $1.1 million in bribes to win a $190 million contract from Petrobras. It entered into a three-year DPA with the DOJ and consented to a Cease-and-Desist Order with the SEC to resolve FCPA charges, and agreed to pay more than $41 million to US authorities.[19] The DOJ and SEC credited about $22 million that Amec Foster Wheeler paid to the UK Serious Fraud Office (SFO), as well as to the Brazil Controladoria-General da União (CGU)/Advocacia-General da União (AGU), and the Brazil Ministério Público Federal (MPF). Separately, Amec Foster Wheeler entered into a three-year DPA with the SFO for charges relating to the bribery in Brazil, as well as for improper payments in India, Malaysia, Nigeria, and Saudi Arabia, agreeing to penalties and disgorgement of about $142.7 million.[20] In light of the UK's interests in prosecuting a UK company, it is no surprise that it received the largest share of the payments made under the global resolution.

The second multi-jurisdictional settlement in 2021 was that of Credit Suisse, which in October agreed to pay $475 million to authorities in the United States and the United Kingdom to resolve charges that it had allegedly engaged in a fraud and money laundering scheme related to $2 billion in loans made to three Mozambican state-owned entities, from which at least $200 million in loan proceeds were used as kickbacks for Credit Suisse bankers and Mozambican government officials.[21] Credit Suisse agreed to a Cease-and-Desist Order with the SEC, with $34 million in disgorgement and interest and a penalty of $65 million, and a three-year DPA with the DOJ (in addition to resolving a wire fraud charge), with a $247 million fine, plus more than $10 million in criminal forfeiture. Credit Suisse also agreed to pay more than $200 million in penalties as part of a settlement with the UK Financial Conduct Authority (FCA). After the application of offset credit for payments to the SEC and the FCA, the company agreed to pay $175 million to the DOJ.[22]

In the last few years, there has been an increasing trend of coordination among national authorities to reach multi-jurisdictional settlements. Indeed, the US Strategy on Countering Corruption, discussed in Section III.A.1, includes a continued emphasis and priority given by the Biden administration to multilateral cooperation. Further, the OECD's 2021 Recommendation, issued in November, formally recommends continued cooperation and sharing of information among countries and encourages countries to coordinate investigations rather than prosecuting companies for the same conduct in multiple jurisdictions. For additional information, refer to Steptoe's blog post on this topic.

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16 *See Jane Does v. Sec. and Exec. Comm'n*, No. 21-1097 (D.C. Cir.).

17 SEC *Statement, Statement of Acting Chair Allison Herren Lee on Empowering Enforcement to Better Protect Investors* (Feb. 9, 2021), https://www.sec.gov/news/public-statement/lee-statement-empowering-enforcement-better-protect-investors.

18 DOJ Press Release, *Amec Foster Wheeler Energy Limited Resolves Foreign Bribery Case and Agrees to Pay Penalty of Over $18 Million* (June 25, 2021), https://www.justice.gov/usao-edny/pr/amec-foster-wheeler-energy-limited-resolves-foreign-bribery-case-and-agrees-pay-penalty.

19 Deferred Prosecution Agreement, *United States v. Amec Foster Wheeler Energy Ltd.*, No. 21-cr-298 (EDNY June 24, 2021), https://www.justice.gov/usao-edny/press-release/file/1406461/download.

20 Serious Fraud Office (SFO) Press Release, *SFO enters into £103m DPA with Amec Foster Wheeler Energy Limited* (July 2, 2021), https://www.sfo.gov.uk/2021/07/02/sfo-enters-into-103m-dpa-with-amec-foster-wheeler-energy-limited-as-part-of-global-resolution-with-us-and-brazilian-authorities/.

21 SEC Press Release, *Credit Suisse to Pay Nearly $475 Million to U.S. and U.K. Authorities to Resolve Charges in Connection with Mozambican Bond Offerings* (Oct. 19, 2021), https://www.sec.gov/news/press-release/2021-213.

22 Cease-and-Desist Order, *In re Credit Suisse Group AG*, https://www.sec.gov/litigation/admin/2021/33-11001.pdf.

Government Enforcement and Compliance Guidance

III.

Government Enforcement and Compliance Guidance

A. ENFORCEMENT POLICY

1. THE BIDEN ADMINISTRATION'S US STRATEGY ON COUNTERING CORRUPTION

In December 2021, the White House issued the United States Strategy on Countering Corruption (the Strategy).[23] The Strategy was issued pursuant to a June 3, 2021 National Security Study Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest (the NSSM).[24]

Although corruption has been linked to national security in the past, the NSSM's pronouncement that the fight against corruption represents a "core" national security interest, and the investing of responsibility for coordinating a strategy to deal with the issue in the National Security Council, elevated the linkage well beyond any previous statement or activity, and potentially opened the door to resources and initiatives that, without such linkage, would not have been available.

The Strategy announced by the White House has five so-called "pillars":

1. Modernizing, Coordinating and Resourcing the US Government Efforts to Better Fight Corruption.
2. Curbing Illicit Finance.
3. Holding Corrupt Actors Accountable.
4. Preserving and Strengthening the Multilateral Anti-Corruption Architecture.
5. Improving Diplomatic Engagement and Leveraging Foreign Assistance Resources to Advance Policy Objectives.

Each pillar delineates specific strategic objectives, or "lines of effort," which seek to integrate anti-corruption efforts into government policy-making across the board.

The Strategy is concerned about the effects of corruption on democracy, human rights and the rule of law, governance, and other conduct, particularly from a transnational rather than a purely domestic perspective. **Kleptocracy** (defined as "a government controlled by officials who use political power to appropriate the wealth of their nation," and can include state capture) receives significant attention, as does "**strategic corruption**," (defined as "when a government weaponizes corrupt practices as a tenet of its foreign policy"). The Strategy also focuses on transnational organized crime. The Strategy makes clear that **private sector actors are understood as playing a key role** in combating corruption, stating that the United States will seek to enlist the private sector as a "full-fledged partner in the fight against corruption," and that private sector actors are expected to play their part by, *inter alia*, engaging in robust self-regulation and development of compliance programs.

The Strategy details concerns about the effects of corruption, focusing on particular types of activities and actors, including various types of service providers and intermediaries, that may represent current systemic weaknesses or threats:

- Financial institutions and other financial actors involved in promoting money laundering and other illicit activities.
- High-value commodities trading and trafficking by corrupt elites and non-state armed groups.
- Real estate investment service providers.
- Shell companies and other opaque corporate structures.
- Under-regulated professional service providers and gatekeepers.
- Logistics and transportation providers.

23 *See* White House, *United States Strategy on Countering Corruption: Pursuant to the National Security Study Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest* (Dec. 2021), https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf.

24 Presidential Action, *Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest*, WHITE HOUSE (June 3, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/03/memorandum-on-establishing-the-fight-against-corruption-as-a-core-united-states-national-security-interest/.

- Authoritarian regimes and their proxies, including state-directed cross-border investments (the so-called "weaponization" of corruption).

From a private sector commercial perspective, the following "lines of effort" from the five pillars appear to be the most noteworthy:

- **FCPA and Related Law Enforcement**. The Strategy promises vigorous enforcement by the United States of the FCPA, anti-money laundering laws, and related legal authorities (including tax enforcement, kleptocracy asset recovery, and forfeitures).
  - It expresses an intent to do more to gather and share information, including through intelligence efforts that will receive increased prioritization in this area, increasing law enforcement resources, and other methods.
  - The use of cryptocurrency in connection with corruption is targeted for increased enforcement attention by the DOJ, through a newly established Task Force, the National Cryptocurrency Enforcement Team.
  - It also indicates an intention to work with partner governments to enforce foreign bribery laws and to enhance their ability to respond to evidence requests and to restrain and recover stolen assets.
- **New Rules to Combat Illicit Finance**. The Strategy, under this second pillar, highlights the likely emergence of a number of new regulatory reporting requirements in a variety of areas where deficiencies are perceived to exist:
  - Ensuring that regulations implementing the provisions of the Corporate Transparency Act (CTA) passed by the United States in January 2021 as part of the Anti-Money Laundering Act of 2020 (discussed further in Section V.A.1), issued in proposed form the day after the Strategy's release[25], result in the effective collection of beneficial ownership information on those controlling **anonymous shell companies**; requiring disclosure of beneficial ownership in government contracting; and increasing the resources available to the Treasury's Financial Crimes Enforcement Network (FinCEN).
  - Increasing transparency in **real estate transactions** by establishing additional reporting requirements (following the Strategy, an Advanced Notice of Proposed Rulemaking was issued by FinCEN).[26]
  - Expanding **gatekeeper (lawyers, accountants and trust and company service providers)** responsibilities, including by working with Congress as necessary to secure additional authority in this area, and **considering ways to increase penalties on gatekeepers** who facilitate corruption and money laundering by, for example, working with states to levy professional sanctions.
  - Prescribing minimum reporting standards for **investment advisors, and other types of equity funds, including private equity**.
  - Reviewing the risks posed by **digital assets** from a corruption perspective.
  - Developing rules to combat money laundering, terrorism finance, and other illicit activities through the trading in markets in **art and antiquities**.
  - Working with allies and partners to push key gatekeepers and facilitators to tighten ways in which corrupt actors move money, including in the **gold and natural resource** areas where key facilitators identified include **transportation, logistics, and construction industries**.
  - Working with domestic and international stakeholders to leverage increased global interest in **environmental, social, and governance investing** as part of broader discussions on gatekeeping, and encouraging **clean corporate governance**, including by improving organizational transparency in corporate decision making, board makeup, and executive compensation.

25 *See FinCEN Issues Proposed Rule for Beneficial Ownership Reporting to Counter Illicit Finance and Increase Transparency*, US TREASURY FIN. CRIMES ENF'T NETWORK (FINCEN) (Dec. 7, 2021), https://www.fincen.gov/news/news-releases/fincen-issues-proposed-rule-beneficial-ownership-reporting-counter-illicit.

26 Anti-Money Laundering Regulations for Real Estate Transactions, 86 Fed. Reg. 69589 (proposed Dec. 8, 2021).

- **More Integrated Efforts of Government**. In recent years, there has been an increase in the variety of tools used by government agencies to combat corruption. This includes the "No Safe Haven" visa denial policy, focused on the demand side, and Global Magnitsky sanctions targeting corrupt actors. This trend can be expected to increase as a result of the Strategy. Various agencies, including the Departments of Treasury, Commerce, and State, and the US Agency for International Development have established or are establishing cross-cutting anti-corruption teams to develop and support their initiatives.
- **The Demand Side**. The Strategy envisions working with Congress to criminalize the demand side of bribery for foreign public officials. Legislation to this effect has been introduced in recent congressional sessions, including the current one, but thus far has not been adopted. The Strategy also envisions the establishment of a pilot Kleptocracy Asset Recovery Rewards Program through the Treasury Department, and the continuation of the DOJ's Kleptocracy Asset Recovery program.[27]
- **Multilateralism and Cooperation**. The Strategy emphasizes the importance of strong multilateral engagement, in the Organization for Economic Co-operation and Development (OECD), United Nations, Organization of American States, and other institutions. In the defense sector, it envisions expanding NATO's Building Integrity Program to target corruption in finance, acquisition, and human resources function. It also calls for cooperation, not only among governments, but in addition through public-private partnerships with business and civil society, including investigative journalists.
- **Development Assistance and Diplomatic Engagement**. The Strategy aims to harness US development assistance resources in anti-corruption efforts, including proactively and reactively (when the US is confronted with so-called "strategic corruption" efforts by other countries). Corruption will be elevated as a diplomatic priority. Perhaps based on the recent Afghanistan experience, the Strategy also calls for improving security assistance and integrating anti-corruption considerations into military planning, analysis and operations. Companies involved in development and military assistance projects should be aware of the increased focus on corruption, while the increased diplomatic focus on this issue is potentially relevant to all companies doing business overseas.

Finally, the Strategy calls for annual progress reports to be made by federal departments and agencies, coordinated by the National Security Council, to the president.

The Strategy is also noteworthy for what it does **not** say. It does not, for example, identify any country by name, except when referencing existing pilot programs in certain countries. And yet, the various references to "strategic corruption" and state-sponsored activity leave little doubt that concerns about China and Russia have loomed large in the preparation of the strategy and the overall national security focus. References to migration and criminal groups reflect concerns over other parts of the world as well, including Central America.

Many of the implications of the Strategy will require time to emerge, some more than others. Foreign actors will be watching closely to see to what extent the nationalist strains underlying certain aspects of the strategy may politicize anti-corruption efforts. But some things are clear at this stage: The Strategy clearly portends more regulation of certain actors and activities, more enforcement of the FCPA and related laws, perhaps more legislation, and a major realignment of overseas assistance and diplomatic efforts. That said, among the implications for the private sector, these priorities and initiatives contained in the Strategy make it more critical than ever that companies have in place effective programs to prevent, detect and remediate corrupt practices within their organizations, and to develop and maintain those programs in the context of broader efforts to promote robust and transparent corporate governance.

27 *See* Foreign Extortion Prevention Act, H.R. 4737, 117th Cong. (1st Sess. 2021), https://www.congress.gov/bill/117th-congress/house-bill/4737?s=1&r=55.

2. DEPUTY ATTORNEY GENERAL LISA MONACO ON CORPORATE CRIME ENFORCEMENT

On October 28, 2021, Deputy Attorney General (DAG) Lisa Monaco outlined sweeping changes to the DOJ's prosecution of corporate crime, signaling a tougher stance on white collar crimes than the previous administration and a reversion to some prior enforcement policies. The key changes and initiatives announced were:

- **Cooperation Credit Requires Disclosure of All Relevant Facts as to All Individuals**. DAG Monaco stressed the importance of disclosing a complete list of individuals involved in any corporate misconduct, returning to prior guidance from a 2015 memorandum (known as the "Yates Memo") that premised cooperation credit on providing all relevant facts relating to the individuals responsible for the misconduct.[28] The Trump administration previously limited this disclosure requirement to include only information about individuals who were "substantially involved" in the misconduct, as opposed to all individuals that may have been involved in the misconduct.[29]

  DAG Monaco announced that this scaled-back approach was rescinded moving forward, and that companies must provide "all non-privileged information about individuals involved in or responsible for the misconduct at issue."[30] She explained that the previous guidance was "confusing" and allowed cooperating companies too much latitude with reporting requirements.[31] Further, DAG Monaco noted that DOJ's investigative team was "better situated" to determine the relevance and culpability of those individuals involved in corporate crime.[32]

- **Broad Scope of Prior Misconduct to be Considered in Corporate Resolutions**. In evaluating the type of resolution the DOJ deems appropriate in corporate white collar matters, including whether to agree to a deferred or non-prosecution agreement, Monaco indicated that the DOJ will consider all types of prior misconduct, regardless of whether the prior misconduct is related to the current issue under investigation.[33] A company's "record of misconduct," whether that be in a civil, criminal, or regulatory space, speaks directly to the company's "overall commitment to compliance programs."[34] In other words, any type of misconduct can signify a weak corporate culture that fails to sufficiently disincentivize crime, regardless of whether the misconduct took place at a state or local level, or even in a foreign country. Although not all instances of prior misconduct are relevant, prosecutors "need to start by assuming all prior misconduct is potentially relevant."[35]

- **Corporate Monitors Endorsed as Important Tool for DOJ**. DAG Monaco endorsed corporate monitors as an available tool to enforce and verify compliance under a DPA or NPA: "To the extent that prior Justice Department guidance suggested that corporate monitors are disfavored or are the exception, I am rescinding that guidance."[36] Regarding the selection of monitors, DAG Monaco announced that the DOJ will study how corporate monitors are selected and whether to standardize the process across all DOJ divisions and offices.[37]

- **Scrutiny of Companies Under DPAs/NPAs**. DOJ will scrutinize whether companies under the terms of an NPA or DPA take those obligations seriously. DAG Monaco stressed that there will be "serious consequences" for a company that fails to comply with the terms of a negotiated DPA or NPA.[38]

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28 *See* Memorandum from Deputy Attorney General Lisa Monaco, *Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies*, DOJ (Oct. 28, 2021), https://www.justice.gov/dag/page/file/1445106/download.

29 DOJ Press Release, *Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime* (Oct. 28, 2021), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute.

30 *Id.*

31 *Id.*

32 *Id.*

33 *See* Memorandum from Deputy Attorney General Lisa Monaco, *Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies*, DOJ (Oct. 28, 2021), https://www.justice.gov/dag/page/file/1445106/download.

34 DOJ Press Release, *Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime* (Oct. 28, 2021), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute.

35 *Id.*

36 *Id.*

37 *Id.*

38 *Id.*

- **Corporate Crime Advisory Group (CCAG)**. This group will evaluate a variety of issues previewed in her speech, including monitorship selection, recidivism, and NPA/DPA compliance. The CCAG will also assist the DOJ in prioritizing rigorous enforcement and individual accountability, in addition to developing recommendations and proposing revisions to the DOJ's policies on corporate criminal enforcement.[39]

3. LATIN AMERICA-SPECIFIC POLICY INITIATIVES

2021 saw several significant US policy developments relating to anti-corruption enforcement and Latin America (LATAM):

- **DOJ Anticorruption Task Force**. The DOJ has established an Anticorruption Task Force focused on Central America as "a key component of the Vice President's work to address the root causes of migration."[40]
  - The task force includes representatives of the FCPA Unit of the DOJ's Fraud Section; the Kleptocracy Asset Recovery Initiative in the International Unit of the Money Laundering and Asset Recovery Section (MLARS); and the Narcotic and Dangerous Drug Section (NDDS).
  - The Task Force will also be supported by special agents of the FBI's International Corruption Unit, the US Drug Enforcement Administration, and the Department of Homeland Security.
- **Northern Triangle Tip Line**. Related to the Anticorruption Task Force, the DOJ established a dedicated whistleblower hotline for anyone who wishes to report fraud or corruption related to the Northern Triangle – comprised of El Salvador, Guatemala, and Honduras – directly to the FBI, in English or Spanish. The Task Force will evaluate tips for jurisdictional links to the United States, such as use of the US financial system, permitting the Task Force to investigate, to prosecute, and, where appropriate, to forfeit and return stolen assets to the people of the Northern Triangle countries.[41]

Practice Tip: The current administration has made significant policy announcements, backed up by specific resource commitments, relating to the investigation and prosecution of corruption-related crimes involving LATAM as part of a broader initiative identifying the fight against corruption as a national security interest as well as an issue relevant to immigration policy goals. These measures present a strong potential for enhanced enforcement risk for companies doing business in LATAM.

- **Engel List**. The Department of State published the "Engel List," a list of alleged corrupt and antidemocratic actors from the Northern Triangle countries. The list was compiled based on both classified and non-classified information of individuals who have knowingly "participated in actions that affect democratic processes or institutions," "engaged in significant acts of corruption," or "engaged in obstructing investigations of such acts of corruption, including those related to government contracts, bribery and extortion, facilitation payments, as well as money laundering, violence, harassment, and intimidation of investigators of governmental and non-governmental corruption."[42]

Practice Tip: The fact that an individual is included on the Engel List does not render dealings with those individuals by private sector actors unlawful, but as a matter of good practice it is important that risk assessment, enhanced due diligence, and remediation measures be put in place for companies whose business puts them into contact with these persons.

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39 *Id.*

40 DOJ Press Release, *Justice Department Anticorruption Task Force Launches New Measures to Combat Corruption in Central America* (Oct. 15, 2021), https://www.justice.gov/opa/pr/justice-department-anticorruption-task-force-launches-new-measures-combat-corruption-central.

41 *Id.*

42 *See* Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, § 353(b), 134 Stat. 1182, 3130 (2020).

B. COMPLIANCE GUIDANCE

1. DOJ/SEC GUIDANCE

The DOJ and SEC most recently updated their guidance related to corporate anti-corruption compliance programs in 2020, by way of certain revisions to the DOJ/SEC FCPA Resource Guide and, in the case of DOJ specifically, that agency's Evaluation of Corporate Compliance Programs guidance document. Key points from those revisions are discussed in our 2020 FCPA YIR.

However, while neither DOJ nor SEC issued new compliance guidance in 2021, some of the DOJ enforcement policies announced by DAG Lisa Monaco in her October 2021 speech are directly relevant to corporate compliance programs. Specifically:

- As discussed above, Monaco indicated the DOJ will consider all types of prior misconduct in determining the appropriate resolution in a corporate white-collar case, as indicative of the company's "overall commitment to compliance programs." In any given pending matter there will almost inevitably be significant discussion and negotiation over which "prior misconduct" should be considered in reaching a particular resolution in a particular case. From a forward-looking, anti-corruption compliance perspective, however, this enforcement policy reinforces what compliance best practices teach. An effective anti-corruption compliance program is difficult to achieve in a vacuum, but instead will be strongest within the context of broader efforts by a company to rigorously assess and mitigate a company's compliance risks over time, and to build and maintain a strong corporate culture around ethics and integrity. Any significant compliance lapses, in whatever area, should give rise to root cause analysis and consideration of their potential implications for other compliance areas. Similarly, the broader implications of any internal control weaknesses or deficiencies that are identified in such matters should be considered. If the recent policy pronouncements hold true, the demands placed on companies seeking a favorable resolution in a white-collar matter will be greater than ever when it comes to demonstrating this type of robust and well-rounded approach to compliance.
- Also, as discussed above, Monaco stressed that a company seeking cooperation credit will be required to disclose all relevant facts regarding all involved individuals, and not only those who the company determines were "substantially involved." Putting aside the issue of cooperation credit, there is little doubt that, from a compliance perspective, understanding the facts with respect to all individuals involved is inherent to a robust investigation and remediation process. This does not—or should not—mean that companies and their counsel must "boil the ocean." What it does mean, however, is that a properly conducted investigation will, in addition to identifying any individuals who were knowingly involved in misconduct, also identify those individuals who missed warning signs, did not raise their hand in the face of misconduct, did not follow procedures that could have caught the misconduct, or otherwise fell short of a company's compliance program standards. Only by understanding these types of issues when they arise can a company design appropriate remediation that includes, where appropriate, not only discipline for wrongdoers but also training, enhanced messaging around ethics and compliance, refinement or augmentation of policies or procedures, and other types of improvements.

Although the OECD updated its compliance program guidance in late 2021 as part of its new anti-corruption Recommendation (see Sections IV and VII.E), the guidance is largely consistent with existing US enforcement practice and expectations and thus is not anticipated to result in material changes.

2. DOJ OPINION

On January 21, 2022, the DOJ issued a rare FCPA Opinion Procedure Release,[43] only the second since 2014.[44] While the facts presented were quite unusual—a ship, with its captain and crew, detained without explanation in the waters of a foreign country, and facing an ambiguous demand for payment in order to be released—it offers more broadly applicable lessons.

Facts Presented to DOJ

The facts at issue arose from detention by the naval forces of a foreign country (Country A) of a maritime vessel, including the captain and crew, owned by a US-based company (the "Requester") and the accompanying demand for payment of $175,000 in cash from a third party purporting to act on behalf of the Country A

43 DOJ Opinion Procedure Release, Foreign Corrupt Practices Act Review, No. 22-01 (Jan. 21, 2022).

44 As discussed in Steptoe's 2020 FCPA YIR, DOJ released Opinion Release No. 20-01 on August 14, 2020.

Navy (the "Third-Party Intermediary").[45] The Requester, concerned that the Third-Party Intermediary intended to pass on the payment being demanded to one or more Country A government officials,[46] decided to seek an opinion from the DOJ. Resolution of the matter was urgent, as the detained captain was suffering from serious medical conditions putting his health and safety at significant risk.[47]

DOJ Conclusion

The DOJ determined that it would not bring an enforcement action based on the proposed $175,000 payment because the Requester would not be making the payment (1) "corruptly" or (2) "to obtain or retain business" as contemplated by the FCPA.[48] These elements have only rarely been interpreted by DOJ in the context of the Opinion Procedure, or for that matter by the federal courts in a litigated FCPA case.

DOJ Reasoning

In finding that the Requester's primary reason for payment was to avoid imminent and potentially serious harm to the captain and crew of the Requester vessel rather than being motivated by corrupt intent, the DOJ relied on *United States v. Kozeny*,[49] for that court's assertions that "an individual who is forced to make payment on threat of injury or death would not be liable under the FCPA" and that "Federal criminal law provides that actions taken under duress do not ordinarily constitute crimes."[50] In *Kozeny*, the court distinguished between viable FCPA defenses involving "true extortion" and "duress" on the one hand and those situations in which "the payer could have turned his back and walked away" on the other.[51] The DOJ found that Requester's situation fell under the first category of cases contemplated by *Kozeny*.[52] At the same time, the DOJ stressed that the Requester's situation was distinct from others where a company is threatened with severe economic harm or financial consequences in the absence of payment, which might lead to liability under the FCPA.[53]

In finding that the payment was not motivated by an intent to obtain or retain business, the DOJ relied on the Requester's attestations that it had no ongoing or anticipated business with Country A and that the Requester was only in Country A's waters due to an error.[54] This error, which resulted in Requester mistakenly anchoring its vessel in Country A's waters, may have violated Country A's regulations and laws governing shipping and anchoring locations and triggered the payment demand by the Third-Party Intermediary,[55] but it did not amount to a "business purpose" associated with payment.[56] It has been accepted as settled law since the Fifth Circuit's holding in *United States v. Kay* that "Congress intended for the FCPA to apply broadly to payments intended to assist the payor, either directly or indirectly, in obtaining or retaining business for some person."[57] The Requester's circumstances, however, fell outside of that admittedly broad scope.

The Requester's efforts to avoid making the payment provided further support for the DOJ's conclusion that there was no corrupt intent. The Requester had made every effort to obtain written, official documentation from the Country A government setting forth the alleged violation and appropriate fine, and had been exceedingly transparent, including by advising US authorities of the situation and requesting that they intervene and notify the foreign government of the issue.[58]

45 DOJ Opinion Procedure Release at 1-2.

46 *Id.* at 2.

47 *Id.*

48 *Id.*

49 582 F. Supp. 2d 535 (S.D.N.Y. 2008).

50 DOJ Opinion Procedure Release at 3 (citing *United States v. Kozeny,* 582 F. Supp. 2d 535, 540 n.31 (S.D.N.Y. 2008).

51 *Kozeny*, 582 F. Supp. 2d at 540.

52 DOJ Opinion Procedure Release at 1, 3.

53 *Id.* at 4.

54 *Id.* at 3.

55 *Id.*

56 *Id.* at 4.

57 *United States v. Kay*, 359 F.3d 738, 755 (5th Cir. 2004).

58 DOJ Opinion Procedure Release at 3.

Expedited Review by DOJ

Finally, it is worth noting the speed with which the DOJ provided its opinion in this case. This request was made on October 19 and 20, 2021, and in a highly unusual move, only one day later, on October 21, the DOJ issued a short preliminary opinion stating it did not intend to take enforcement action under the FCPA's anti-bribery provisions in response to the contemplated payment. Following the DOJ's preliminary opinion, the Requester provided additional information to the DOJ, and the DOJ issued the Release on January 21, 2022. The DOJ explained that it provided the short preliminary opinion due to the unusual and exigent circumstances at issue, including the risk of imminent harm to the health and well-being of the individuals noted in the request.[59]

Takeaways

- A duress defense to the FCPA must implicate real risk to life or individual health and safety. Conversely, threats of economic harm, even if severe, generally will not support such a defense.
- The "obtain or retain business" element of the FCPA is very broad, but is not without its limits. This element of the FCPA has been found to be ambiguous on its face but, when interpreted in light of its legislative history, to be very broad indeed. This is the teaching of the Fifth Circuit's seminal 2004 decision in *United States v. Kay*. That said, there are circumstances in which a payment to a foreign official will not be improper because it lacks this statutorily-required purpose. What is not clear from this release is how much the accidental character of the Requestor's entry into the waters of Country A influenced the DOJ's position here.
- Taking steps to achieve transparency is often an important compliance step. While the exact parameters of what type of transparency to seek will depend on the facts of the particular situation, the steps taken by the Requestor (including its efforts to determine the legal basis for the payment request) represent best practices for addressing ambiguous situations where a payment is requested under circumstances presenting red flags suggesting that the purpose may be for the personal benefit of a foreign government official or officials.
- The amount of a payment is relevant, but not determinative. The payment at issue here – $175,000 – was large, but that did not prevent DOJ from concluding it would not prosecute in this instance. While the size of a payment can itself be evidence of corrupt intent, the result in this release underscores that there is no *per se* amount that is either illegal or, conversely, permissible. The amount is a critical fact, but one that has to be analyzed in the context of the overall facts and application of the statutory elements to those facts.

Overview of the DOJ Opinion Procedure

The FCPA Opinion Procedure enables issuers and domestic concerns to obtain the DOJ's opinion as to whether certain specific, prospective—not hypothetical—conduct conforms with the DOJ's present enforcement policy regarding the anti-bribery provisions of the FCPA.[60] If an enforcement action is brought against a requester following an opinion finding the requester's conduct is in conformity with the DOJ's enforcement policy, the opinion creates a rebuttable presumption that the requester's conduct, as specified in the opinion, is in compliance with the anti-bribery provisions of the FCPA.[61] DOJ FCPA opinions are not precedential, and are not binding on any agency except the DOJ. Moreover, they can be relied on only to the extent that the disclosure of facts and circumstances in the request is accurate and complete.[62] As FCPA enforcement has matured, and other guidance has emerged, the use of the Opinion Procedure by companies—never that robust to begin with—has declined significantly.

59 *Id.* at 1.

60 28 CFR Part 80.1.

61 28 CFR Part 80.10.

62 *See* 28 CFR Part 80.11.

OECD Guidance

IV.

OECD Guidance

On November 26, 2021, and as further discussed below in Section VII.E, the OECD Council issued a Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions, which includes an annex entitled "Good Practice Guidance on Internal Controls, Ethics and Compliance," updating the OECD's prior guidance on these topics. While not binding, this guidance for private sector actors is worth understanding given that, historically, the OECD's guidance in this arena has been highly influential in jurisdictions around the world, including the United States, and given that the ever-greater global convergence of anti-corruption compliance standards foreshadows what multinational firms may be seeing, at least from the OECD countries where they do business.

Significant Legal Developments

V.

Significant Legal Developments

A. LEGISLATION

1. BENEFICIAL OWNERSHIP REQUIREMENTS (CORPORATE TRANSPARENCY ACT)

Under the Corporate Transparency Act (CTA), enacted as part of the National Defense Authorization Act (NDAA) on January 1, 2021, Congress put in place beneficial ownership reporting requirements for certain "reporting companies." The purpose of this legislation is to limit the use of shell companies to conceal ownership interests in order to facilitate money laundering, terrorism financing, human and drug trafficking, foreign corruption, and other illicit activity.[63] Companies that violate the CTA face fines up to $10,000 and imprisonment for up to two years.[64]

This legislation represented a significant change in the law governing corporate formation in the United States given that, as noted by FinCEN, "[f]ew jurisdictions in the United States require legal entities to disclose information about their beneficial owners—that is, the people who actually own or control a company—or the persons forming them."[65]

> ***Practice Tip:*** While companies that are already highly regulated under US law as well as large companies with operations in the US are exempted from the new beneficial ownership reporting requirements, for covered entities, the legislation represents a significant change that the US Treasury views as critical for its "strategy to combat corruption [and] to make our economy—and the global economy—stronger, fairer, and safer from criminals and national security threats."[66]

The CTA requires "reporting companies" to file identifying information regarding their beneficial owner(s) with FinCEN, in accordance with regulations promulgated by that agency.[67]

- **Reporting companies.** The definition of corporate entities subject to the reporting requirement is broad, and includes:[68]
  - Corporations.
  - Limited liability companies, and similar US entities.
  - Foreign companies registered to do business in the United States.
- **Exempted companies.** The CTA exempts from the reporting requirement a number of different types of companies. The exempted entities generally are already subject to ownership reporting requirements, or were otherwise deemed to pose a lesser risk for purposes of the Act, and include, among others:
  - Publicly-traded companies.
  - Banks, credit unions, and savings and loan companies.
  - Insurance companies and insurance producers.
  - Investment advisors.
  - Public accounting firms registered under Sarbanes-Oxley.
  - Registered broker-dealers.
  - Non-profits.

63 2021 NDAA § 6402(b). *See* also 2020 FCPA YIR.

64 § 6403(c)(3)(A). Note, however, that the CTA includes a safe harbor from liability if the person who submitted inaccurate information voluntarily submits corrections within 90 days. § 6403(c)(3)(C).

65 *Fact Sheet: Beneficial Ownership Information Reporting Notice of Proposed Rulemaking (NPRM)*, US TREASURY FIN. CRIMES ENF'T NETWORK (FINCEN) (Dec. 7, 2021), https://www.fincen.gov/news/news-releases/fact-sheet-beneficial-ownership-information-reporting-notice-proposed-rulemaking.

66 *Id.*

67 2021 NDAA § 6403.

68 *Id.*

- Large companies operating in the US, denominated "large operating companies" (and defined as companies that employ more than 20 employees on a full-time basis in the US, have an operating presence at a physical location in the US, and have filed income tax returns in the US demonstrating more than $5 million in gross receipts or sales).[69]
- Subsidiaries of certain exempted entities.[70]

◊ **What must be reported.** Covered companies must identify each of their beneficial owners by disclosing the beneficial owner's:

- Full legal name.
- Date of birth.
- Current residential or business address.
- A unique identifying number from an acceptable identification document or FinCEN identifier.[71]

◊ **Beneficial owners.** A "beneficial owner" includes any individual who, directly or indirectly:

- Exercises substantial control over the entity.
- Owns or controls not less than 25% equity in the entity.[72]

Excluded from the definition of beneficial owners are: (1) minor children, provided that parent or guardian information is reported; (2) individuals acting as intermediaries, custodians, or agents on behalf of another; (3) any individual acting solely as an employee of a reporting company and whose control is derived solely from employment; (4) any individual whose only interest in a reporting company is through a right of inheritance; and (5) a creditor of a reporting company who does not otherwise qualify as a beneficial owner.[73]

In December 2021, FinCEN issued a Notice of Proposed Rulemaking (the Proposed Rule) regarding the implementation of the reporting requirements described above.[74] The comment period for the Proposed Rule ended on February 7, 2022.[75]

Under the CTA, reports filed by beneficial owners will not be publicly available (*i.e.*, the registry will not be "open"), but will only be available to law enforcement and other authorities. In this respect, the CTA is narrower than some other countries' beneficial ownership rules.

2. US GOVERNMENT SUBPOENA POWER RE FOREIGN BANK RECORDS (ANTI-MONEY LAUNDERING ACT)

Besides the CTA, the NDAA also contained the Anti-Money Laundering Act of 2020 (AMLA).[76] Section 6308 of the AMLA expands on existing authority granted to the US Treasury and the DOJ under 31 U.S.C § 5318(k) to issue subpoenas to non-US banks that maintain correspondent accounts in the United States. The government's subpoena power over non-US bank records was previously limited to records of correspondent accounts held in the United States; records located abroad had to be obtained through the Mutual Legal Assistance Treaty process, a process which can be cumbersome and is not available with respect to all countries. Section 6308 provides the government with authority to seek both records related to the correspondent account and "any account at the foreign bank," including those maintained abroad.[77] This grant of authority is limited only by the requirement that the subpoena relate to a US criminal investigation, an investigation into violations of the Bank Secrecy Act, a civil forfeiture action, or an investigation pursuant to 31 U.S.C § 5318A.[78]

Practice Tip: Along with other legislative measures enacted in 2021, the enhanced subpoena powers regarding non-US bank records provide another tool for the US government to investigate and prosecute crimes that involve money laundering, including international corruption.

69 § 6403(a)(a)(11)(B).

70 *Id.*

71 2021 NDAA § 6403.

72 § 6403(a)(a)(3)(A). Note that "substantial control" is not defined. *See* NDAA, § 6403(a)(a)(3)(A).

73 § 6403(a)(a)(3)(B).

74 *Financial Crimes Enforcement Network, Beneficial Ownership Information Reporting Requirements, Notice of Proposed Rulemaking*, 86 Fed. Reg. 69,920 (Dec. 8, 2021) (proposed Dec. 7, 2021).

75 *Id.*

76 2021 NDAA § 6301 *et seq.*

77 § 6308(a)(3)(A).

78 *Id.*

B. JUDICIAL DECISIONS

1. EXTRATERRITORIALITY

2021 brought additional judicial decisions defining the government's jurisdictional reach in FCPA cases. By way of background, in a 2018 decision, *United States v. Hoskins*, as detailed in the 2018 FCPA YIR, the Second Circuit held that a foreign national who did not act as an employee, officer, director or agent of domestic concern could not be held criminally liable for aiding and abetting or conspiring to violate the FCPA unless the alleged conduct took place within the territory of the United States.[79] Put another way, the court rejected the notion that a person not directly covered by the FCPA's substantive anti-bribery provisions could nonetheless be liable under conspiracy, or aiding and abetting, principles.[80]

Last year, adopting the reasoning in *Hoskins*, the District Court for the Southern District of Texas held in *United States v. Rafoi-Bleuler* that the FCPA cannot apply extraterritorially to a foreign national who has neither engaged in conduct in the US nor acted as an officer, director, employee or agent of domestic concern.[81]

Practice Tip: Some federal courts have been receptive to arguments that there are important limitations to the US government's ability to exercise extraterritorial jurisdiction over a certain category of persons, *i.e.*, non-US persons who have acted entirely outside the US. When facing a government investigation or prosecution, a careful analysis should be undertaken of whether the elements for the exercise of such jurisdiction have been met.

2. AGENCY

Hoskins and Rafoi-Bleuler are also significant for the potential implications on the government's ability to establish "agency" under the FCPA. In both cases, the defendants are non-US persons who had not, as required by the literal terms of the FCPA provision directly applicable to such individuals, engaged in their conduct while in the United States.[82] This meant that the government was required to establish an agency relationship that would obviate the need to satisfy that territoriality requirement, permitting jurisdiction to be asserted.

Hoskins. In 2019, a jury found Hoskins guilty under the FCPA after the government presented evidence that Hoskins, a former senior vice president for the Asia Region of French multinational firm Alstom Holdings, S.A. (Alstom), assisted alleged co-conspirators, Frederic Pierucci, a former executive with Alstom Power Inc. (API), a Connecticut-based subsidiary of Alstom, David Rothschild, a former vice president of regional sales with API, and William Pomponi, who held the same title, in hiring sham consultants to bribe officials of an Indonesian state-owned electricity company to obtain a $118 million contract for API.[83] The government's argument was that, even though Hoskins was employed by the parent company, a non-US entity, he nevertheless acted as an agent of the US subsidiary.

As detailed in the 2020 FCPA YIR, the District Court of Connecticut subsequently overturned Hoskins's conviction,[84] holding that although the government introduced evidence that API "both (1) controlled the hiring of consultants…and (2) gave Hoskins instructions, which he followed," the evidence was insufficient to prove that Hoskins "acted subject to API's control such that [he] was an agent of API."[85]

79 *United States v. Hoskins*, 902 F.3d 69, 96 (2d Cir. 2018).

80 *Cf. A Resource Guide to the US Foreign Corrupt Practices Act*, DOJ CRIM. DIV. & SEC ENF'T DIV. 35-36 (2d ed. July 2020), https://www.justice.gov/criminal-fraud/file/1292051/download. https://www.justice.gov/criminal-fraud/file/1292051/download. ("A foreign company or individual may be held liable for aiding and abetting an FCPA violation or for conspiring to violate the FCPA, even if the foreign company or individual did not take any act in furtherance of the corrupt payment while in the territory of the United States. In conspiracy cases, the United States generally has jurisdiction over all the conspirators where at least one conspirator is an issuer, domestic concern, or commits a reasonably foreseeable overt act within the United States." (citations omitted)).

81 *United States. v. Rafoi-Bleuler*, No. 4:17-cr-00514 (S.D. Tex. Nov. 12, 2021). Rafoi-Bleuler was also noted in the 2019 FCPA YIR.

82 15 U.S.C. 78dd-3.

83 Hoskins' conviction was covered at length in the 2019 FCPA YIR.

84 *United States v. Hoskins*, No. 3:12-cr-238, 2020 WL 914302 (D. Conn. Feb. 26, 2020).

85 *Id.* at *7.

The government appealed, arguing before the Second Circuit in August 2021 that it had presented enough evidence at trial to show that Hoskins was an agent of API and that the decision as the agency relationship therefore was appropriate for the jury to decide.[86] Attorneys for Hoskins countered, *inter alia*, that there was insufficient evidence as a matter of law to establish a principal-agent relationship because API had no authority to fire, demote, or reassign Hoskins, or to make decisions affecting his compensation.[87]

The Second Circuit's decision in *Hoskins* is pending. A decision to affirm would saddle the government—at least in the Second Circuit—with a clear burden for establishing a relevant agency relationship in pursuing foreign nationals whose conduct occurred abroad.

> ***Practice Tip:*** The FCPA's anti-bribery provisions specifically apply to, among others, "agents" of corporate entities subject to the FCPA. Thus, the legal principles underlying the principal-agent relationship can play an important role in FCPA matters, including with respect to liability as between corporate entities and third-party service providers, employees of different corporate entities within the same corporate family, and parent and subsidiary corporate entities. When analyzing potential liability in such cases, it is important to understand these principles and current jurisprudence applying them.

Rafoi-Bleuler. The government argued that Rafoi-Bleuler's agency relationship was established through her role as an asset manager responsible for laundering proceeds of an alleged bribery scheme to obtain and extend contracts from the Venezuela state-owned oil company Petróleos de Venezuela S.A. (PDVSA).[88] Rafoi-Bleuler argued that the services she provided to her alleged co-conspirators were "professional" services as opposed to those performed pursuant to an "agency" relationship, and that the term "agent" as interpreted by the government is unconstitutionally vague.[89]

The district court found that the government failed to provide evidence sufficient to establish that Rafoi-Bleuler acted as an agent, noting that agency cannot merely be alleged, rather "[a]s a matter of law, [agency] requires undisputed evidence of mutual assent and control over the details of the person and agency, such that the principal controls the details over the assignment. Absent direct or undisputed evidence, an agency does not exist."[90] The court also suggested that it found Rafoi-Bleuler's argument regarding vagueness to be persuasive, observing that "no court has interpreted the statute or rendered a judicial decision that fairly discloses the manner in which the term may be applied to establish jurisdiction."[91]

On December 7, 2021, the government notified the Fifth Circuit that it intends to appeal *Rafoi-Bleuler*, suggesting that the government will continue to pursue a broad interpretation of its jurisdiction under the FCPA.

> ***Practice Tip:*** From a corporate compliance perspective, and despite certain challenges the DOJ has encountered in the cases discussed here, it is important to understand that the FCPA's statutory language supports a broad exercise of extraterritorial jurisdiction, and that the DOJ will interpret those provisions as expansively as possible. Employees of companies subject to the FCPA, including employees who are neither located in the US nor are US nationals, should be made aware that bribery of an official outside of the US can trigger not only corporate but also individual liability. The same is true in many cases for foreign third-party business partners of, or service providers for, such companies.

86 Stewart Bishop, *Feds Tell 2nd Circ. Alstom Exec's FCPA Acquittal was Faulty*, Law360 (Aug. 17, 2021), https://www.law360.com/articles/1413592/feds-tell-2nd-circ-alstom-exec-s-fcpa-acquittal-was-faulty.

87 *Id.*

88 *Memorandum Opinion and Order, United States. v. Rafoi-Bleuler*, No. 4:17-cr-00514 (S.D. Tex. Nov. 12, 2021) at 7-8.

89 *Id.* at 6.

90 *Id.* at 15 (citations omitted).

91 *Id.* at 21-22.

3. EXTRADITION

As described in the 2015 FCPA YIR, in July 2015, a Norwegian court imposed custodial sentences on four former executives of Yara International ASA convicted of paying $8 million in bribes to officials in India and Libya. Former Chief Legal Officer Kendrick Wallace, a US citizen, received a two-and-a-half-year sentence. In 2017, a Norwegian appeals court revised his sentence upward to seven years.[92]

In March 2021, the US government on behalf of Norway filed a complaint pursuant to 18 U.S.C. § 3181 et seq. in the Middle District of Florida seeking the extradition of Wallace from the United States to Norway. In June 2021, the court denied the extradition request on statute of limitations grounds.[93] Specifically, the court held that 18 U.S.C. § 3282(a), the applicable five-year statute of limitations in the United States, barred Wallace's extradition because he was indicted in 2014 on the basis of conduct that occurred in 2007.[94] While the US government also argued that the statute of limitations was tolled by the Norwegian government's efforts to obtain evidence through Mutual Legal Assistance Treaty requests, the court found an insufficient showing to allow it to find "that it reasonably appears, or reasonably appeared at the time [each] request was made, that such evidence [of the offense] is, or was, in such foreign country."[95]

4. OTHER JUDICIAL DEVELOPMENTS

Ng "Roger" Chong Hwa (1MDB) – Efforts to Dismiss Indictment Fail. As reported in the 2018 FCPA YIR, in October 2018 Ng "Roger" Chong Hwa was indicted for conspiring to violate the FCPA for his alleged participation in a scheme to bribe Malaysian and Abu Dhabi government officials to retain business for Goldman Sachs, as well as to circumvent the internal accounting controls of Goldman Sachs, which underwrote more than $6 billion in funds from Malaysia's state-owned investment fund, 1Malaysia Development Berhad (1MDB).[96] Ng was eventually extradited to face his charges in the Eastern District of New York.

In September 2021, the district court rejected Ng's motion to dismiss his indictment. Ng had argued, *inter alia*, that the indictment failed to allege that he conspired to circumvent internal accounting controls as contemplated by the FCPA. Specifically, he argued that the FCPA's internal accounting control provision applies only to the transactions and assets of an "issuer," but the indictment alleges bribes that were paid with 1MDB rather than Goldman Sachs funds.[97]

This argument was unavailing. The court held that the indictment contained sufficient allegations relating to Goldman Sachs's internal accounting controls because the indictment alleged that Goldman Sachs assets were used to purchase the bonds at issue and that Ng conspired to conceal information from the Goldman Sachs's Compliance Group and the Intelligence Group—which were responsible for the company's internal accounting controls—in order to secure the bond deals.[98] The court also found sufficient the allegation that the funds obtained via the bond transaction were used in the alleged bribery scheme.[99] It noted that "the relevant transaction and use of assets are the Goldman Sachs Group's purchase of the bonds with its own assets," which the indictment alleges would not have been authorized if not for Ng's efforts to circumvent Goldman Sachs's internal controls.[100]

Trial is set to begin in February 2022.

92 *Former Yara Legal Chief Sentenced to 7 Years for Corruption*, *Reuters* (Jan. 17, 2017), https://www.reuters.com/article/yara-intl-corruption/update-1-former-yara-legal-chief-sentenced-to-7-years-for-corruption-idUKL5N1F74L2.

93 *Matter of Extradition of Wallace*, No. 8:21-MJ-1246, 2021 WL 2401906 (M.D. Fla. June 11, 2021).

94 *Id.* at 8.

95 *Id.* citing 18 U.S.C. § 3292(a).

96 *United States v. Low Taek Jho and Ng Chong Hwa*, No. 1:18-cr-00538 (E.D.N.Y. Oct. 3, 2018).

97 *United States v. Low Taek Jho and Ng Chong Hwa*, No. 1:18-cr-00538 (E.D.N.Y. Sept. 10, 2021).

98 *Id.* at 62.

99 *Id.*

100 *Id. at 63.*

Joseph Baptiste and Roger Richard Boncy – First Circuit Affirmance of Grant of New Trial. As noted in the 2020 FCPA YIR, in June 2019, retired US Army Colonel Joseph Baptiste and former Haitian Ambassador Roger Richard Boncy were both convicted of one count of conspiracy to violate the FCPA and the Travel Act.[101] Baptiste was also convicted of one count of violating the Travel Act and one count of conspiracy to commit money laundering.[102] Both Boncy and Baptiste were subsequently granted a new trial based on ineffective assistance provided by Baptiste's attorney.[103] The government appealed this decision. In August 2021, the US Court of Appeals for the First Circuit affirmed the district court's decision.[104]

On appeal, the government did not contest the district court's finding of ineffective counsel, including findings that defense counsel: (1) raised an entrapment defense without a factual basis; (2) failed to challenge a photo of cash sent from Baptiste's phone that Baptiste claimed represented bonuses for staff rather than funds for bribing Haitian officials; (3) did not contest agent testimony labeling ambiguous language used by Baptiste as code for bribes (*e.g.*, "tips," "tak[ing] care of...people on the ground," "leeway," "unforeseen expenses," "something," "anything," "stuff on the table," "social programs" and "Christmas bonuses"); and (4) failed to call witnesses who would have testified to Baptiste's favorable reputation with Haitian officials and legal political conduct.[105] Rather, the government argued that the district court should have found there was no prejudice because the evidence of guilt was "overwhelming".[106]

Rejecting this argument, the district court held that while "strong evidence…is a factor in the prejudice analysis…it is not the be-all and end-all, for (after all) the chief focus remains on the fundamental fairness of the proceeding."[107]

Whether the government will seek a new trial, and if so, the setting of a schedule for such trial, remain pending.

101 DOJ Press Release, *Two Businessmen Convicted of International Bribery Offenses* (June 20, 2019), https://www.justice.gov/opa/pr/two-businessmen-convicted-international-bribery-offenses-0.

102 *United States v. Baptiste*, No. 1:17-cr-10305, Dkt. No. 286 (D. Mass. Mar. 11, 2020).

103 *United States v. Baptiste*, No. 1:17-cr-10305, 2020 WL 1169402 (D. Mass. Mar. 11, 2020).

104 *United States v. Baptiste*, 8 F.4th 30, 39 (1st Cir. 2021).

105 *Id.* at 39-40.

106 *Id.* at 37.

107 *Id.* (internal quotations and citations omitted).

World Bank and Other International Financial Institutions

VI.

World Bank and Other International Financial Institutions

International Financial Institutions (IFIs) continued to investigate and sanction companies and individuals engaged in fraud, corruption, and other misconduct in projects financed by those entities worldwide. The World Bank Group, with the largest and oldest sanctions system, led the charge once again.

A. THE WORLD BANK GROUP

Integrity Vice Presidency (INT). In the second year of a global pandemic, INT received a significantly higher number of complaints in FY2021 compared to FY2020. Despite that increase, the number of investigations INT initiated decreased. In FY2021, INT received 4,311 complaints, compared to 2,598 in FY2020, leading to 347 preliminary investigations, resulting in 40 new external investigations, compared to 46 in FY2020.[108] INT closed 28 existing external investigations, and submitted 17 sanctions cases and 18 settlements to the Office of Suspension and Debarment (OSD).[109] The number of referrals to national authorities decreased from 17 in FY2020 to 13 in FY2021.[110]

> ***Practice Tip:*** While settlements are negotiated between respondents and INT, the final terms are submitted to OSD for approval.

In February 2021, INT also hired a new director of investigations, strategy and operations, Alan Bacarese. Prior to joining the World Bank, Bacarese was the director of integrity and anti-corruption at the African Development Bank. In his current role, Bacarese oversees INT's investigation of sanctionable practices, as well as INT's efforts to promote best practices of preventing fraud and corruption in World Bank-financed projects.

Office of Suspension and Debarment. As the first level of review, OSD issued Notices of Sanctions Proceedings, along with recommended sanctions, and temporarily suspended 19 firms and four individuals. Of those, eight respondents submitted an explanation to OSD, seeking withdrawal of the notice or a reduction of the recommended sanction.[111] As a result, OSD reduced the recommended sanction of five respondents. In addition, OSD sanctioned 29 respondents via uncontested determinations. The numbers of cases and settlements OSD reviewed dropped from 29 cases in FY2020 to 20 cases in FY2021, and from 22 settlements in FY2020 to 18 in FY2021.[112]

Unlike the prior year, OSD rejected two cases in their entirety. While OSD found insufficient evidence for at least one claim in seven of 20 cases, it did find sufficient evidence for all claims in the remaining 11 cases.[113] Consistent with previous years, the most common sanctionable practice reviewed by OSD was fraud (87%).[114] Compared to FY2020, the numbers of cases and settlements including an allegation of collusion increased from 20% to 24% in FY2021, and the number of cases including a corruption allegation increased slightly from 20% to 21% in FY2021.

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108 The 40 new investigations included nine in East Asia Pacific; eight in Eastern and Southern Africa; seven in Europe and Central Asia; seven in South Asia; four in Central and Western Africa; three in Latin America/Caribbean; one in Middle East/North Africa; and one related to the International Finance Corporation.

109 World Bank, *World Bank Group Sanctions System Annual Report FY21*, at 4, https://documents1.worldbank.org/curated/en/284891634566178252/pdf/World-Bank-Group-Sanctions-System-FY21.pdf (last accessed Jan. 28, 2022).

110 *Id.* at 62.

111 *Id.* at 4.

112 *Id.*

113 *Id.* at 29.

114 *Id.* at 49.

Only 8% of cases included an allegation of obstruction.[115] Consistent with the last four years, OSD did not review any cases involving allegations of coercion.

Sanctions Board. The Sanctions Board—the appellate body for the sanctions system— issued only one additional sanction in FY2021 than it had in FY2020. In FY2021, the Sanctions Board sanctioned eight firms and individuals in five cases.[116] The Sanctions Board convened five times during FY2021 and issued six decisions, including one involving a request for reconsideration of a previously decided case.[117] Overall, only 20% of respondents chose to appeal cases to the Sanctions Board. More than half of respondents (57%) were represented by counsel and 50% of cases involved an oral hearing before the Sanctions Board.[118]

Practice Tip: Sanctions Board hearings in 2021 were all conducted virtually. At this time, the World Bank is scheduled to re-open in March 2022, and it remains to be seen if and when in-person hearings will resume.

This past year, the Sanctions Board highlighted an anticipated enhancement to the World Bank's rules on successor liability. Following Sanctions Board Decision No. 101, the World Bank identified the bank's lack of definition of the term "successor" and announced it will fill this gap through an upcoming approval of a definition of the term and clarification of responsibilities within the bank for successorship determination.[119] To date, the World Bank has not yet published any update on the matter.

The Sanctions Board also further defined its jurisdiction in relation to public officials in Sanctions Board Decisions No. 132 and 133. Consistent with previous decisions, the Sanctions Board continues to sanction "public officials," which includes individuals taking or reviewing selection or procurement process decisions, "provided that … they did not act as government officials" when engaging in the sanctionable conduct. In Decisions No. 132 and 133, the Sanctions Board imposed a debarment sanction on an individual who was a public official who was carrying out project management functions under bank-financed contracts, and who had solicited payments from a supplier and a contractor on the project. At the same time, the Sanctions Board yet again confirmed that "government officials" as such fall outside of the bank's jurisdiction.[120]

In FY2021, the Sanctions Board also had changes in its composition: Alejandro Escobar and Olufunke Adekoya concluded their terms; and Adedoyin Rhodes Vivour and Eduardo Zuleta were appointed as new members.[121] Further, in December 2021, Mark Kantor concluded his term; and Michael Ostrove was appointed as a new member.

Integrity Compliance Officer (ICO). In the post-sanctions phase, the ICO engaged with over 118 sanctioned firms and individuals and released 30 firms and/or individuals from sanctions, compared to only 18 in FY2020. In addition, the ICO issued 58 notices to newly sanctioned parties on their conditions for release.[122] In addition, the ICO notified 29 companies that their sanctions would be continued beyond the initial sanctions period because they had not yet met the conditions for release.[123]

With respect to companies that were released from sanctions, the ICO specifically called out two companies as exemplars for the positive results gained from working constructively to achieve integrity programs consistent with the World Bank's standards. In one case, the company, a Myanmar-based consulting firm, benefitted from mentorship from another company in its industry.[124] In the other case, the company, SNC Lavalin, Inc., initially had been sanctioned to a 10-year debarment and monitorship, the longest such sanction in the World Bank's history, but in 2021, the company was released two years early.

115 *Id.* at 30.

116 *Id.* at 4.

117 *Id.*

118 *Id.* at 46

119 *Id.* at 48.

120 *Id.* at 47.

121 *Id.* at 43.

122 *Id.* at 4.

123 *Id.* at 26.

124 *Id.* at 27.

Practice Tip: For sanctioned companies, understanding the sanctioning institution's integrity guidelines and how to apply those principles and rules to the company's operations is critical to obtaining timely release. In 2021, the World Bank ICO noted with respect to SNC Lavalin, which was released two years early from what had been a 10-year debarment, "to address its integrity compliance gaps, the SNCL Group indeed undertook a significant 'integrity journey'—as self-described by the company—that was facilitated by ongoing, meaningful engagement with the ICO and the third-party integrity compliance monitor . . . ."[125]

Other Developments. Additionally, the World Bank revised its posting practices related to the Sanctions and Debarment list. As a result, the list includes a description of the type of misconduct engaged in by each individual and/or entity. This includes the Notices of Uncontested Sanctions Proceedings issued by OSD, which now also include additional information relating to the underlying sanctionable practices.[126]

B. INTER-AMERICAN DEVELOPMENT BANK GROUP

In 2021, the Inter-American Development Bank Group (IDB) sanctioned 20 entities and 27 individuals.

Of these, five companies were debarred as a result of entering into a negotiated resolution with IDB. Most recently, in November 2021, IDB entered into a settlement agreement with the Belgian-based company Tractebel Engineering S.A. related to allegations of fraud and corruption in connection with a contract under the Program for the Rehabilitation of the Péligre Transmission Line in Haiti.[127] As a result, the company was debarred for 46 months. The company allegedly did not disclose fees paid to an agent, misrepresented the availability of personnel for the project, and offered paid positions to former colleagues of executing agency officials.

Practice Tip: Under IDB's procedures, parties can negotiate settlements with the Office of Institutional Integrity, IDB's investigations office, but only prior to the submission of the case to the sanctions officer.

The sanctions officer imposed sanctions on 34 companies and individuals, a significant increase from four the prior year.[128] And the Sanctions Committee sanctioned eight companies and individuals.

Of all the sanctions, nine included at least one claim of corruption, 23 included at least one claim of fraud, and 23 included at least one claim of collusion. None of the cases included sanctions based on obstruction, coercion or extortion.[129]

Practice Tip: Sanctionable practices under the standards adopted by the World Bank and IDB are: corruption; fraud; coercion; collusion; and obstruction. IDB also has adopted misappropriation as a prohibited practice. Other IFIs have not adopted obstruction as a sanctionable practice, but some of these institutions have established other types of sanctionable practices.

C. AFRICAN DEVELOPMENT BANK

In 2021, the African Development Bank's Office of Integrity and Anti-Corruption released its 2020 Annual Report.[130] The bank reported 62 cases closed following completed investigations, six cases involving findings of sanctionable practices submitted to the Sanctions Office, and three negotiated settlement agreements.[131] Fraud allegations were involved in 35% of the closed cases, as well as in all three settlements.[132]

125 *Id.* at 25.

126 *Id.* at 27.

127 Inter-American Development Bank News Release, *IDB Announces Settlement with Tractebel Engineering S.A. Regarding Prohibited Practices* (Nov. 29, 2021), https://www.iadb.org/en/news/idb-announces-settlement-tractebel-engineering-sa-regarding-prohibited-practices (last accessed Jan. 28, 2022).

128 Inter-American Development Bank, *List of sanctioned firms and individuals*, https://www.iadb.org/en/transparency/sanctioned-firms-and-individuals (last accessed Jan. 28, 2022).

129 *Id.*

130 African Development Bank, *PIAC Office of Integrity and Anti-Corruption 2020* Annual Report, https://www.afdb.org/en/documents/integrity-and-anti-corruption-department-annual-report-2020 (last accessed Jan. 29, 2022).

131 *Id.* at 12.

132 *Id.*

In November 2021, the African Development Bank appointed Paula Santos Da Costa as new acting director of the Office of Integrity and Anti-Corruption.[133]

D. ASIAN DEVELOPMENT BANK

Also in 2021, the Asia Development Bank's (ADB) Office of Anticorruption and Integrity (OAI) issued its 2020 Annual Report.[134] The bank opened 89 new investigations, with fraud allegations comprising the majority of new investigations (64 out of the 89 total).[135] The bank also closed 76 cases following completed investigations, with 59 of those investigations resulting in debarments or other remedial actions.[136] A total of 89 companies and 31 individuals were debarred by the ADB in 2020 as a result of investigations closed by the bank's OAI.[137]

133 African Development Bank News Release, T*he African Development Bank appoints Mrs. Paula Santos Da Costa, Acting Director, Office of Integrity and Anti-Corruption*, https://www.afdb.org/en/news-and-events/african-development-bank-appoints-mrs-paula-santos-da-costa-acting-director-office-integrity-and-anti-corruption-40456 (last accessed Jan. 28, 2022).

134 Asia Development Bank, *Office of Anticorruption and Integrity 2020 Annual Report*, https://www.adb.org/sites/default/files/institutional-document/696631/oai-annual-report-2020.pdf (last accessed Feb. 9, 2022).

135 *Id.* at 14.

136 *Id.*

137 *Id.* at 15.

International Developments

VII.

International Developments

A. UNITED KINGDOM

2021 proved to be a particularly challenging year for the Serious Fraud Office (SFO), the UK agency charged with investigating and prosecuting serious or complex fraud, bribery, and corruption.

On the one hand, the SFO had a strong first half of the year, which included:

- Three DPAs relating to bribery and corruption.
- Conviction of Petrofac for seven counts of failing to prevent bribery.

On the other hand, the SFO suffered a number of significant defeats, including:

- A judgment by the highest court in the UK that the SFO could not compel foreign companies to produce documents stored overseas.
- The collapse of the trial of former executives at Serco Geografix Ltd (Serco) due to fundamental failures in the SFO's disclosure process.
- The quashing of a conviction of a former Unaoil executive.

In addition, figures obtained by *Global Investigations Review* via a Freedom of Information Act request show that the SFO opened only four new probes in 2021—its lowest total in over a decade.[138]

Finally, while the SFO closed some of its legacy corruption investigations including those into British American Tobacco[139] and KBR, Inc.,[140] a number of long-running investigations remain on its slate including those into ENRC, the Rio Tinto group, and the Glencore group of companies.

DPAS

Bringing its total to 12 since the introduction of the DPA regime in the UK in 2004, the SFO entered into three additional DPAs during 2021, all of which relate to bribery and corruption.

Amec Foster Wheeler Energy Limited (Amec Foster Wheeler). This resolution, also discussed in Section II.F, was the largest in terms of the penalties imposed, related to the use of corrupt agents in the oil and gas sector by the legacy Foster Wheeler business.[141] According to the DPA, the offenses spanned from 1996 to 2014 and took place across the world, in Nigeria, Saudi Arabia, Malaysia, India, and Brazil.

Amec Foster Wheeler agreed to pay a total of £103m ($143 million), an amount which included a financial penalty, payment of the SFO's costs of £3.4 million ($4.5 million), and payment of compensation to the people of Nigeria of £210,610 ($284,000). In keeping with the recent trend of multi-jurisdictional cooperation, the DPA was part of a global resolution relating to Amec Foster Wheeler's conduct with settlements (amounting to a total of $177 million) also reached in the US and in Brazil.

> ***Practice Tip:*** The UK "DPA Code of Practice" specifies that compensation, donation to charities, disgorgement, financial penalty, and costs may be included in the terms of a DPA, and it is typical that the SFO seeks to recover the costs of their investigation, and any other costs incurred during the DPA process.

Amec Foster Wheeler Plc and Amec Foster Wheeler had been acquired by John Wood Group plc (Wood Group) in October 2017.

138 Michael Griffiths, *Low number of new SFO cases sparks concern*," Global Investigations Rev. (Dec. 16, 2021), https://globalinvestigationsreview.com/enforcement/low-number-of-new-sfo-cases-sparks-concern.

139 SFO Press Release, *SFO closes British American Tobacco (BAT) Plc investigation* (Jan. 15, 2021), https://www.sfo.gov.uk/2021/01/15/sfo-closes-british-american-tobacco-bat-plc-investigation/.

140 SFO Press Release, *SFO closes investigation into KBR Inc.'s UK subsidiaries* (Mar.18, 2021), https://www.sfo.gov.uk/2021/03/18/sfo-closes-investigation-into-kbr-inc-s-uk-subsidiaries/.

141 SFO Press Release, *SFO enters into £103m DPA with Amec Foster Wheeler Energy Limited*, (July 2, 2021), https://www.sfo.gov.uk/2021/07/02/sfo-enters-into-103m-dpa-with-amec-foster-wheeler-energy-limited-as-part-of-global-resolution-with-us-and-brazilian-authorities/.

According to the judgment relating to the approval of the DPA, Wood Group fully cooperated with the SFO (and other authorities). Wood Group also committed to reporting annually for the full term of the DPA (in this case, three years) to the SFO on its group-wide ethics and compliance program. For the first time, the DPA documents make clear that there has been no resolution as to the culpability of any individuals, leaving open the possibility that there may be individuals relevant to this matter that could be investigated or prosecuted in the future.

Other DPAs. The SFO also received judicial approval for separate DPAs entered into with two UK-based companies for bribery offenses.[142] For legal reasons, the SFO cannot identify the companies to which the DPAs relate but has announced that "[t]he two DPAs share a common Statement of Facts" and "[t]he criminal conduct saw bribes paid in relation to multi-million pound UK contracts," in violation of sections 1 and 7 of the Bribery Act 2010.

These two companies will pay a total of £2,510,065 ($3.4 million), comprising disgorgement of profits and a financial penalty. In addition, according to a statement issued by the director of the SFO, Lisa Osofsky, the DPAs contain an undertaking by a parent company to support a comprehensive compliance program and obligations to report to the SFO on compliance at regular intervals during the two-year term of the DPAs.[143]

CORPORATE CONVICTIONS

There were two corporate guilty pleas in 2021, one for corruption under pre-Bribery Act 2010 law, and one for failure to prevent bribery under the Bribery Act 2010.

GPT Special Project Management Ltd (GPT). GPT pleaded guilty under Section 1 of the Prevention of Corruption Act 1906, which governs conduct committed prior to the Bribery Act's enactment. The GPT matter involved conduct between December 2008 and July 2010 in relation to a £2 billion ($2.7 billion) contract to supply telecoms services to the Saudi Arabian National Guard.[144] GPT was ordered to pay a confiscation order of £20,603,000 ($28 million), a fine of £7,521,920 ($10 million), and costs of £2,200,000 ($3 million).

Petrofac Limited (Petrofac). Following a four-year investigation by the SFO into Petrofac's use of Unaoil and "other agents,"[145] in October 2021, Petrofac pleaded guilty to seven counts of failing to prevent bribery under the Bribery Act 2010 between 2011 and 2017.[146] Specifically, Petrofac pleaded guilty to failing to prevent former senior executives of the Petrofac group of subsidiaries from using agents to systematically bribe officials and to win oil contracts in Iraq, Saudi Arabia, and the United Arab Emirates. The senior executives of the Petrofac Group had paid £32 million ($44 million) in bribes to obtain contracts worth approximately £2.6 billion ($3.5 billion). Petrofac was ordered to pay £77 million ($95 million) in penalties and costs. The SFO also secured a conviction of Petrofac's former head of sales, David Lufkin, for 14 counts of bribing agents.

Practice Tip: Unlike Section 1 of the Bribery Act which broadly provides that it is an offence to offer, promise or give an advantage, or to request, agree to receive or accept an advantage where it relates to the improper performance of a relevant activity, Section 7 creates a strict liability corporate offence of failure to prevent bribery to obtain or retain business or a business advantage. Section 7 also has extra-territorial effect: a commercial organization may commit the offence as a result of conduct carried out by an "associated person" if it is either a company incorporated in the UK or a partnership formed in the UK, or carries on a business, or part of a business, in any part of the UK, regardless of where it was incorporated or formed. It is a full defense to a Section 7 charge for companies to show they had adequate procedures in place to prevent bribery.

INDIVIDUAL CONVICTIONS

It was a complicated year for the SFO with respect to individual prosecutions, with the agency succeeding in achieving convictions in some cases but also suffering a stunning reversal in a previously litigated case.

142 SFO Press Release, *SFO secures two DPAs with companies for Bribery Act offenses* (July 20, 2021), https://www.sfo.gov.uk/2021/07/20/sfo-secures-two-dpas-with-companies-for-bribery-act-offences/.

143 *Id.*

144 SFO Press Release, *GPT pleads guilty to corruption* (Apr. 28, 2021), https://www.sfo.gov.uk/2021/04/28/gpt-pleads-guilty-to-corruption/.

145 Petrofac, *Update on SFO investigation and Board change* (May 25, 2017), https://www.petrofac.com/media/news/update-on-sfo-investigation-and-board-change/.

146 SFO Press Release, *Serious Fraud Office secures third set of Petrofac bribery convictions* (Oct. 4, 2021), https://www.sfo.gov.uk/2021/10/04/serious-fraud-office-secures-third-set-of-petrofac-bribery-convictions/.

Ziad Akle (Unaoil) – Quashing of Conviction. On December 10, 2021, the conviction of Ziad Akle, who had been sentenced in 2020 to five years in prison for conspiracy to bribe an Iraqi official to secure a $55 million oil deal, was quashed by the Court of Appeal.[147] The Court of Appeal found that the SFO had failed in its disclosure duties, prompting the announcement by the UK attorney general that she has commissioned an independent review of the SFO.[148]

Paul Bond (Unaoil-related). A former senior sales manager at SBM Offshore, Paul Bond, was found guilty in February 2021 of two counts of conspiracy to give corrupt payments, following a retrial of his case,[149] and sentenced to three and a half years' imprisonment.[150] This conviction followed on the heels of the convictions in 2020 of three former Unaoil territory managers for Iraq—Basil Al Jarah, Stephen Whiteley and Ziad Akle. Since the reversal of Akle's conviction, Bond has announced his intention to appeal his conviction.[151]

Basil Al Jarah and Stephen Whiteley (Unaoil). The SFO obtained confiscation orders from Basil Al Jarah of £402,000 ($545,000)[152] and Stephen Whiteley for £100,000 ($135,500), related to their earlier convictions in the Unaoil matter.[153]

David Lufkin (Petrofac). In more positive news for the SFO, David Lufkin, former head of sales at Petrofac, pleaded guilty to an additional three counts of bribery (in addition to the 11 counts of bribery to which he pleaded guilty in 2019). The plea related to offering and making corrupt payments of approximately $30 million to agents to influence the award of contracts awarded in 2013 and 2014.[154] Lufkin, in addition to pleading guilty, had cooperated with the SFO, and was sentenced to a two-year custodial sentence, which was suspended for 18 months.[155] In sentencing Lufkin, the judge expressed the hope that the low sentence would "act as an encouragement to others to do the same." This type of result—leniency to an individual defendant in recognition of cooperation and a guilty plea—is still unusual in the UK. Thus, this case could pave the way for more cooperators to come forward to secure more lenient treatment for themselves, with the obvious impact on the companies on which they have negative information. The SFO also secured a confiscation order from Lufkin in the amount of £140,000 ($190,000).[156]

Practice Tip: Although there is a statutory framework[157] in the UK which allows for a reduction in sentence for a defendant who has provided, or offered to provide, assistance to an investigator or prosecutor as long as they have entered a guilty plea, the hurdles to reaching such an agreement remain high and are fraught with uncertainty. Accordingly, such agreements are far from commonplace.

147 Kirstin Ridley, *Unaoil executive's conviction quashed in heavy blow to UK fraud agency*, REUTERS, Dec. 11, 2021, https://www.reuters.com/world/uk/conviction-former-unaoil-executive-quashed-sharp-blow-uks-sfo-2021-12-10/.

148 David Pegg and Rob Evans, *Attorney general begins review of SFO after judges overturn bribery conviction,* GUARDIAN, Dec. 10, 2021, https://www.theguardian.com/law/2021/dec/10/sfo-judges-overturn-conviction-unaoil-lisa-osofsky.

149 SFO Press Release, *Fourth executive convicted of bribery in post-occupation Iraq* (Feb. 24, 2021) (Fourth executive convicted of bribery in post-occupation Iraq), https://www.sfo.gov.uk/2021/02/24/fourth-executive-convicted-of-bribery-in-post-occupation-iraq/.

150 SFO Press Release, *Fourth oil executive sentenced for paying bribes to win a multi-million pound contract in post-occupation Iraq* (Mar. 1, 2021), https://www.sfo.gov.uk/2021/03/01/fourth-oil-executive-sentenced-for-paying-bribes-to-win-a-multi-million-pound-contract-in-post-occupation-iraq/.

151 Johnathan Ames, *Executive Paul Bond to appeal conviction in Unaoil case,* TIMES, Dec. 23, 2021, https://www.thetimes.co.uk/article/executive-paul-bond-to-appeal-conviction-in-unaoil-case-ng366fq7q.

152 SFO Press Release, *Former Unaoil executive ordered to pay £402k in confiscation* (June 17, 2021), https://www.sfo.gov.uk/2021/06/17/former-unaoil-executive-ordered-to-pay-402k-in-confiscation/.

153 SFO Press Release, *SFO reclaims £100,000 from Unaoil executive* (Nov. 3, 2021, https://www.sfo.gov.uk/2021/11/03/sfo-reclaims-100000-from-unaoil-executive/.

154 SFO Press Release, Former senior Petrofac executive pleads guilty to bribery offenses (Jan. 14, 2021), https://www.sfo.gov.uk/2021/01/14/former-senior-petrofac-executive-pleads-guilty-to-three-further-bribery-offenses/.

155 SFO Press Release, Serious Fraud Office secures third set of Petrofac bribery convictions (Oct. 4, 2021), https://www.sfo.gov.uk/2021/10/04/serious-fraud-office-secures-third-set-of-petrofac-bribery-convictions/.

156 SFO Press Release, *SFO secures confiscation against former Petrofac executive* (Dec. 15, 2021),(https://www.sfo.gov.uk/2021/12/15/serious-fraud-office-secures-confiscation-against-former-petrofac-executive/.

157 Serious Organized Crime and Police Act 2005, Section 73.

Other Individuals. In August 2021, the SFO charged five individuals with bribery and money laundering in relation to the suspected payment of bribes to win contracts within the UK construction sector.[158] The trial is scheduled to begin later this year.

OTHER DEVELOPMENTS

Serco Executives Acquittal for Prosecutorial Error. In July 2019, the SFO entered into a DPA with Serco in relation to three offenses of fraud and two of false accounting, relating to a scheme to defraud the UK Ministry of Justice by hiding profits Serco made between 2010 and 2013 for the provision of services relating to the electronic monitoring (or "tagging") of prisoners. The SFO also charged two former executives with fraud in relation to representations made to the Ministry of Justice, under the Fraud Act 2006 and Theft Act 1968. In April 2021, following a review of the disclosure process for trial, which uncovered prosecutorial errors made in the non-disclosure of certain materials, the SFO was forced to offer no evidence and the defendants were acquitted.[159] While not a bribery case, this development is relevant to this area, and had broader significance, as it represented yet another defeat for the SFO in prosecuting individuals related to a corporate DPA.

SFO Discovery Powers. In February 2021, the UK Supreme Court held that the SFO cannot compel the production of documents held outside the UK by foreign companies with no direct presence in the UK (*i.e.*, with no fixed place of business in the UK and which do not carry on business in the UK), albeit that it appeared to accept that the SFO can compel a UK company to produce documents stored overseas.[160] Although unhelpful for the SFO, there remains a number of avenues to obtain evidence stored overseas from overseas companies, including mutual legal assistance.

ENRC Civil Litigation Against the SFO. In May 2021, the civil claim by ENRC against the SFO for £70 million ($94.5 million) in damages began. ENRC accused the SFO of misfeasance in public office and encouraging improper conduct by ENRC's previous legal representatives, which the SFO says is "devoid of merit."[161] The judgment is expected in the first half this year.

B. LATIN AMERICA

While there are important differences among the various countries in the region, historically, a number of countries in Latin America (LATAM) have suffered from recurring or chronic issues with government corruption, antiquated or otherwise insufficient local law frameworks to fight corruption, a lack of independent and well-resourced local prosecutorial functions, political instability, and weak democratic institutions. Transparency International has characterized the Americas as "a region in crisis" as of 2021, with numerous countries in Latin America experiencing either no improvement, or declines, in their corruption levels as measured by the TI Corruptions Perceptions Index.[162]

Recent years had seen significant developments in terms of homegrown efforts to fight corruption, in many cases accompanied by initiatives to collaborate with US authorities, with Brazil's Operation Car Wash serving as the standard bearer in this regard. In early 2021, President Jair Bolsonaro of Brazil ended Operation Car Wash.[163] While, as discussed further below, this has not meant the end of anti-corruption enforcement in Brazil—LATAM's largest economy—the picture there is now decidedly more complex. Meanwhile, in the region's second-largest economy, Mexico, there has been a distinct failure to make advances against corruption despite the current President, Andres Manuel Lopez Obrador, having been elected in 2018 with a pledge to end corruption.[164] In other parts of this large and diverse region, the picture is mixed, with worsening corruption and weaker institutions in some countries, but brighter spots in others.

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158 SFO Press Release, *Serious Fraud Office charges five persons with bribery and money laundering* (Aug. 17, 2021), https://www.sfo.gov.uk/2021/08/17/serious-fraud-office-charges-five-persons-with-bribery-and-money-laundering/.

159 SFO Press Release, *SFO offers no evidence against Nicholas Woods and Simon Marshall* (Apr. 26, 2021), https://www.sfo.gov.uk/2021/04/26/sfo-offers-no-evidence-against-nicholas-woods-and-simon-marshall/.

160 R *(on the application of KBR, Inc) v Director of the Serious Fraud Office* [2021] UKSC 2.

161 Martin Coyle, *ENRC's multimillion-pound SFO claim has 'failed' for lack of evidence, lawyer says,* Mlex (a LexisNexis company) (Sept. 28, 2021), https://mlexmarketinsight.com/news/insight/enrc-s-multimillion-pound-sfo-claim-has-failed-for-lack-of-evidence-lawyer-says.

162 *See* Transparency Int'l, *CPI 2021 for the Americas: A Region in Crisis* (Jan. 25, 2022), https://www.transparency.org/en/news/cpi-2021-americas-a-region-in-crisis (while the Americas as defined by TI includes North America, the observations here apply specifically and with particular force to the countries comprising LATAM).

163 Ricardo Brito and Gram Slattery, *After seven years, Brazil shuts down Car Wash anti-corruption squad* (Feb. 3, 2021), https://www.reuters.com/article/us-brazil-corruption/after-seven-years-brazil-shuts-down-car-wash-anti-corruption-squad-idUSKBN2A4068.

164 *See* Transparency Int'l, *CPI 2021 for the Americas: A Region in Crisis,* (Jan. 25, 2022), https://www.transparency.org/en/news/cpi-2021-americas-a-region-in-crisis.

THE IMPACT OF COVID-19

Local and geopolitical issues, including elections, have affected enforcement in various countries in the region. In addition, LATAM was particularly hard hit by the COVID-19 pandemic, suffering close to 30% of global mortality rates.[165] This public health catastrophe has had a multifold effect on local corruption risk and on anti-corruption enforcement. Latin America was already "the most unequal region in the world in terms of income."[166] The economic contractions that occurred throughout the region due to the pandemic only worsened those disparities.[167] Both governments and local populations were caught up in grappling with the effects of the pandemic both from a public health perspective and with respect to the devastating impact on local economies. In addition, there were several corruption scandals related specifically to the pandemic, including scandals involving government officials who allegedly secured preferential treatment for vaccination for themselves, family, and other associates, as well as scandals involving alleged schemes to inflate prices for medical supplies for the personal gain of government officials.[168]

LOCAL ENVIRONMENTS AND DEVELOPMENTS

Brazil

The situation in Brazil is quite mixed, and there is significant uncertainty as to what to expect in the coming years given the upcoming presidential elections in that country. President Jair Bolsonaro was elected in 2018 in large part as a result of Operation Car Wash's exposure of the longstanding and deep-seated web of corrupt dealings among the country's political and economic leaders. President Bolsonaro styled himself as an anti-corruption crusader, but ended Operation Car Wash in February 2021, asserting that his administration is free from corruption.[169] At the same time, corruption scandals continued to embroil Brazil, including members of Bolsonaro's political coalition and his own family.[170]

In the upcoming presidential elections in October 2022, Bolsanaro is facing opposition by the former president of Brazil, Luis Ignacio da Silva (known as Lula), who had been convicted in Brazil in connection with Operation Car Wash but whose conviction was annulled by Brazil's Supreme Court in March 2021, permitting him to run for re-election.[171] Sergio Moro, the former judge who presided over many of the Brazilian investigations and prosecutions in connection with Operation Car Wash, including the now-annulled conviction of da Silva, has also declared his candidacy.[172] The outcome of the presidential elections has the potential for having a very significant impact on anti-corruption enforcement in Brazil.

While Operation Car Wash has ended, the Brazilian agency empowered to address integrity issues, including corruption, related to public procurements—the Comptroller General (CGU)—has been increasingly active.[173] The CGU is responsible for, among other things, bringing administrative actions under Brazil's Clean Company Act. This important agency remained active even during the pandemic and brought over 120 administrative proceedings—more than half of the total such proceedings brought by the agency since it was established in 2014—against corporate entities between

165 Congressional Res. Serv., *Latin America and the Caribbean: Impact of COVID-19* (Jan. 21, 2022), https://sgp.fas.org/crs/row/IF11581.pdf.

166 *Id.*

167 *Id.*

168 Patrick J. McDonell and Adriana León, *'Vaccine-gate' roils Peru: Politicians, families and friends secretly got COVID shots*, LA TIMES (Feb. 18, 2021), https://www.latimes.com/world-nation/story/2021-02-18/peru-vaccine-gate-politicians-diplomats-received-chinese-vaccine; Jack Nicas, *Brazilian Leader Accused of Crimes Against Humanity in Pandemic Response*, N.Y. TIMES (Oct. 19, 2021), https://www.nytimes.com/2021/10/19/world/americas/bolsonaro-covid-19-brazil.html; Mitra Taj et al., *'V.I.P. Immunization' for the Powerful and Their Cronies Rattles South America*, N.Y. TIMES (Feb. 25, 2021), https://www.nytimes.com/2021/02/25/world/americas/covid-south-america-vaccine-corruption.html; Natalie Kitroeff and Mitra Taj, *Latin America's Virus Villains: Corrupt Officials Collude With Price Gougers for Body Bags and Flimsy Masks,* N.Y TIMES (June 20, 2020), https://www.nytimes.com/2020/06/20/world/americas/coronavirus-latin-america-corruption.html.

169 Ricardo Brito and Gram Slattery, *After seven years, Brazil shuts down Car Wash anti-corruption squad, REUTERS* (Feb. 3, 2021), https://www.reuters.com/article/us-brazil-corruption/after-seven-years-brazil-shuts-down-car-wash-anti-corruption-squad-idUSKBN2A4068.

170 Gabriel Strargardter and Maria Carolina, *Brazil's Bolsonaro implicated in alleged graft scheme as lawmaker, UOL reports,* REUTERS (July 5, 2021), https://www.reuters.com/world/americas/brazils-bolsonaro-implicated-alleged-graft-scheme-lawmaker-uol-reports-2021-07-05/.

171 Anthony Boadle, *Brazil polls show Lula gaining over Bolsonaro, third candidate 'embryonic'*, REUTERS (Jan. 14, 2022), https://www.reuters.com/world/americas/brazil-poll-shows-lula-gaining-over-bolsonaro-third-candidate-embryonic-2022-01-14/.

172 *Id.*

173 *Anti-corruption in Brazil: Current Status and the Next Steps*, GLOBAL INVESTIGATIONS REV. (Oct. 15, 2021), https://globalinvestigationsreview.com/review/the-investigations-review-of-the-americas/2022/article/anti-corruption-in-brazil-current-status-and-the-next-steps.

2020 and 2021.[174] The CGU also entered into leniency agreements with five companies in 2021.[175] Under those agreements, the companies have cooperated with the CGU's investigation and agreed to pay a fine.[176] Companies doing business in Brazil should also be aware that there are other agencies that also remain active, including at the state level, where there are also comptroller general agencies with administrative investigative and sanctioning powers, as well as attorneys general with criminal investigation and prosecution powers.[177]

Meanwhile, FCPA enforcement cases related to Brazil continue to roll in as a result of the now-ended Operation Car Wash based on historic conduct. For example, the *Amec Foster Wheeler* settlement—discussed in the Case Summaries Appendix—which included resolutions with authorities in Brazil as well as the US and UK, related to bribes paid between 2011-2014 to officials at Brazil's state-owned Petrobras in exchange for a $190 million contract to design a gas-to-chemicals complex.[178]

Mexico

Mexico, despite having enacted significant anti-corruption laws, has yet to see actual resourcing for, and meaningful enforcement of, those laws. The special prosecutor for corruption assumed office in 2019, but her office is underfunded and understaffed. Similarly, Mexico's National Anti-Corruption System has failed to receive the political and financial backing needed to give it any real force. In March 2021, the OECD Working Group on Bribery noted in its periodic evaluation of Mexico that, of 20 recommendations made by the OECD in 2018, Mexico has made no progress on nine and only partially implemented the other 11.[179] The OECD also noted that Mexico has the worst ranking in the Corruption Perception Index of all OECD countries,[180] and that "enforcement of Mexico's foreign bribery offence has only nominally increased, with four ongoing investigations . . . compared to two at the time of the [prior] evaluation. [This] . . . absence of prosecutions of foreign bribery by Mexico more than nineteen years after Mexico's foreign bribery offence came into force a cause for significant concern."[181]

Also in 2021, President Lopez Obrador put forward to voters a referendum as to whether ex-government officials (which would include members of opposition parties) should be subject to investigation and prosecution for corruption, but there was widespread voter apathy and the percentage of voters turning out to vote on the referendum fell far short of the threshold required for the vote to be binding.[182]

Other Regional Developments

Argentina and Colombia, the two largest economies in the region after Brazil and Mexico, also saw worsening scores by Transparency International.[183] These two countries also experienced declines in their ability to address corruption, as measured by an annual assessment conducted by other observers of the region, known as the Capacity to Combat Corruption Index.[184]

174 Controladoria-Geral Da Uniao, *Painel Correicao EM Dados* (Feb. 4, 2022), http://paineis.cgu.gov.br/corregedorias/index.htm.

175 Agencia Brazil, *CGU recovers BRL 1.8 billion in leniency agreements in 2021* (Dec. 12, 2021), https://agenciabrasil.ebc.com.br/en/geral/noticia/2021-12/cgu-recovers-brl-18-billion-leniency-agreements-2021.

176 Portifolio-Ingles, CGU, at 19-20, https://www.gov.br/cgu/pt-br/centrais-de-conteudo/publicacoes/institucionais/arquivos/portifolio-ingles.pdf. (last visited Feb. 9, 2022).

177 *See, e.g., Odebrecht reaches R660 million settlement for 'admitted illicit acts' on Rio works projects*, UOL ECONOMIA (Jan. 24, 2022), https://economia.uol.com.br/noticias/estadao-conteudo/2022/01/25/odebrecht-fecha-acordo-de-r-660-mi-por-ilicitos-confessados-em-obras-no-rio.htm (discussing leniency agreement reached in January, 2022, between Novonor S.A., previously known as Odebrecht, with Rio de Janeiro's State Office of the Comptroller-General and State Office of the Attorney General relating to "illicit acts" in relation to construction work performed by the company for the state of Rio de Janeiro).

178 DOJ Press Release, *Amec Foster Wheeler Energy Limited Agrees to Pay Over $18 Million to Resolve Charges Related to Bribery Scheme in Brazil* (June 25, 2021), https://www.justice.gov/opa/pr/amec-foster-wheeler-energy-limited-agrees-pay-over-18-million-resolve-charges-related-bribery

179 OECD, *Implementing The 2018 OECD Anti-Bribery Convention. Phase 4 Report: Mexico*, https://www.oecd.org/corruption/anti-bribery/OECD-Mexico-Phase-4-Report-ENG.pdf.

180 *Id.* at 10.

181 *Id.* at 5.

182 Global Americans, *In Mexico, AMLO's anti-corruption referendum falls flat* (Aug. 6, 2021), https://theglobalamericans.org/2021/08/in-mexico-amlos-anti-corruption-referendum-falls-flat/.

183 *See* Transparency International, *CPI 2021 for the Americas: A Region in Crisis* (Jan. 25, 2022), https://www.transparency.org/en/news/cpi-2021-americas-a-region-in-crisis.

184 Brian Winter and Geert Aalbers, *The Capacity to Combat Corruption (CCC) Index (2021)*, https://www.as-coa.org/sites/default/files/CCC_Report_2021.pdf.

There were some counterpoints in the region. For example, Uruguay has remained a regional leader in terms of political stability and relatively low levels of corruption. Ecuador saw some worsening in terms of the perception of corruption levels, but in 2020 and 2021 this country also saw criminal prosecutions of a former president, and a former vice-president, for corruption-related crimes.[185] Chile, long known as one of the countries in the region enjoying lesser levels of corruption and greater stability, has not succeeded in further improving its TI score, but in 2021 saw a very significant corruption prosecution of a former senator, and the legislature is currently considering a new constitution that includes anti-corruption measures.[186]

A NOTE ON US ENFORCEMENT RELATED TO LATAM

As a region, LATAM-related cases have consistently represented a substantial portion of the FCPA-related enforcement docket. After undertaking a review of the corporate and individual cases brought over the past decade, we determined that approximately one-third to one-half of these cases brought in any given year, when considering both corporate and individual matters, have related to countries in LATAM.[187] As discussed herein, the picture around local enforcement in the near term is complex. However, given the history in terms of US enforcement, combined with the Biden administration's policy emphasis on the interrelationship between anti-corruption and other policy priorities relevant to LATAM—including anti-drug trafficking, anti-money laundering, and immigration, *see supra* at Section III.A.3 – and the significance of the region from a national security standpoint, we would not be surprised to see the region continue to play an important role in US enforcement cases. Moreover, companies and individuals involved in corruption in LATAM can easily come to the attention of US authorities in part because of geographic proximity and the intertwining of the US and LATAM economies, resulting in frequent movement of monies, products, and people between the US and countries in LATAM.

C. CHINA

As China swiftly controlled the COVID-19 outbreak, its economy rebounded strongly in 2021, shaking off the negative impact brought by the pandemic. As such, China has been active in rule-making activities and enforcement actions, at the same time responding to various challenges posed by tensions in international politics. On the rule-making side, the National People's Congress (NPC) and the National Supervision Commission (NSC) continue to promulgate laws and regulations to build up a more comprehensive anti-corruption mechanism and to tie up potential loose ends. Supervision commissions independently supervise public officials and investigate violations of official duties, including anti-corruption. Such commissions operate at the national, provincial, regional, city, and municipal level, including autonomous prefectures and counties. The Implementation Rules for the Supervision Law of the People's Republic of China and the Supervisors Law of the People's Republic of China, both issued in 2021, are good examples of the Chinese government's efforts to provide further clarifications to anti-corruption procedures, authority designation and boundaries.

On the enforcement side, China turned its attention to accountability of bribe-giving parties, deterring bribes from the supply side. Continued efforts to build up a culture of compliance prompted the creation of a third-party compliance monitoring mechanism, one that resembles the FCPA monitorship program in the United States. Repatriation of fugitive officials and retrieval of illegal proceeds march on through anti-corruption campaigns and international cooperation, despite the worldwide pandemic outbreak. Of course, the pharmaceutical industry, a regular top target for anti-corruption enforcement, is not forgotten: a new set of compliance standards has been imposed on them, in a further attempt to keep this industry in line.

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185 Transparency International, *Corruption Perceptions Index* (2020), https://www.transparency.org/en/cpi/2020/index/ecu; Brian Winter and Geert Aalbers, *The Capacity to Combat Corruption (CCC) Index* (2021), https://www.as-coa.org/sites/default/files/CCC_Report_2021.pdf.

186 Transparency International, *CPI 2021 for the Americas: A Region in Crisis* (Jan. 25, 2022), https://www.transparency.org/en/news/cpi-2021-americas-a-region-in-crisis; Brian Winter and Geert Aalbers, *The Capacity to Combat Corruption (CCC) Index (2021)*, https://www.as-coa.org/sites/default/files/CCC_Report_2021.pdf.

187 Internal analysis of FCPA individual and corporate cases between 2011-2021.

LEGISLATIVE/RULE-MAKING IN ANTI-CORRUPTION/ BRIBERY

With respect to anti-corruption concerning public officials, China's legislative/rule-making activities in 2021 mainly focused on further refining the organizational structure and procedures for anti-corruption enforcement without changing the substantive law (*e.g.*, relevant provisions under the Criminal Law). The Supervision Law promulgated in 2018 is a cornerstone of China's anti-corruption legal framework, yet leaves many issues for further clarifications. In 2021, two new laws/regulations were enacted to implement and support the Supervision Law, furthering China's anti-corruption legal framework.

Implementation Rules for the Supervision Law of the People's Republic of China (Implementation Rules).[188] On September 20, 2021, the NSC promulgated the long-awaited implementation rules for the Supervision Law, which provide additional details and clarification on certain key issues left open in the Supervision Law. For example, the implementation rules include the following:

- Defines the term "occupation-related violations" by public officials, the investigation of which is a key mandate for supervision commissions under the Supervision Law. The term is defined as "actions committed by public officials related to their duties, which do not constitute a crime, but lead to legal liabilities for public officials." (Art. 23)
- Clarifies the scope of "managing staff of state-owned enterprises (SOEs)," an ambiguous and controversial concept in the past, by listing three major categories of individuals considered to be managing staff. (Art. 40).
- Sets forth detailed conditions and procedural requirements for the use of fifteen types of investigative measures available to supervision commissions.

Supervisors Law of the People's Republic of China (Supervisors Law).[189] The Supervisors Law came into effect as of January 1, 2022, and is the first of its kind to standardize the appointment, removal, functions, and duties of supervisors, a special type of functionary created in 2018 by the Supervision Law to carry out the statutory functions of supervision commissions. Pursuant to the Supervisors Law, the duties of supervisors include educating and supervising public officials, investigating occupation-related violations and crimes of public officials, and undertaking a key role of carrying out international cooperation in anti-corruption.

With respect to commercial bribery in 2021, there were no changes to or new legislative or judicial interpretations issued regarding the substantive laws, namely the Criminal Law and the Anti-Unfair Competition Law, which provide for criminal and administrative penalties for commercial bribery acts.

> ***Practice Tip:*** China is progressively furthering its legal framework for anti-corruption and anti-bribery, with the NSC and its local counterparts refining their organizational structure and duties and robustly investigating corruption/bribery-related crimes and violations. It is essential that companies operating in China adhere to local laws and regulations, as well as any applicable overseas anti-bribery laws, in order to avoid penalties and reputational damage. US companies operating in China need to be alert to a wide variety of corruption and related risks found in China's rapidly evolving commercial and legal environment.

ANTI-CORRUPTION/BRIBERY ENFORCEMENT

China's anti-corruption/bribery enforcement remained strong in 2021. According to NSC statistics, in 2021, that agency turned over cases concerning 74,000 public officials to various levels of Procuratorate offices for criminal investigation,[190] reflecting an uptick over the previous year.[191]

Focusing on Bribe-Giving. To further strengthen enforcement as to bribe-givers, an initiative originating with the 19th National Congress of the Chinese Communist Party, the NSC, together with the Supreme People's Court (SPC), the Procuratorate, and other authorities, jointly issued the Opinions on Further Promoting the Investigation of Bribe-Giving and Bribe-Acceptance on September 8, 2021.[192]

188 *Implementation Rules for the Supervision Law of the People's Republic of China*, NAT'L SEC. COMM'N, Sept. 20, 2021.

189 *Supervisors Law of the People's Republic of China*, National People's Congress, Aug. 20, 2021.

190 *National Supervision Committee's Report on Work Progress in 2021*, PAPER, Jan. 21, 2021, https://www.thepaper.cn/newsDetail_forward_16389566.

191 *Supreme People's Procuratorate: Corruption and Bribery Account for over 80% of Work-related Crimes*, NANJING MORNING POST, Feb. 5, 2021, http://njcb.xhby.net/pc/con/202102/05/content_886820.html.

192 *Opinions on Further Promoting the Investigation of Bribe-Giving and Bribe-Acceptance*, the National Supervision Commission, Sept. 8, 2021.

Notably, this document asks the authorities to establish a "blacklist" for bribe-givers and carry out research on market access and qualification restrictions for them. It is also worth noting that the document tries to strike a balance between the need to tackle bribery and to protect legitimate business interests and personal rights. The document requires relevant authorities to carefully employ law enforcement measures that would restrict personal or property rights, such as detention, asset freezes, and overseas travel restrictions, with sufficient consideration given to their consequences so as to minimize the impact of such measures on lawful business operations.

Third-Party Compliance Monitoring. As to China's efforts on protecting legitimate business interests as part of its continuous efforts to combat bribery, on June 3, 2021, the Supreme People's Procuratorate and eight other authorities jointly issued the Guiding Opinions on Establishing a Mechanism for Third-Party Supervision and Evaluation of the Compliance of Enterprises Involved in Criminal Cases (for Trial Implementation)[193] (Third-Party Mechanism Guiding Opinions). This brand new third-party compliance monitoring mechanism, to some extent, appears to resemble the FCPA compliance monitorship approach in the context of non-trial resolutions (settlements).

- **Compliance Monitoring.** The Third-Party Mechanism Guiding Opinions provide a framework for a non-prosecution mechanism in certain criminal cases, aiming to replace criminal prosecution with compliance commitments by market participants who plead guilty to certain applicable crimes, including economic crimes and occupation-related crimes (*e.g.*, bribery-related crimes). In applicable cases, the Procuratorate may, *sua sponte* or upon application by the relevant company, involve a team of third-party monitors charged with monitoring the company's compliance efforts during the monitoring period they set based on review of compliance improvement plans submitted by the company.
- **Appointment of Monitors.** Monitors are appointed by an inter-departmental "management committee of the third-party mechanism" from the monitors list compiled in accordance with relevant criteria. On December 16, 2021, the first tranche of professionals selected as third-party monitors was published, consisting of professionals from law firms, accounting firms, industry associations, governments, enterprises, academic institutions, and elsewhere.[194]
- **Compliance Assessment.** The monitor's final assessment report, compliance improvement plan and periodic reports submitted by the company during the monitorship period are to serve as an "important reference" to the Procuratorate in making decisions on arrest, investigative measures, prosecution, and issuing sentencing recommendations.

Practice Tip: As China continues to focus on anti-corruption/bribery enforcement, increasingly, in recent years, with respect to bribe-giving, it is essential that foreign companies operating in China have in place corporate compliance mechanisms that are tailored to China's regulatory environment and can effectively minimize anti-corruption/bribery risks.

CORPORATE COMPLIANCE

Corporate compliance was a regulatory buzzword in China in 2021, appearing in many policy documents. Corporate compliance guidelines on export controls and antitrust were issued and China's banking and insurance watchdog designated 2021 as the year of construction of internal control compliance management.

- **Pushing towards More Robust Compliance Management Systems.** On November 1, 2021, the State-owned Assets Supervision and Administration Commission issued the Opinions on Further Deepening the Construction of State-owned Enterprises under the Rule of Law,[195] which require centrally-administered SOEs to establish a comprehensive and effective compliance management system that covers all aspects of business operations by 2025. Besides general requirements, the opinions require that the compliance management mechanism be led by the general counsel of a company and coordinated with the management systems of legal, compliance, internal control, and risk management.

193 Guideline, *Opinions on Further Promoting the Investigation of Bribe-Giving and Bribe-Acceptance*, NAT'L SUPERVISION COMM'N, Sept. 8, 2021.

194 *Management Committee of the Third-party Mechanism's Decision on the First Tranche of Third-Party Monitors*, SUPREME PEOPLE'S PROCURATORATE OF CHINA, Dec. 17, 2021, https://www.spp.gov.cn/spp/tzgg1/202112/t20211217_539044.shtml.

195 Opinions on Further Deepening the Construction of State-owned Enterprises under the Rule of Law, STATE-OWNED ASSETS SUPERVISION AND ADMIN. COMM'N, Nov. 1, 2021.

- **Continuous Regulatory Supervision on Compliance in the Pharmaceutical Industry.** A remarkable new compliance standard for the pharmaceutical industry, which is a top target for anti-corruption/bribery enforcement actions, the Pharmaceutical Industry Compliance Management Practices (PIAC/T 00001-2020)[196] (PICMP) came into effect on February 26, 2021. Although the PICMP is non-compulsory, it serves as a useful reference and benchmark to establish or improve a comprehensive compliance program for companies operating in the pharmaceutical industry in China.

Practice Tip: In light of China's evolving regulatory developments in corporate compliance, companies should also remain vigilant to any new industry requirements and review and update their compliance program regularly. As third-party compliance is generally deemed a higher-risk area for business operations in China, a robust third-party compliance program is often critical to an effective overall corporate compliance system.

D. HONG KONG

Amid the pandemic and a politically turbulent 2021, Hong Kong continues to be among the top performers in Asia in keeping corruption under effective control, and is ranked 12 out of the 180 countries included in the 2021 Transparency International Corruption Perceptions Index.[197]

Hong Kong's success in fighting against corruption is credited to the Independent Commission Against Corruption (ICAC), an independent organization charged with investigating bribery and corruption in Hong Kong. In 2021, the ICAC continued to steer the anti-corruption campaign through systemic prevention, robust law enforcement, and continued cooperation with other authorities, domestically and abroad.

The Prevention of Bribery Ordinance (POBO) is the pillar of Hong Kong's anti-corruption legal authority. Generally speaking, active bribery (giving, offering, and promising an advantage) and passive bribery (soliciting or accepting an advantage) are both criminal offenses under the POBO. The POBO governs corruption in the private sector, as well as in connection with public officials.

Practice Tip: In 2021, the ICAC continued to bolster its strong and hard-earned reputation since its establishment in 1974. Companies operating in Hong Kong are aware of the ICAC's robust anti-corruption enforcement in both the private and public sectors.

RISING COMPLAINS AND PROSECUTIONS

Although ICAC has not published its 2021 Annual Report yet, the data published by ICAC for the first eight months of 2021 demonstrate an increase in corruption-related complaints and prosecutions:

- The ICAC received 1,460 corruption complaints, 15% more than 2020. Among these, complaints concerning government bureaus/departments decreased by 1% (from 415 to 409), and pursuable complaints dropped by 7% (from 276 to 256).[198]
- 118 persons were prosecuted in 71 cases, as compared with 95 persons in 54 cases in 2020. During the period, nine government servants were prosecuted for corruption and related offenses, and three were formally cautioned.[199]

While complaints/cases related to public officials decreased, there was a swarm of cases in the private sector, including the building management, construction, finance, and insurance industry sectors.[200]

196 Pharmaceutical Industry Compliance Management Practices (PIAC/T 00001-2020), CHINA PHARM. INDUS. ASS'N, Feb. 26, 2021.

197 Transparency International, *Corruption Perceptions Index 2021* (Jan. 25, 2022), https://www.transparency.org/en/cpi/2021/index/hkg.

198 Legislative Council Panel on Security, *The Chief Executive's 2021 Policy Address Briefing by Commissioner Independent Commission Against Corruption* (Oct. 20, 2021), https://www.legco.gov.hk/yr20-21/english/panels/se/papers/se20211025cb2-1529-2-e.pdf

199 *Id.*

200 *Id.*

ICAC CASES

Former Executives of Convoy Global Holdings Limited. On October 16, 2021, four former executive directors of Convoy charged by the ICAC for conspiracy to defraud over bonds placement of a listed company were convicted and sentenced to four to seven months' imprisonment.[201] This result was a joint operation between the ICAC and the Securities and Futures Commission (SFC).

Catherine Leung (Vice Chairman - JPMorgan). On February 1, 2021, Catherine Leung, the former vice chairman of Asia investment banking in JPMorgan, was found not guilty of bribery for offering a job to the son of a logistics company chairperson, Ang Keng-lam, to win a mandate for an initial public offering. The deputy district judge stated that Leung was found not guilty because she had not played a major role in the decision to hire Ang's son and that Leung had followed procedures required under JPMorgan's client referral program.[202]

Eugene Yeoh (Co-head of IPO Vetting - HKEX). On December 3, 2021, Eugene Yeoh, the former co-head of IPO vetting at the Stock Exchange of Hong Kong Limited (HKEX) was found not guilty of receiving bribes. Yeoh was charged with accepting HK$9.15 million (US$1.18 million) in bribes from a financial consultant to approve 12 listings. The consultant made the payments to Yeoh's wife. However, the prosecution had not proven that Yeoh knew of the consultant's role in the relevant IPOs, nor that the money was a bribe and not for investment purposes, since Yeoh's wife was an investment professional.[203]

COLLABORATION WITH OTHER REGULATORS

As the above cases show, many investigations involve the financial sector. The ICAC takes a proactive stance in cooperating with various Hong Kong financial regulators, including the SFC, the Financial Reporting Council (FRC), the Hong Kong Monetary Authority, and the Insurance Authority.[204]

- "Jade Qilin," a joint operation between the ICAC and SFC, resulted in the arrest of five individuals, including a current senior executive and a former senior executive of an unnamed listed company, following a search of the offices of the listed company and one of its underwriters in its initial public offering.[205]
- "Sniper," a joint operation between the ICAC and FRC, involved a search of the offices of an unnamed public interest entity auditor in the initial public offering of a listed company and the premises of other relevant parties.[206]

Practice Tip: The signed MOUs between the ICAC and other enforcement agencies boost their effectiveness in cracking down on corrupt conduct. Listed companies, licensed persons, and registered institutions regulated by the SFC, as well as public interest entities regulated by the FRC, should be aware that they could be subject to greater scrutiny by the regulators.

Cross-border Cooperation. With respect to cooperation with international authorities, the ICAC is playing a more active role in the Executive Committee of the International Association of Anti-Corruption Authorities (IAACA), after ICAC Commissioner Simon Peh Yun-lu was elected president of the IAACA.[207]

201 ICAC Press Release, *Four charged by ICAC sentenced for conspiracy to defraud over bonds placement of listed company* (Oct. 16, 2021), https://www.icac.org.hk/en/press/index_id_1197.html.

202 Sharon Tam and Alun John, *Former JPMorgan Asia top banker found not guilty of bribery*, REUTERS (Jan. 31, 2021), https://www.reuters.com/article/us-jp-morgan-hongkong-corruption-idUSKBN2A11AG.

203 Sara Cheng, *Hong Kong court finds former bourse exec not guilty of graft*, REUTERS (Dec. 3, 2021), https://www.reuters.com/world/asia-pacific/hong-kong-court-finds-former-bourse-exec-not-guilty-graft-2021-12-03/.

204 Legislative Council Panel on Security, *The Chief Executive's 2021 Policy Address Briefing by Commissioner Independent Commission Against Corruption* (Oct. 20, 2021), https://www.legco.gov.hk/yr20-21/english/panels/se/papers/se20211025cb2-1529-2-e.pdf

205 SFC Enforcement News, *SFC and ICAC joint operation on listed company's suspicious money lending activities* (Aug. 13, 2021), https://apps.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/enforcement-news/doc?refNo=21PR83.

206 FRC Press Release, *FRC and ICAC joint operation against suspected misconduct and bribery* (Nov. 22, 2021), https://www.frc.org.hk/en-us/FRC_PressRelease/FRC_Press_Release%20FRC_ICAC_Joint_Operation_EN.pdf.

207 Tony Kwok, *How Hong Kong's anti-corruption expertise can strengthen the global body* SOUTH CHINA MORNING POST (Jan. 16, 2022), https://www.scmp.com/comment/opinion/article/3163192/how-hong-kongs-anti-corruption-expertise-can-strengthen-global-body

The ICAC has also worked closely with the PRC National Commission of Supervision, the Guangdong Provincial Commission of Supervision, and the Commission Against Corruption of Macao as Hong Kong moves to further integrate into the Guangdong-Hong Kong-Macao Greater Bay Area.[208] In the Greater Bay Area, the ICAC has been discussing with the Qianhai Anti-Corruption Bureau to jointly offer corruption prevention consultancy services to Hong Kong enterprises with operations in Qianhai, which would serve as a pilot project for establishing a synergic integrity supervision system in this area.[209]

NEW INDUSTRY GUIDANCE

Corruption Prevention Guidance – Construction Industry. To counter corruption in the building management and construction industries, the ICAC assisted the Property Management Services Authority in framing the *Code of Conduct on Prevention of Corruption* and the related *Best Practice Guide.*[210]

Corruption Prevention Guidance – Insurance Industry. The ICAC also published and promoted the Corruption Prevention Guide for Insurance Companies in collaboration with the Insurance Authority, aiming to assist insurance companies to establish and strengthen their corruption prevention capabilities in the management of insurance intermediaries, underwriting, and claims verification.[211]

Consultation Paper – Securities Industry. In a consultation paper, the HKEX proposed to introduce a new code provision requiring issuers to establish an anti-corruption policy, and to upgrade the adoption of a whistleblowing policy from a recommended best practice to a provision under the Corporate Governance Code.[212]

Practice Tip: The ICAC's compliance guidance for companies in the construction and insurance industries, and the Hong Kong Stock Exchange's securities industry white paper are useful reads for companies operating in these industries in Hong Kong.

POTENTIAL IMPACT OF THE REPUBLIC OF CHINA'S NATIONAL SECURITY LAW

Companies should also note that the promulgation of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (National Security Law) on June 30, 2020, could exert potential influence on corporate internal investigations from the perspective of international anti-corruption cooperation. Some have also expressed concerns over whether Hong Kong's press and citizens could continue to serve as anti-corruption watchdogs. However, in 2021, we did not see ICAC's anti-corruption efforts obstructed in this manner, and the ICAC continued to bolster its strong and hard-earned reputation since its establishment in 1974.

E. OTHER INTERNATIONAL DEVELOPMENTS OF NOTE: OECD

On November 26, 2021, the OECD Council issued a Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions (the 2021 Recommendation).[213] The Council's last recommendation in this area was issued in 2009. Intervening developments and experience gave rise to the 2021 Recommendation, which was under consideration for some time prior to its issuance.[214]

208 Legislative Council Panel on Security, *The Chief Executive's 2021 Policy Address Briefing by Commissioner Independent Commission Against Corruption* (Oct. 20, 2021), https://www.legco.gov.hk/yr20-21/english/panels/se/papers/se20211025cb2-1529-2-e.pdf.

209 Shenzhen Government Online, *Qianhai to explore integrity supervision methods with HK practice* (May 25, 2021), http://www.sz.gov.cn/en_szgov/news/infocus/Qianhai/news/content/post_8805031.html.

210 PMSA Press Release, *Codes of Conduct for Property Management Industry Entitled "Prevention of Corruption" and "Prescribed Conditions on Licences" to be Gazetted Tomorrow* (Jul. 22, 2021), https://www.pmsa.org.hk/en/press-release-en/codes-of-conduct-for-property-management-industry-entitled-prevention-of-corruption-and-prescribed-conditions-on-licences-to-be-gazetted-tomorrow/.

211 ICAC Post, *ICAC Launches Corruption Prevention Guide for Insurance Companies* (Mar. 9, 2021), https://www.icac.org.hk/icac/post/issue42/en/sub_article_02.html.

212 HKEX, *Consultation Paper: Review of Corporate Governance Code and Related Listing Rules* (Apr. 16, 2021), https://www.hkex.com.hk/News/Market-Consultations/2016-to-Present/April-2021-Review-of-CG-Code-and-LR?sc_lang=en.

213 OECD Council, *Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (Nov. 26, 2021), https://legalinstruments.oecd.org/en/instruments/OECD_LEGAL-0378.

214 One of the authors of this guide, Lucinda Low, provided input on a draft of the 2021 Recommendation at the invitation of the OECD Working Group on Bribery as part of an external stakeholder consultation process.

The 2021 Recommendation cannot be characterized with a single headline. It is a multi-faceted document, comprised of 31 individual recommendations divided into 16 sections. It is broad in scope, covering the waterfront of the OECD's historical activity in the anti-corruption arena—not just through the Anti-Bribery Convention but through some of its "soft law" instruments—as well as some important issues not previously addressed by the OECD.

The 2021 Recommendation contains the first provisions of the OECD on the so-called "demand side," calling on its member countries to take steps to curb the solicitation of bribes. It also tackles the increasingly vexing issue of constraints posed by data protection laws on anti-corruption compliance measures. It calls for increased protection of whistleblowers and some parameters around the growing use of "non-trial resolutions" (*i.e.,* settlements) by countries in response to due process and other concerns.

As to the waterfront of historical activity, the 2021 Recommendation seeks to increase the effectiveness of activities relating to: (1) the criminalization and enforcement of the offense of bribery of foreign public officials; (2) sanctions and confiscation; (3) international cooperation; (4) tax deductibility; (5) accounting requirements, external audit, and internal controls, ethics and compliance; (6) public procurement and other public advantages; (7) officially supported export credits; and (8) cooperation with non-members.

There are two Annexes to the 2021 Recommendation. Annex 1, directed to countries party to the OECD Convention, sets forth Good Practice Guidance on Implementing Specific Articles of that Convention. Annex 2, directed to companies and their business organizations and professional associations, sets forth Good Practice Guidance on Internal Controls, Ethics and Compliance, updating guidance previously adopted by the OECD in 2010.

Below we set out what we consider to be the key takeaways from the 2021 Recommendation, in both the areas of continued focus and the newer areas.

KEY TAKEAWAYS FROM THE 2021 RECOMMENDATION

1. **Proactivity in Government Investigations and Enforcement.** Strikingly, the 2021 Recommendation repeatedly uses the word "proactive" in relation to law enforcement investigations and prosecutions, including international cooperation.[215] This focus dovetails with the similar emphasis US enforcement officials have placed on their approach to bribery investigations.[216] The Recommendation also urges that bribery cases be investigated and prosecuted "without undue delay" (Recommendation IX.i.).
2. **Multijurisdictional Cases.** Recommendation XIX, part C, "encourages direct coordination" by the relevant authorities at an early stage in concurrent or parallel investigations and prosecutions, and puts some flesh on the bones of Article 4.3 of the OECD Anti-Bribery Convention. It not only encourages consultation among the relevant countries when more than one of them has jurisdiction over an alleged offense, but also indicates they should "pay due attention to the risk of prosecuting the same natural or legal person in different jurisdictions for the same criminal conduct." It also encourages joint or parallel investigative teams, and cautions against efforts that would unduly affect the investigations and prosecutions of other jurisdictions. While not earth-shattering, these provisions are a welcome step in the direction of rationalizing how multi-jurisdictional cases are handled and minimizing the risks of double jeopardy and ineffective prosecutions.
3. **Data Protection.** The principal message of the data protection sections, under Recommendation XXVI, is that member countries should ensure that compliance with such laws "does not unduly impede the effectiveness" of international cooperation in investigations and prosecutions, or of compliance programs, including due diligence. They encourage member countries to issue guidance and/or regulations that allow for processing of data in connection with due diligence and investigations. For companies increasingly struggling to reconcile the strictures of laws such as General Data Protection Regulation (GDPR) with their compliance obligations, this represents a welcome development.

215 *See, e.g.,* Recommendations VI.ii, iii; VIII, XVI, XIX.A.x, XXI.iv.

216 *See, e.g.,* Remarks of Deputy Attorney General Lisa O. Monaco at ABA's 36th National Institute on White Collar Crime (the "Monaco Memo"), Oct. 28, 2021, https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute. David Last, Chief of the FCPA Unit, DOJ, made remarks at the ACI FCPA Conference on December 1, 2021, that enforcement officials at the DOJ are using a broad range tools to identify misconduct, including mining and using data; and Charles Cain, Chief of the FCPA Unit, SEC, made similar remarks at the ACI FCPA Conference on December 1, 2021, that enforcement officials at the SEC are not "sitting there passively" waiting for cases to come in.

4. **Non-Trial Resolutions.** Recommendations XVII and XVIII, while encouraging the use of non-trial resolutions (such as DPAs, NPAs, and the like), which have been growing internationally, caution that such resolutions "should follow the principles of due process, transparency, and accountability," ensure that such resolutions do not create obstacles either to enforcement by other countries or of other persons, and do not impede international cooperation. They also emphasize the need for appropriate oversight of such resolutions, but, significantly, without limiting such oversight to judicial authorities ("by a judicial, independent public, or other relevant competent authority, including law enforcement authorities"). This was an area of significant focus leading up to the adoption of the 2021 Recommendation. While it will likely not significantly affect US settlement practice, it is important as the use of DPAs and similar instruments spreads globally.

5. **Accounting Requirements and External Audit.** Recommendation XXIII.A. requires member countries to take measures to ensure that they have adequate accounting requirements in order to combat off-book accounts and other practices designed to facilitate or conceal bribes and consider enforcement for accounting offenses. It also emphasizes (in part B.) the importance of adequate external auditing standards and external reporting requirements for auditors who discovery bribery.

6. **Internal Controls, Ethics and Compliance.** Recommendation XXIII.D. directs member countries to take steps to incentivize compliance programs by companies engaged in international business, both in the context of granting public advances, such as subsidies, licenses, government contracts, development assistance contracts and export credits, and in the context of enforcement. At the same time, it cautions that any incentives offered in the enforcement context "not fully exonerate" companies from liability. Subsection C of the same recommendation also contains measures to encourage companies to develop and implement compliance programs, including encouraging business and professional associations to encourage and assist companies in this regard. Again, this is not likely to significantly affect US enforcement practices, which already seek to incentivize compliance, but may affect policy or practices by other agencies as well as in other countries.

7. **SOEs and SMEs.** The recommendations make clear that state-owned enterprises should be covered by measures that apply to companies, including measures incentivizing the development of compliance programs.[217] They also seek to enhance awareness and compliance by small and medium-size enterprises (SOEs).[218] Coverage of SOEs is an important issue, given their prevalence internationally.

8. **The Demand Side.** Although the OECD Convention itself only addresses the supply side of bribery, pressure has been growing for increased efforts on the demand side. The 2021 Recommendation breaks new ground for the OECD in this regard. Recommendations XII and XIII direct member countries to raise awareness of bribe solicitation risks, "with particular attention to high-risk geographical and industrial sectors of operation" (not defined in this document), provide training to officials posted abroad (such as diplomatic personnel) on how to respond to issues of solicitation, engage in collective action, and coordinate with others, as well as publishing on a publicly available website their rules regarding gifts, hospitality, entertainment, and expenses for domestic public officials. While only a first step by the OECD, whose membership likely makes the impact of this part of the 2021 Recommendation more limited than if it were global, if it promotes additional efforts in this arena, it could prove to be important.

9. **Facilitating Payments.** Recommendation XIV, also part of the "demand side" section, encourages countries to review their "policies and approach" on small facilitation payments, and to encourage companies to prohibit or discourage them, given their corrosive effects. Although most countries now prohibit such payments, and many company policies prohibit or strongly discourage them, the reference to "policies and approach" suggests that existing measures are not enough.

The 2021 Recommendation contains provisions on a number of additional topics not highlighted above, including provisions relating to sanctions and the freezing, seizure and confiscation of bribes, international cooperation, tax deductibility, whistleblower encouragement and protection, public procurement, export credits, and cooperation with non-OECD members.

217 *See, e.g.*, Recommendation XXIII.c (relating to compliance programs), Annex I, B.1., and Annex II.

218 *See, e.g.*, Recommendations IV.ii, XXIII.C, and Annex II.

ANNEX I: GOOD PRACTICE GUIDANCE ON IMPLEMENTING THE ANTI-BRIBERY CONVENTION

Annex I, the Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, is directed to countries that are party to the OECD Anti-Bribery Convention. Its guidance emanates from the OECD's monitoring program.

Notable points in Annex I include: (1) A.1: ensuring that bribe solicitation is not a defense or exception in national laws; (2) B.1: ensuring national laws make SOEs liable for bribery; (3) B.3: ensuring that national laws make companies liable in a wide range of circumstances, including when senior officials fail to prevent misconduct by lower-level persons; (4) B.5: ensuring that corporate liability cannot be avoided through restructuring or merger; and (5) C: strengthening corporate liability for the acts of intermediaries.

The 2021 Recommendation is principally intended to spur action by countries to implement the recommendations in the different areas it covers. Its impact thus depends substantially on whether such implementation occurs, something that will have to be assessed over time. While it is unlikely to significantly change the policies or practices of US enforcement agencies, it may well have an impact on other authorities and multijurisdictional cases. It may also result in more leveling of the playing field for compliance, including between state-owned enterprises and private enterprises, and limiting the deleterious effects of data protection regimes on compliance practices. Finally, whether through cooperation with non-member countries or otherwise, it may influence the development of anti-corruption standards in other arenas.

ANNEX II: GOOD PRACTICE GUIDANCE ON INTERNAL CONTROLS, ETHICS AND COMPLIANCE

As relevant to corporate compliance programs, the updated Good Practice Guidance on Internal Controls, Ethics and Compliance can be found in Annex II to the 2021 Recommendation. Historically, the OECD's guidance regarding corporate compliance has been highly influential with OECD member countries. Given that history, and the ever-increasing convergence of compliance standards around the globe, the 2021 Recommendation similarly could have a significant impact and influence, particularly on countries other than the United States.

The 2021 Recommendation contains several provisions that are of importance to corporate compliance efforts:

- First, it calls for member countries to incentivize the development of compliance programs, both in the enforcement context, and when companies seek to participate in government procurement or receive other public advantages.
- Second, it calls for leveling the playing field between state-owned enterprises and private firms, by making the former subject to the same compliance expectations and standards as the latter.
- Third, it calls for countries to remove obstacles to effective due diligence and other compliance practices presented by data protection regimes.
- Fourth, it emphasizes accounting standards and internal audit.
- Fifth, it seeks to encourage whistleblower protection and reporting.
- Sixth and finally, it enhances and updates the OECD's guidance on internal controls, ethics and compliance, guidance that influences the standards imposed by United States and other enforcement authorities in countries that participate in the OECD, and are party to the Anti-Bribery Convention.

All of the measures in this 2021 Recommendation will be part of the monitoring program conducted by the OECD Working Group on Bribery.

For companies, the 2021 Recommendation will have both direct and indirect effects. The indirect effects come from the continued evolution of the enforcement environment and international cooperation, including the reality of today's multijurisdictional world. The direct effects come principally from the provisions focused on whistleblowing and compliance programs. While the updated OECD Guidance is unlikely to have a material impact on the compliance expectations of US enforcement authorities, they may well have an impact on foreign enforcers.

Appendix – Case Summaries

FCPA Corporate Settlements

A. CREDIT SUISSE GROUP AG

CONDUCT:

SEC alleged that between 2013 and March 2017, Credit Suisse Group AG and Credit Suisse Securities (Europe) Limited (CSSEL) (collectively, Credit Suisse), engaged in a fraud and money laundering scheme related to $2 billion in loans made to three Mozambican state-owned companies (Proindicus S.A., Empresa Moçambicana de Atum, S.A. (EMATUM) and Mozambique Asset Management (MAM)).[219] SEC alleged that Credit Suisse defrauded investors in these companies. In addition, at least $200 million in loan proceeds were diverted to pay kickbacks to current and former Credit Suisse bankers and bribes to Mozambican government officials.[220] The SEC found that the fraud was a consequence of "significant lapses in internal accounting controls."[221]

STATUTORY PROVISIONS:

The SEC charged Credit Suisse AG with violating the FCPA's books and records and internal accounting control provisions.[222] In connection with the EMATUM financial offerings, the SEC also charged Credit Suisse AG with using interstate commerce for the purpose of fraud or deceit.[223] The DOJ charged Credit Suisse AG and CSSEL with a related, non-FCPA, conspiracy to commit wire fraud.[224]

PAYMENTS:

The SEC and DOJ found a Credit Suisse intermediary diverted funds from Proindicus and EMATUM loan proceeds to pay approximately $50 million in kickbacks to current and former Credit Suisse bankers and approximately $150 million in bribes to government officials and their relatives.[225]

BENEFIT:

Credit Suisse was ordered to disgorge $26.2 million in net profits.[226]

PROSECUTING AGENCIES:

DOJ, SEC, United Kingdom Financial Conduct Authority (FCA), Switzerland Financial Market Supervisory Authority (FINMA).

RESOLUTION:

In October 2021, Credit Suisse AG agreed to a Cease-and Desist Order with the SEC. At the same time, Credit Suisse AG entered into a three-year deferred prosecution agreement with the DOJ, while CSSEL pled guilty to one count of conspiracy to commit wire fraud.

Credit Suisse agreed to pay disgorgement and interest totaling more than $34 million and a penalty of $65 million to the SEC.[227] In addition, it agreed to a $247 million criminal fine with the DOJ, with Credit Suisse paying $175 million, after crediting for amounts paid to the SEC and UK FCA. It also agreed to pay over $200 million in a penalty as part of a settled action with the UK FCA.[228] In total, these penalties amount to approximately $475 million. Credit Suisse also agreed to forgive $200 million in debt owed by the Mozambican government.[229]

219 DOJ Press Release, *Credit Suisse Resolves Fraudulent Mozambique Loan Case in $547 million Coordinated Global Resolution* (Oct. 19, 2021), https://www.justice.gov/usao-edny/pr/credit-suisse-resolves-fraudulent-mozambique-loan-case-547-million-coordinated-global.

220 *Id.*

221 SEC Press Release, *Credit Suisse to Pay Nearly $475 Million to U.S. and U.K. Authorities to Resolve Charges in Connection with Mozambican Bond Offerings* (Oct. 19, 2021), https://www.sec.gov/news/press-release/2021-213.

222 *See* Order Instituting Cease-and-Desist Proceedings, *In the Matter of Credit Suisse Group AG*, SEC Exch. Act Release No. 11001, ¶¶ 65-66 (Oct. 19, 2021), https://www.sec.gov/litigation/admin/2021/33-11001.pdf.

223 *Id.* ¶¶ 62-64.

224 *See* DOJ Deferred Prosecution Agreement, *Credit Suisse Group AG*, No. 21-cr-521, ¶ 1 (Oct. 19, 2021), https://www.justice.gov/criminal-fraud/file/1444986/download.

225 SEC Order, *In the Matter of Credit Suisse Group AG*, ¶¶ 11-26; DOJ Press Release, *Credit Suisse Resolves Fraudulent Mozambique Loan Case in $547 million Coordinated Global Resolution* (Oct. 19, 2021), https://www.justice.gov/usao-edny/pr/credit-suisse-resolves-fraudulent-mozambique-loan-case-547-million-coordinated-global.

226 *Id.* ¶¶ 67, IV.B.

227 *Id.* ¶¶ IV.B-C.

228 DOJ Deferred Prosecution Agreement, *Credit Suisse Group AG*, ¶¶ 4, 8.

229 *Id.*

The SEC found that Credit Suisse engaged in substantial remediation efforts including a review and enhancement of its internal controls and procedures, the establishment of a UK FCA team to conduct due diligence, and the establishment of a Global Focus Client Committee to assess client risks from a compliance perspective.[230] The DOJ gave Credit Suisse partial credit (15% off the low end of the Sentencing Guidelines) for cooperation.[231]

VOLUNTARY DISCLOSURE/OTHER:

The case did not originate with a voluntary disclosure (no credit given by DOJ for such disclosure).

NOTEWORTHY:

A London-based subsidiary of the Russian bank VTB Capital plc (VTB) entered into a Cease-and-Desist order with the SEC, agreeing to pay more than $6 million to resolve non-FCPA charges related to VTB's alleged role in the EMATUM scheme.[232] As discussed in the 2019 FCPA YIR, in 2019, three Credit Suisse employees—Andrew Pearse, Surjan Singh, and Detelina Subeva—also entered related guilty pleas.[233] In another related proceeding, Jean Boustani, an executive of United Arab Emirates-based shipbuilding company Privinvest Group, was tried and acquitted by a jury of conspiracy to commit wire fraud, conspiracy to commit securities fraud, and conspiracy to commit money laundering charges.[234]

B. AMEC FOSTER WHEELER ENERGY LIMITED

CONDUCT:

Between 2011 and 2014, Amec Foster Wheeler Energy Limited (Amec Foster Wheeler), a UK-based engineering company and subsidiary of John Wood Group plc, allegedly paid bribes to Brazilian officials in order to win an approximately $190 million contract from Petrobras, the Brazilian state-owned oil company, to design a gas-to-chemicals complex.[235] Amec Foster Wheeler allegedly paid the bribes through third-party agents, including one agent who was allowed to work on the project "unofficially" despite failing Amec Foster Wheeler's due diligence process.[236] The unofficial agent, from Italy, worked in conjunction with a Brazilian agent that was hired officially, and whose engagement was used to cover the Italian agent's involvement.[237]

STATUTORY PROVISIONS:

The DOJ charged Amec Foster Wheeler with conspiracy to violate the anti-bribery provisions of the FCPA.[238] The SEC found Amec Foster Wheeler violated the anti-bribery, books and records, and internal accounting control provisions.[239]

PAYMENTS:

According to the DOJ and SEC, Amec Foster Wheeler paid approximately $1.1 million in bribes in connection with obtaining the Petrobras contract.[240]

BENEFIT:

Amec Foster Wheeler sought to win an approximately $190 million oil and gas engineering and design contract from Petrobras. The DOJ alleged that Amec Foster Wheeler received approximately $12.9 million in "profits" from the Petrobras contract while the SEC found that Amec Foster Wheeler obtained an overall "benefit" of over $17.6 million.[241]

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230 SEC Order, *In the Matter of Credit Suisse Group AG*, ¶¶ 11-26.

231 DOJ Deferred Prosecution Agreement, *Credit Suisse Group AG*, ¶ 4.

232 *See* Order Instituting Cease-and-Desist Proceedings, *In the Matter of VTB Capital plc*, SEC Exch. Act Release No. 11000 (Oct. 19, 2021), https://www.sec.gov/litigation/admin/2021/33-11000.pdf.

233 Pearse, a former managing director of CSSEL, pleaded guilty to conspiracy to commit wire fraud. Singh, a former managing director of CSSEL, and Subeva, a former vice president of CSSEL, pleaded guilty to conspiracy to commit money laundering.

234 Mogomotsi Magome, *Shipbuilding Executive Found Not Guilty in Mozambique Debt Fraud Trial*, Wall St. J. (Dec. 2, 2019) (Manuel Chang), https://www.wsj.com/articles/shipbuilding-executive-found-not-guilty-in-mozambique-debt-fraud-trial-11575310415.

235 *See* DOJ Deferred Prosecution Agreement, *Amec Foster Wheeler Energy Limited*, No. 21-cr-98, Statement of Facts ¶ 16 (Jun. 24, 2021), https://www.justice.gov/opa/press-release/file/1411296/download.

236 *See* Order Instituting Cease-and-Desist Proceedings, *In the Matter of Amec Foster Wheeler Limited*, SEC Exch. Act Release No. 92259, ¶ 1 (Jun. 25, 2021), https://www.sec.gov/litigation/admin/2021/34-92259.pdf.

237 DOJ Information, *Amec Foster Wheeler Energy Limited*, No. 21-cr-98, ¶¶ 29-30, 33, 35,42.

238 DOJ Deferred Prosecution Agreement, *Amec Foster Wheeler Energy Limited*, ¶ 1.

239 SEC Order, *In the Matter of Amec Foster Wheeler Limited*, ¶¶ 31-34.

240 DOJ Deferred Prosecution Agreement, *Amec Foster Wheeler Energy Limited*, Statement of Facts ¶ 43; SEC Order, *In the Matter of Amec Foster Wheeler Limited*, ¶ 1.

241 DOJ Deferred Prosecution Agreement, *Amec Foster Wheeler Energy Limited*, Statement of Facts ¶ 41; SEC Order, *In the Matter of Amec Foster Wheeler Limited*, ¶ 1.

PROSECUTING AGENCIES:

DOJ, SEC, United Kingdom Serious Fraud Office (SFO), Brazil Controladoria-General da Uniao (CGU)/Advocacia-Geral da Uniao (AGU), Brazil Ministerio Publico Federal (MPF).

RESOLUTION:

Amec Foster Wheeler entered into a three-year deferred prosecution agreement with the DOJ and consented to a Cease-and-Desist Order with the SEC to resolve its FCPA charges in June 2021. As part of the global resolution, Amec Foster Wheeler agreed to pay more than $41 million subject to offsets for payments to UK and Brazilian agencies.[242] After accounting for the offsets, Amec Foster Wheeler agreed to pay a minimum combined sum of approximately $17.8 million to resolve the DOJ and SEC charges.[243] This amount was part of a global resolution of approximately $177 million.

The DOJ gave Amec Foster Wheeler full credit (25% off the low end of the Sentencing Guidelines) for its cooperation in the investigation by timely producing key documents, providing the facts developed in its internal investigation, and making current or former employees available for interviews as well as engaging in remediation efforts including terminating the employees responsible for the misconduct and enhancing internal accounting controls.[244]

VOLUNTARY DISCLOSURE/OTHER:

The case did not originate with a voluntary disclosure (no credit given by DOJ for such disclosure).

NOTEWORTHY:

The payments were allegedly made through third-party agents, including one agent who, according to the SEC, failed Foster Wheeler's due diligence process but was allowed to continue working on the project "unofficially."[245] The agent then engaged in conduct that included paying bribes to a Petrobras official to obtain confidential information on the company's behalf to win a contract and to negotiate favorable pricing and other project terms.[246]

C. DEUTSCHE BANK AG

CONDUCT:

According to the DOJ, between 2009 and 2016, Deutsche Bank AG (Deutsche Bank) engaged in a pattern of making improper payments and bribes to third-party consultants who were relatives or associates of foreign officials; the DOJ alleged that Deutsche Bank falsely recorded these payments as legitimate business expenses using falsified invoices and other documentation.[247] The DOJ investigation focused primarily on business development consultants in Abu Dhabi, Saudi Arabia, and Italy.[248] The SEC investigated similar alleged conduct involving Abu Dhabi, Italian, and Middle Eastern Deutsche Bank business development consultants as well as a Chinese business development consultant.[249]

STATUTORY PROVISIONS:

The DOJ charged Deutsche Bank with one count of conspiracy to violate the FCPA's books and records and internal accounting control provisions, as well as one count of conspiracy to commit wire fraud affecting a financial institution.[250] The SEC charged Deutsche Bank with violating the books and records and internal accounting control provisions.[251]

PAYMENTS:

The DOJ alleged that Deutsche Bank made approximately $5.4 million in bribe payments or payments for unknown, undocumented, or unauthorized services to Abu Dhabi, Middle Eastern, and Italian business development consultants.[252] The SEC also alleged that Deutsche Bank

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242 DOJ Deferred Prosecution Agreement, *Amec Foster Wheeler Energy Limited*, ¶ 7; SEC Order, *In the Matter of Amec Foster Wheeler Limited*, ¶ IV.B.

243 *Id.*

244 DOJ Deferred Prosecution Agreement, *Amec Foster Wheeler Energy Limited*, ¶ 4; SEC Order, *In the Matter of Amec Foster Wheeler Limited*, ¶ 35.

245 SEC Order, *In the Matter of Amec Foster Wheeler Limited*, ¶ 1.

246 SEC Order, *In the Matter of Amec Foster Wheeler Limited*, ¶ 19.

247 DOJ Press Release, *Deutsche Bank Agrees to Pay over $130 Million to Resolve Foreign Corrupt Practices Act and Fraud Case* (Jan. 8, 2021), https://www.justice.gov/opa/pr/deutsche-bank-agrees-pay-over-130-million-resolve-foreign-corrupt-practices-act-and-fraud.

248 *See* DOJ Deferred Prosecution Agreement, *Deutsche Bank Aktiengesellchaft*, No. 20-cr-00584, Statement of Facts ¶ 1 (Jan. 7, 2021), https://www.justice.gov/criminal-fraud/file/1369951/download. The DOJ case also focused on a separate, factually-unrelated scheme in which Deutsche Bank allegedly engaged in fraudulent and manipulative commodities trading practices related to publicly-traded futures contracts for precious metals. See DOJ Press Release, *Deutsche Bank Agrees to Pay over $130 Million to Resolve Foreign Corrupt Practices Act and Fraud Case* (Jan. 8, 2021), https://www.justice.gov/opa/pr/deutsche-bank-agrees-pay-over-130-million-resolve-foreign-corrupt-practices-act-and-fraud.

249 *See* Order Instituting Cease-and-Desist Proceedings, *In the Matter of Deutsche Bank AG*, SEC Exch. Act Release No. 90875 (Jan. 8, 2021), https://www.sec.gov/litigation/admin/2021/34-90875.pdf.

250 DOJ Deferred Prosecution Agreement, *Deutsche Bank Aktiengesellchaft*, Statement of Facts ¶ 1.

251 SEC Order, *In the Matter of Deutsche Bank*, ¶¶ 34, 36.

252 DOJ Deferred Prosecution Agreement, *Deutsche Bank Aktiengesellchaft,* Statement of Facts ¶¶ 22, 36, 41; SEC Order, *In the Matter of Deutsche Bank*, ¶¶ 23, 27.

made approximately $1.6 million in additional improper payments to a Chinese business development consultant.[253]

BENEFIT:

According to the SEC, Deutsche Bank received a benefit of approximately $35 million as a result of the approximately $7 million in improper payments.[254]

PROSECUTING AGENCIES:

DOJ, SEC.

RESOLUTION:

As part of the coordinated resolution, Deutsche Bank agreed to pay the SEC disgorgement of $35 million with prejudgment interest of $8 million. It also entered into a three-year deferred prosecution agreement with the DOJ and agreed to pay a $79.6 million fine.[255]

The DOJ gave Deutsche Bank a 25% discount off the midpoint of the Sentencing Guidelines for cooperation.[256] The company received credit for providing regular updates on its internal investigation, highlighting key facts and documents, making employees available for interviews as well as engaging in remedial measures such as: conducting a root cause analysis and significantly enhancing its internal accounting controls.[257]

VOLUNTARY DISCLOSURE/OTHER:

The case did not originate with a voluntary disclosure (no credit given by DOJ for such disclosure).

D. WPP PLC

CONDUCT:

According to the SEC, WPP plc (WPP), an advertising agency with dual-headquarters in London and New York City, utilized an acquisition strategy whereby WPP sought to acquire small, localized advertising agencies in high-risk markets.[258] WPP allegedly failed to devise and maintain a sufficient system of internal accounting controls necessary to detect and prevent improper payments and bribes by subsidiaries in India, China, Brazil, and Peru.[259] In addition to making improper payments, WPP's Brazilian and Peruvian subsidiaries allegedly falsified and/or failed to maintain records to conceal the improper payments.[260]

STATUTORY PROVISIONS:

WPP allegedly violated the anti-bribery, books and records, and internal accounting control provisions of the FCPA.[261]

PAYMENTS:

The SEC found a WPP subsidiary based in India paid as much as $1 million in bribes to Indian officials to obtain and retain government business.[262] It also found a Chinese subsidiary of WPP made an improper payment of $107,000 to a vendor in connection with a tax audit.[263] Finally, it found WPP subsidiaries based in Brazil and Peru made improper payments of unspecified amounts.[264]

BENEFIT:

According to the SEC, WPP's Indian subsidiary received a benefit of $5,669,596 as a result of improper payments by its Chinese subsidiary;[265] WPP's Chinese subsidiary avoided a tax obligation of $3,261,437;[266] WPP's Brazilian subsidiary received a benefit of $891,457 as a result of improper

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253 SEC Order, *In the Matter of Deutsche Bank*, ¶ 14.

254 *Id.* ¶ 3. The DOJ did not address the benefits Deutsche Bank received as a result of its improper payments.

255 The DOJ Deferred Prosecution Agreement also resolved the factually-unrelated commodities fraud charge with Deutsche Bank agreeing to pay an additional $7,530,218 in criminal disgorgement, victim compensation payments, and criminal penalties related to the fraud case. DOJ Press Release, *Deutsche Bank Agrees to Pay over $130 Million to Resolve Foreign Corrupt Practices Act and Fraud Case* (Jan. 8, 2021), https://www.justice.gov/opa/pr/deutsche-bank-agrees-pay-over-130-million-resolve-foreign-corrupt-practices-act-and-fraud.

256 DOJ Deferred Prosecution Agreement, *Deutsche Bank Aktiengesellchaft*, ¶ 1.

257 DOJ Deferred Prosecution Agreement, *Deutsche Bank Aktiengesellchaft*, ¶ 4; SEC Order, In the Matter of Deutsche Bank, ¶¶ 39-40.

258 *See* Order Instituting Cease-and-Desist Proceedings, *In the Matter of WPP plc*, SEC Exch. Act Release No. 93117 (Sept. 24, 2021), https://www.sec.gov/litigation/admin/2021/34-93117.pdf.

259 *Id.*

260 *Id.* ¶¶ 27, 29.

261 *Id.* ¶¶ 32-34.

262 *Id.* ¶ 16.

263 *Id.* ¶ 22.

264 *Id.* ¶¶ 27, 29.

265 *Id.* ¶ 20.

266 *Id.* ¶ 22.

payments and falsified books and records;[267] and WPP's Peruvian subsidiary received a benefit of $291,935 as a result of improper payments and deficient books and records.[268]

PROSECUTING AGENCY:

SEC.

RESOLUTION:

WPP consented to a Cease-and-Desist Order with the SEC to resolve its FCPA charges and agreed to pay $10.1 million in disgorgement, $1.1 million in prejudgment interest, and an $8 million civil penalty, for a total of $19.2 million.[269]

WPP received credit for its cooperation and remediation. WPP's cooperation included sharing facts developed through internal investigations, translating key documents, and making employees available for interviews.[270] WPP's remediation included terminating executives and employees involved in the misconduct as well as strengthening global compliance, internal investigations, risk, and control functions.[271]

VOLUNTARY DISCLOSURE/OTHER:

Unknown.

NOTEWORTHY:

According to the SEC, WPP had engaged in a number of acquisitions in high-risk markets, acquiring a controlling interest in small, local advertising agencies and then often structuring those agreements to include earn-out provisions whereby the agency's founder would receive the full purchase price for the acquisition only upon meeting future financial goals.[272] In some cases, the agency's founder continued to serve as the CEO of the local entity subsequent to WPP's acquisition.[273] Nonetheless, according to the SEC, WPP failed to take adequate measures to ensure that the acquired entities implemented WPP's internal accounting controls and compliance policies.[274] In addition, when red flags arose, including anonymous complaints alleging bribery, WPP initially failed to adequately investigate those red flags.[275] For example, with respect to WPP's India subsidiary, after receiving anonymous allegations of bribery, WPP tasked its financial director for the region to oversee an investigation, and the financial director in turn engaged an accounting firm whose investigation "relied on information provided by CEO A and India Subsidiary CFO (CFO A), did not contact third parties, and ultimately provided a report to WPP, which contained no conclusions related to the bribery allegations."[276] Only after receiving additional anonymous complaints over the course of two years did WPP direct its legal team to conduct an investigation.[277] That investigation, which included steps such as email review and third-party due diligence reports, uncovered a bribery scheme at the subsidiary involving the local CEO and CFO, going back to the time of the original anonymous complaints.[278]

267 *Id.* ¶ 27.

268 *Id.* ¶ 29.

269 *Id.* ¶ 38.

270 *Id.* ¶ 36.

271 *Id.* ¶ 37.

272 SEC Press Release, *SEC Charges World's Largest Advertising Group with FCPA Violations* (Sept. 24, 2021), https://www.sec.gov/news/press-release/2021-191.

273 *Id.*

274 *Id.*

275 *Id.*

276 SEC Order, *In the Matter of Deutsche Bank*, ¶ 12.

277 *Id.* ¶¶ 18-19.

278 *Id.*

Individual Enforcement Actions

A. FCPA AND ANTI-MONEY LAUNDERING CASES INVOLVING FOREIGN BRIBERY BROUGHT IN 2021

1. SERGIO RODRIGO MENDEZ MENDIZABAL, ARTURO MURILLO PRIJIC, BRYAN BERKMAN, LUIS BERKMAN, AND PHILIP LICHTENFELD (BOLIVIA)

NAMES OF INDIVIDUALS:

Sergio Rodrigo Mendez Mendizabal (Mendez), former Bolivian minister of government; Arturo Murillo Prijic (Murillo), former minister of government; Bryan Berkman, Florida-based business owner; Luis Berkman, Bryan's father and close associate of Mendez; Philip Lichtenfeld, associate of both Berkmans and Mendez.

CONDUCT:

Defendants allegedly orchestrated a bribery scheme between approximately November 2019 and April 2020 in which bribes were paid by Lichtenfeld to the Bolivian government officials.[279]

STATUTORY PROVISIONS:

Conspiracy to commit money laundering.[280]

PAYMENTS:

Bryan Berkman, Luis Berkman, and Lichtenfeld paid $582,000 to Mendez and $20,000 to "Co-Conspirator 2" for a total of $602,000.[281]

BENEFIT:

Bryan Berkman's Floridian company would receive an approximately $5.6 million contract to provide tear gas and other such equipment to the Bolivian Ministry of Defense.[282]

PROSECUTING AGENCY:

DOJ. In addition, the Bolivian Interior Minister said that the country would ask the US to extradite Murillo.[283]

RESOLUTION:

Mendez accepted a plea agreement in which he pleaded guilty to conspiracy to commit money laundering. Under the terms of the plea agreement, he may receive a sentence of 10 years in prison and a fine of up to $500,000 or twice the amount of the criminally derived property involved in the transactions, whichever is greater. The court also has the authority to order criminal forfeiture and restitution.[284] His sentencing hearing has been continued to June 9, 2022.[285]

Luis Berkman accepted a plea agreement in which he pleaded guilty to one count of conspiracy to commit money laundering. Under the terms of the plea agreement, he may receive a sentence of up to 10 years in prison and may receive a fine of up to $500,000 or twice the amount of the criminally derived property involved in the transactions, whichever is greater. The court also has the authority to order criminal forfeiture and restitution.[286]

Bryan Berkman accepted a plea agreement in which he pleaded guilty to conspiracy to commit an offense against the United States, namely, a violation of the FCPA, 15 USC § 78dd-2, all in violation of 18 USC § 371. Under the terms of the plea agreement, he may receive a term of imprisonment of up to five years, and/or a fine of up to $250,000 or twice the gain or twice the loss, whichever is greater. The court also has the authority to order criminal forfeiture and restitution.[287]

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279 DOJ Press Release, *Former Minister of Government of Bolivia, Owner of Florida-Based Company, and Three Others Charged in Bribery and Money Laundering Scheme* (May 26, 2021), https://www.justice.gov/opa/pr/former-minister-government-bolivia-owner-florida-based-company-and-three-others-charged.

280 Criminal Complaint, *United States v. Berkman et al.*, No. 21-mj-06320 (S.D. Fla. May 20, 2021).

281 Criminal Complaint, *United States v. Murillo Prijic*, No. 21-mj-03013 (S.D. Fla. May 24, 2021).

282 DOJ Press Release, *Former Minister of Government of Bolivia, Owner of Florida-Based Company, and Three Others Charged in Bribery and Money Laundering Scheme* (May 26, 2021), https://www.justice.gov/opa/pr/former-minister-government-bolivia-owner-florida-based-company-and-three-others-charged.

283 CBS Miami, *Bolivia's Former Interior Minister Charged For Bribes In Tear Gas Deal With Florida-Based Businessmen* (May 26, 2021), https://miami.cbslocal.com/2021/05/26/bolivia-former-interior-minister-arturo-murillo-arrested-bribe/.

284 Mendez Plea Agreement, *United States v Mendez, 05/20/21, No. 21-mj-06320No. 21-cr-60257* (S.D. Fla. Sept. 29, 2021)

285 Order Granting Third Joint Mot.to Continue Sentencing Hr'g, *United States v. Berkman*, et. al , No. 21-cr-60257 (S.D. Fla. Jan. 27, 2022).

286 Luis Berkman Plea Agreement, *United States. v. Berkman,* No. 21-cr-60258 (S.D. Fla. Sept. 29, 2021).

287 Bryan Berkman Plea Agreement, *United States v. Berkman et al.*, No. 21-cr-60255 (S.D. Fla. Sept. 29, 2021).

Lichtenfeld accepted a plea agreement in which he pleaded guilty to conspiracy to commit an offense against the United States, namely, a violation of the FCPA 15 USC § 78dd-2, all in violation of 18 USC § 371. The court may impose a term of imprisonment of up to five years, and/or a fine of up to $250,000 or twice the gain or twice the loss, whichever is greater. The court may order criminal forfeiture and restitution.[288]

Murillo was indicted in December 2021. His trial is set for May, 23, 2022.[289]

NOTEWORTHY:

The Bolivian government is seeking to sue the same defendants in Florida state court for their roles in the bribery scheme. The case was filed on July 29, 2021 and is set to go to trial on October 31, 2022.[290]

2. FREDRICK CUSHMORE JR. (EGYPT)

NAME OF INDIVIDUAL:

Fredrick Cushmore Jr., vice president, head of international sales of Corsa Coal.

CONDUCT:

Cushmore allegedly conspired with other American executives and Egyptian foreign officials to bribe Egyptian nationals to secure business with an Egyptian state-owned and state-controlled entity.[291]

STATUTORY PROVISIONS:

Conspiracy to violate the FCPA.[292]

PAYMENTS:

$4.8 million.[293]

BENEFIT:

Lucrative coals contracts and expansion of business in Egypt.[294]

PROSECUTING AGENCY:

DOJ.

RESOLUTION:

Cushmore pleaded guilty on November 17, 2021. The terms of his plea are sealed. [295]

3. ALVARO PULIDO VARGAS, JOSE GREGORIA VIELMA-MORA, EMMANUEL ENRIQUE RUBIO GONZALEZ, CARLOS ROLANDO LIZCANO MANRIQUE, AND ANA GUILLERMO LUIS (VENEZUELA)

NAMES OF INDIVIDUALS:

Alvaro Pulido Vargas (Pulido), who controlled several companies that obtained contracts for food and medicine to Venezuela; Governor Jose Gregoria Vielma-Mora, governor of the Venezuelan State of Tachira, Emmanuel Enrique Rubio Gonzalez, son of Pulido; Carlos Rolando Lizcano Manrique, and Ana Guillermo Luis, who helped control companies to enter into such contracts.

CONDUCT:

Defendants allegedly coordinated in a money laundering and bribery scheme from 2015-2020. The indictment alleged that they laundered money from bank accounts in Antigua, the United Arab Emirates, as well as other countries to and through bank accounts in the United States and paid bribes to Venezuelan government officials, including defendant Gregoria.[296]

STATUTORY PROVISIONS:

Conspiracy to commit money laundering and money laundering.[297]

PAYMENTS:

Gregoria and "Co-conspirator 2" received approximately $17,256,935 in bribes.[298]

PROSECUTING AGENCY:

DOJ.

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288 Lichtenfeld Plea Agreement, *United States v. Lichtenfeld*, No. 21-cr-60256 (S.D. Fla. Sept. 29, 2021).

289 Order, *United States v. Murillo*, 12/29/21, No. 32-cr-60340.

290 Compliant, *Plurinational State of Bolivia v. Arturo Carlos Murillo et al.* No. 2021-018442-CA-01 (Fla. Cir. Ct. Jul. 29, 2021).

291 Information, *Unites States v. Cushmore*, No. 21-cr-00455 (W.D. Pa. Nov. 3, 2021).

292 *Id.*

293 *Id.*

294 *Id.*

295 Docket, *United States v. Cushmore,* No. 21-cr-00455 (W.D. Pa. Nov. 17, 2021).

296 DOJ Press Release, *Five Individuals Charged with Money Laundering in Connection with Alleged Venezuela Bribery Scheme,* (Oct. 21, 2021), https://www.justice.gov/opa/pr/five-individuals-charged-money-laundering-connection-alleged-venezuela-bribery-scheme.

297 *Id.*

298 Indictment, *United States v. Pulido et al.*, No. 21-cr-20509 (S.D. Fla. Oct. 7, 2021).

BENEFIT:

Obtaining and inflating contracts through a Venezuelan state-controlled food and medicine distribution program for the people of Venezuela. [299]

RESOLUTION:

All defendants have been considered fugitives since November 8, 2021.[300]

NOTEWORTHY:

Pulido was also indicted in 2019 for his role in a separate money laundering scheme. Pulido and a Columbian businessman are alleged to have bribed Venezuelan officials with payments for shipments of construction materials that were never actually sent to the country to secure a contract with the government to build low-income housing. (For more details, see our 2019 FCPA/Anti-Corruption Year in Review.)

4. NAMAN WAKIL (VENEZUELA)

NAME OF INDIVIDUAL:

Naman Wakil, owner of various food companies.

CONDUCT:

Wakil allegedly schemed with others to bribe state officials. These included Venezuelan state officials and officials at joint ventures between government-owned institutions and various foreign companies in the Orinoco belt of Venezuela. He allegedly laundered funds related to this bribery scheme to and from bank accounts located in south Florida. Additionally, prosecutors allege that he used illicit funds to purchase 10 apartment units in south Florida, a $3.5 million plane, and a $1.5 million yacht, among other things. He also allegedly used a portion of the funds to make said bribery payments to or for the benefit of the Venezuelan officials. He allegedly concealed these bribes as payments for logistics services and customs paperwork.[301]

STATUTORY PROVISIONS:

Conspiracy to violate the FCPA; FCPA; conspiracy to commit money laundering; international laundering of monetary instruments; engaging in transactions in criminally derived property.[302]

PAYMENTS:

$11.75 million to the food company and at least $500,000 to the energy company, as well as a $300,000 condominium in Miami as payment.

BENEFIT:

At least $250 million in contracts from a Venezuela's state-owned and state-controlled energy company and a Venezuela state-controlled food company.[303]

PROSECUTING AGENCY:

DOJ.

RESOLUTION:

Trial is set for November 7, 2022.[304]

5. LUIS ALVARAZ VILLAMAR (ECUADOR)

NAME OF INDIVIDUAL:

Luis Alvaraz Villamar (Alvarez), operations manager of Decevale, an Ecuadorian entity that operated a centralized depository for the clearing and settlement of securities.

CONDUCT:

Defendant admits that, while working for a Peruvian state-owned financial institution responsible for handling the social security proceeds of Peruvian police officers, he accepted bribes.[305]

STATUTORY PROVISIONS:

Conspiracy to commit money laundering.[306]

PAYMENTS:

Alvarez received approximately $3,155,671.[307]

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299 DOJ Press Release, *Five Individuals Charged with Money Laundering in Connection with Alleged Venezuela Bribery Scheme*, (Oct. 21, 2021), https://www.justice.gov/opa/pr/five-individuals-charged-money-laundering-connection-alleged-venezuela-bribery-scheme.

300 Docket, *United States v. Pulido et al.*, No. 21-cr-20509 (S.D. Fla. Nov. 8, 2021).

301 DOJ Press Release, *Executive Arrested and Charged for Bribery and Money-Laundering Scheme*, (Aug. 4, 2021), https://www.justice.gov/opa/pr/executive-arrested-and-charged-bribery-and-money-laundering-scheme.

302 Indictment, *United States v. Wakil*, No. 21-20406 (S.D. Fla. July 29, 2021).

303 DOJ Press Release, *Executive Arrested and Charged for Bribery and Money-Laundering Scheme*, (Aug. 4, 2021), https://www.justice.gov/opa/pr/executive-arrested-and-charged-bribery-and-money-laundering-scheme.

304 Docket, *United States v. Wakil*, No. 21-20406 (S.D. Fla.).

305 Complaint, *United States v. Alvarez*, No. 21-cr-20308 (S.D. Fla. June 25, 2021).

306 *Id.*

307 Factual Proffer, *United States v. Alvarez*, No. 21-cr-20308 (S.D. Fla. June 25, 2021).

BENEFIT:

The individual paying bribes to the defendant was allowed to act as custodian over the social security investments, essentially giving him total control and ability to retain their investment business.[308]

PROSECUTING AGENCY:

DOJ.

RESOLUTION:

Alvarez accepted a plea agreement in which he pleaded guilty to conspiracy to commit money laundering. He may receive up to 10 years in prison and/or a fine of up to $500,000 or twice the amount of criminally derived property, whichever is greater as well as criminal forfeiture and restitution.[309]

6. PETER WEINZIERL AND ALEXANDER WALDSTEIN (BRAZIL, MEXICO AND PANAMA)

NAMES OF INDIVIDUALS:

Peter Weinzierl and Alexander Waldstein, officers of Meinl Bank AG.

CONDUCT:

Defendants are alleged to have roles in a massive money laundering scheme involving Odebrecht S.A., a Brazil-based global construction conglomerate. Between approximately 2006 and 2016, defendants worked with others to launder money in a scheme to defraud Brazil's tax authority and to create off-books slush funds used by Odebrecht to pay bribes to public officials around the world. As a part of this scheme, the defendants used fraudulent transactions and sham agreements to move more than $170 million from bank accounts in New York to offshore bank accounts and also caused millions of dollars in illicit proceeds to be transferred from an Antiguan bank to a brokerage account located in the United States to purchase securities there.[310]

STATUTORY PROVISIONS:

Both defendants are charged with one count of conspiracy to commit money laundering and two counts of international promotional money laundering. Weinzierl is also charged with one count of engaging in a transaction in criminally derived property.[311]

PAYMENTS:

$5,000,000 in bribes to Mexican government officials; $3,005,800 to Brazilian government officials; in separate occurrences, $5,220,960, $1,400,000, $2,750,000, and $600,000 to Panamanian government officials.[312]

BENEFIT:

In exchange for the bribes, Odebrecht received contracts around the world. For their part in the conspiracy, Weinzierl and Waldstein obtained "substantial fees" in the "millions of dollars" in exchange for processing the sham transactions and facilitating the scheme.[313]

PROSECUTING AGENCY:

DOJ.

RESOLUTION:

Weinzierl was arrested after landing his private jet in London and is undergoing extradition proceedings.[314] Waldstein remains at large.

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308 *Id.*

309 Plea Agreement, *United States v. Alvarez*, No. 21-cr-20308 (S.D. Fla. June 25, 2021).

310 DOJ Press Release, *Two Bank Executives Charged for Conspiring to Launder Hundreds of Millions of Dollars Through U.S. Financial System in Connection with Odebrecht Bribery and Fraud Scheme*, (May 25, 2021), https://www.justice.gov/opa/pr/two-bank-executives-charged-conspiring-launder-hundreds-millions-dollars-through-us-financial.

311 Indictment, *United States v. Weinzierl & Waldstein*, No. 20-cr-00383 (E.D.N.Y. May 25, 2021).

312 *Id.*

313 *Id.*

314 Owen Walker, *Vienna's banking industry struggles to shake off dirty money scandals*, FINANCIAL TIMES, Aug. 31, 2021, https://www.ft.com/content/cca24b53-379b-4553-baa4-e8bbe53f8b25.

7. ADAM BECHIR, HAMID TAKANE, RIAZ TYAB, AND NOURACHAM BECHIR NIAM (CHAD)

NAMES OF INDIVIDUALS:

Adam Bechir, the Republic of Chad's former ambassador to the United States and Canada; Hamid Takane, Chad's former deputy chief of mission for the United States and Canada; Riaz Tyab, a citizen of Canada and founding shareholder of the start-up energy company; Nouracham Bechir Niam, wife of Adam Bechir.

CONDUCT:

Bechir and Takane were charged with soliciting and accepting a $2 million bribe from Griffiths Energy, a Canadian start-up energy company, and conspiring to launder the bribe payment.[315] Tyab, a founding shareholder and director of the start-up company from 2009 through 2011, arranged for the bribe to be paid to Bechir's wife, Niam. The bribe was paid through a sham contract for consulting services that Niam did not provide. In addition to the $2 million bribe, the start-up energy company also issued shares in the company to Niam and another individual.

STATUTORY PROVISIONS:

All four defendants are charged with conspiracy to commit money laundering. Bechir, Takane, and Niam were charged with money laundering. Niam and Tyab were also charged with conspiracy to violate the FCPA.[316]

PAYMENTS:

$2 million bribe and the start-up energy company also issued shares in the company to Niam, to Takane's wife, and to a third Chadian individual.

BENEFIT:

Lucrative oil contracts for Griffiths Energy from the Government of Chad.

PROSECUTING AGENCY:

DOJ.

RESOLUTION:

Tyab entered a guilty plea to one count of conspiracy to violate the FCPA. As part of his guilty plea, Tyab agreed to forfeit criminal proceeds of approximately $27 million. The remaining three defendants remain at large.[317]

8. RAYMOND KOHUT (ECUADOR)

NAME OF INDIVIDUAL:

Raymond Kohut, a Canadian citizen and a manager and crude oil trader for a European energy trading company, Gunvor Group.

CONDUCT:

The alleged scheme involved the trading company paying at least $22 million to Ecuadorian officials in order to, among other things, obtain confidential, non-public information about Petroecuador that would assist the trading company on securing contracts. The payments were allegedly concealed through false invoices and consulting agreements with the Singaporean subsidiary of the trading company. During several calls and meeting, Kohut and others are alleged to have conspired to conceal the bribery and money laundering from compliance personnel.

STATUTORY PROVISIONS:

Conspiracy to commit money laundering.[318]

PAYMENTS:

The alleged scheme involved the trading company paying at least $22 million to Ecuadorian officials.

BENEFIT:

Obtain contracts from Empresa Publica de Hidrocarburos del Ecuador (Petroecuador).

PROSECUTING AGENCY):

DOJ.

RESOLUTION:

On April 6, 2021, Kohut pled guilty to the DOJ's charge of conspiracy to commit money laundering. He faces up to 20 years in prison and agreed to a $2.2 million criminal forfeiture. According to public sources, Gunvor has been cooperating with the DOJ probe, and has taken steps to ban the use of what it called "agents" for business development purposes.[319]

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315 Indictment, *United States v. Naeem Riaz Tyab, Mahamoud Adam Bechir, Youssouf Hamid Takane, and Nourachem Bechir Niam,* No. 1:19-cr-00038 (D.D.C. Feb. 7, 2019), https://www.justice.gov/opa/press-release/file/1397106/download.

316 DOJ Press Release, *Charges Unsealed Against Former Chadian Diplomats to the U.S. Charged in Connection with International Bribery and Money Laundering Scheme* (May 24, 2021), https://www.justice.gov/opa/pr/charges-unsealed-against-former-chadian-diplomats-us-charged-connection-international-bribery.

317 *Id.*

318 Information, *United States v. Raymond Kohut,* No. 1:21-cr-00115 (E.D.N.Y. Apr. 6, 2021), https://www.justice.gov/criminal-fraud/file/1388211/download.

319 Chris Prentice, *Former Gunvor employee pleads guilty in Petroecuador bribery case*, REUTERS (Apr. 6, 2021), https://www.reuters.com/article/us-usa-petroecuador-corruption-plea/former-gunvor-employee-pleads-guilty-in-petroecuador-bribery-case-idUSKBN2BT2DR.

9. JOHN ROBERT LUZURIAGA AGUINAGA AND JORGE CHERREZ MIÑO (ECUADOR)

NAMES OF INDIVIDUALS:

Luzuriaga Aguinaga (Luzuriaga) and Jorge Cherrez Miño (Cherrez), two Ecuadorian citizens.

CONDUCT:

A bribery and money laundering scheme involving Ecuador's public police pension fund (ISSPOL). Cherrez allegedly received payments from the ISSPOL investment business in an account in the United States and used Florida-based companies and bank accounts to pay the bribes. Cherrez and Luzuriaga allegedly laundered the corrupt proceeds through Florida-based companies and bank accounts, including numerous US investment fund companies incorporated in Florida with Cherrez as an officer or director.[320]

STATUTORY PROVISIONS:

Conspiracy to commit money laundering.[321]

PAYMENTS:

$2.6 million in bribes to ISSPOL officials, including at least approximately $1,397,066 to Luzuriaga, ISSPOL's risk director and a member of ISSPOL's Investment Committee.

BENEFIT:

Defendants obtained contracts and other business advantages including contracts to act as an investment advisor for an Ecuadorian public institution that is responsible for managing the financial contributions of Ecuadorian police officers toward their social security.[322] Cherrez allegedly obtained approximately $65 million in profits from one aspect of the scheme.[323]

PROSECUTING AGENCY:

DOJ.

RESOLUTION:

Luzuriaga was arrested February 26, 2021.[324] He entered a plea agreement with the DOJ on February 2, 2022, in which he plead to one count of conspiracy to commit money laundering.[325] The court signed an order considering Cherrez a fugitive as of November 16, 2021.[326]

10.AFEWORK BEREKET (DJIBOUTI)

NAME OF INDIVIDUAL:

Afework Bereket, employee of LM Ericsson (parallel DOJ/SEC Enforcement Action of Ericsson discussed in our 2019 FCPA/Anti-Corruption Year In Review).

CONDUCT:

From at least 2010 to about January 2014, Bereket and other employees of LM Ericsson allegedly acted in concert to bribe officials in Djibouti. They allegedly did this to obtain business advantages. Bereket allegedly engaged in corrupt actions such as disguising bribes as payments to a consulting company for services, causing Ericsson AB's branch office in Ethiopia to enter into a sham contract with a consulting company, failing to disclose relationships with foreign officials, and approving fake invoices.[327]

STATUTORY PROVISIONS:

Conspiracy to violate the FCPA and conspiracy to commit money laundering.[328]

PAYMENTS:

$2.1 million.[329]

BENEFIT:

Obtaining business advantage in the form of contracts with a state-owned telecom company valued at more than €20 million.[330]

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320 Complaint, *United States v. Jorge Cherrez Miño*, No. 21-mj-02326 (S.D. Fla. Feb. 19, 2021), https://www.justice.gov/criminal-fraud/file/1387516/.

321 *Id.*; Complaint, *United States v. John Luzuriaga Aguinaga*, No. 21-mj-02270 (S.D. Fla. Feb. 10, 2021), https://www.justice.gov/opa/press-release/file/1372691/download.

322 Plea Agreement, No. 21-cr-20528 (S.D. Fla. Feb. 2, 2022).

323 Complaint, *United States v. Jorge Cherrez Miño*, No. 21-mj-02326 (S.D. Fla. Feb. 19, 2021), https://www.justice.gov/criminal-fraud/file/1387516/download.

324 DOJ Press Release, *Two Men Charged in Ecuadorian Bribery and Money Laundering Scheme*, https://www.justice.gov/opa/pr/two-men-charged-ecuadorian-bribery-and-money-laundering-scheme.

325 Plea Agreement, *United States v. Luzuriaga*, No. 21-cr-20528 (S.D. Fla. Feb. 2, 2022).

326 Order Transferring Case to Fugitive Status, *United States v. Cherrez*, No. 21-cr-20528 (Nov. 16, 2021).

327 Indictment, United States v. Bereket, No. 20-cr-00283 (S.D.N.Y. June 3, 2020) (unsealed 09/08/21).

328 *Id.*

329 *Id.*

330 DOJ Press Release, *Former Ericsson Employee Charged for Role in Foreign Bribery Scheme*, (Sept. 8, 2021), https://www.justice.gov/opa/pr/former-ericsson-employee-charged-role-foreign-bribery-scheme.

PROSECUTING AGENCY:

DOJ.

RESOLUTION:

The case is ongoing.

NOTEWORTHY:

Related cases: United States v. Ericsson Egypt Ltd. Docket No. 19-cr-00884 (S.D.N.Y.); United States v. Telefonaktiebolaget LM Ericsson, Docket No. 19-cr-00884 (S.D.N.Y.).

B. SIGNIFICANT UPDATES TO FCPA AND ANTI-MONEY LAUNDERING CASES INVOLVING FOREIGN BRIBERY BROUGHT IN PRIOR YEARS

1. CARMELO URDANETA AQUI (VENEZUELA)

NAMES OF INDIVIDUALS:

Carmelo Urdaneta Aqui, former legal counsel to the Venezuelan Ministry of Oil and Mining. (Also discussed in our 2018 FCPA/Anti-Corruption Year in Review.)

CONDUCT:

Beginning in December 2014, Urdaneta Aqui, along with several others, was involved in a conspiracy that involved embezzlement, money laundering, and bribery. Through this scheme, prosecutors contend defendants managed to embezzle over $1.2 billion from a Venezuelan state oil company, PDVSA. To do this, they used Miami real estate and "sophisticated false investment schemes."[331]

STATUTORY PROVISIONS:

Conspiracy to commit money laundering.[332]

PAYMENTS:

$1 million.

BENEFIT:

$1.2 billion in embezzled funds from the oil company.

PROSECUTING AGENCY:

DOJ.

RESOLUTION:

Defendant pleaded guilty to conspiracy to commit money laundering. He could potentially be sentenced to up to 10 years in prison and/or a fine of up to $500,000 or twice the amount of criminally derived property, whichever is greater, as well as criminal forfeiture and restitution. His sentencing is set to occur on March 25, 2022.[333]

2. CARLOS ENRIQUE URBANO FERMIN (VENEZUELA)

NAME OF INDIVIDUAL:

Carlos Enrique Urbano Fermin, a Venezuelan citizen who controlled companies that provided goods or services to PDVSA subsidiaries. (Also discussed in our 2020 FCPA/ Anti-Corruption Year in Review.)

CONDUCT:

Paying of bribes to a Venezuelan official to prevent his companies from being prosecuted for corruption relating to the procurement process.

STATUTORY PROVISIONS:

Conspiracy to commit money laundering.[334]

PAYMENTS:

$100,000 to an intermediary at a bank in Florida.

BENEFIT:

Prevent Urbano Fermin's companies from being prosecuted for corruption relating to the procurement process.

PROSECUTING AGENCY:

DOJ.

RESOLUTION:

Urbano Fermin pleaded guilty to one count of conspiracy to commit money laundering. Urbano Fermin also agreed to fully and truthfully disclose the existence, nature and location of all assets in which the defendant has or had any direct or indirect financial interest or control, and any assets involved in the offense of conviction. The property subject to forfeiture is the amount equal to the amount of proceeds traceable to the violation which is $100,000.[335]

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331 DOJ Press Release, *Two Members of Billion-Dollar Venezuelan Money Laundering Scheme Arrested*, (July 25, 2018), https://www.justice.gov/opa/pr/two-members-billion-dollar-venezuelan-money-laundering-scheme-arrested.

332 Second Superseding Information, *United States v. Urdaneta Aqui*, No. 1:18-cr-20685 (S.D. Fla. July 12, 2021).

333 Docket, *United States v. Guruceaga et al.*, No. 1:18-cr-20685 (S.D. Fla.).

334 Information, *United States v. Carlos Enrique Urbano Fermin*, No. 20-cr-20163 (S.D. Fla. Mar. 20, 2020).

335 Plea Agreement, *United States v. Carlos Fermin*, No. 1:20-cr-20163 (S.D. Fla. Apr. 19, 2021), https://www.justice.gov/criminal-fraud/file/1388226/download.

3. JOSE CARLOS GRUBISICH (BRAZIL)

NAME OF INDIVIDUAL:

Jose Carlos Grubisich, the former CEO of Brazil-based petrochemical company Braskem S.A. (Braskem).[336] (Also discussed in our 2019 FCPA/Anti-Corruption Year in Review.)

CONDUCT:

Grubisich was charged in 2019 with violations of the FCPA and with money laundering, and on April 15, 2021, Grubisich pleaded guilty. Grubisich admitted that while CEO of Braskem, he agreed to pay bribes to Brazilian government officials to ensure Braskem's retention of a contract for a significant petrochemical project from Petroleo Brasileiro S.A. (Petrobras), Brazil's state-owned and state-controlled oil company. Grubisich also admitted that, as Braskem's CEO, he falsified Braskem's books and records by falsely recording the payments to Braskem's offshore shell companies as payments for legitimate services. Grubisich also signed false Sarbanes-Oxley certifications submitted to the SEC that, among other things, attested that Braskem's annual reports fairly and accurately represented Braskem's financial condition, and that Grubisich, as Braskem's principal officer, had disclosed all fraudulent conduct by Braskem's management and other employees with control over Braskem's financial reporting.[337]

STATUTORY PROVISIONS:

FCPA and money laundering.

PAYMENTS:

An alleged diversion of about $250 million to a secret slush fund.

BENEFIT:

Bribed Brazilian government officials to ensure Braskem's retention of a contract for a significant petrochemical project from Petrobras.[338]

PROSECUTING AGENCY:

DOJ.

RESOLUTION:

Grubisich was arrested on November 20, 2019,[339] and, on December 12, 2019, Grubisich was granted bail in return for $30 million—that is, about half his wealth.[340] Grubisich pleaded guilty to one count of conspiracy to violate the anti-bribery provisions of the FCPA and one count of conspiracy to violate the books and records provision of the FCPA and to fail to accurately certify Braskem's financial reports. Grubisich has agreed to pay approximately $2.2 million in forfeiture. He is scheduled to be sentenced on August 5, and faces a maximum penalty of 10 years in prison.[341]

4. JOSE LUIS DE JONGH ATENCIO (VENEZUELA)

NAME OF INDIVIDUAL:

Jose Luis De Jongh Atencio (De Jongh,) a US and Venezuelan citizen who was formerly a procurement officer and manager at Citgo Petroleum Corporation, a subsidiary of PDVSA. (Also discussed in our 2020 FCPA/Anti-Corruption Year in Review.)

CONDUCT:

De Jongh allegedly accepted $2.5 million in bribes as well as directed that bribe payments be made to others. The bribes were made in exchange for De Jongh assisting businessmen and related companies in procuring contracts with Citgo, and providing them with other business advantages.[342]

STATUTORY PROVISIONS:

Conspiracy to commit money laundering, money laundering, conspiracy to commit commercial bribery, and Travel Act – Texas commercial bribery.[343]

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336 Charges against Odebrecht and Braskem are discuss in more detail in our 2016 FCPA Year in Review.

337 *Id.*

338 *Id.*

339 DOJ Press Release, *Former Chief Executive Officer of a Brazilian Petrochemical Company Charged for His Role in a Scheme to Pay Bribes to Brazilian Officials and to Falsify Company Books and Records* (Nov. 20, 2019), https://www.justice.gov/opa/pr/former-chief-executive-officer-brazilian-petrochemical-company-charged-his-rolescheme-pay.

340 Jody Godoy, *Ex-Braskem Exec Granted $30M Bail In Bribery Case,* Law360 (Dec. 12, 2019), https://www.law360.com/whitecollar/articles/1227974/ex-braskem-exec-granted-30m-bail-in-bribery-case?nl_pk=68fd5cae-c0a6-4c2f-a308- 8a532192cccc&utm_source=newsletter&utm_medium=email&utm_campaign=whitecollar. *Cf.* Criminal Minute Entry, *United States v. Grubisich*, No. 19-cr-102 (E.D.N.Y. Dec. 12, 2019).

341 Guilty Plea, United States v. Grubisich, No. 19-cr-102 (E.D.N.Y. April 15, 2021), https://www.justice.gov/opa/pr/former-chief-executive-officer-publicly-traded-petrochemical-company-pleads-guilty-foreign.

342 DOJ Press Release, *Former Venezuelan Official Charged in Connection with International Bribery and Money Laundering Scheme* (Aug. 6, 2020), https://www.justice.gov/opa/pr/former-venezuelan-official-chargedconnection-international-bribery-and-money-laundering.

343 Superseding Indictment, 4:20-cr-0035 (S.D. Tex. Dec. 16, 2020).

PAYMENTS:

$2.5 million in bribes as well as directing that bribe payments be made to others.[344]

BENEFIT:

Assisting businessmen and related companies in procuring contracts with Citgo, and providing them with other business advantages.

PROSECUTING AGENCY:

DOJ.

RESOLUTION:

On March 22, 2021, De Jongh pled guilty to one count of conspiracy to commit money laundering.[345] De Jongh faces up to 20 years in prison. As part of his plea, De Jongh agreed to forfeit over $3 million seized from his bank accounts and 15 properties that he purchased with his corrupt proceeds. Sentencing is scheduled for August 2022.

5. DANIEL COMORETTO GOMEZ (VENEZUELA)

NAME OF INDIVIDUAL:

Daniel Comoretto Gomez (Comoretto), a dual citizen of Venezuela and Italy and a manager at PDVSA involved in the trading of asphalt.[346] (Also discussed in our 2020 FCPA/Anti-Corruption Year in Review.)

CONDUCT:

Comoretto agreed with other employees of PDVSA, an asphalt company executive located in the United States and, later, with several employees of Sargeant Marine, to participate in scheme in which Comoretto and other PDVSA employees would receive bribes in order to assist those companies in obtaining contracts to purchase asphalt from PDVSA.[347]

STATUTORY PROVISIONS:

Conspiracy to commit money laundering.

PAYMENTS:

Approximately 45 cents for every barrel of asphalt that either Asphalt Company or Sargeant Marine purchased from PDVSA totaling $229,000.

BENEFIT:

Contracts to purchase asphalt from PDVSA.

PROSECUTING AGENCY:

DOJ.

RESOLUTION:

Comoretto pleaded guilty to one count of money laundering and faces 57 to 71 months in prison.[348]

6. LUIS ENRIQUE MARTINELLI LINARES AND RICARDO ALBERTO MARTINELLI LINARES (PANAMA)

NAME OF INDIVIDUALS:

Luis Enrique Martinelli Linares (Luis) and Ricardo Alberto Martinelli Linares (Ricardo), brothers and sons of the former president of Panama, Ricardo Alberto Martinelli Berrocal. (Also discussed in our 2020 FCPA/Anti-Corruption Year in Review.)

CONDUCT:

Luis and Ricardo were implicated in laundering $28 million in a massive bribery and money laundering scheme involving Odebrecht S.A. (Odebrecht), a Brazil-based global construction conglomerate. Luis admitted that he agreed with his brother, Ricardo, and others to establish offshore bank accounts in the names of shell companies to receive and disguise over $28 million in bribe proceeds from Odebrecht for the benefit of his close relative, a high-ranking public official in Panama. To advance the scheme, Luis agreed with others to cause the wiring of the Odebrecht bribe funds into and out of the United States, and used some of the proceeds of the scheme to purchase a yacht and a condominium in the United States.[349]

344 DOJ Press Release, *Former Venezuelan Official Charged in Connection with International Bribery and Money Laundering Scheme* (Aug. 6, 2020), https://www.justice.gov/opa/pr/former-venezuelan-official-chargedconnection-international-bribery-and-money-laundering.

345 DOJ Press Release, *Former Venezuelan Official Pleads Guilty in Connection with International Bribery and Money Laundering Scheme* (Mar. 23, 2021), https://www.justice.gov/opa/pr/former-venezuelan-official-pleads-guilty-connection-international-bribery-and-money.

346 Information, *United States v. Daniel Comoretto Gomez*, No. 1:21-cr-00014 (E.D.N.Y. Jan. 27, 2021), https://www.justice.gov/criminal-fraud/file/1367001/download.

347 *Id.*

348 Minute Entry, Dkt #17, *United States v. Daniel Comoretto Gomez,* No. 1:21-cr-00014 (E.D.N.Y. Jan. 27, 2021).

349 DOJ Press Release, *Panamanian Intermediary Pleads Guilty in Connection with International Bribery and Money Laundering Scheme* (Dec. 2, 2021), https://www.justice.gov/opa/pr/panamanian-intermediary-pleads-guilty-connection-international-bribery-and-money-laundering.

STATUTORY PROVISIONS:

Each charged with one count of conspiracy to commit money laundering and two counts of concealment money laundering. Luis was also charged with two counts of engaging in transactions in criminally derived property.[350]

PAYMENTS:

$28 million bribe.

BENEFIT:

In exchange for the bribes, Odebrecht received contracts around the world. Luis and Ricardo received $28 million in bribe proceeds from Odebrecht for the benefit of their close relative, a high-ranking public official in Panama.

PROSECUTING AGENCY:

DOJ.

RESOLUTION:

On December 2, 2021 and December 14, 2021, Luis and Ricardo, respectively, pleaded guilty to one count of conspiracy to commit money laundering.[351] Luis admitted that he agreed with his brother, Ricardo, and others to establish offshore bank accounts in the names of shell companies to receive and disguise over $28 million in bribe proceeds from Odebrecht for the benefit of his close relative, a high-ranking public official in Panama.[352] As part of the guilty plea, they also agreed to a forfeiture amount of approximately $18.9 million. Ricardo is scheduled to be sentenced on May 13, 2022, and Luis is scheduled to be sentenced on May 20, 2022. Both face a maximum penalty of 20 years in prison.[353]

7. ASANTE BERKO (GHANA)

NAME OF INDIVIDUAL:

Asante Berko, a US citizen and former executive at Goldman Sachs's London-based subsidiary. (Also discussed in our 2020 FCPA/Anti-Corruption Year in Review.)

CONDUCT:

According to the SEC, from 2015 through 2016, Berko arranged for his firm's client, a Turkish energy company, to funnel at least $2.5 million to an intermediary company in Ghana as part of a bribery scheme. The intermediary company would then pay bribes to Ghanaian government officials in order to secure a contract to build and operate an electrical power plant and sell power to the Ghanaian government.[354] The SEC alleged that Berko secretly received more than $2 million from the energy company for arranging the bribery scheme, and his firm stood to earn over $10 million in fees if the energy company secured the power plant project. Moreover, according to the SEC's complaint, Berko took deliberate measures to prevent his employer from detecting the scheme, including assisting the Energy Company's CEO to "draft false and misleading responses to the questions posed by [Goldman Sachs] compliance personnel."[355]

STATUTORY PROVISIONS:

Violation of the FCPA.

PAYMENTS:

The SEC alleged that Berko arranged for a payment of at least $2.5 million to a Ghana-based intermediary company to pay illicit bribes to Ghanaian government officials.

BENEFIT:

As alleged by the SEC, Berko secretly received more than $2 million from the energy company for arranging the bribery scheme, and the SEC further alleged that his firm stood to earn over $10 million in fees if the energy company secured the power plant project.[356]

PROSECUTING AGENCY:

SEC.

350 Indictment, *United States v. Luis Martinelli and Ricardo Martinelli*, No. 1:21-cr-00065 (E.D.N.Y. Feb. 4, 2021), https://www.justice.gov/criminal-fraud/file/1457181/download.

351 DOJ Press Release, *Panamanian Intermediary Pleads Guilty in Connection with International Bribery and Money Laundering Scheme* (Dec. 2, 2021) https://www.justice.gov/opa/pr/panamanian-intermediary-pleads-guilty-connection-international-bribery-and-money-laundering; DOJ Press Release, *Panamanian Intermediary Extradited to the United States Pleads Guilty to International Bribery and Money Laundering Scheme* (Dec. 14, 2021) https://www.justice.gov/opa/pr/panamanian-intermediary-extradited-united-states-pleads-guilty-international-bribery-and.

352 *Id.*

353 *Id.*

354 Complaint, *S.E.C. v. Asante K. Berko*, No. 20-civ-01789 (E.D.N.Y. Apr. 13, 2020), https://www.sec.gov/litigation/complaints/2020/comp-pr2020-88.pdf.

355 *Id.*

356 Complaint, *S.E.C. v. Asante K. Berko*, No. 20-civ-01789 (E.D.N.Y. Apr. 13, 2020), https://www.sec.gov/litigation/complaints/2020/comp-pr2020-88.pdf.

RESOLUTION:

The SEC obtained a final judgment against Berko.[357] Berko consented to the entry of a final judgment that permanently enjoins him from violating the anti-bribery provision of the FCPA, Section 30A of Securities Exchange Act of 1934, and orders him to disgorge $275,000 in ill-gotten gains plus $54,163.92 in prejudgment interest.[358]

8. JOSEPH BAPTISTE AND ROGER RICHARD BONCY (HAITI)

NAMES OF INDIVIDUALS:

Joseph Baptiste, retired US Army Colonel; Roger Richard Boncy, Haitian ambassador-at-large. (Also discussed in our 2018 FCPA/Anti-Corruption Year in Review, 2019 FCPA/Anti-Corruption Year in Review and 2020 FCPA/Anti-Corruption Year in Review.)

CONDUCT:

Alleged that Baptiste and Boncy solicited bribes from undercover FBI agents in connection with a proposed project to develop a port in Haiti. As part of the scheme, the men allegedly told agents that they would funnel payments to Haitian officials through a non-profit controlled by Baptiste in order to secure government approval of the project.[359]

STATUTORY PROVISIONS:

Conspiracy to violate the FCPA and the Travel Act; violation of the Travel Act; conspiracy to commit money laundering.[360]

PAYMENTS:

Alleged that Baptiste and Boncy received $50,000 in bribes from undercover FBI agents.

BENEFIT:

Government approval of a project for a non-profit controlled by Baptiste.[361]

PROSECUTING AGENCY:

DOJ.

RESOLUTION:

On August 9, 2021, the First Circuit affirmed the district court's grant of a new trial for Baptiste and Boncy.[362]

NOTEWORTHY:

After a two-week trial in June 2019, Baptiste and Boncy were both convicted of one count of conspiracy to violate the FCPA and the Travel Act.[363] Baptiste was also convicted of one count of violating the Travel Act and one count of conspiracy to commit money laundering.[364] On March 11, 2020 both Baptiste and Boncy were granted new trials based on ineffective assistance of counsel based on the performance of Baptiste's attorney.[365] Boncy was also granted a new trial because of the larger role his attorney had to take on in the trial due to Baptiste's attorney's performance.[366]

9. ROGER NG, JHO LOW, AND TIM LEISSNER (MALAYSIA)

NAME OF INDIVIDUALS:

Roger Ng, former managing director of Goldman Sachs and head of investment banking for Goldman Malaysia; Jho Low, Financier; Tim Leissner, former Southeast Asia chairman of Goldman Sachs. (Also discussed in our 2018 FCPA/Anti-Corruption Year in Review, 2019 FCPA/Anti-Corruption Year in Review and 2020 FCPA/Anti-Corruption Year in Review and Section V.B.4. of this 2021 FCPA/Anti-Corruption Year in Review.)

357 Final Judgment, *S.E.C. v. Asante K. Berko*, No. 20-civ-01789 (E.D.N.Y. June 23, 2021), https://www.sec.gov/litigation/litreleases/2021/judgment25121.pdf.

358 *Id.*

359 *Id.*

360 Indictment, *United States v. Baptiste*, No. 17-cr-10305, Dkt. No. 1 (D. Mass. Oct. 4, 2017).

361 DOJ Press Release, *Retired U.S. Army Colonel Indicted for Conspiring to Bribe Senior Government Officials of the Republic of Haiti* (Oct. 4, 2017), https://www.justice.gov/opa/pr/retired-us-army-colonel-indicted-conspiringbribesenior-government-officials-republic-haiti.

362 *See* Judgement of United States Court of Appeals, *United States v. Baptiste*, No. 17-cr-10305, Dkt. No. 308 (D. Mass. Aug. 9, 2021).

363 DOJ Press Release, *Two Businessmen Convicted of International Bribery Offenses* (June 20, 2019), https://www.justice.gov/opa/pr/two-businessmen-convicted-international-bribery-offenses-0.

364 *Id.*

365 *See* Memorandum and Order, *United States v. Baptiste*, No. 17-cr-10305, Dkt. No. 286 (D. Mass. Mar. 11, 2020).

366 *Id.*

CONDUCT:

The trio allegedly sought bribes from government officials to obtain and retain lucrative business deals for Goldman Sachs, and to launder the proceeds of this criminal conduct through the US financial system by purchasing real estate and artwork, and funding major Hollywood films.[367] The conspiracy was allegedly achieved by leveraging Low's relationships with government officials, including a high-ranking Malaysian official with authority to approve 1MDB's business decisions, as well as the payment of hundreds of millions in bribes to steer business toward Goldman Sachs.[368]

STATUTORY PROVISIONS:

Conspiracy to violate the FCPA; conspiracy to commit money laundering.

PAYMENTS:

Allegedly, more than $2.7 billion was misappropriated from 1MDB in connection with the scheme.[369]

BENEFIT:

Steer business toward Goldman Sachs.

PROSECUTING AGENCIES:

DOJ; SEC.

RESOLUTION:

On December 21, 2021, the court denied Ng's motion to dismiss the superseding Indictment.[370] Jury selection commenced on February 7, 2022, with opening statements scheduled to begin on February 14, 2022.[371]

NOTEWORTHY:

The high-ranking 1MDB official was identified by news reports as Malaysia's former Prime Minister and head of 1MDB, Najib Razak.[372] Razak moved to intervene in the case in March 2021, and the court denied Razak's motion on April 5, 2021.[373]

10. ARMENGOL ALFONSO CEVALLOS DIAZ (ECUADOR)

NAME OF INDIVIDUAL:

Armengol Alfonso Cevallos Diaz (Cevallos), Businessman (Also discussed in in our 2018 FCPA/Anti-Corruption Year in Review, 2019 FCPA/Anti-Corruption Year in Review and 2020 FCPA/Anti-Corruption Year in Review.)

CONDUCT:

Cevallos, a Miami-based businessman and Ecuadorian citizen, was indicted for conspiracy to violate the FCPA and conspiracy to commit money laundering for his role in an alleged scheme to bribe Petroecuador officials. Cevallos was alleged to have solicited and funneled $4.4 million in bribes to Petroecuador officials from an oil services company.[374]

STATUTORY PROVISIONS:

Conspiracy to violate the FCPA; conspiracy to commit money laundering; money laundering.[375]

PAYMENTS:

$4.4 million in bribes.[376]

BENEFIT:

Contracts from Petroecuador for companies controlled by Cevallos and others.[377]

PROSECUTING AGENCY:

DOJ.

RESOLUTION:

On January 28, 2020, Cevallos pled guilty to one count of conspiracy to violate the FCPA and one count of conspiracy to commit money laundering. On February 2, 2021, Cevallos was sentenced to 35 months imprisonment, three years supervised release, and ordered to pay a $35,000 fine.[378]

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367 *Superseding Indictment, United States v. Low Taek Jho and Ng Chong Hwa, No. 18-cr-0053, Dkt. No. 55 (E.D.N.Y. Dec. 9, 2020).*

368 *Id.*

369 *Id.*

370 Docket, *United States v. Low Taek Jho and Ng Chong Hwa,* No. 18-cr-00538 (E.D.N.Y. Oct. 3, 2018).

371 Superseding Indictment, *United States v. Low Taek Jho and Ng Chong Hwa*, No. 18-cr-00538, Dkt. No. 55 (E.D.N.Y. Dec. 9, 2020).

372 Dominic Rushe, *US justice department charges former Goldman bankers in 1MDB scandal,* THE GUARDIAN (Nov. 1, 2018), https://www.theguardian.com/world/2018/nov/01/malaysia-1mdb-scandal-us-justice-department-charges-former-goldman-bankers.

373 Letter Motion for Hearing and Joinder, *United States v. Low Taek Jho and Ng Chong Hwa,* No. 18-cr-00538, Dkt. No. 65 (E.D.N.Y. Mar 14, 2021); Order, *United States v. Low Taek Jho and Ng Chong Hwa,* No. 18-cr-00538, Dkt. No. 74 (E.D.N.Y. Apr. 5, 2021).

374 Indictment, *United States v. Cevallos Diaz et al.,* No. 19-cr-20284, Dkt. No. 3 (S.D. Fla. May 9, 2019).

375 *Id.*

376 DOJ Press Release, *Miami-Based Businessman Pleads Guilty to FCPA and Money Laundering Violations in Scheme Involving PetroEcuador Officials,* (Jan. 23, 2020), https://www.justice.gov/opa/pr/miami-based-businessman-pleads-guilty-fcpa-and-money-laundering-violations-scheme-involving.

377 *Id.*

378 *Sentencing Hearing Transcript, United States v. Cevallos Diaz et al.,* No. 1:19-cr-20284, Dkt. No. 138 (S.D. Fla. Feb 2, 2021).

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