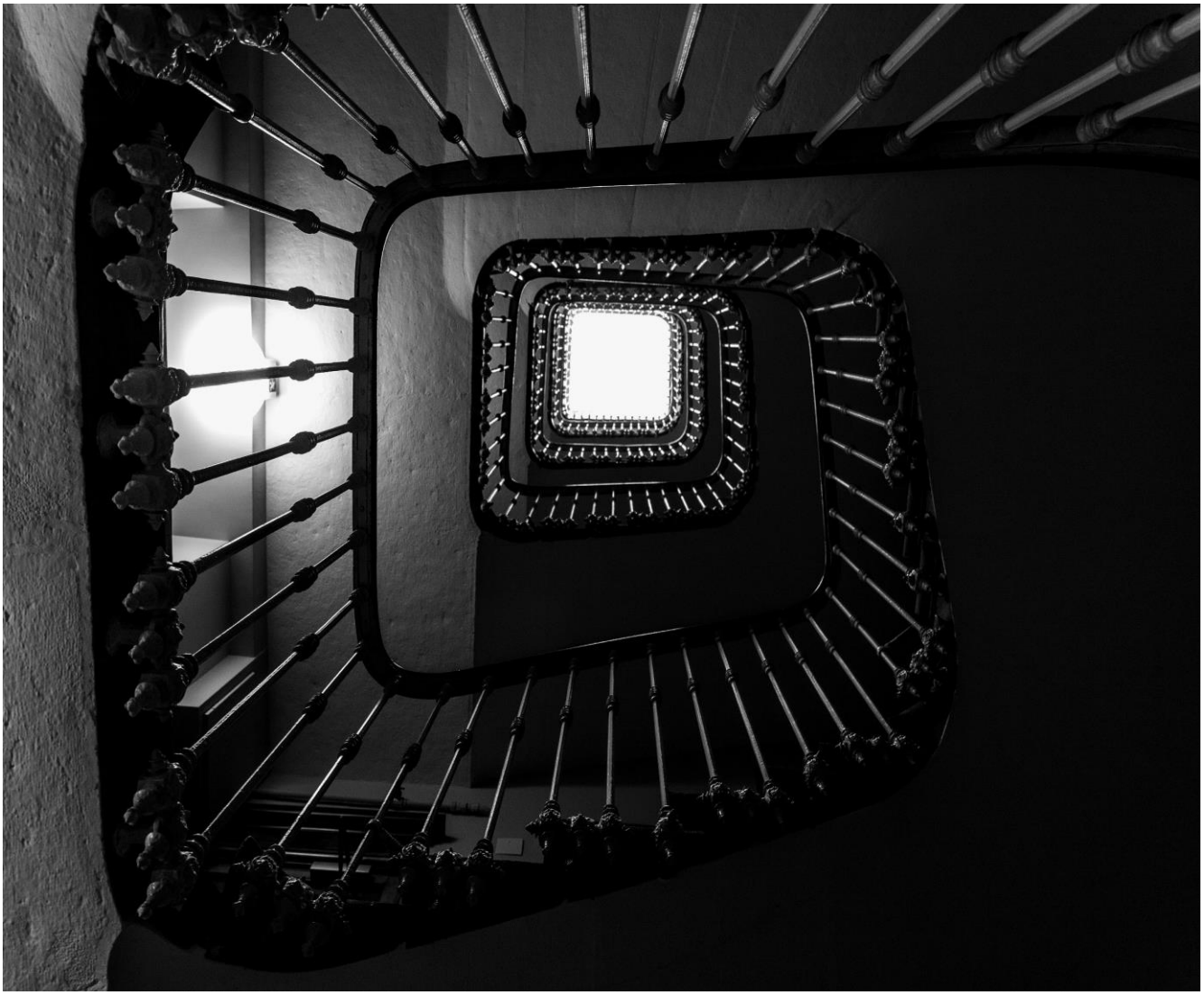
A&O SHEARMAN



FCPA Digest

Recent trends and patterns in the enforcement of the Foreign Corrupt Practices Act

JULY 2024

Executive Summary

In 2023, the DOJ and the SEC resolved a total of fourteen corporate enforcement actions under the FCPA, four more than in the previous year. The total penalties yielded approximately $571 million. While the number of actions increased, there was a significant decrease in total penalties from 2022. Two out of the fourteen resolutions were paired enforcement actions. As in previous years, the geographic reach was generally diverse, with corporate enforcement actions coming out of Latin and Central America, Asia, and Africa.

In 2023, the DOJ charged or unsealed charges against only twelve individuals in FCPA-related cases. This number continues to trend downward from twenty-three in 2021 to eighteen in 2022. Despite the decline in individual enforcement, 2023 saw greater geographical diversity in terms of the courts in which charges were filed. While most individuals were charged in the Southern District of Florida, the DOJ also brought charges in the Central District of California, the Southern District of Texas, the Southern District of New York, and the District of Connecticut. As was the case in 2022, the SEC did not charge any individuals for FCPA-related conduct in 2023.

As we explain in this 2023 Trends & Patterns, among the highlights from the year were:

- the DOJ and SEC resolved fourteen corporate enforcement actions with total sanctions of approximately $571 million—a notable decrease from the prior year;
- the DOJ charged only twelve individuals in FCPA-related cases, continuing the downward trend;
- two DOJ public declinations with disgorgement;
- the SEC's reliance on the broad FCPA accounting provisions;
- the DOJ's continuous updates to its voluntary self-disclosure policy;
- increased enforcement cooperation among agencies in the U.S, as well as cross-jurisdictional cooperation among foreign agencies;
- the DOJ's Clawback Pilot Program completed its first full year of implementation;
- the DOJ announced its M&A Safe Harbor Policy; and
- President Biden signed into law the Foreign Extortion Prevention Act (FEPA), which extends the federal bribery statute to criminalize foreign officials receiving bribes.

With special thanks to the editorial partners Paula Howell Anderson, Emily Westridge Black, Patrick Hein, Claire Rajan, and Jonathan Swil, editorial associates Chris Collins, Casey Determan, Carter Gantt, Zhaohua Huang, and Justin Meshulam.

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STATISTICS: THE YEAR IN NUMBERS

The DOJ and SEC resolved a total of 14 corporate FCPA enforcement actions during 2023, yielding approximately $571 million in corporate penalties. This represents a slight increase in the number of actions, but a significant decrease in total penalties from 2022, when there were ten corporate FCPA enforcement actions yielding approximately $1.68 billion in corporate penalties. In 2023:

- The DOJ resolved five corporate enforcement matters (*Corsa Coal*, *Freepoint Commodities LLC*, *H.W. Wood Limited*, *Tysers Insurance Brokers Limited*, and *Lifecore Biomedical*);
- The SEC resolved seven corporate enforcement actions (*a global manufacturer*, *Clear Channel Outdoor Holdings, Inc.*, *Flutter Entertainment PLC*, *Frank's International N.V.*, *Gartner, Inc.*, *Koninklijke Philips N.V.*, and *Rio Tinto PLC*);
- The DOJ and SEC jointly resolved two corporate enforcement actions (*Albemarle Corporation* and *Corporacion Financiera Colombiana SA / Grupo Aval*).[1]

Regarding enforcement actions against individuals, the DOJ charged or unsealed charges against 12 individuals during 2023, while the SEC did not file any new cases against individuals. The DOJ also brought money laundering or conspiracy to commit money laundering cases to cover bribery schemes for which FCPA enforcement was not available. This may change—as discussed further below, in December 2023, President Biden signed into law the Foreign Extortion Prevention Act (FEPA), which extends the federal bribery statute to criminalize foreign officials receiving bribes, while historically the FCPA only criminalizes offers of bribes to foreign officials.

Despite repeated statements from the SEC that it plans to focus on responsible individuals, the SEC has not charged any individuals since 2020.

In keeping with our usual practice, we first discuss the 2023 corporate enforcement actions below, followed by individual enforcement actions.

Key takeaways from 2023 corporate enforcement actions

2023's 14 combined corporate resolutions outpaced the 10 in 2022, continuing the upward trend since 2021's twelve-year low of four. Despite this uptick in the number of actions, 2023 saw a marked decrease in both the total and average corporate penalties as compared with the previous two years, unless we exclude obvious outliers from prior years. The 14 corporate FCPA resolutions in 2023 garnered approximately $571 million in fines and penalties, including fines and disgorgement. This is significantly less than half of 2022's total of $1.68 billion. 2023's largest corporate settlement—$218,509,663 by Albemarle—pales in comparison to Glencore's $1.1 billion resolution in 2022. However, if we exclude this Glencore outlier (note that a significant part of the fine and forfeiture in the massive Glencore action was credited against the penalties for the violations of the Commodity Exchange Act imposed by the CFTC), 2022 and 2023 would have very similar totals. Indeed, the CFTC reached that settlement under its own foreign bribery laws despite not having an FCPA equivalent.

The average corporate penalty for 2023 is just shy of $44 million, a marked decrease compared with an average of $168 million in 2022, $164 million in 2021, and the peak average of $686 million in 2020.

One possible reason for the lower average penalty is the government's increased efforts to incentivize voluntary self-disclosure, cooperation, and remedial measures using discounts. The maximum discount for full cooperation and timely and appropriate remediation has been raised from 25% to 50%. The Albemarle resolution exemplifies this—it received a 45% reduction for cooperation and remediation as well as the first fine reduction under the new clawbacks program despite not timely self-reporting the misconduct. H.W. Wood and Tysers each received 25% reductions for cooperation and remedial measures. Additionally, some of the conduct giving rise to these enforcement actions is rather stale, which may indicate that some self-reporting companies are settling old violations regardless of potential statute of limitations defenses. That said,

[1] We are treating *Grupo Aval* and *Corficolombiana* as one action for purposes of our discussion as the cases arise from the same facts and circumstances.

statutes of limitations are usually not an obstacle for the government because most FCPA cases involve concealment and conspiracy.

As we have noted in previous Trends and Patterns, however, we continue to view the median corporate penalty—i.e., the figure for which half the values are larger, and half are smaller—as a more reliable benchmark to minimize the influence of outliers. Although Glencore was a high outlier in 2022, there were multiple low outliers in 2023—with Corsa Coal, Gartner, H.W. Wood, and Lifecore all under $3 million. The median corporate penalty in 2023 was $11.5 million—the lowest since 2018.

A much smaller portion of the total 2023 figure will be paid to foreign governments. For example, $20.3 million of the Grupo Aval/Corficolombiana settlement will be paid to Colombian enforcement authorities in penalties, and Freepoint may pay up to $22.4 million to Brazilian authorities. These numbers are dwarfed by the roughly $400 million from multiple settlements that was to be paid to foreign governments in 2022. As a result, the actual amount of money the U.S governmental enforcement authorities garnered through corporate FCPA violations is probably not much lower in 2023. Despite the smaller figure relating to foreign governments, the DOJ intends to continue a trend of foreign cooperation. 2023 did see the first coordinated resolution with Colombian enforcers in the matter of Corficolombiana, and in November 2023 the DOJ announced the International Corporate Anti-Bribery initiative which aims to increase international collaboration and information sharing to fight corruption.

Corporate enforcement actions in 2023

On March 6, 2023, the SEC initiated a settled administrative proceeding against a global mining and metals company for alleged FCPA violations. The SEC alleged that in July 2011, the mining company hired a consultant who had connections with current and former Guinean government officials and allegedly made payments to an official to help the mining company keep its mining rights in Guinea. The consultant, who had no employment contract, was allegedly paid $10.5 million for his services, and $822,506 of that payment was allegedly used to bribe a Guinean government official. The mining company has agreed to pay a $15 million civil fine on a non-admission basis in connection with the books and records provisions of the FCPA.

Also on March 6, 2023, the SEC announced FCPA-related charges against Flutter Entertainment, PLC (Flutter), a global gaming and sports betting company and successor-in-interest to The Stars Group, Inc. (Stars Group). The SEC alleged that between 2015 and 2020, Stars Group, which was lobbying to have poker officially legalized in Russia at the time, paid certain Russian consultants roughly $8 million. The money was allegedly used in part to cover reimbursements for gifts to Russian government officials and for "consultation payments" to the Russian state agency that controlled internet censorship filters to block gambling sites. Flutter has agreed to pay a civil penalty of $4 million for violations of the books and records provisions of the FCPA.

On March 8, 2023, the DOJ announced its decision to decline to prosecute Corsa Coal Corporation (Corsa Coal) for alleged violations of the FCPA. The DOJ has rolled out enhanced and more consistently applied voluntary self-disclosure policies that may provide a path to a declination, even where aggravating factors are present. The DOJ highlighted this case as an example of the successful application of these policies. The DOJ alleged that between 2016 and 2020, employees and agents of Corsa Coal engaged in a scheme to bribe Egyptian government officials in exchange for contracts with a state-owned and controlled coal company. Corsa Coal paid roughly $4.8 million to an intermediary which then funneled the bribes to Egyptian officials. Corsa Coal earned roughly $32.7 million in illicit profits from those contracts. In the press release, the DOJ noted that Corsa Coal timely and voluntarily self-disclosed the misconduct, cooperated fully and proactively, took remedial measures, and will disgorge its illicit profits to the extent of its financial ability, which totals $1.2 million.[2]

[2] The release states: "The Government, with the assistance of a forensic accounting expert, conducted an independent ability to pay analysis, considering a range of factors outlined in the Justice Department's Inability to Pay Guidance." The company does not have to be bankrupt, but has to show greater payment would "substantially threaten the continued viability of the Company."

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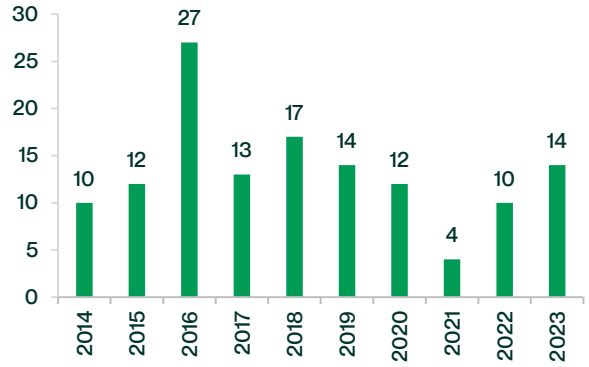
Total corporate enforcement actions: 2014 – 2023



On April 26, 2023, the SEC initiated a settled administrative proceeding against Frank's International N.V. (Frank's)—now Expro Group Holdings N.V.—a global oilfield services provider, in connection with alleged FCPA violations by its subsidiaries. Between 2008 and 2014, Frank's subsidiaries allegedly paid high commissions to a sales agent in Angola knowing that there was a risk that the funds would be used to bribe Angolan government officials and knowing that the funds were in fact used to influence the award of contracts to the subsidiaries. The SEC considered Frank's self-reporting of the conduct. Frank's will pay a civil fine of $3 million, disgorgement of $4,176,858, and prejudgment interest of $821,863 to settle the charges for violations of both the FCPA's anti-bribery and books and records provisions.

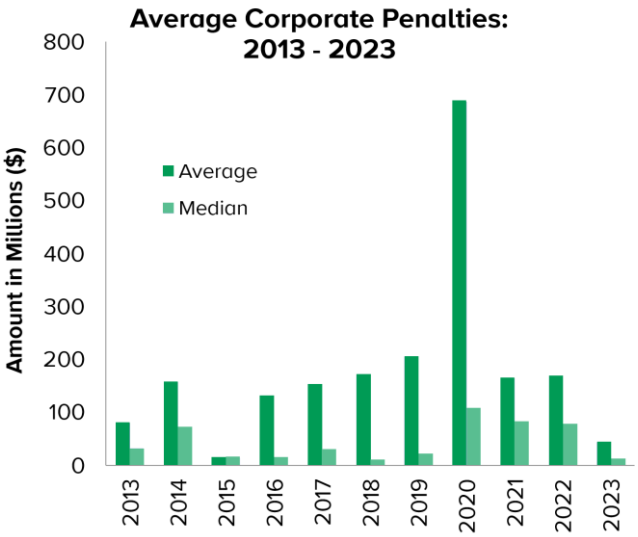
On May 11, 2023, Koninklijke Philips N.V., a medical supply company, settled FCPA-related charges with the SEC. The SEC alleged the company's Chinese subsidiary (Philips China) gave discounts to distributors between 2014 and 2019, which created a risk that the extra monies could be used to bribe government employees. The SEC also alleged that Philips China improperly influenced hospital officials to design technical specifications for public contracts to use Philip's medical equipment. Finally, Philips China allegedly submitted fictitious bids purportedly from other manufacturers so that the public tenders could meet the state-imposed legal minimum bid requirements. This conduct allegedly resulted in Philips' unjust enrichment in the amount of roughly $41 million. Philips agreed to pay $15 million in a civil fine, disgorgement of $41,126,170, and prejudgment interest of $6,047,633. As part of the settlement, Philips also agreed to periodically report on its compliance programs and related remedial measures for two years.

On May 26, 2023, the SEC announced a settled administrative proceeding against Gartner, Inc., a technological research and consulting company, in connection with alleged FCPA violations. According to the SEC, from December 2014 to August 2015 Gartner allegedly knew or consciously disregarded that purported consulting fees it paid to a private South African company connected to government officials would be used to bribe the officials to help Gartner obtain consulting contracts. Gartner consented to the SEC's order and agreed to pay a $1.6 million civil penalty, disgorgement of $675,974, and prejudgment interest of $180,790.

On August 10, 2023, Corporacion Financiera Colombiana S.A. (Corficolombiana), the bank subsidiary of holding company Grupo Aval Acciones y Valores S.A. (Grupo Aval), entered into a three-year deferred prosecution agreement (DPA) with the DOJ for conspiring to violate the antibribery provision of the FCPA. Between 2012 and 2015, Corficolombiana allegedly paid at least $28 million in bribes to high-ranking Colombian government officials to obtain a contract extension related to a highway infrastructure project. According to the DOJ, Corficolombiana allegedly conspired with the Brazilian-based global construction conglomerate Odebrecht S.A. to bribe Colombian officials to obtain the contract extension. Corficolombiana has agreed to cooperate with the DOJ in related criminal investigations. Corficolombiana will pay a criminal penalty of $40.6 million, which may be reduced by up to half to account for related penalties made to the Colombian government, likely resulting in a penalty of $20.3 million. Corficolombiana has also agreed to forfeit $28,630,000, which will be credited against Grupo Aval's disgorgement payment to the SEC. Finally, in connection with the settlement, Corficolumbiana agreed to continue to implement remedial measures and report its progress to the DOJ for the next three years.

In parallel, the SEC initiated a settled administrative proceeding against Grupo Aval and Corficolombiana for alleged FCPA violations concerning the same conduct. Grupo Aval and Corficolombiana consented to the SEC's order and will pay disgorgement of $32,139,731 and prejudgment interest of $8,129,558.

On August 25, 2023, a global manufacturer of products and services, settled FCPA-related charges with the SEC for allegedly bribing Chinese officials to obtain business. According to the SEC, from 2014 to 2017, employees of the manufacturer's Chinese subsidiary allegedly facilitated overseas trips for Chinese government officials with the pretext of engaging in marketing activities and falsified internal compliance documents to cover up their scheme. The SEC alleges that the trips were worth nearly $1 million and were bribes in the form of travel and tourism to encourage the government officials to buy the manufacturer's products. Additionally, between February 2016 and September 2018, the subsidiary's employees allegedly caused the manufacturer to pay $254,000 to a Chinese travel agency to fund the overseas trips. The manufacturer promptly self-reported the misconduct and has agreed to pay a $2 million civil fine, disgorgement of $3,538,897, and prejudgment interest of $1,042,721.



On September 28, 2023, Clear Channel Outdoor Holdings, Inc. (CCOH), an out-of-home advertising company, settled FCPA-related charges with the SEC in connection with alleged misconduct by its then majority-owned China-based subsidiary, Clear Media Limited (Clear Media). According to the SEC, between 2012 and 2017 Clear Media allegedly paid bribes to Chinese government officials to obtain advertising contracts. The bribes were allegedly paid using sham intermediaries and fake invoices to generate funds for illegitimate "customer development" consultants and disguising the payments as legitimate expenses. The SEC also alleged that from 2012 to 2019 CCOH failed to implement sufficient internal accounting controls. CCOH agreed to pay a civil fine of $6 million and disgorgement of $16,355,567, plus prejudgment interest of $3,760,920, for violations of the anti-bribery and books and records provisions of the FCPA.

On September 29, 2023, Albemarle, a global specialty chemicals company that sells catalysts used by oil refineries, entered into a three-year non-prosecution agreement (NPA) with the DOJ in connection with alleged misconduct by Albemarle and its subsidiaries. Between 2009 and 2017, Albemarle's agents allegedly bribed officials in India, Indonesia, and Vietnam to obtain sales of refinery catalysts to oil refineries in those countries, resulting in an improper benefit of roughly $98.5 million from sales to state-owned customers. Albemarle has agreed to continue cooperating with the DOJ in any current or future investigations related to that same conduct, implement extensive remedial measures, and pay a $98,236,547 criminal monetary penalty, and $98,511,669 in forfeiture, against which the SEC disgorgement payment, discussed below, will be credited. The company received a 45% discount on the criminal penalty off the recommended minimum sentence under the U.S. Sentencing Guidelines for its cooperation and full remediation, including ceasing use of sales agents entirely and significantly decreasing the use of other third parties involved in sales and utilizing artificial intelligence in its programs. The company also received a discount of $763,453 under the DOJ's new Compensation Incentives and Clawbacks Pilot Program ("Clawback Pilot Program"), which will be discussed later in this issue.

In parallel, Albemarle also settled charges with the SEC in connection with related and additional conduct. According to the SEC, Albemarle's allegedly inadequate internal controls allowed for corrupt payments to be made to agents in China, India, Indonesia, the United Arab Emirates, and Vietnam. Pursuant to the settlement, Albemarle agreed to pay disgorgement of $81,856,863 and prejudgment interest of $21,761,447. Albemarle conducted an internal investigation and self-disclosed the potential violations to the SEC. Albemarle's total payments represent over a combined resolution in excess of $218.5 million.

In November 2023, the DOJ announced two three-year DPAs with two reinsurance brokers in connection with their alleged conspiracy to bribe

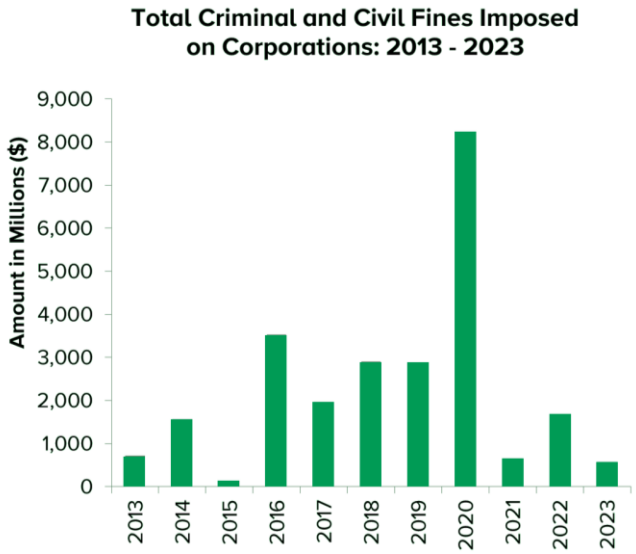
Ecuadorian officials. The DOJ alleged that between 2013 and 2017 Tysers Insurance Brokers Limited (Tysers) and H.W. Wood Limited (H.W. Wood) carried out a scheme to bribe Ecuadorian government officials, allegedly earning them tens of millions of dollars in illicit profits. Employees and agents of H.W. Wood allegedly paid $2.8 million in bribes through an intermediary to the then-chairmen of two state-owned insurance companies and three other Ecuadorian officials to secure business. In addition, Tysers paid roughly $20.3 million in commissions and H.W. Wood paid roughly $7.9 million in commissions and premium payments to the intermediary company that paid the bribes. In exchange, Tysers and H.W. Wood retained commissions of approximately $10.5 million and $2.3 million, respectively. Both companies have agreed to cooperate in any ongoing or future investigations related to this conduct, enhance their compliance programs, and provide updates to the Department during the three-year terms of the agreements. Tysers will pay a $36 million criminal penalty and administrative forfeiture of $10,589,275. Under the U.S. Sentencing Guidelines, H.W. Wood would pay $22.5 million in criminal penalties and administrative forfeiture of $2,338,735. However, due to the company's inability to pay, the DOJ waived the forfeiture and reduced H.W. Wood's criminal penalty to $508,000 in criminal penalties.

On November 16, 2023, the DOJ announced its decision to decline to prosecute Lifecore Biomedical, Inc. (Lifecore), a pharmaceutical manufacturer, for alleged FCPA violations. Between May 2018 and August 2019, employees and agents of Lifecore's former U.S. subsidiary Yucatan Foods L.P. allegedly bribed Mexican government officials through an intermediary with roughly $14,000 to secure a wastewater discharge permit for its wastewater treatment plant in Mexico. The DOJ came to its decision noting that Lifecore timely and voluntarily self-disclosed the conduct, fully cooperated with the investigation, promptly and appropriately remediated, and will pay $1,286,060 in disgorgement, against which $879,555 will be credited for Lifecore's payments to regulatory authorities in Mexico.

Finally, on December 14, 2023, the DOJ announced a three-year DPA with Freepoint Commodities LLC (Freepoint), a commodities trading company, in connection with charges of conspiracy to violate the FCPA. Between 2012 and 2018, Freepoint and its co-conspirators allegedly bribed Brazilian officials at Brazil's state-owned oil company, Petróleo Brasileiro S.A. (Petrobras), to obtain business and confidential information about competitors, which ultimately earned Freepoint over $30.5 million in illicit profits. According to the DOJ, the scheme was concealed by using code words and encryptions, paying corrupt consultancy fees and commissions, engaging in sham negotiations, and funneling bribes through an intermediary. Petrobras was at the center of four FCPA-related actions in 2022, *Honeywell*, *Tenaris*, *Glencore*, and *Petrobas* itself, each discussed in a previous edition. In each action, Petrobras officials allegedly accepted bribes from the companies. Freepoint has agreed to pay a criminal penalty of $68 million, an administrative forfeiture of $30,551,000, to cooperate in ongoing or future investigations relating to this conduct, and to enhance its compliance programs. Up to one-third of the criminal penalty may be credited against any penalties Freepoint may pay to Brazilian authorities, and up to one-fourth of the forfeiture may be credited against disgorgement Freepoint will pay to the CFTC to settle a related matter.

Key takeaways from 2023 individual actions

The DOJ charged twelve individuals in FCPA-related cases in 2023. Despite the Biden Administration's purported focus on holding individuals accountable, this continues a downward trend in individual enforcement actions, from twenty-three in 2021 to eighteen in 2022. June 2020 was the last time the SEC charged an individual in an FCPA enforcement action. There are a few other points worth highlighting here:



First, two of the individuals charged were foreign officials (Nass and Cosenza); the DOJ also charged executives and corporate managers, a diverse group of defendants.

Second, as discussed more fully later, on December 14, 2023, Congress passed the Foreign Extortion Prevention Act (FEPA), which criminalizes foreign officials receiving bribes in exchange for business. The bill, signed into law by President Biden on December 22, 2023, fills a gap in FCPA enforcement. Until FEPA, foreign officials could not be prosecuted under the FCPA for receiving bribes, which limited enforcement to the "supply side" of bribery. To cover the "demand side" prosecutors often brought money laundering charges. In 2023, the DOJ brought money laundering or conspiracy to commit money laundering counts related to alleged bribery schemes against 11 of the 12 defendants (everyone but Contreras), two of whom were former officials (Nass and Cosenza). This has been routine practice for the DOJ. As a result of the enactment of FEPA, it is likely that we will see the DOJ prosecute foreign officials for receiving bribes in the coming year.

Third, the DOJ continues to bring charges against individuals that stem from cases against companies. This sometimes arises because companies are required to identify culpable individuals to be eligible to receive credit for cooperation. One of the individual actions (*Nass*) involved misconduct related to PDVSA. Venezuela's state-owned oil and natural gas company has become a regular fixture in our Trends and Patterns publications, including last year when six individuals charged were connected with PDVSA. Three of the individual actions stemmed from the same bribery scheme that gave rise to the Freepoint settlement, involving Brazil's state-owned energy company Petrobras (*Oztemel, Oztemel, and Innecco*).

Finally, there was more geographical diversity in 2023 in terms of the courts in which were filed in. In 2022, almost all of the individual actions were filed in the Southern District of Florida. The majority of individuals charged in 2023 were still charged there, reflecting the relatively high number of FCPA-related cases arising from Latin America and Florida's close connections to the region (*Contreras*, *Nass*, and *Zaglin*, *Marchena*, *and Cosenza*). However, the DOJ also brought charges against individual defendants in the Central District of California (*Diallo*), the Southern District of Texas (*Aguilar*), the Southern District of New York (*Bankman-Fried*), and the District of Connecticut (*Oztemel*, *Oztemel*, *and Innecco*).

Individual enforcement actions

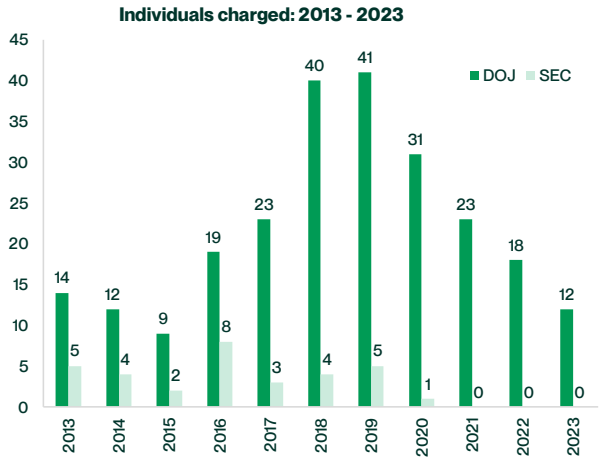
As was the case in 2022, the SEC did not bring any FCPA-related charges against individuals in 2023. The DOJ brought or unsealed FCPA-related charges against 12 individuals in relation to eight enforcement actions: (i) *Oztemel*, *Oztemel, and Innecco*; (ii) *Bankman-Fried*; (iii) *Nass*; (iv) *Diallo*; (v) *Aguilar*; (vi) *Meza*; (vii) *Contreras*; and (viii) *Zaglin*, *Centeno*, *and Marchena*. As discussed below, these cases include a mix of executives, corporate managers, and former foreign officials.

DOJ actions

In February 2023, Glenn Oztemel and Eduardo Innecco were indicted on charges of conspiracy to violate the FCPA, conspiracy to commit money laundering, violating the FCPA, and money laundering. In a superseding indictment issued on August 29, 2023, Gary Oztemel (Glenn's brother) was added with the same charges, less the charge for violating the FCPA. The charges arose from an alleged scheme to bribe Brazilian officials in exchange for business with Petrobras, Brazil's state-owned and state-controlled energy company. Gary was the owner of Connecticut-based Oil Trade & Transport S.A. (OTT) and Petro Trade Services Inc. (Petro Trade), and Glenn was a senior oil and gas trader at unnamed Connecticut trading companies, while Innecco was an oil and gas broker at the same two trading companies at the Brazil location. According to the DOJ, between 2010 and 2018, the Oztemels paid over a million dollars in corrupt payments disguised as consulting fees and commissions to Innecco, who in turn allegedly used the funds to bribe Brazilian officials. In exchange, the officials provided the co-conspirators with confidential information about Petrobras' operations and helped win contracts with Petrobras for the two Connecticut trading companies and OTT. The three co-conspirators allegedly concealed the scheme using code words, personal email accounts, aliases,

encryptions, and by routing payments through Petro Trade.[3]

On March 28, 2023, Samuel Bankman-Fried was charged in a superseding indictment for various counts of fraud and conspiracy to commit fraud, conspiracy to operate an unlicensed money transmitting business, conspiracy to commit money laundering, conspiracy to make unlawful contributions and defraud the Federal Election Commission, and conspiracy to violate the anti-bribery provisions of the FCPA. Through the cryptocurrency companies he controlled, including FTX.com, Bankman-Fried made headlines after allegedly engaging in a series of fraudulent schemes, stealing customer deposits, and misappropriating customer funds for business and personal use. He also allegedly attempted to influence U.S. cryptocurrency regulations by making massive, allegedly illegal, campaign contributions. The FCPA charges brought against Bankman-Fried concerned his alleged payment of $40 million in bribes to Chinese government officials to unfreeze certain trading accounts. Following a high-profile trial covering the core fraud charges—separated from the other charges following Bankman-Fried's challenge in a Bahamian court to the addition of five new charges not present at the time of his extradition from the Bahamas out of concern for delay—the FCPA charges against Bankman-Fried were set for trial in March 2024. The trial was bifurcated in this



manner because of the parties' concerns that the Bahamas did not consent to the five additional charges that were brought after extradition. At the time, it was unclear when the Bahamas would grant its consent for these additional charges as required by the extradition treaty between the two countries. However, in December 2023 prosecutors notified the court that they do not intend to proceed with the second trial for the FCPA charges. The indictment alleges that over $226 million in funds and assets is forfeitable from Bankman-Friedman and his companies. The prosecutors wrote a letter to the court explaining their reasoning, citing the public's desire that Bankman-Fried be sentenced and ordered to pay restitution to those members of the public who had been affected by his fraud. A trial on the additional charges would have delayed Bankman-Fried's sentencing. Interestingly, Bankman-Fried's counsel sought to have the FCPA charges dismissed as they were not agreed to under the terms of the extradition treaty reached with the Bahamas. Judge Kaplan denied Bankman-Fried's motion, finding the arguments for dismissal to be moot or without merit. Bankman-Fried was sentenced to 25 years in prison on March 28, 2024, for his convictions related to the core fraud charges. Consequently, the first trial to prosecute cryptocurrency bribes under the FCPA is dead in the water.

On March 29, 2023, Alvaro Ledo Nass, a former official at Petroleos de Venezuela, S.A. (PDVSA), pled guilty to conspiracy to commit money laundering in violation of the FCPA. In his role at PDVSA, Venezuela's state-owned and state-controlled oil company, Nass allegedly participated in various foreign currency exchange schemes. Between 2012 and 2017, Nass allegedly accepted bribes totaling at least $11,510,025 in exchange for his participation, including the facilitation of payments to co-conspirators, in schemes that used loan contracts to exploit Venezuela's fixed foreign currency exchange rate, which artificially inflated the value of Venezuelan Bolivars compared to the open foreign currency exchange market. In June 2023, Judge Kathleen M. Williams of the Southern District of Florida sentenced Nass to three years in prison, coupled with an order of forfeiture and a fine of $7,500. While the DOJ initially had sought an eight-year prison sentence following Nass's March 2023 guilty plea, the court elected to give a shorter sentence more consistent with that of other PDVSA officials who accepted plea deals in the same case.

[3] The Oztemel brothers' trial is scheduled to begin in September 2024.

In June 2023, the DOJ unsealed a superseding indictment charging Amadou Kane Diallo, a Senegalese national and CEO of California companies Virtual Advisors LLC and Liquide Inc., with wire fraud and money laundering and adding an FCPA violation as a twenty-second count. With some conduct occurring in the United States, Diallo allegedly solicited investments in these companies by making false representations about how funds would be used and his credentials and past successes. Diallo's conduct allegedly resulted in the payment of $1,878,729 from at least 11 investors, which went to fund his own personal lavish spending. Diallo allegedly provided luxurious accommodations and entertainment to a foreign official to obtain a grant of land in Senegal, and offered to provide five vehicles to a second official to assist with the grant. [4]

On August 3, 2023, Javier Alejandro Aguilar Morales, a former oil trader at Vitol Inc., was charged with violating the FCPA and laundering money while in the United States in the Southern District of Texas. Aguilar was charged with conspiracy to violate the FCPA and conspiracy to commit money laundering in the Eastern District of New York in 2020, in connection with alleged bribes he paid to officials at Ecuador's national oil company, Petroecuador. As previewed in our last year's issue, the DOJ added FCPA and money laundering charges against Aguilar in December 2022 for his alleged involvement in a corruption scheme related to Petróleos Mexicanos (PEMEX), Mexico's state-owned petroleum company. And its subsidiary PEMEX Procurement international, Inc. (PPI). Between August 2017 and July 2020, Aguilar and others allegedly engaged in a bribery and money laundering scheme in which he paid bribes to Mexican officials to obtain business for Vitol with and related to PEMEX and PPI. Aguilar and co-conspirators allegedly used wire transfers and other corrupt payments, diverted through domestic and offshore bank accounts through shell companies and intermediaries, used sham consulting agreements and invoices, and communicated through personal accounts using aliases and encrypted messaging platforms, code names, and code words to conceal the scheme. In May 2023, Judge Eric Vitaliano of the Eastern District of New York dismissed the Pemex-related FCPA charges against Aguilar without prejudice for lack of venue because these violations, by DOJ's own admission, took place in Texas. However, the court denied Aguilar's motion to dismiss the charge of conspiracy to commit money laundering, finding it tied to illegal financial transactions in the Eastern District of New York. [5] The DOJ immediately refiled the charges in the Southern District of Texas to cure the venue deficiency. Aguilar was charged with conspiracy to violate the FCPA, violation of the FCPA, violation of the Travel Act, and money laundering. The Texas case is ongoing.[6]

On October 27, 2023, Mexican citizen Christian Julian Cazarin Meza pled guilty to one count of conspiracy to violate the FCPA for her role, along with Aguilar and others, in bribing officials of PEMEX in exchange for securing improper advantages for Vitol in obtaining and retaining business. Specifically, in exchange for the illicit payments, the officials provided inside information that Vitol used to secure contracts with PEMEX. Some of this conduct occurred while the defendant was in the United States.

On November 2, 2023, Venezuelan citizen Orlando Alfonso Contreras Saab pled guilty to conspiracy to violate the FCPA for his role as an intermediary for paying bribes to José Gregorio Vielma Mora, the former governor of Tachira in Venezuela, on behalf of companies seeking lucrative contracts to provide food boxes to state agencies in Tachira. Contreras received nearly $17 million in bribes for himself and the governor over the course of the alleged scheme, some of which occurred in the United States. Contreras pled guilty after the DOJ filed charges in an information rather than an indictment, which typically suggests that a defendant is cooperating with the DOJ. Contreras did, in fact, substantially assist the government in the prosecution of others.[7]

On December 20, 2023, the DOJ unsealed a November 28, 2023, indictment charging three

[4] Diallo's trial is scheduled to begin on January 13, 2025.

[5] On February 23, 2024, Aguilar was convicted by a federal jury on all counts of the superseding indictment in the E.D.N.Y. He faces five years in prison for each FCPA count and 20 years in prison for money laundering.

[6] The Texas trial is scheduled to begin on August 26, 2024. However, on June 20, 2024, Aguilar filed an unopposed motion for continuance due to post-trial motions in the E.D.N.Y. matter.

[7] It is reported that Contreras cooperated with the U.S. government to obtain evidence against the former Venezuelan governor and Alex Saab, another central figure in the scheme. However, in December 2023, the U.S. government allowed Alex Saab to return to Venezuela as part of a negotiated prisoner exchange. In light of the release and Contreras's cooperation, the district court judge presiding over the case sentenced Contreras on February 16, 2024 to only six months in prison.

individuals in connection with their roles in an alleged international bribery scheme. All three individuals were charged with conspiracy to commit money laundering. Carl Alin Zaglin, owner of a law enforcement uniform manufacturer, was also charged with conspiracy to violate the FCPA and violating the FCPA. Francisco Roberto Cosenza Centeno, the former Executive Director of a Honduran governmental entity[8] that procured goods for the Honduran National Police was also charged with money laundering and engaging in transactions in criminally deprived property. Aldo Nestor Marchena, who controlled several entities and bank accounts in Florida, was also charged with money laundering, engaging in transactions in criminally derived property, and conspiracy to violate the FCPA. According to the DOJ, between March 2015 and November 2019, Zaglin, Marchena, and others allegedly agreed to bribe Cosenza and other officials to obtain $10 million worth of contracts for the sale of uniforms and other goods with the governmental entity Cosenza worked for. The illicit profits were allegedly laundered through the U.S. and Belize.[9]

SEC actions

The SEC did not charge any individuals for FCPA-related conduct in 2023.

GEOGRAPHY & INDUSTRIES

Geography

As in previous years, the geographic reach of FCPA enforcement was generally diverse, with several notable enforcement actions coming out of Latin and Central America. Similar to 2022, several enforcement actions stemmed from alleged misconduct in Colombia (*Grupo Aval / Corficolombiana*), Brazil (*Freepoint Commodities*, and relatedly *Oztemel*), Ecuador (*Tysers Insurance / H.W. Wood*), Mexico (*Aguilar*), and Venezuela (*Nass*). As mentioned in previous editions, despite the Biden Administration's initiative to focus enforcement efforts on El Salvador, Guatemala, and Honduras, only one individual enforcement action in 2023 involved those countries (*Zaglin* in Honduras).

There were also FCPA enforcement actions in Asia, with misconduct alleged to have occurred in Vietnam, India, Indonesia, and China (*Albemarle)*. China drew further attention in three other enforcement actions (*Clear Channel*, *a global manufacturer*, and *Koninklijke Philips*). There was also one enforcement action involving Russia *(Flutter Entertainment*), which was the first action involving Russia since 2020.

Enforcement actions relating to Africa stemmed from alleged misconduct in South Africa (*Gartner*), Angola (*Frank's Int'l*), Guinea (*Rio Tinto*), and Senegal (*Diallo*).

Industries

FCPA corporate enforcement actions in 2023 implicated several industries which are frequently the subject of FCPA enforcement, including financial services (*Freepoint*, *Grupo Aval / Corficolombiana*, *Diallo, Tysers Insurance / H.W. Wood*), mining (*Rio Tinto*), and oil and gas (*Frank's Int'l*, *Albemarle*, *Aguilar*, *Nass*). Enforcement actions also touched on a broad range of other industries in 2023, including a consumer goods manufacturing company, advertising (*Clear Channel*), medical device manufacturing (*Koninklijke Philips*), gaming and sports betting (*Flutter Entertainment*), consulting (*Gartner*), and government supplies (*Zaglin*).

Cryptocurrency is a hot-button issue for the DOJ and SEC. The cryptocurrency market saw a huge spike in 2020, which has been a cause of concern for U.S. regulators and law enforcement. As a result, the DOJ has created several new units to deal with cases involving cryptocurrency. The charges against FTX's former CEO Samuel Bankman-Fried would have been the first cryptocurrency-related prosecution under the FCPA. But with the cancellation of his second trial, it remains to be seen how an FCPA charge involving cryptocurrency would be prosecuted. In theory, an FCPA indictment based on cryptocurrency would not alter the government's approach since cryptocurrency qualifies as "anything of value" under the FCPA. Nonetheless, the FCPA-related charges against Bankman-Fried demonstrate the broad range of tools the DOJ and SEC have available to combat fraud and other unlawful activity tied to cryptocurrency.

[8] The full name of the entity is Comité Téccnico del Fideicomiso para la Administración del Fondo de Protección y Seguridad Poblacional.

[9] Carl Alan Zaglin, Francisco Roberto Cosenza Contento, and Aldo Nestor Marchena's trial is scheduled to begin on November 4, 2024 in the Southern District of Florida.

TYPES OF SETTLEMENTS

As in prior years, the DOJ and SEC continued to use DPAs and administrative proceedings to resolve most of their FCPA enforcement actions in 2023.

SEC

In keeping with years past, in 2023 the SEC relied solely on administrative proceedings to resolve its corporate enforcement actions possibly because administrative proceedings provide the SEC with a more efficient, less expensive resolution to the issue. As noted in prior publications, the SEC has not used a civil settlement before an independent Article III court since 2016.

DOJ

By comparison, the DOJ settled enforcement actions in a variety of ways, with DPAs being the most common. Of the six actions the DOJ resolved in 2023, three resulted in DPAs, and one resulted in an NPA.[10] Continuing last year's trend, the DOJ issued two official declinations in 2023—declining to prosecute Corsa Coal and Lifecore Biomedical.

As reflected in the list below, the DOJ used three of the four various settlement devices available in its 2023 FCPA enforcement actions against corporate entities.

- Plea Agreements — None[11]
- Deferred Prosecution Agreements — *Grupo Aval / Corficolombiana*, *Freepoint Commodities*, *Tysers Insurance / H.W. Wood*
- Non-Prosecution Agreements — *Albemarle*
- Public Declinations with Disgorgement — *Corsa Coal*, *Lifecore Biomedical*

ELEMENTS OF SETTLEMENTS

Self-disclosure, cooperation, and remediation

Continuing the trend from last year that voluntary disclosures lead to declinations, two companies that settled FCPA charges with the DOJ in 2023 received credit for voluntary disclosure and both resulted in declinations (*Corsa Coal* and *Lifecore Biomedical*). Albemarle received partial credit for what the DOJ determined to be an untimely disclosure, but it still received credit for its cooperation and remedial efforts. All other companies who settled the enforcement actions against them also received credit for cooperation and remedial measures (*Corficolombiana*, *Freepoint*, *Tysers Insurance / H.W. Wood*, *Corsa Coal*, *Lifecore Biomedical*).

The SEC acknowledged voluntary self-disclosures by Frank's International and Gartner. All companies that settled charges with the SEC received credit for their cooperation and remediation.

Sentencing guidelines and discounts

In 2023, the sanctions imposed by the DOJ in corporate enforcement actions were all based on the U.S. Sentencing Guidelines. The maximum available discount under the DOJ's FCPA Corporate Enforcement Policy ("CEP") increased from 25% to 50% in 2023. As a result, the DOJ's sentencing discounts varied largely depending on the relevant conduct of the companies.

Albemarle received the greatest discount at 45%, approaching the new maximum. According to the DOJ, this substantial discount reflected credit for Albemarle's cooperation, acceptance of responsibility, and subsequent remedial actions, along with partial self-disclosure credit. Corficolombiana received a 30% discount for its cooperation and remediation efforts. Tysers Insurance and H.W. Wood each received a 25% discount for their cooperation and remediation efforts. Finally, Freepoint received a 15% discount as the DOJ noted that Freepoint's initial cooperation was limited in its degree and impact.

In making the decisions to provide larger discounts, the DOJ noted that Albemarle was prompt in providing information from its internal investigation and providing other requested information and documents, that it produced relevant documents that were located outside of the United States, and that it was proactive in identifying previously unknown information. The DOJ noted that Corficolombiana was also timely and thorough in providing facts from its internal investigation and that it was proactive in

[10] While the DOJ pursued Tysers Insurance and H.W. Wood jointly in one enforcement action, it resolved the action through individual DPAs for both parties.

[11] In 2023, the DOJ entered into a plea agreement with Ericsson for the company's breach of a 2019 DPA.

providing information to which the DOJ did not have access or did not already know.

Monitors and reporting requirements

Returning to the pre-2022 trend, the DOJ did not impose any new compliance monitorships in 2023. However, as part of Ericsson's 2023 plea agreement concerning the breach of its 2019 DPA, the DOJ extended Ericsson's compliance monitorship for one year.

In 2023, the DOJ and SEC also continued the trend of requiring companies, as part of their settlement agreements, to report to the DOJ or SEC on the implementation of their compliance programs. The DOJ imposed a three-year reporting requirement on five companies (*Albemarle*, *Grupo Aval / Corficolombiana*, *Freepoint*, *Tysers Insurance / H.W. Wood*), and the SEC imposed a similar two-year reporting requirement on Koninklijke Philips. As previewed in last year's Trends and Patterns, such reports must be certified by the company's CEO and chief compliance officer, similar to the Sarbanes-Oxley Act's CEO/CFO certification requirement for public companies. Thus, it appears that, save for exceptional circumstances, the DOJ and SEC may be moving to replace monitorships with self-reporting coupled with officer certifications.

UPDATES TO PREVIOUSLY DISCUSSED INDIVIDUAL ENFORCEMENT ACTIONS

We discuss below developments during 2023 for FCPA enforcement actions against individuals. For a description of the case developments from the prior year, please see our previous edition.

Carlo Alloni

On June 28, 2023, Judge George B. Daniels of the Southern District of New York ruled that Carlo Alloni, a former executive of the Swedish Telecom company, Ericsson, would not serve any time in prison. Alloni had participated in a course of dealing involving the payment of around $2.1 million to officials in Djibouti to secure contracts for Ericsson within the country. Alloni previously pled guilty to his involvement in May 2018 and became the first person to cooperate with the government's investigation of Ericsson, discussed separately below. Alloni's cooperation proved crucial in the government's investigation and factored heavily in the court's sentencing decision.

Cary Yan and Gina Zhou

As discussed in last year's Trends & Patterns, on December 1, 2022, Cary Yan and Gina Zhou pled guilty to one count of conspiring to violate the FCPA. Both were sentenced in the first half of 2023. The charges brought against Yan and Zhou stemmed from an alleged scheme to bribe elected officials in the Republic of the Marshall Islands (RMI). Allegedly, the two sought to secure, through bribes ranging from $7,000 to $22,000, the passage of legislation which would establish a semi-autonomous region within the RMI that would benefit the business interests of Yan, Zhou, and their associates. For her role in the scheme, Zhou was sentenced to 31 months imprisonment on February 16, 2023. Later, on May 16, 2023, Yan was sentenced to 42 months in prison for his role. In support of the sentences it sought, the DOJ noted that even though FCPA cases are typically driven by large bribe amounts, well beyond the tens of thousands of dollars at issue in this case, "bribery—large and small amounts alike—causes significant harm."

Claudia Patricia Diaz Guillen

On November 16, 2023, Judge William P. Dimitrouleas of the Southern District of Florida stated in an indicative order that he would reduce the sentences of Claudia Patricia Diaz Guillen, the former National Treasurer of Venezuela, and her husband, Adrian José Velasquez Figueroa. The DOJ filed an eleven-count superseding indictment against Guillen, Figueroa, and a Venezuelan billionaire businessman Raúl Gorrín Belisario in 2020. The indictment alleged one count of conspiracy to violate the anti-bribery provisions of the FCPA, one count of conspiracy to commit money laundering, and nine counts of laundering of monetary instruments. Specifically, the indictment alleged that Belisario had paid hundreds of millions of dollars in bribes to Guillen and her predecessor to secure an improper advantage in obtaining the rights to conduct foreign currency exchange transactions at favorable rates. A jury found Guillen and Figueroa guilty in December 2022 and both were sentenced to 180 months in prison based on a sentencing guideline range of 151–188 months. However, on April 27, 2023, the Sentencing Commission passed an amendment to the Sentencing Guidelines which allows for a lower

sentencing range for those with no criminal history at the time of sentencing. The Amendment went into effect on November 1, 2023. Judge Dimitrouleas is now reconsidering the sentencing based on the amended sentencing guidelines which allow a sentencing range of 121–151 months imprisonment.

Gordon Coburn and Stephen Schwartz

In February 2019, Gordon Coburn and Stephen Schwartz, former executives of a multinational information technology services and consulting company, were charged with approving a $2 million payment to an Indian official to expedite a construction permit, in violation of the FCPA. In August 2023, the DOJ sought to introduce evidence of an alleged earlier $600,000 bribe paid in 2013. Coburn and Schwartz allegedly did not know about the bribe at the time but later discussed the payment in a 2014 videoconference call, as confirmed by Schwartz's notes. Trial was scheduled for October 2023 but was delayed at the last minute due to problem with a key witness's passport; a new trial date has been set for September 2024 in the District of New Jersey.

Jorge Cherrez Miño & John Robert Luzuriaga Aguinaga

On October 14, 2021, the DOJ filed an eight-count indictment against Jorge Cherrez Miño and John Robert Luzuriaga Aguinaga for an alleged scheme relating to Ecuador's public police pension fund. Cherrez, an Ecuadorian citizen and director of a group of investment companies incorporated in Florida, is alleged to have paid more than $2.6 million in bribes to officials of Ecuador's Instituto de Seguridad Social de la Policía Nacional ("ISSPOL"), in exchange for investments for his companies. The indictment alleged a conspiracy to commit money laundering, direct money laundering violations, and violations of the anti-bribery provisions of the FCPA. The U.S. also sought forfeiture of over $72 million related to the alleged scheme. Luzuriaga, who had influence over ISSPOL's investment decisions and received nearly $1.4 million of the alleged bribes, was charged with conspiracy to commit money laundering and entered into a plea agreement with the DOJ in February 2022. While Luzuriaga was initially sentenced to 58 months in prison followed by three years of supervised release in December 2022, on November 30, 2023, his sentence was reduced to 40 months due to his cooperation in the investigation. Cherrez has been labeled a fugitive and his case is ongoing.

Luis Carlos De Leon-Perez

In August 2023, former Venezuelan official Luis Carlos De Leon-Perez was sentenced by Judge Kenneth M. Hoyt of the Southern District of Texas to prison for one year and one day for each of two counts after pleading guilty to conspiracy to violate the FCPA and conspiracy to launder money. Although the FCPA does not directly penalize the recipient of a bribe, conspiracy charges present an alternative avenue for holding recipients liable. De Leon-Perez admitted to conspiring with officials of PDVSA and its subsidiaries to solicit bribes from PVSA vendors, specifically directing bribes from Florida and Texas businessmen in exchange for payment priority and additional contract opportunities with PDVSA. He further admitted to conspiring with the businessmen to launder and conceal the illicit proceeds through a series of financial transactions involving wire transfers to Swiss bank accounts. The sentences will run concurrently; he was also fined $472,000 and had previously forfeited $18.1 million from a Swiss bank account.

Naeem Tyab

On September 6, 2023, Judge Richard Leon of the District of Columbia sentenced Naeem Tyab to three years in prison for his role in a scheme to bribe diplomats in Chad in exchange for oil contracts. Tyab, a former Canadian oil executive and co-founder of Griffiths Energy International, pled guilty in 2019 to one count of conspiracy to violate the FCPA and agreed to forfeit $27 million in profits from the alleged scheme. In setting the three-year sentence, Judge Leon rejected requests for lighter sentences made both by Tyab and the DOJ, citing Tyab's cooperation with the government, which sought a downward departure in light of Tyab's cooperation. Judge Leon stated that a shorter sentence would not adequately deter such conduct.

Naman Wakil

In September 2023, Judge Kathleen Williams of the Southern District of Florida dismissed bribery and money laundering charges against Naman Wakil, who died in July of natural causes before he could be tried on the alleged charges. Wakil had been accused of

paying bribes to secure government contracts from Venezuelan officials.

Nervis Villalobos Cárdenas and Javier Alvarado-Ochoa

On October 10, 2023, Judge Kenneth Hoyt of the Southern District of Texas declined to dismiss charges against two Venezuelan nationals accused of participating in a scheme to bribe PDVSA officials for lucrative contracts. The indictments against Nervis Villalobos Cárdenas, Venezuela's former Vice Minister of Energy, and Javier Alvarado-Ochoa, the former president of a PDVSA subsidiary, alleged that the defendants engaged in a conspiracy to violate the FCPA and money laundering statutes. The attorneys for Cárdenas and Alvarado-Ochoa argued that the relevant statutes did not apply to foreign nationals who were not physically present in the U.S. when they allegedly committed the relevant criminal acts. Judge Hoyt rejected the argument, citing to a Fifth Circuit decision from February 2023 overturning the dismissal of claims against Murta and Rafoi, as discussed below.

Paulo J.D.C. Casqueiro-Murta and Daisy Rafoi-Bleuler

On November 28, 2023, the Fifth Circuit affirmed Texas federal district Judge Kenneth Hoyt's dismissal of the indictment against banker Paulo Jorge Da Costa Casqueiro Murta under the Speedy Trial Act. Murta was accused of facilitating bribe payments to PDVSA officials between 2011 and 2013 and indicted in 2019. He first appeared in court in July 2021 after being extradited from Portugal. Another Swiss citizen Daisy Rafoi-Bleuler was also indicted for allegedly opening Swiss bank accounts and facilitating related PDVSA bribes.

Judge Hoyt had previously dismissed the charges against Murta and Rafoi on the grounds, *inter alia*, that the FCPA "agent" language was too vague and the court lacked subject matter jurisdiction. The Fifth Circuit reversed and remanded Rafoi's dismissal in February 2023, finding that extraterritoriality is a merits question, not one of subject matter jurisdiction. Furthermore, jurisdiction was established because a federal indictment needs only to charge a defendant with an offense against the United States in language similar to that used by the relevant statute.

However, in *Rafoi*, the Fifth Circuit did not reach the secondary liability issue, and thus did not make any ruling as to the applicability of the Second Circuit's decision in *Hoskins.* Thus, it is unclear if defendants who are otherwise outside the scope of the FCPA can be tried as co-conspirators under the FCPA. Furthermore, although the Fifth Circuit agreed with the Second Circuit's adoption of the FCPA's definition of agent being aligned with the common law definition of the term, it elected not to define the common law meaning itself. The Fifth Circuit instead delegated that decision to the lower courts. Thus, multiple variables remain undecided in the Fifth Circuit and elsewhere regarding the scope and applicability of the FCPA.

In May 2023, Judge Hoyt dismissed Murta's case for the second time due to the government's violations of the federal speedy trial statute and the Sixth Amendment. The prosecution again appealed this second dismissal. While the Fifth Circuit agreed that the dismissal for speedy trial violations was proper, it overturned the lower court's decision to dismiss *with prejudice* and again remanded the case back to the district court for reassignment. Should the indictment be dismissed without prejudice, the DOJ retains the option to re-file charges against Murta. Furthermore, the Fifth Circuit reassigned the cases involving Murta and Rafoi to a different district judge for further proceedings.[12]

Roberto Enrique Rincon Fernandez

In January 2023, Roberto Enrique Rincon Fernandez was sentenced to 18 months in prison and one year of supervised release by Judge Gray H. Miller of the Southern District of Texas after pleading guilty in 2016 to violating and conspiring to violate the FCPA, as well as tax fraud. Rincon participated in a scheme to secure energy contracts from PDVSA.

Saman Ahsani and Cyrus Ahsani

In January 2023, former Unaoil executive Saman Ahsani was sentenced to over a year in prison in the Southern District of Texas after pleading guilty in 2019 to conspiracy to violate the FCPA, money laundering, and obstruction of justice. S. Ahsani must

[12] On May 20, 2024, Murta pled guilty to conspiracy to violate the FCPA. Judge Gray Miller of the Southern District of Texas sentenced Murta to time served, and Murta was ordered to forfeit $105,000 pursuant to the plea.

also forfeit $1.5 million. Between 1999 and 2016, he allegedly facilitated payment of bribes around the world to secure contracts for Unaoil, including in Algeria, Angola, Azerbaijan, the Democratic Republic of the Congo, Iran, Iraq, Kazakhstan, Libya, and Syria.

In June 2023, Judge Andrew S. Hanen of the Southern District of Texas agreed to delay the sentencing of Cyrus Ahsani, former Unaoil CEO and brother of Saman Ahsani. [13]

Tim Leissner and Roger Ng

In March 2023, Tim Leissner was ordered by Judge Margo Brodie of the Eastern District of New York to forfeit $43.7 million and 3.3 million shares of fitness drink company Celsius Holdings Inc. In August 2018, Leissner pled guilty to foreign bribery and money-laundering charges related to the 1MDB money-laundering and bribery scheme. Shortly after, Leissner's co-conspirator Roger Ng was sentenced to 10 years in prison for his role in the 1MDB scandal.

NEW INVESTIGATIONS

In 2023, the following companies disclosed anti-bribery investigations in their securities filings. Although the investigations likely commenced prior to 2023, the existence became known for the first time publicly in 2023:

- *Stanley Black & Decker Inc.*: In its February 2023 annual report, Stanley Black & Decker voluntarily disclosed to the DOJ and SEC certain transactions related to its international operations that may have violated U.S. anti-bribery laws. While the company did not explain where the violations may have occurred, Stanley Black & Decker confirmed that it is cooperating with the investigations and is committed to enhancing its anti-corruption policies and controls.
- *Stryker Corporation*: After resolving FCPA actions in 2013 and 2018, Stryker Corporation disclosed in a May 2023 securities filing that it has engaged outside counsel to determine whether certain business activities in foreign countries violated the FCPA after being contacted by the DOJ and SEC. The company did not disclose where the violations may have occurred but confirmed that it is cooperating with both agencies. In 2018, Stryker paid a $7.8 million penalty to resolve FCPA offenses in India, China, and Kuwait; in 2013, the company paid $13.2 million to resolve FCPA violations in Argentina, Greece, Mexico, Poland, and Romania, where it allegedly made payments to doctors and administrators at government-controlled hospitals. Stryker did not make an admission of guilt regarding the SEC's findings in either action.
- *SAP SE*: In a 2023 filing, SAP disclosed ongoing investigations related to conduct that may violate the FCPA. Their June 2023 Consolidated Half-Year Financial Statements allotted $186 million to potential regulatory compliance matters.[14]
- *Inotiv, Inc.*: In an August 2023 filing, Inotiv—a contract research organization—and several subsidiaries disclosed that they had received requests from the SEC regarding documentation related to the importation of non-human primates from Asia going back to December 2017. Specifically, the SEC requested information related to whether their importation practices complied with the FCPA. This request came after Inotiv's main supplier of monkeys and two officials in Cambodia's Ministry of Agriculture, Forests and Fisheries were charged with conspiring to illegally export about 3,000 macaques to the United States.
- *Charles River Laboratories International*: In the same month, Charles River Laboratories International noted that the DOJ, SEC, and U.S. Fish and Wildlife Service initiated investigations regarding several shipments of non-human primates from Cambodia to the company.

[13] Sentencing has been scheduled for November 18, 2024.

[14] In January 2024, SAP resolved parallel investigations by the DOJ and the SEC into violations of the FCPA by agreeing to pay $220 million in penalties and criminal forfeiture. The resolutions cover improper payments to officials in South Africa and Indonesia to secure software and professional services contracts between 2013 and 2018, bid-rigging and corrupt payments to government officials in Malawi, Tanzania, Ghana, and Kenya between 2014 and 2017, and improper gifts to government officials in Azerbaijan between 2021 and 2022. SAP agreed to an administrative order with the SEC requiring $85 million in disgorgement and $13 million in prejudgment interest, with an offset of $60 million for payments made to South African authorities in connection with a parallel enforcement action. The company entered into a DPA with the DOJ, agreeing to pay a criminal penalty of $118 million and a criminal forfeiture of $100 million, with credits for $55 million of the criminal penalty fine paid to South African authorities, any disgorgement or forfeiture paid to the SEC or South African authorities, and $110,000 for withholding bonuses from employees engaged in misconduct under the Criminal Division's Pilot Program Regarding Compensation Incentives and Clawbacks.

Notably, the disclosure did not specifically reference the FCPA, unlike Inotiv's disclosure. Charles River Laboratories confirmed that it is cooperating with all agencies and, while the investigations progress, has voluntarily suspended all shipments of non-human primates from Cambodia. In addition to notifications of the civil investigations, the company also received a grand jury subpoena regarding these shipments.

- *GE Healthcare Technologies*: In its November 2023 securities filing, GE Healthcare Technologies, a company spun-off from General Electric in 2023, disclosed that it had voluntarily alerted the DOJ and SEC of possible violations of the FCPA related to tender irregularities and other conduct in China. The company confirmed that it is cooperating with the investigations and has enhanced its compliance policies and practices.

UPDATES TO CORPORATE ENFORCEMENT ACTIONS

Glencore

Following the resolution of the FCPA action against Glencore, wherein Glencore entered into a plea agreement requiring the company to pay $700 million for the alleged FCPA violation, the international actions and investigations stemming from the same alleged conduct have continued to progress. In September 2023, in relation to a part of the global settlement agreement, Glencore subsequently paid $29.7 million to the Swiss authorities, though investigations remain ongoing by Swiss authorities and the Dutch Public Prosecution Service. In total, the multinational commodity trading and mining company has now paid over $1 billion to settle allegations that it bribed officials in several countries.

Ericsson

In connection with the individual case against Carlo Alloni and his cooperation in the investigation against Ericsson, on March 2, 2023, Ericsson announced that it had reached a resolution with the DOJ regarding non-criminal breaches of its DPA. Ericsson entered into a DPA in 2019 to resolve two alleged FCPA violations: one count of conspiracy to violate the anti-bribery provision of the FCPA, and one count of conspiracy to violate the internal controls and books and records provisions. The charges against Ericsson stemmed from alleged improper payments to government officials in Djibouti, China, Vietnam, Indonesia, and Kuwait, as well as the improper accounting of those payments. Under the DPA, Ericsson agreed to pay over $520 million in fines and agreed to the imposition of an independent compliance monitorship for three years. The DOJ determined that Ericsson breached its obligations under the DPA when it failed to disclose all information and evidence related to the alleged FCPA violations. To resolve the breach, Ericsson agreed to plead guilty to the charges deferred under the DPA, serve a term of probation through June 2024, and extend the independent compliance monitorship for one more year. Ericsson also must pay an additional criminal penalty of nearly $207 million, which includes the elimination of any cooperation credit originally awarded under the 2019 DPA. [15]

Boston Scientific

Medical device maker Boston Scientific disclosed in late 2022 and early 2023 that it is cooperating with the SEC and the U.S. attorney's office in Massachusetts in their investigation of possible violations of the FCPA related to the company's conduct in Vietnam. As covered in the last year's issue, in March 2022, Boston Scientific received a whistleblower letter alleging such violations. Subsequent to the company's initial disclosure of its receipt of the whistleblower letter, Boston Scientific disclosed that it received related subpoenas from the SEC and Massachusetts prosecutors in the months that followed. We understand the investigation is ongoing.

CEMIG

The DOJ and SEC have closed investigations into possible FCPA violations by Companhia Energética de Minas Gerais ("CEMIG"), a Brazilian power company, without bringing charges. The investigations by the two U.S. authorities began after CEMIG, self-reported in its 20-F filing on May 17, 2019, legal scrutiny over potential corruption faced in its home country over its investment into two Brazilian energy companies, Guanhães Energia S.A. and Santa Antônio Energia S.A. CEMIG conducted an

[15] Ericsson's monitorship and plea agreement ended in June 2024.

internal investigation with the help of a specialized independent company and found no wrongdoing. The SEC closed its investigation of the company in December 2022, and the DOJ followed shortly thereafter, ending its investigation in February 2023.

Airbus

On August 10, 2023, following the expiration of a three-year DPA, Judge Tanya Chutkan of the District of Columbia granted the U.S. government's request to dismiss the charges against Airbus. The company entered into the DPA in January 2020 to resolve charges that it had conspired to violate the FCPA and the Arms Export Controls Act. The FCPA claims focused on an alleged bribery scheme in China, where officials allegedly accepted payments from Airbus executives in exchange for lucrative aircraft contracts for the company. As part of its agreement with the DOJ, Airbus agreed to pay a $527 million fine, to cooperate with investigators, and to implement a stronger compliance program. Additionally, Airbus agreed to pay $55 million to resolve export controls-related charges and a $5 million penalty to the Department of State directorate of defense trade controls. In requesting that the district judge dismiss the claims against Airbus, the DOJ noted that the company had fulfilled all of its obligations under the DPA. Airbus's agreement with the DOJ was just one part of a historic, cross-jurisdictional $4 billion resolution with authorities in France, the U.K., and the U.S. This global settlement remains the largest foreign corruption settlement of all time.

BROAD USE OF FCPA ACCOUNTING PROVISIONS

While the FCPA is traditionally thought to be limited to foreign corruption or bribery schemes, enforcement officials continue to rely heavily on the FCPA's books and records and internal controls provisions (accounting provisions) which do not have to be tethered to an allegation of foreign bribery or corruption schemes. The following cases illustrate how the broad the accounting provisions are wielded by enforcement officials to capture a wide range of illegal conduct.

Roadrunner

On February 14, 2023, the SEC announced that it had settled charges against shipping and logistics company Roadrunner Transportation Systems, Inc. (Roadrunner) for allegedly engaging in a multiyear accounting fraud scheme in violation of the FCPA's accounting provisions.

The SEC alleged that from 2013 to 2017, Roadrunner "engaged in an accounting fraud scheme by manipulating its financial reports to hit earnings guidance and analyst projections." Roadrunner allegedly deferred accounting for expenses and then spread them across different quarters to reduce the expenses' impact on quarterly financials, did not write down assets that were worthless and receivables that were uncollectable, and manipulated earnout liabilities related to Roadrunner's acquisitions of other companies to provide a financial "buffer" that could be used in future quarters to minimize the impact of future expenses. Roadrunner allegedly concealed all of this from its independent auditor by, among other acts, providing false and misleading documents and hiding the loss of one of its operating company's largest customers. As a result, Roadrunner issued a restatement in 2018 to correct these misstatements.

To resolve these claims, Roadrunner agreed to disgorge approximately $7.1 million with prejudgment interest of $2.5 million. The SEC deemed this judgment satisfied by a September 2019 civil settlement with private plaintiffs that had brought a class action against Roadrunner for violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, among other violations, which stemmed from the same facts resulting in the 2018 restatement, for which Roadrunner agreed to pay $20 million.

MusclePharm

On June 27, 2023, the SEC settled charges against several former executives of Las Vegas-based nutritional supplement company MusclePharm Corp. (MusclePharm), alleging that its former executives engaged in improper revenue recognition practices to achieve growth demanded by its former CEO, in violation of the FCPA's accounting provisions.

The SEC alleged that beginning in 2017, Brian Casutto, Executive Vice President of Sales and Operations, and Matthew Zucco, Vice President of Sales, engaged in a fraudulent scheme to prematurely recognize revenues for its products it had sold but had not yet shipped. MusclePharm's CFO, Kevin Harris, allegedly should have raised that

these revenues were recognized prematurely but failed to do so.

Additionally, MusclePharm was alleged to prematurely recognized $12.8 million of revenue for products sold at the time of shipment and before delivery, contrary to the contracts it had with many of its customers. The SEC stated that Harris should have known that revenues were being prematurely recognized.

Finally, the SEC alleged that MusclePharm overstated its revenues by $15.8 million by classifying credits that it granted to certain customers, which allowed customers to pay a reduced price, as expenses rather than reduced revenues, which Harris should have known was contrary to GAAP standards.

In a settlement with the SEC, Harris, Casutto, and Zucco agreed to an entry of judgement, permanently enjoining them from violating the FCPA accounting provisions and antifraud provisions of federal securities laws. Casutto and Zucco agreed to pay disgorgement with prejudgment interest of $79,760 and $15,033, respectively. Casutto and Harris agreed to pay a civil penalty of $207,183 and $50,000, respectively, while the issue of Harris' civil penalty was reserved for further determination by a court. The SEC also barred Casutto from serving as an officer or director of a public company for five years.

Separately, the SEC charged MusclePharm's former CEO, Ryan Drexler, for violating the antifraud provisions of federal securities laws, as well as aiding and abetting violations of the FCPA accounting provisions. Drexler's case is still pending.

View

On July 3, 2023, the SEC announced settled charges against View, Inc. (View), a California-based manufacturer of "smart" windows that automatically respond to the sun by tinting, for materially misstating its warranty liabilities in violation of the FCPA's accounting provisions.

According to the SEC, View reported that it had an estimated warranty liability of $22 million to $25 million in periodic reports, proxy statements, and registration statements from December 2020 to May 2021; however, this estimate failed to include the accompanying shipping and replacement costs, which would increase the warranty liability to a total of $48 million to $53 million. The SEC alleged that, as a result, View failed to comply with GAAP standards and materially misstated its warranty liability. The SEC found that View had insufficient internal accounting and disclosure controls and failed to maintain books and records that accurately reflected liabilities.

In the settlement order, View agreed to cease and desist from future violations of securities laws. However, the SEC did not order View to pay any civil penalties after finding that View had self-reported its conduct, promptly took remedial action, and cooperated with the investigation.

As this case demonstrates, companies may be able to avoid more severe penalties for accounting provisions violations by taking prompt remedial action and cooperating with enforcement officials.

Co-Diagnostics

On July 5, 2023, the SEC announced settled charges against a Utah-based molecular diagnostic company Co-Diagnostics, Inc. (Co-Diagnostics), its CEO Dwight Egan, and its Head of Corporate Communications and Investor Relations Andrew Benson, for issuing securities after two alleged misleading press releases and failing to disclose certain related-party transactions.

The SEC alleged that Co-Diagnostics, issued misleading press releases on February 6 and 10, 2020. Co-Diagnostics allegedly stated that its tests could be used by consumers to detect COVID-19; however, the tests were intended for research purposes only and could not be used for clinical diagnostic purposes. Following these press releases, Co-Diagnostics offered and sold securities to investors.

The SEC further alleged that Co-Diagnostics failed to disclose in its proxy statements certain transactions involving the family members of Co-Diagnostics' CEO, CFO, Secretary, and General Counsel. Additionally, it allegedly failed to keep accurate books and records and failed to have disclosure controls and procedures to ensure that related-party transactions were properly disclosed.

Without admitting or denying the SEC's findings, Co-Diagnostics agreed to pay a civil penalty of $250,000.

Plug Power

In August 2023, the SEC announced it had settled charges against Plug Power, Inc. (Plug Power), a New York-based green hydrogen and hydrogen-fuel-cell solution company, alleging that Plug Power failed to properly account for certain assets in violation of the FCPA's accounting provisions.

The SEC alleged that from 2018 to 2020, Plug Power failed to properly account for its right of use assets and lease liabilities for certain sale-leasebacks transactions, classify and present certain costs related to research and development as a cost of revenue, estimate loss accruals for extended maintenance contracts, and account for bonus expenses and certain conversions of Plug Power's convertible preferred stock.

In May 2021, Plug Power restated its financial statements and identified material weaknesses in its internal controls over financial reporting and ineffective disclosure controls. Shortly after, Plug Power began taking remedial action.

In its settlement with the SEC, Plug Power agreed to pay $1.25 million in civil penalties, to remediate the material weaknesses identified within one year, and publicly disclose whether, in management's opinion, Plug Power had fully remediated its material weaknesses.

Fluor

On September 6, 2023, the SEC announced that it had settled charges against Fluor Corporation (Fluor), a Texas-based corporation, for allegedly materially misstating financial statements and periodic reports filed to the SEC, in violation of the FCPA's accounting provisions.

The SEC alleged that Fluor had deficiencies in its longstanding accounting practices for two fixed-price construction projects. According to the SEC, Fluor allegedly bid on these projects, relying on overly optimistic cost and timing estimates. As a result, Fluor experienced cost overruns that increased over time. Fluor then allegedly failed to maintain a system of internal accounting controls to properly account for these projects in accordance with GAAP. Consequently, the SEC alleged that this resulted in inaccurate books and materially misstated financial statements, including overstating net earnings of upwards of $51 million.

In 2020, Fluor undertook an internal investigation that identified material weaknesses in its internal controls and material errors in its financial statements. Shortly after, Fluor restated its quarterly and annual reports for 2016 to 2019.

Fluor agreed to pay $14.5 million in civil penalties and to cease and desist from committing or causing future violations of federal securities laws. The SEC noted that Fluor's cooperation and remedial acts factored into its decision to settle the charges.

GTT

On September 25, 2023, the SEC announced it had settled charges against GTT Communications, Inc. (GTT), a Virginia-based telecommunications company, for allegedly making materially misleading statements and omissions relating to Cost-of-Revenue in certain 2019 and 2020 annual, quarterly, and current reports, in violation of the FCPA's accounting provisions.

The SEC alleged that GTT struggled to reconcile data between two of its systems—its Client Management Database and its bill processing system. Over time, the two systems began showing discrepancies between GTT's actual expenses versus its expected expenses. GTT allegedly knew about these discrepancies but did not have the resources to review its Cost-of-Revenue invoices manually for proper classification. GTT also did not implement policies and procedures designed to provide reasonable assurance that the Cost-of-Revenue reflected in GTT's financial statements was based on reasonable support. Consequently, GTT allegedly failed to disclose material facts concerning certain unsupported adjustments to its Cost-of-Revenue.

In 2020, GTT announced that certain financial statements should no longer be relied upon, undertook an internal investigation, and attempted to remediate the discrepancies. GTT self-reported the issues to the SEC and cooperated with the SEC's investigation.

Due to GTT's self-reporting of the discrepancies, its attempt to take remedial action, and its cooperation, the SEC agreed to settle charges without imposing a civil penalty.

Similar to the *View* case discussed above, this case demonstrates that a company may mitigate penalties

for accounting provisions violations by taking prompt remedial action and cooperating with enforcement officials.

Hyzon

On September 26, 2023, the SEC settled charges against Hyzon Motors, Inc. (Hyzon), a New York-based hydrogen fuel cell electric car builder, for allegedly misleading investors about its business relationships and hydrogen fuel cell electric vehicle sales before and after a July 2021 merger with a publicly-traded special purpose acquisition company (SPAC), in violation of the FCPA's accounting provisions.

The SEC alleged that Hyzon made false and misleading statements to investors about its customer and supplier relationships. According to the SEC, Hyzon "misrepresented the status of its business dealings with potential customers and suppliers to create the false appearance that significant sales transactions were imminent." Hyzon overstated the number of electric vehicles it had completed, delivered, and sold. Specifically, Hyzon allegedly falsely claimed that it had delivered its first electric vehicle and posted a misleading video on social media that indicated that the vehicle ran on hydrogen when it did not. Hyzon also allegedly claimed to have sold 87 electric vehicles when it had neither owned them nor built them prior to shipment.

The SEC found that Hyzon failed to implement and maintain a system of internal accounting controls that would ensure that its sales transactions were accounted for properly and its financial statements prepared in accordance with GAAP.

Hyzon agreed to a permanent injunction and to pay $25 million in civil penalties.

ComEd

On November 18, 2020, a special grand jury indicted Commonwealth Edison Company (ComEd), an Illinois-based electrical utility company, under the FCPA's accounting provisions. The DOJ alleged that four ComEd executives and associates conspired to influence the former speaker of the Illinois House of Representatives to pass legislation that would benefit ComEd. ComEd allegedly sought to influence the speaker by, among other conduct, providing contracts, jobs, and payments to the speaker's political allies and workers. According to the DOJ, ComEd attempted to disguise the bribes as legitimate business transactions by creating false documentation and records, including invoices.

In May 2023, a jury found that ComEd's executives and associates knowingly and willfully falsified and caused to be falsified certain ComEd books, records, and accounts so that they did not accurately and fairly reflect the transactions and disposition of ComEd's assets.

On September 28, 2023, ComEd and its parent company, Exelon Corporation (Exelon), entered into a settlement with the SEC. Pursuant to the settlement, ComEd and Exelon agreed to cease and desist from committing or causing future violations of federal securities laws, including the FCPA accounting provisions, and Exelon Corporation agreed to pay $46,200,000 in civil penalties.

Here, the implicated official was not a foreign official, and the accounting provisions were wielded to capture bribery conduct. This case demonstrates that the accounting provisions may be used to combat domestic bribery when the implicated entity is an issuer.

Brooge

On December 22, 2023, the SEC announced settled charges against Brooge Energy Limited (Brooge), a UAE-based oil storage facility owner and operator, for violations of the FCPA's accounting provisions.

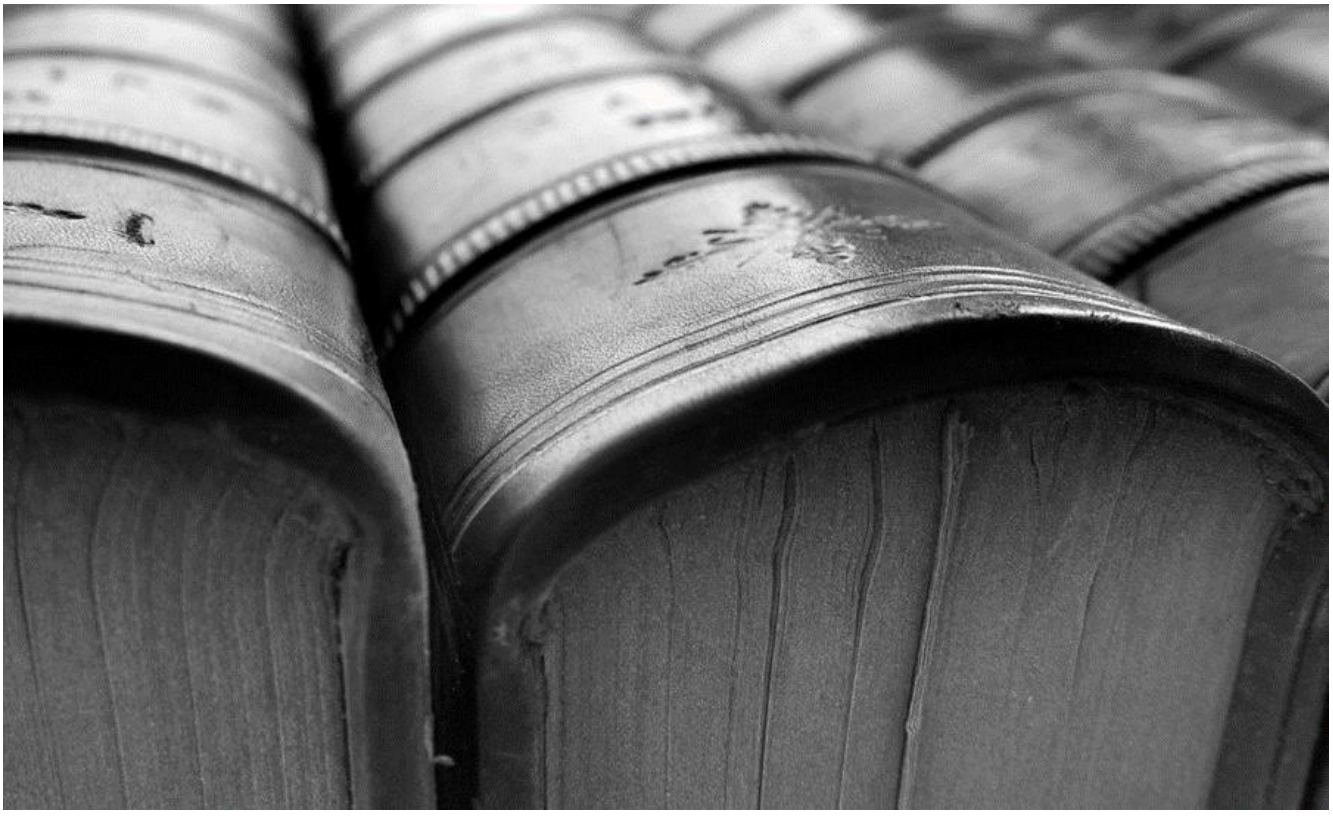
According to the SEC, Brooge's revenues were unsupported and misstated by upwards of 80% for the years 2018 to 2021. Brooge allegedly created a set of false invoices that reflected significantly high rates and volumes for customers that had not used Brooge's facilities and were shown as paid through a series of complex transactions. Brooge then allegedly provided these invoices to independent auditors along with falsified supporting ledgers and documents.

Under the terms of the settlement, Brooge agreed to pay $5 million in civil penalties.

Perennial statutory issues

JURISDICTION

FOREIGN OFFICIALS



We discuss in detail some of the substantive statutory-related issues within the FCPA context in 2023.

JURISDICTION

Legal issues

In 2023, the government's continuous anti-corruption enforcement efforts have been bolstered by the Supreme Court's April 2023 opinion in *Turkiye Halk Bankasi A.S. v. United States.* In *Halkbank*, the Supreme Court held that foreign states and their instrumentalities do not have immunity from criminal prosecution under the Foreign Sovereign Immunities Act (FSIA). In doing so, the Court found that Turkiye Halk Bankasi A.S. (Halkbank), a Turkish state-owned bank, did not have statutory immunity from U.S. criminal prosecution for alleged money laundering.

Halkbank was indicted in 2019 for allegedly laundering approximately $20 billion in Iranian oil money to assist the Iranian government in evading sanctions. Approximately $1 million of the $20 billion was laundered through the U.S. Turkish government officials maintained the scheme through receiving and accepting bribes.

Halkbank, in its reply brief in the Supreme Court, argued (1) that Congress has not granted courts criminal jurisdiction over foreign states and their instrumentalities, (2) the FSIA prevents criminal jurisdiction, and (3) the FSIA's commercial activities exception to immunity does not apply in this case.

Halkbank's arguments were not persuasive to the Court. Relying on the text of the statute, the Supreme Court held that the FSIA does not grant immunity to foreign states or instrumentalities. The Court noted that although the FSIA contains no references to criminal provisions, it does provide legal standards governing claims of immunity for lawsuits filed against foreign states even in the civil context. Writing for the majority, Justice Kavanaugh acknowledged the statute's silence on criminal matters stating, "The Act says not a word about criminal proceedings."

While the Supreme Court's decision provides clarity on some issues, it leaves several others unresolved. *Halkbank* addresses whether the FSIA grants any state-owned enterprises immunity from criminal prosecution, but the Court did not clarify whether common law immunity applies where FSIA immunity does not, requiring the issue to be addressed by the Second Circuit on remand. *Halkbank* also potentially left open the door for state and local prosecutors to freely commence criminal proceedings against foreign states. While the Court dismissed the concern in the Opinion, noting, "no history of state prosecutors subjecting foreign states or their instrumentalities to criminal jurisdiction," the decision leaves the door open as to how this potential issue would be reviewed or resolved by the courts.

The holding demonstrates that foreign states and instrumentalities can be prosecuted in the U.S. for wrongdoing that primarily occurs abroad.

Self-disclosure efforts

Individual defendants have pushed back against corporate self-disclosure regimes, arguing that this effectively amounts to "outsourcing" investigations and implicates the corporation as a state actor. In 2016, a multinational information technology services and consulting company initiated an internal investigation and reported to the DOJ two former executives who allegedly violated the FCPA.

The company's former president, Gordon Coburn, and former legal chief, Steven Schwartz, were charged for violating the FCPA over allegations of bribing Indian officials to receive a planning permit for the company. The bribery allegations arose from the company's internal investigation. The company's company policy required their participation in the investigation, including multiple interviews, or risk of termination.

Several months into the internal investigation, the company's outside counsel contacted the DOJ to self-disclose potential FCPA violations under the DOJ's 2016 voluntary self-disclosure ("VSD") pilot program.

Those former executives argued the company was acting as a state actor by cooperating with the DOJ, raising concerns related to their constitutional rights as targets of a criminal investigation. However, Judge Kevin McNulty of the United States District Court for the District of New Jersey held in a July 2023 ruling that this coordination between the company and the DOJ did not equate to an outsourcing of a bribery investigation. Judge McNulty found that although government policies incentivized the company to investigate and report corporate wrongdoing, the

incentives and the company's coordination with the DOJ did not make the company a government actor.

In an attempt to suppress statements made in interviews with the company, defendants Coburn and Schwartz argued in their *Garrity* motions[16] that the company's coordination with DOJ prosecutors equated to the government outsourcing its investigation to the company. The motions were denied by Judge McNulty who stated in his decision,

> "The mere existence of such voluntary disclosure policies, however, does not amount to 'such significant encouragement' by the Government that any interview conducted by [the company] 'must in law be deemed to be that of the State.' That [the company] was acting in furtherance of generally applicable Government policies does not render all its actions state actions. Some additional and more specific state involvement in the interviews is required."

This decision is a win for federal prosecutors, allowing the DOJ to continue to rely on self-disclosure to combat FCPA violations.

Typical jurisdictional hooks

In 2023, the Eastern District of New York continued unraveling a multi-national money laundering scheme related to the FCPA. As discussed above, on May 31, 2023, Judge Eric Vitaliano in the Eastern District of New York dismissed Mexico-related foreign bribery charges for improper venue in the *Vitol* case.

The dismissal is a part of the DOJ's ongoing case against Aguilar. Aguilar was first indicted in July 2020 on charges of conspiracy to violate the FCPA and conspiracy to commit money laundering. The DOJ brought additional charges against him in 2022 related to a bribery scheme with Mexican oil company officials. The multi-national scheme involves wrongdoing in Ecuador and Mexico and has resulted in charges of conspiracy to commit bribery, bribery, and related money laundering.

Prior to the dismissal, counsel for Aguilar filed a motion to dismiss the Mexico-related charges and requested a venue transfer to Texas, claiming the scheme took place in Houston, Texas. Judge Vitaliano initially denied the motion to dismiss and ruled that the defendant could transfer the case to the Southern District of Texas. Aguilar's counsel argued the court lacked authority to transfer and renewed the motion to dismiss, to which the judge responded with his dismissal. The judge then went to grant the renewed motion to dismiss. The government promptly refiled the Mexico-related charges in the Southern District of Texas, another DOJ jurisdictional strategy of filing charges in the jurisdiction where steps of the bribery scheme occurred.[17]

FOREIGN OFFICIALS

2023 marks the advent of a new tool in the DOJ's enforcement toolbox—the Foreign Extortion Prevention Act (FEPA). As discussed further in a later section, FEPA authorizes the criminal prosecution of foreign officials who seek or take bribes from American companies or individuals while in the U.S. and abroad, or in exchange for American business. FEPA enables the prosecutors to pursue offenders acting in and outside of the U.S. Under the statute, foreign officials can be arrested when entering U.S. territory, while residing in countries with an extradition treaty with the U.S., or traveling to any country that maintains an extradition treaty with the U.S.

While FEPA is a new prosecutorial tool at the government's disposal, the DOJ might continue to utilize alternative avenues such as anti-money laundering laws to hold foreign officials accountable for receiving bribes. The prosecution and sentencing of former Venezuelan national treasurer and her husband to fifteen years in prison is a recent example

[16] *Garrity* motions are motions to suppress statements compelled by the threat of termination, stemming from *Garrity v. New Jersey* where the Supreme Court held that the government may not threaten government employees with termination to elicit statements for use in subsequent criminal proceedings. 385 U.S. 493, 500 (1967). Defendants argued that the company was acting as a state actor and thereby violated their *Garrity* protections by failing to provide certain warnings prior to the internal investigation interviews.

[17] Aguilar's trial began in January 2024 trial in the Eastern District of New York and ultimately led to convictions of conspiracy to violate the FCPA, violating the FCPA, and conspiracy to commit money laundering. This makes Aguilar the first defendant to stand trial amidst the DOJ's global efforts in investigating bribes between trading firms and state oil companies. The outcome of the case will likely lead to broad implications for how the DOJ prosecutes multi-jurisdiction, foreign bribery schemes of this nature, and the department's refiling of charges in the Southern District of Texas is a reminder of its ongoing commitment to crack down on FCPA violations.

of the DOJ's successful prosecution under anti-money laundering laws.

Former Venezuelan national treasurer, Claudia Patricia Díaz Guillen, and her husband, Adrian José Velásquez accepted bribes of over $136 million from billionaire businessman Raúl Gorrin Belisario. The extensive bribery scheme involved "bulk cash hidden in cardboard boxes, offshore shell companies, Swiss bank accounts, and international wire transfers" which the pair used "to purchase multiple private jets and yachts, and to fund a high-end fashion line started by Díaz and Velásquez in South Florida." The two laundered money using the U.S. financial system. According to the indictment, Guillen and Velásquez wired money and made purchases in South Florida with their illicit funds. This is simply one of many examples of the DOJ using money laundering to confer jurisdiction over foreign officials.

Relatedly, the DOJ published an Opinion Procedure Release, providing guidance to companies on whether sponsoring foreign officials' traveling expenses for adoption services conforms with anti-bribery provisions under the FCPA.

The requestor, an adoption service provider, sought out an opinion from the DOJ due to a new requirement mandating that officials of the foreign country's government make annual visits to some of the families of adopted children from the foreign country to ensure successful adoptions.

The requestor sought to pay two government officials' expenses for a five-day trip to Massachusetts, New York, and Washington D.C. The two officials would be chosen by the foreign government and would travel to the U.S. to conduct "post-adoption supervision, including meeting with families and their adopted children and meeting with the requestor's leadership at its offices to learn more about the requestor's processes and regulations." The requestor outlined, among other stipulations, that the covered expenses included economy-class airfare, domestic lodging at a mid-range hotel, local transportation, and meals. The requestor would pay these expenses directly to providers. The requestor also specified that no compensation, such as cash or a daily stipend, will be given to officials for their visit.

The DOJ opinion stated that based on the facts and circumstances provided by the requestor, they would not take enforcement action under the anti-bribery provisions of the FCPA. However, the DOJ did note that the Opinion Procedure Release has "no binding application" except as to the requestor, and can only be relied on to the extent the facts and circumstances presented by the requestor are "accurate and complete." The DOJ's opinion stands apart from the various actions it has brought under the FCPA for bribery schemes involving adoption services, which according to the FBI are susceptible to fraud and corruption, and sponsored travel expenses of foreign officials.

Compliance guidance

DOJ GUIDANCE

WHISTLEBLOWERS

NEW DEVELOPMENTS

ENFORCEMENT COOPERATION ACROSS REGULATORY AGENCIES AND JURISDICTIONS CONTINUES

DOJ GUIDANCE

DOJ continues to update its voluntary self-disclosure policy

In last year's Trends and Patterns, we discussed Deputy Attorney General Lisa Monaco's September 2022 memorandum, which instructed each component of the DOJ that prosecutes corporate crime to review its policies on voluntary self-disclosure and, if there is no formal written policy to incentivize self-disclosure, to draft and publicly share such a policy.

Following this directive, on February 22, 2023, the DOJ released the United States Attorneys' Offices Voluntary Self-Disclosure Policy ("VSP"). This policy sets forth the criteria the USAOs use to determine an appropriate resolution for an organization that makes a VSD of misconduct to the USAOs, the USAOs' standardized expectations of what constitutes a VSD, and "clear and predictable benefits for such VSDs." The DOJ stated that VSD pursuant to this policy will receive resolutions under more favorable terms than if the government had learned of the misconduct through other means.

The USAOs require the following for a self-disclosure to be considered "voluntary":

- The company was under no preexisting obligation to disclose;
- The company made the disclosure prior to an "imminent threat of disclosure or government investigation";
- The company made the disclosure "prior to the misconduct being publicly disclosed or otherwise known to the government";
- The company made the disclosure "within a reasonably prompt time" after becoming aware of the misconduct; and
- The company disclosed "all relevant facts concerning the misconduct that are known to the company at the time of the disclosure."

With respect to the exact timing for a disclosure to be considered "prompt," recent revisions to the Criminal Division's Corporate Enforcement Policy ("CEP") require companies with aggravating circumstances—such as recidivism, or the involvement of top executives—to disclose wrongdoing "immediately" to potentially avoid prosecution and receive sentence reductions. Companies without such aggravating factors need only to disclose wrongdoing in a "timely" fashion to qualify for a declination and other benefits. The DOJ has separately defined "immediate" as "a matter of weeks" and noted that "timely" could be "up to six months."[18]

The DOJ claims these revised policies are effective immediately. While the Department has not publicly released figures, it reported "an uptick in companies that self-report wrongdoing" in March 2023. Further, recent settlements shed light on how the DOJ evaluates a company's cooperation in light of the updated VSP and CEP.

DOJ continues its focus on corporate off-channel communications policies

The DOJ continues to refine its policies regarding the extent to which corporations should regulate employees' usage of personal devices and ephemeral messaging platforms for business purposes (i.e., "off-channel" policies). As reported in last year's Trends and Patterns, Deputy Attorney General Monaco's September 2022 memorandum emphasized that effective off-channel policies are a prerequisite for any robust corporate compliance program. In March 2023, the DOJ released updated guidance instructing prosecutors to consider companies' off-channel policies in their Evaluation of Corporate Compliance Programs ("ECCP").

Off-channel policies generally include companies' rules around electronic communications, "bring-your-own-device" ("BYOD"), permitted and prohibited mobile applications, and data preservation. Accordingly, prosecutors are advised to focus on the communication channels through which a company permits its employees to conduct business, how such policies impact data preservation, and the extent to which the company implements such policies and disciplines non-compliance. With respect to ephemeral messaging platforms specifically, "[p]olicies governing such applications should be

[18] https://globalinvestigationsreview.com/just-anti-corruption/article/doj-official-clarifies-difference-between-immediate-and-timely-self-disclosure.

tailored to the corporation's risk profile and specific business needs and ensure that, as appropriate and to the greatest extent possible, business-related electronic data and communications are accessible and amenable to preservation by the company."

Although companies are often expected to conduct routine auditing to assess whether certain compliance policies are being followed and implemented effectively, on May 17, 2023, the DOJ's Fraud Chief Glenn Leon indicated at Compliance Week's 2023 National Conference that the DOJ does not expect companies to audit employees' personal devices and applications.

The DOJ's updated guidance comes as the SEC's and other regulators' sweeping crackdown on off-channel communications has rattled the financial sector, and reflects the Department's evolving posture toward off-channel communications. Since 2020, the DOJ's CEP has required companies to implement "appropriate guidance and controls on the use of personal communications and ephemeral messaging platforms that undermine the company's ability to appropriately retain business records or communications" to receive remediation credit. This current policy appears more flexible than the previous policy in place from 2017 to 2020, which required companies to "prohibit[] employees from using software that generates but does not appropriately retain business records or communications."

Nonetheless, the recently updated ECCP guidance demonstrates the DOJ's continued focus on ensuring that companies preserve business records and communications that may become relevant during future FCPA investigations. Companies can manage off-channel risks by continually assessing their policies regarding which devices and applications employees are permitted to use to conduct business, ensuring employees and managers are aware of such policies, and devising appropriate measures for addressing non-compliance.

DOJ ends initial year of the clawback pilot program

As noted in last year's digest, on March 3, 2023, the DOJ announced a new pilot program—the Clawback Pilot Program. The three-year program aims to reward corporations that foster a culture of compliance through their compensation programs, including the use of compensation clawback policies. The program seeks to shift the financial responsibility for crime away from the shareholder and onto the culpable employees.

The Clawback Pilot Program consists of two parts. The first requires that when entering into criminal resolutions, companies must incorporate compliance criteria into compensation policies, and report the implementation to the DOJ. The second allows the Criminal Division to consider the reduction of fines when companies actually "clawback" compensation from those responsible for the commission of the violation. When certain conditions are met, corporations will get a credit equal to the amount of compensation that the company attempts to claw back from employees. If the compensation is successfully recouped, then the company will keep the credit. If unsuccessful, the company will only have a fine reduction of 25% of the money that it attempted to claw back.

On June 22, 2023, Leila Babaeva, Senior Counsel to Deputy Attorney General Lisa Monaco, said at the GIR Live: Women in Investigations Conference that the Clawback Pilot Program is about more than clawing back money obtained illegally. She added that it is not "necessarily fair" to characterize the program as focused on clawbacks alone, but rather that the DOJ wants to "reward companies that reward compliance."[19] In the program, the fine reduction equals the amount clawed back from employees involved in wrongdoing.

In response to criticism that U.S. employment laws may prohibit lawsuits seeking clawbacks, Babaeva said that the program was just as much about incentivizing employees as it was punishing wrongdoers. There is tension between a company's desire for detailed information about which compensation structures will be rewarded and the Department's stance that the packages must be highly individualized. The Department suggested that it would look favorably upon a company factoring compliance into performance evaluations, tracking whether managers relay messages from and

[19] To that end, Monaco announced on March 7, 2024, at the ABA's National Institute on White Collar Crime that the Department is expanding its whistleblower program, offering compensation to those who are first to report "significant corporate or financial misconduct" unknown to the Department. The compensation would be a "portion of the resulting forfeiture."

comport with compliance departments, and measuring how many times an employee had to be reminded to complete compliance training programs.

As of the time of this publication, the Clawback Pilot Program has just completed its first full year of implementation. But critics already say that the benefits of the program appear to be minimal. For example, in January 2024, the DOJ reached a settlement with SAP, a German software company—of $220 million. In that settlement, the DOJ only credited an abysmal $110,000 under the Clawback Pilot Program.

DOJ doubles down on data analytics to identify FCPA violations, expects companies to do the same

In 2023, the DOJ emphasized the increasingly important role of data analytics in FCPA compliance and enforcement. Acting Assistant Attorney General for the DOJ's Criminal Division Nicole M. Argentieri spoke in November 2023 about the Department's efforts to expand the use of data analytics to FCPA enforcement. The DOJ has used data analytics in other areas of white-collar enforcement and is now investing in manpower and technology to leverage data to detect misconduct and investigate potential FCPA violations. These investments seem to be paying off, as the DOJ analyzed data and financial records to build its case against Arturo Murillo, Bolivia's former Minister of the Government who—as covered in a previous edition—pled guilty to money laundering for diverting military contracts to a Florida-based company in return for over $500,000 in bribe payments.

As the DOJ continues to "double down" on data analytics, it expects companies to do the same. In March 2023, the DOJ released updated guidance instructing prosecutors to consider companies' data analytics capabilities when assessing corporate compliance programs (*see* ECCP). The DOJ now expects companies to collect and analyze data to continuously assess compliance risks, detect non-compliance, and measure effectiveness to identify potential policy updates. As an example, Argentieri's November 2023 speech highlighted how Albemarle's use of data analytics in compliance monitoring and assessment contributed to its remediation credit. Indeed, these developments come as the DOJ recently announced its own corporate crime database, which has been lauded as promoting transparency and helping to track trends in corporate criminal prosecutions.

The DOJ's increased use of data analytics serves as a warning for companies considering voluntary disclosure as the Department invests in tools and personnel which may help the government detect misconduct, including potential FCPA violations. Further, companies seeking to resolve FCPA enforcement matters may be expected to demonstrate how they are leveraging data to promote compliance. Therefore, companies should consider how to incorporate data analytics to monitor, measure, and evaluate their compliance programs.

DOJ announced the M&A safe harbor policy

In October 2023, the DOJ announced its Mergers & Acquisitions Safe Harbor Policy, which aims to incentivize companies to voluntarily self-disclose criminal misconduct discovered by an acquiring company during the acquisition process, regardless of whether the misconduct was discovered pre- or post-acquisition.

Companies are required to report misconduct within six months of closing a transaction and are given up to one year from the closing date to remediate the misconduct. Extensions can be granted for these six-month and one-year cutoffs depending on the nature, circumstances, and facts of the deal. However, where misconduct threatens national security or involves ongoing or imminent harm, self-disclosure must be immediate. If the company does report some wrongdoing discovered, it may qualify for a declination of prosecution if they promptly report said misconduct.

The provision has differing impacts on the acquiring company and the acquisition target. For acquiring companies, aggravated factors[20] will not prevent them from qualifying for a declination. Additionally, when an acquiring company self-discloses, the target company can also receive the benefit of declination,

[20] Aggravating circumstances include but are not limited to involvement by executive management of the company in the misconduct, a significant profit to the company from the misconduct, pervasiveness of the misconduct within the company, and criminal recidivism. These circumstances typically result in criminal resolutions under the DOJ's FCPA Corporate Enforcement Policy, but they do not limit eligibility for declination under the Safe Harbor Policy.

unless aggravating factors exist at the acquired company. Finally, disclosed misconduct will not be factored into the future recidivist analyses of acquiring companies—unless the information would otherwise be required for disclosure or already known by the Department.

The new Safe Harbor Policy does place some limitations on which M&A deals may qualify for the benefits. It only applies to "bona-fide, arm's length" transactions, according to Associate Deputy Attorney General Marshall Miller. Not only are "sham" deals disqualified from protection under the policy, but they could result in *greater* criminal liability imposed on companies. Miller states, "For example, if we find out that a company improperly structured a transaction to avoid applicable reporting obligations, it would not qualify for the protections of the policy." While it is clear some deals may be deemed ineligible for declination, additional guidance on what qualifies as a "sham" deal has not yet been provided by the DOJ.

The overall goal of the DOJ's Safe Harbor Policy is timely compliance. Through incentivizing self-disclosure and penalizing non-compliance, the policy makes for stronger compliance among companies and more efficient investigations and remediation of misconduct in mergers and acquisitions.

DOJ emphasizes importance of guilty pleas but defends corporate settlements that stop short of requiring them

On November 29, 2023, DOJ Acting Assistant Attorney General Nicole M. Argentieri highlighted the DOJ's 2023 successes at the 40th International Conference on the FCPA. Argentieri discussed the importance of treating issuers and non-issuers alike and ensuring the payment of all fines (subject to the anti-piling on policy that directs the DOJ to avoid duplicative fines or penalties for the same underlying conduct and guidance on inability to pay). Argentieri also focused heavily on the requirement of guilty pleas, which she said will be required without hesitancy where circumstances warrant, particularly in cases that are "especially egregious."

Argentieri cited Binance, a cryptocurrency exchange, as an example. Binance paid approximately $4.3 billion in penalties and its CEO pled guilty to criminal charges related to anti-money laundering, unlicensed money transmitting, and sanctions violations. This is not an FCPA case, but among the largest corporate criminal resolutions in the DOJ's history. As to the FCPA, the DOJ also required Ericsson, a multinational networking and telecommunications company, to plead guilty to two FCPA-related charges last year. Pursuant to a 2019 DPA, Ericsson was required to provide certain documents and information to the DOJ. When it failed to do so, the Department required the company to plead guilty to those charges and pay a $200 million fine.

Conversely, on December 12, 2023, Argentieri defended the DOJ amid bipartisan criticism that the Department is too soft on corporate crime. Senators criticized the Department for using settlement agreements in place of guilty pleas and for refusing to charge company executives in some cases. Argentieri said that the use of settlement agreements, such as DPAs and NPAs, do not let businesses "off the hook," even though they do not require companies to plead guilty.

The DOJ also faces criticism for choosing not to charge company executives in certain cases, as it did with the Sackler family executives of Purdue Pharma. Purdue pled guilty to charges related to pushing sales of OxyContin in 2020 and was levied a hefty fine. Argentieri called the fine a "substantial step" as the largest financial penalty ever levied against a drugmaker. But critics say that without charging the Sackler family, the DOJ sends the message that those with money can settle without criminal ramifications.

DOJ launches corporate crime database

Senator Richard Durbin of Illinois, Senator Richard Blumenthal of Connecticut, and U.S. Representative Mary Gay Scanlon of Pennsylvania have been urging the DOJ to implement a corporate crime database. In November of 2022, they unveiled a bill that would require the Department to create a national database reporting on corporate crime. On June 9, 2023, the database launched. It currently tracks all corporate crime cases that have been resolved beginning in April 2023, and the Department hopes to gradually expand the database to include relevant cases from the last several years. It will include both individual cases related to corporate crime and cases against companies. The database is searchable, can be sorted by date, and provides links to documents and summaries of proceedings.

DOJ focuses on national security in corporate criminal enforcement

While the FCPA remains a potent statute for enforcement officials to wield, it appears that the DOJ may be shifting its resources to pursue more sanctions violations than FCPA violations. In September 2023, the DOJ announced the appointment of the National Security Division's first Chief Counsel for Corporate Enforcement, indicating a new focus by the DOJ to investigate and prosecute corporate crimes that have national security implications. The DOJ has also committed to increasing staffing in this division.

According to the announcement, some of the types of cases that the DOJ will investigate and prosecute include companies violating sanctions and exports controls. In the future, the division may also focus on trade secrets violations, especially as they relate to China.

The announcement indicates that sanctions prosecutions will continue to outpace FCPA violations in 2024. Accordingly, companies and corporate counsel should consider enhancing their compliance policies not only to account for FCPA risk but also to evaluate exposure to national security risks.

WHISTLEBLOWERS

Two denied whistleblowers appeal SEC denial of award after another whistleblower in same investigation receives $279 million

In 2019, Swedish telecommunications giant Ericsson reached a $1.1 billion settlement with the DOJ and the SEC over a range of FCPA violations pertaining to illegal payments it allegedly made to win business in five countries. In connection with this settlement, the SEC issued a record $279 million award to a whistleblower for tips which aided the investigation that culminated in the Ericsson settlement. Thereafter, two additional individuals, former Ericsson executive Liss-Olof Nenzell and an anonymous informant identified as Jane Doe, claimed their tips also aided the Ericsson investigation and requested whistleblower awards as well. After their claims were denied in a final SEC order, both claimants appealed their respective claim denials before the U.S. Court of Appeals for the District of Columbia Circuit in early June 2023. Ultimately, the parties stipulated to a voluntary dismissal in August 2023.

Law firm claims that the Flutter International enforcement action was supported by a whistleblower complaint

In early 2023, the SEC announced a $4 million FCPA enforcement action against Irish company Flutter International based on the finding that Flutter paid approximately $8.9 million to consultants in Russia to support Flutter's efforts to have poker legalized in Russia. In mid-2023, Seiden Law LLP, an international law firm based in New York, issued a release asserting that the SEC's enforcement action was supported by a whistleblower complaint filed by Seiden in 2021. The Seiden complaint came after Flutter voluntarily contacted the SEC following a 2016 internal review of the company's payment practices. Although this timeline raises the question of whether the SEC investigation could plausibly have been supported by the Seiden complaint, the SEC did award $279 million to an Ericsson whistleblower notwithstanding the fact that they came forward after the opening of the investigation.

NEW DEVELOPMENTS

The future of the FCPA and monitorships

At a legal conference in November 2023, two top FCPA enforcement officials signaled that monitorships are still on the table, even though they appear to have fallen out of favor in recent years. The head of the SEC's FCPA unit, Charles Cain, said that it was an encouraging sign that neither the DOJ nor SEC have had to impose monitorships over foreign bribery violations in 2023. The DOJ's top FCPA enforcer, David Fuhr, noted that "monitorships have been used, are being used, and will be used in appropriate circumstances." According to the DOJ, monitorships have a limited role and should not be viewed as punishment, rather as a way for companies to implement an "effective set of policies." While conceding that no compliance program is perfect, Fuhr stated that his ultimate goal is for compliance officers to articulate the key risks that their company is facing.

As discussed in last year's Trends and Patterns, the DOJ imposed a compliance monitorship as part of Glencore's 2022 FCPA settlement, which ranks as the ninth largest corporate FCPA settlement of all

time. Even as compliance monitorships have been on the decline in recent years, these remarks serve as a reminder of the depth of the DOJ's and SEC's toolbox in resolving FCPA corporate enforcement actions. In place of monitorships, there has been a preference for self-reporting obligations. Nevertheless, monitorships are still the preferred enforcement mechanism in some other corporate cases which involve behavior like seen recently in the Binance case. In its settlements with the US Department of Justice and regulatory agencies, Binance agreed to two monitors; one under the terms of the DOJ settlement and the other under the terms of the FinCEN settlement.

Gain-based penalties – from Glencore to Freepoint

In December of 2023, the DOJ and CFTC settled their claims against Freepoint Commodities LLC (Freepoint). Freepoint settled with the DOJ for $98 million and with the CFTC for $7.6 million. The DOJ's claims sounded in FCPA charges. The case against Freepoint was largely a redux of the gain-based penalties in Glencore in 2022.

But Glencore's settlement was remarkable because it was the first case in the FCPA's 45-year history in which the DOJ imposed a gain-based forfeiture on top of a gain-based criminal fine. The CFTC took part in this investigation and settlement since the payments were allegedly used for fraudulent trades and bids with state-owned entities in various foreign countries. In total, Glencore paid fines totaling over $1.186 billion—including $270 million in forfeiture—and was ordered to install internal compliance monitors for three years.

This new practice continued into 2023 as the DOJ imposed simultaneous gain-based forfeitures and penalties in multiple cases this past year. For example, in December 2023, Freepoint agreed to pay a $68 million criminal fine and an additional criminal forfeiture of $30.5 million—both based on the trading company's illicit gains from allegedly bribing Brazil's state-owned oil company to secure business.

In addition to promoting accountability, gain-based penalties are seemingly designed as a deterrent against bribery schemes that result in sizeable illicit profits. Not only do gain-based penalties serve to deter repeat offenses by companies such as Freepoint and Glencore, but these heightened penalties also send a broader message that the consequences of exploiting foreign corruption will be proportional to the illicit gains.

Fifth Circuit: *Miranda* does not apply to questioning in prosecutor's office

In February 2023, the Fifth Circuit held in *United States v. Murta* that investigators were not required to issue a *Miranda* warning before questioning a foreign citizen abroad for suspected FCPA violations, reversing a district court's dismissal of two indictments. In Lisbon, Portugal, investigators with the Department of Homeland Security ("DHS") questioned Murta, a Portuguese citizen, regarding his knowledge of corruption allegations against PDVSA, the Venezuelan state oil company. Ultimately, Murta was charged with one count of conspiring to violate the FCPA, as well as three related counts of money laundering. The Fifth Circuit found that Murta was not "in custody" because he was not restrained and his lawyer was present. The court also concluded that the environment was not coercive enough to be considered a "station-house interrogation." Regardless, the DHS investigators lacked jurisdiction to arrest the defendant abroad.

USAO: Past management's involvement not an aggravating factor

On March 1, 2023, Chief Counsel to the U.S. Attorney for the Southern District of New York Andrea Griswold reassured companies that USAOs will not consider prior management's involvement to be an aggravating factor in self-reported white-collar criminal cases. Griswold's remarks highlight a nuanced but potentially important distinction between the Criminal Division's CEP and USAOs' VSP as noted above. Unlike the USAOs' VSP, which specifies that "current" management's involvement is an aggravating factor, Main Justice's self-disclosure policy makes no distinction between current and former management. Therefore, former executives' involvement can weigh heavily in companies' decision whether to report wrongdoing to the Criminal Division.

ENFORCEMENT COOPERATION ACROSS REGULATORY AGENCIES AND JURISDICTIONS CONTINUES

2023 saw a continuation of the trend of cooperation among agencies in the U.S., as well as cross-jurisdictional cooperation among foreign agencies.

DOJ/SEC cooperation

Since 2010, the DOJ has been involved in about 50% of enforcement actions brought by the SEC for FCPA violations. However, in 2023, the SEC brought only two corporate enforcement actions that involved the DOJ (*Corficolombiana* and *Albemarle*)—22%—down from 57% in 2022. This is the lowest number in the past decade.

On August 10, 2023, the SEC announced that it had charged Corficolombiana with violating the FCPA. The Company also entered into a DPA with the DOJ. (Notably, the Corficolombiana settlement also marks an important first for the DOJ—the first ever coordinated resolution with Columbian authorities.)

On September 29, 2023, Albemarle entered into a three-year NPA whereby it agreed to pay a penalty of $98.2 million and an administrative forfeiture of $98.5 million. This penalty reflects a reduction under Part II of the DOJ's Clawback Pilot Program for compensation clawbacks, as discussed above.

Albemarle made voluntary disclosures regarding the bribery scheme, cooperated with the government's investigation. and took voluntary remedial and disciplinary actions, including withholding bonuses and terminating the employees involved. Subsequently, the DOJ's penalty was reduced by $763,453 for the compensation clawed back from culpable employees. Acting Assistant Attorney General Nicole M. Argentieri of the DOJ's Criminal Division said of the settlement: "Today's resolution also demonstrates the real benefits that companies can receive if they self-disclose misconduct, substantially corporate, and extensively remediate." The DOJ agreed to credit approximately $81.9 million of the forfeiture against disgorgement Albemarle agreed to pay to the SEC, which appreciated the assistance of the DOJ, among other U.S. and foreign enforcement agencies, in a press release.

Other domestic cross-agency enforcement

Freepoint (DOJ/CFTC)

Following last year's cooperation on the Glencore enforcement action, the DOJ and the CFTC worked together on another company involving in commodities trading. On December 14, 2023, Freepoint, a commodities merchant, agreed to pay more than $100 million to settle allegations by both the CFTC and DOJ that the company illegally traded fuel-oil based on non-public information that it obtained through corrupt payments. The CFTC alleged that between 2012 and 2018, the company bribed employees and agents of state-owned Brazilian oil Petrobras, in exchange for material non-public information related to the purchase and sale of oil. According to the DOJ press release, Freepoint communicated with Petrobras using codewords and encrypted messaging applications, engaged in "sham negotiations," and funneled unlawful payments through offshore bank accounts and shell companies.

The CFTC alleges that using this scheme, Freepoint gained "unlawful competitive advantages" in trading oil products, which resulted in more than $30 million of unlawful gains. As part of the settlement, Freepoint agreed to disgorge $7.6 million to the CFTC related to these allegations.

Freepoint entered into a DPA with the DOJ for the charges of conspiracy to violate the FCPA. Pursuant to that DPA, Freepoint is to pay a criminal penalty of $68 million and an administrative forfeiture of $30,551,150. The DOJ has also charged three individuals in relation in this scheme, including a senior oil trader at Freepoint who helped make the bribes, and two agents who assisted in facilitating the payments.

International Corporate Anti-Bribery Initiative (ICAB)

On November 29, 2023, Acting Assistant Attorney General Nicole M. Argentieri announced the creation of a new program aimed at fighting corruption around the globe: the International Corporate Anti-Bribery initiative (ICAB). The initiative will be housed under the umbrella of the DOJ's FCPA unit, but members will work across agencies with the DOJ's Criminal Division and the State Department, and collaborate with agencies around the world. According to the announcement by the DOJ, the initiative will "start by focusing on regions where we can have the most impact on both coordination and case generation."

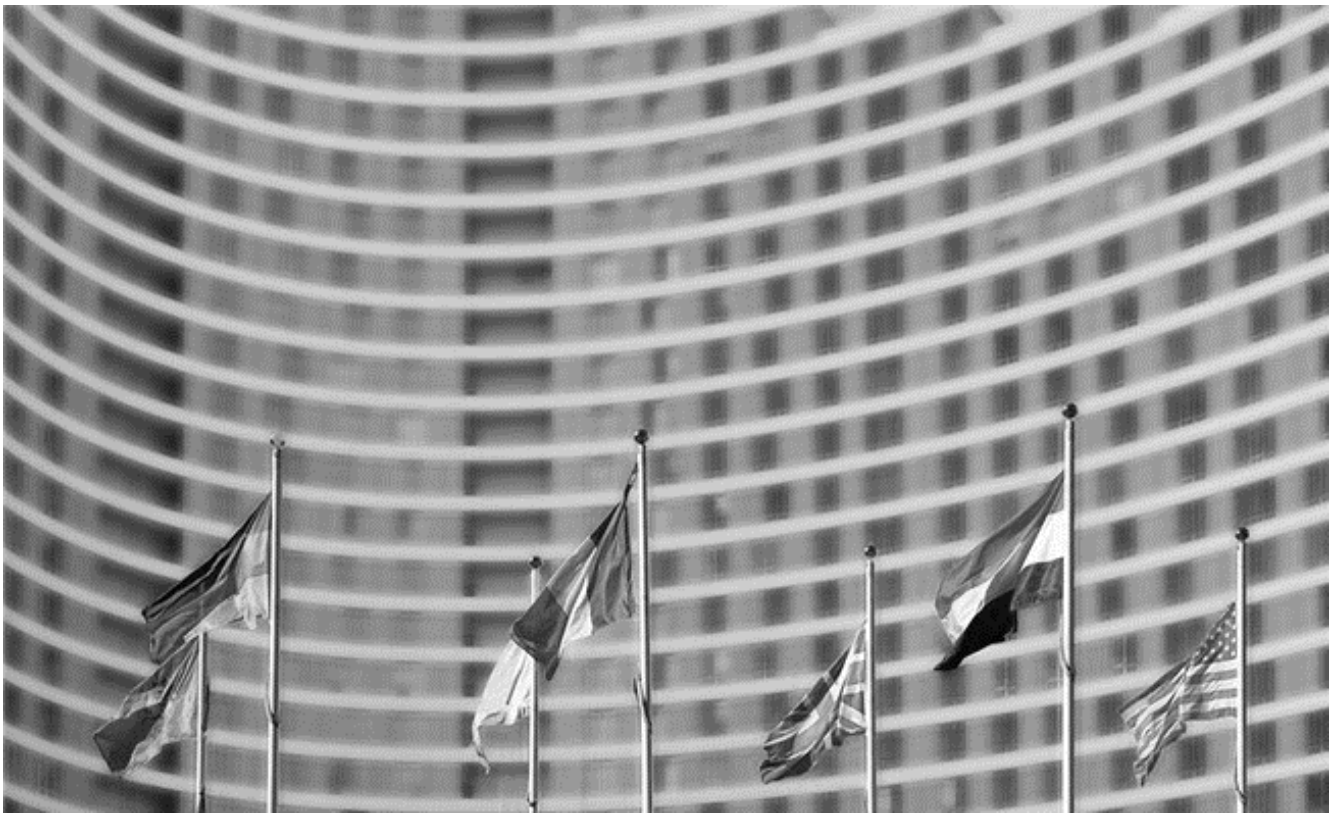
The program will be led by three prosecutors within the division, who will work to bolster existing relationships and build new partnerships around the world. The goal of this initiative is to leverage the prosecutors' experience and facilitate cross-border information sharing to help "enhance [the DOJ's] ability to identify—and to effectively investigate and prosecute—foreign bribery offences acting in these

regions." As is consistent with its overall goal to increase the use of data in investigating and prosecuting violations of the FCPA, the DOJ intends to use the ICAB to "up[ ] its game when it comes to data analytics."

Unusual developments

NEW ANTI-CORRUPTION LAW CRIMINALIZES THE DEMAND SIDE OF BRIBERY

DUTCH PROSECUTORS JOIN INTERNATIONAL CORRUPTION-FIGHTING GROUP



New anti-corruption law criminalizes the demand side of bribery

In December 2023, President Biden signed into law the Foreign Extortion Prevention Act ("FEPA"), which criminalizes demand-side bribery by extending the federal bribery statute to cover foreign officials who solicit bribes. FEPA provides a basis for companies doing business abroad to emphasize to foreign officials the importance of avoiding any appearance of corruption because they now too could be criminally or civilly liable. Prior to FEPA, the FCPA only criminalized offers of bribes to foreign officials but did not penalize foreign officials who solicit or receive bribes.

Under the new law, a "foreign official" can be prosecuted for "corruptly demand[ing], seek[ing], receiv[ing], accept[ing], or agree[ing] to receive or accept, directly or indirectly, anything of value" (1) personally or for any other person; (2) from an "issuer"; or (3) from any U.S. "domestic concern" in return "for being influenced in the performance of an official act, being induced to do or omit an act in violation of an official duty, or conferring any improper advantage in connection with obtaining or retaining business for or with, or directing business to, any person."

This new law modifies the existing bribery statutes codified under 18 U.S.C. § 201; thus the FCPA has not been modified or infringed upon. FEPA mimics some key elements of the FCPA's prohibitions against foreign corruption. For instance, FEPA has a broad jurisdictional scope like the FCPA, and defines a "foreign official" in a similar way as any person acting officially or unofficially on behalf of a government, or any department, agency, or instrumentality thereof or on behalf of any public international organization. FEPA also adopts the "business-nexus element seen in the FCPA." However, FEPA also stands distinct from the FCPA in several ways. Unlike the FCPA, this new law expands foreign official to include individuals acting in an *unofficial* capacity for a government or public entity. Additionally, FEPA incorporates the definition of "senior political figure" and "senior executive of a foreign government-owned commercial enterprise." FEPA goes beyond Section 201's domestic bribery component to prohibit a broader range of actions. The result is that FEPA applies not just against foreign officials who demand a bribe in return for an "official act" but also prohibits demands for "conferring any improper advantage."

FEPA will apply when a *quid pro quo* is demanded, i.e., a foreign official demands a thing of value in return for (1) "being influenced in the performance of any official act;" (2) "being induced to do or omit to do any act in violation of the official duty of such foreign official or person"; or (3) "conferring any improper advantage, in connection with obtaining or retaining business for or with, or directing business to, any person." Violations will carry a potential penalty of (1) a fine not more than $250,000 or three times the monetary equivalent of the thing of value; and/or (2) imprisonment for not more than 15 years.

FEPA was passed to fill a gap left by the FCPA, which focused on outlawing the "supply side" of bribery and will serve a crucial role in deterring and penalizing the "demand side" of bribery. The FCPA's gap since its passage has been the fact that it specifically criminalized the "supply side" of bribery while leaving unregulated the "demand side" of bribery. This meant that foreign officials could demand compensation for favorable treatment and escape prosecution under the FCPA.

The DOJ responded to this by prosecuting other demand side foreign bribery cases under Money Laundering Control Act (MLCA). This was a creative way to fill the gap, but still the practice of prosecuting "demand side" bribery remained limited. Thus, with the passage of FEPA, the system of combatting bribery has now become complete with the last remaining corrupt actors being subject to anti-bribery laws just like the "supply side" actors have been.

Because a broader category of foreign individuals will be subject to FEPA, companies are advised to be more careful of who they work with, for instance, in setting up joint ventures with SOEs. The prohibition applies to foreign officials and those individuals who are working for a government in an unofficial capacity. Thus, foreign corruption has been sufficiently curtailed from all sides with the passage of FEPA.

Biden bars corrupt foreign actors from entering the U.S.

In December of 2023, President Joe Biden barred noncitizens from entering the U.S. if they have been deemed to facilitate and enable significant corruption. Biden's proclamation authorized the Secretary of State to identify individuals who have been known to allow corruption to flourish by

providing services like money laundering. In addition to these restrictions, the Biden Administration has created a new Anti-Corruption Center within the U.S. Agency for International Development which has issued dozens of anti-corruption sanctions and enacted new reporting requirements for companies transacting domestically.

Ericsson breached DPA and how to avoid it

As discussed earlier, in March 2023, the DOJ announced that Sweden-based telecommunications company Telefonaktiebolaget LM Ericsson had agreed to plead guilty to violations under the FCPA and paid over $200 million for breaching its 2019 DPA.

Breaches of DPAs have typically resulted in the DOJ extending the terms of the DPA itself, by months or even years. In some instances, the DOJ has imposed more severe penalties. Here, Ericsson both paid additional penalties and agreed to extend the term of monitor for a year and to serve a term of probation through June 2024. Breaches of DPA are rare but usually occur from continuing misconduct or new misconduct. It is critical for companies to remain cognizant of affirmative disclosure obligations under a DPA related to post-resolution conduct, as well as pre-resolution conduct.

According to the DOJ, Ericsson violated the DPA by failing to disclose all factual information and evidence related to three alleged bribery schemes in Djibouti, China, and Iraq, before entering into the 2019 DPA. Ericsson failed to produce emails showing that its executives and managers were aware of alleged bribery schemes in Djibouti and China even though the emails were responsive to agreed-upon search terms. Additionally, the DOJ focused on Ericsson's alleged mischaracterization of certain allegations disclosed late in the settlement process. Two weeks before the DPA was agreed to, Ericsson disclosed that it learned of new "generalized information" relating to new internal investigation concerning conduct in Iraq. The disclosure allegedly did not provide any more detail and omitted key information and material facts. Also, the internal investigation report was finalized five days after the DPA and no update was provided.

There are a couple of practice points to note. First, care should be taken in document productions to ensure compliance with agreed-upon parameters. Second, it is important for companies and their outside counsel to align on the appropriate level of disclosure and the balance between advocacy and a duty to disclose. Here, the internal investigation had been going for years and was only disclosed two weeks prior to the settlement.

Dutch prosecutors join international corruption-fighting group

On September 6, 2023, the Dutch Fiscal Information and Investigation Service ("FIOD") joined the International Anti-Corruption Crime Centre ("IACCC"). The FIOD is an agency of the Dutch government responsible for investigating financial crimes. The IACCC brings together specialist law enforcement officers from around the world to tackle allegations of grand corruption, such as bribery of public officials, embezzlement, abuse of function, and laundering crime proceeds. Hosted within the National Crime Agency ("NCA") in London, the IACCC is currently assisting domestic grand corruption investigations, corruption occurring at the highest levels of government in a way that requires significant subversion of the political, legal, and economic systems, in over 40 different jurisdictions around the world; in 2022 alone, it identified more than £380 million of stolen and hidden assets. The FIOD will join other IACCC members including the U.K.'s NCA, the U.S.'s FBI and HSI, the Australian Federal Police, the Royal Canadian Mounted Police, New Zealand's Police and its Serious Fraud Office, INTERPOL, and Singapore's Corrupt Practices Investigation Bureau.

Private litigation

FORMER DIRECTOR OF GLOBAL COMPLIANCE ANALYTICS AT PFIZER FILES CIVIL COMPLAINT AGAINST COMPANY BASED ON REPORTING ALLEGED FCPA ISSUES

PETROBRAS TELLS DC CIRCUIT THAT FSIA BARS INVESTOR FRAUD SUIT

U.S. INVESTOR LAWSUIT AGAINST ERICSSON OVER IRAQ CORRUPTION PROBE DISMISSED

AMENDED COMPLAINT FILED AGAINST ERICSSON ON BEHALF OF AMERICAN VICTIMS OF TERRORISM

Former director of global compliance analytics at Pfizer files civil complaint against company based on reporting alleged FCPA issues

In early August 2023, Frank Han, the former Director of Global Compliance Analytics at Pfizer, filed a civil complaint—first in California state court, subsequently moved to federal court—claiming wrongful termination and whistleblower retaliation. Han had previously expressed concerns about potential FCPA violations to his immediate supervisor and other colleagues after a fraud detection algorithm Han had developed to analyze the company's global external funding uncovered evidence that Pfizer paid potentially influential government officials ("PIGOs") in China ten times as much money in total as it paid to PIGOs in any other country. Specifically, Han alleges that Pfizer had spent $168 million on PIGOs in China between the second quarter of 2019 and the third quarter of 2021. After Han came forward with these concerns, he was allegedly subject to criticism, berating, and multiple negative performance reviews—on the basis of which Han brought his retaliation claim. Pfizer had previously disclosed FCPA scrutiny of its Chinese operations in a 2020 quarterly securities filing.

Petrobras tells DC Circuit that FSIA bars investor fraud suit

On March 7, 2023, state-owned Brazilian oil company Petrobras filed an interlocutory appeal urging the D.C. Circuit Court to overturn a D.C. District Court's denial of its motion for summary judgment and grant of plaintiffs' motion for summary judgment in a case arising out of a massive bribery scandal involving Petrobras. Specifically, EIG Global Energy Partners LLC sued Petrobras in 2016 after U.S. investment funds managed by EIG allegedly lost their entire investment in an oil drilling venture which collapsed following the Operation Car Wash scandal. EIG alleged that Petrobras had fraudulently induced it to invest in an intermediary entity involved in the doomed venture, asserting that Petrobras is not entitled to sovereign immunity because its acts placed it within the commercial activity exception to the Foreign Sovereign Immunities Act. In its appeal, Petrobras argued that it is entitled to summary judgment because it never specifically targeted EIG or other U.S. investors and therefore did not cause a "direct effect" in the United States as required by the FSIA. Likewise, Petrobras argued that the District Court erred in granting summary judgment to EIG on the merits of its fraud case without conclusively deciding the threshold question of jurisdiction.

U.S. investor lawsuit against Ericsson over Iraq corruption probe dismissed

On May 24, 2023, Judge William Kuntz (E.D.N.Y.) dismissed a securities class action against Ericsson, the Swedish telecommunications company. The lead plaintiff Boston Retirement Systems ("BRS") is a pension fund for state capital employees and acquired Ericsson's American Depositary Shares. The lawsuit was filed in March 2022 in which BRS alleged that various public disclosures and statements made by Ericsson materially misrepresented the source of the company's growth in the Middle East and the robustness of its compliance protocols. Specifically, BRS alleged that Ericsson falsely attributed its financial growth to large-scale infrastructure projects, when in fact its financial success lay in corrupt conduct—the payment of protection money by company contractors to Islamic State of Iraq and Syria (ISIS)—which an internal investigation conducted by outside counsel had already flagged. However, Judge Kuntz granted Ericsson's motion to dismiss on the grounds that its statements about financial growth and compliance protocols were too general and nebulous to mislead investors or induce reliance.

Amended complaint filed against Ericsson on behalf of American victims of terrorism

Notwithstanding the aforementioned dismissal in the Eastern District of New York, Ericsson continued to grapple with legal battles related to its allegedly illicit transactions in the Middle East. On December 20, 2022, hundreds of Americans filed an amended Anti-Terrorism Act complaint against Ericsson, alleging that Ericsson had made protection payments to designated Foreign Terrorist Organizations, provided operational aid to terrorists by obstructing U.S. counterterrorism efforts, facilitated terrorist attacks against Americans through their manipulation of communications networks in Afghanistan, and fraudulently concealed said conduct. The complaint was filed in the District of Columbia District Court, captioned *Schmitz, et al. v. Ericsson Inc., et al.*, Case 1:22-cv-02317, purportedly after an extensive investigation following Ericsson's Iraq-related disclosures in February 2022.

Enforcement in the United Kingdom

SERIOUS FRAUD OFFICE

NATIONAL CRIME AGENCY INVESTIGATIONS

LEGISLATIVE DEVELOPMENTS

OTHER DEVELOPMENTS

SERIOUS FRAUD OFFICE

In keeping with the rest of this publication, this section will focus on the U.K. Serious Fraud Office's (SFO) efforts to tackle bribery, fraud, and corruption in 2023.

Nick Ephgrave, a former assistant commissioner of the Metropolitan Police, was appointed in September 2023 as the new director of the SFO and is the first non-lawyer to hold the position in the SFO's history. It seems he has hit the ground running, having already proposed new approaches to the conduct of investigations. For example, Ephgrave is encouraging more use of policing techniques to increase the speed of investigations and suggesting that the SFO should consider reforms to enable it to pay whistleblowers to incentivize them to come forward. .

The response to Ephgrave's appointment seems to have been broadly positive and the SFO has launched several new investigations since he became director.

Ephgrave's appointment also coincides with the expansion of the SFO's powers under the Economic Crime and Corporate Transparency Act 2023 (ECCTA), which we discuss below. Ephgrave wants to expand the SFO permanent workforce by up to a third.[21]

SFO INVESTIGATIONS

There has been growth in SFO activity more generally in 2023, particularly fraud-related investigations, with several new investigations launching in recent months.

In November 2023, the SFO began an investigation into suspected fraud at the law firm Axiom Ince, after the firm allegedly lost £66 million of client money. Funds were allegedly transferred from the firm's bank account to an account with the State Bank of India. Seven individuals have been arrested, after more than 80 SFO investigators and Metropolitan Police Officers conducted raids across nine UK sites.

In December 2023, the SFO also announced that it had opened an investigation into AOG Technics Ltd., a supplier of aircraft components. The SFO and NCA carried out a raid in connection with the investigation, arresting one person. The investigation concerns the sale of parts backed by allegedly fraudulent paperwork, which were subsequently used on many large airlines, leading the Civil Aviation Authority in the UK, and other regulators worldwide, to issue safety notices to those owning, operating, or maintaining such aircraft.

Further, on December 1, 2023, the SFO confiscated £466,000 from executives of Balli Steel plc for their role in a global finance fraud.[22] This follows the sentencing of the company's CEO and two of its senior executives in April 2023 to 12 years in prison for defrauding over 20 banks of approximately half a billion dollars. The three executives were investigated by the SFO proceeds of crime team, resulting in confiscation orders against individuals of between £100,000 and £350,000.

NATIONAL CRIME AGENCY INVESTIGATIONS

The National Crime Agency (NCA) has also made several high-profile arrests in 2023 in connection with international bribery-related offences.

The Chief of Staff to the President of Madagascar, and one of her associates, have been convicted of bribery offences. The officials sought bribes from a UK mining company, Gemfields, in return for licenses to operate in Madagascar. The officials were seeking approximately £225k, as well as a 5% equity stake in the mining venture.[23]

In addition, in December 2023, the former Director of Corporate Banking for the First Bank of Nigeria's UK business was charged with accepting bribes, including money and a vehicle, from a prominent businessman in the Nigerian oil, gas and petroleum industry. He faces up to ten years in prison.[24]

LEGISLATIVE DEVELOPMENTS

As we touched on in our previous issue, the ECCTA heavily expands the powers of enforcement agencies, targeting bribery, corruption and fraud offences.

Under the Act, the NCA has been given greater powers to compel certain regulated businesses to supply information regarding suspected money

[21] Financial Times

[22] SFO Press Release, "SFO confiscates over £450,000 from CEO and a senior executive behind global finance fraud", (1 December 2023),
<https://www.sfo.gov.uk/2023/12/01/sfo-confiscates-over-450000-from-ceo-and-a-senior-executive-behind-global-finance-fraud/#:~:text=Case%20Updates-,SFO%20confiscates%20over%20%C2%A3450%2C000%20from%20CEO%20and,executive%20behind%20global%20finance%20fraud&text=Today%2C%20the%20Serious%20Fraud%20Office,UK's%20specialist%20anti%2Dfraud%20agency>.

[23] NCA Press Release, "Madagascan President's Chief of Staff charged with bribery", (14 August 2023),
<https://www.nationalcrimeagency.gov.uk/news/madagascan-president-s-chief-of-staff-charged-with-bribery>.

[24] NCA Press Release, "Banker charged with bribery", (18 December 2023),
<https://www.nationalcrimeagency.gov.uk/news/banker-charged-with-bribery>

laundering and terrorism financing without the need to wait for a Suspicious Activity Report to have been made. In particular, the ECCTA 2023 has amended the Proceeds of Crime Act 2002, so as to allow the NCA to compel the disclosure of information in two circumstances in relation to money laundering, namely where:

- the information would help the NCA to conduct operational or strategic analysis for the purposes of its criminal intelligence function,[25] or
- a foreign financial intelligence unit requests that the NCA provide the information, and the NCA has reasonable grounds to believe the information would assist the foreign intelligence unit's operational or strategic analysis.[26]

As discussed above, the ECCTA has also had a significant impact on the SFO, who have had their "section 2A" pre-investigation powers widened. Previous provisions had restricted the use of the SFO's pre-investigation powers solely to instances of suspected international bribery and corruption. The amendments mean that the SFO can now compel individuals and companies to provide information at the pre-investigation stage in all SFO cases, including domestic bribery and other fraud offences. The change is expected to enable the SFO to conduct faster investigations and broader information gathering exercises.

Our previous update also identified possible changes to the "identification doctrine," this is the rule on how misconduct by an individual can be attributed to a company. The "directing mind and will" test has been supplemented with a new "senior manager" test for certain types of offences[27]. Under the new test, a company will be criminally liable where a "senior manager" of the company, who is acting within the actual or apparent scope of their authority, commits a relevant economic crime offence.[28] A senior manager is an individual who plays a significant role in making decisions about how the whole, or a substantial part, of the activities of the company are managed or organized, or the actual managing or organizing of the whole or a substantial part of those activities. This change has been introduced with a view to making it easier to prosecute large organizations.

The ECCTA further introduces a new offence for failing to prevent fraud, similar to the failure to prevent bribery offence introduced under the Bribery Act 2010.[29] The new offence applies only to large organizations (in any sector). To be considered a "large organization," two of the following conditions must be met in the financial year preceding the year in which the offence is committed:

- having turnover of more than £36 million,
- a balance sheet total of more than £18 million,
- having more than 250 employees.

Organizations will be guilty of this new offence if a person associated with the corporate body, including, e.g., its employees, agents, intermediaries, and subsidiaries, commits a fraud offence, with the intention of benefitting, either directly or indirectly, the organization itself or any person to whom, or to whose subsidiary undertaking, the associate provides services on behalf of the organization.

An organization will not be liable if it had reasonable fraud prevention procedures in place, or it was reasonable not to have such procedures.[30] What is "reasonable" for an organization is likely to depend on a range of factors, such as its size, and the jurisdiction(s) in which it operates. The offence will come into force once statutory guidance has been published regarding the reasonable procedures which organizations will be expected to put in place.[31]

OTHER DEVELOPMENTS

The ECCTA has also introduced amendments to Companies House's filings requirements, described as "the most significant change for Companies House in [...] history".[32] We explored these changes in depth in a recent update.

In summary, the changes are aimed at increasing transparency in the ownership of UK corporate entities by imposing greater identification requirements. The significant changes give wider powers to the Registrar to share and request information in order to fulfil new statutory objectives.

Companies will also have to file more extensive information with Companies House and the Registrar, including smaller companies and micro-entities. Companies must also register an "appropriate" office address and, for the first time, an email address. Documents sent to these addresses will be "expected to come to the attention of a person acting on behalf of the company."

[25] Proceeds of Crime Act 2002, s.339ZH(6A).

[26] Proceeds of Crime Act 2002, s.339ZH(6B).

[27] UK Government Policy Paper, "Factsheet: identification principle for economic crime offences", (26 October 2023), < Factsheet: identification principle for economic crime offences - GOV.UK (www.gov.uk)>

[28] ECCTA 2023, s.196(1).

[29] The Bribery Act 2010, Section 7.

[30] S.199(4)(b).

[31] S.219(8).

[32] UK Government Press Release, "Robust new laws to fight corruption, money laundering and fraud", (26 October 2023), <Robust new laws to fight corruption, money laundering and fraud - GOV.UK (www.gov.uk)>.

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