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# 2021 Global Anti-Bribery Year-in-Review

JANUARY 27, 2022

## I. 2021 ENFORCEMENT TRENDS AND KEY DEVELOPMENTS

### A. Introduction

In 2021, the number of publicly resolved Foreign Corrupt Practices Act (FCPA) cases was relatively low compared with previous years, but there were numerous interesting developments, and enforcement activity going forward into 2022 appears to be trending upwards. Of note, the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) announced the lowest number of corporate resolutions in more than a decade. At the same time, in the first year of the Biden administration, enforcement authorities consistently maintained that enforcement remains active, and a number of policy announcements and ongoing DOJ and SEC proceedings indicate that the volume of enforcement actions is likely to increase in 2022. The new administration's anti-corruption priorities and its release of several substantial policy initiatives toward the end of 2021 further suggest significant and growing enforcement efforts going forward. Below are four key developments that occurred during 2021:

1. **Announcement of Anti-Corruption Strategy:** In June, President Biden issued a National Security Memorandum,<sup>1</sup> which, among other proposals, advanced a multifaceted policy initiative designed to counter corruption.<sup>2</sup> The administration then unveiled a 38-page strategy paper in December that outlined the administration's plans

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<sup>1</sup> Joseph R. Biden Jr., President of the United States, Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest (June 3, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/03/memorandum-on-establishing-the-fight-against-corruption-as-a-core-united-states-national-security-interest>.

<sup>2</sup> See WilmerHale, *Biden: The Fight Against Foreign and Transnational Corruption Is a National Security Interest* (June 8, 2021), <https://www.wilmerhale.com/en/insights/client-alerts/20210608-biden-the-fight-against-foreign-and-transnational-corruption-is-a-national-security-interest>.

to combat corruption globally by bolstering resources for public sector anti-corruption enforcement, collaborating with the private sector to enforce anti-corruption programs, using anti-money laundering (AML) and sanctions tools in concert with the FCPA to counter foreign government corruption, and promoting cooperation among US authorities and partner countries to improve cross-border anti-corruption efforts.<sup>3</sup>

2. **Updated Enforcement Guidance:** The DOJ and SEC continued to provide further detail and clarification regarding their perspectives on corporate enforcement, indicating that US enforcement authorities will continue to aggressively pursue corporate crime. Recent guidance indicates that these enforcement authorities will (1) continue their efforts to investigate FCPA violations proactively, rather than relying substantially on companies to self-report;<sup>4</sup> (2) “surge resources” in order to “redouble commitment to white-collar enforcement”;<sup>5</sup> (3) favor the imposition of independent compliance monitors where corporate compliance programs are considered untested or inadequately implemented at the time of resolution;<sup>6</sup> and (4) have “no tolerance” for, and hold accountable, companies that breach the terms of their settlement agreements.<sup>7</sup> Indeed, the DOJ notified two companies late in the year that they may have breached the terms of their resolutions, demonstrating the government’s stronger approach toward corporate compliance.<sup>8</sup>
3. **Continued International Cooperation and Cross-Border Investigations:** The US government has engaged in ongoing cooperation with authorities in other countries, making cross-border coordination on both investigations and resolutions a hallmark of anti-corruption enforcement. At the same time, many foreign authorities have expanded their own anti-corruption enforcement efforts. Indeed, two out of four corporate settlements entered in 2021 involved coordinated settlement efforts with other countries, and the DOJ also continued to charge individuals in connection with

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<sup>3</sup> The White House, United States Strategy on Countering Corruption (Dec. 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf>.

<sup>4</sup> Clara Hudson, *FCPA enforcement is “in an entirely new” place, says acting criminal division chief*, GLOBAL INVESTIGATIONS REV. (June 2, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/fcpa/fcpa-enforcement-in-entirely-new-place-says-acting-criminal-division-chief>.

<sup>5</sup> *John Carlin on stepping up DOJ corporate enforcement*, GLOBAL INVESTIGATIONS REV. (Oct. 11, 2021), <https://globalinvestigationsreview.com/news-and-features/in-house/2020/article/john-carlin-stepping-doj-corporate-enforcement>.

<sup>6</sup> Lisa O. Monaco, Deputy Attorney General, DOJ, Memorandum on Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies (Oct. 28, 2021), <https://www.justice.gov/dag/page/file/1445106/download>; see also David Last, Chief, FCPA Unit, DOJ, and Charles Cain, Chief, FCPA Unit, SEC, General Session: DOJ and SEC Year in Review, American Conference Institute: 39th International Conference on the Foreign Corrupt Practices Act (Dec. 1, 2021).

<sup>7</sup> Lisa O. Monaco, Deputy Attorney General, DOJ, Keynote Address at ABA’s 36th National Institute on White Collar Crime (Oct. 28, 2021), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute>.

<sup>8</sup> Lisa O. Monaco, Deputy Attorney General, DOJ, Keynote Address at ABA’s 36th National Institute on White Collar Crime (Oct. 28, 2021), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute>.

several long-running cross-border investigations. Furthermore, recent remarks by the DOJ indicate that it will continue to pursue international collaboration by crediting penalties when other domestic and foreign enforcement authorities are involved.<sup>9</sup>

- 4. *New Tools for Law Enforcement.*** The administration's anti-corruption focus built upon the framework that Congress recently established in the Corporate Transparency Act (CTA),<sup>10</sup> a key component of the Anti-Money Laundering Act of 2020 (AMLA), which in part requires that the Financial Crimes Enforcement Network (FinCEN) create and maintain a registry of beneficial ownership information for reporting companies. The AMLA also significantly expanded whistleblower awards for Bank Secrecy Act/AML violations<sup>11</sup> and provided additional authority for the DOJ to obtain documents from foreign financial institutions.<sup>12</sup> These and other tools created through this key legislation will likely provide new leads to enforcement authorities seeking to identify the proceeds of illicit activity and prosecute bad actors.

As discussed further below, 2021 also saw noteworthy developments in the prosecution of individuals in connection with FCPA violations, new and ongoing court cases concerning enforcement actions, and collateral actions—including restitution claims, shareholder suits, and whistleblower activity—based on FCPA-related conduct. Taken together with the initiatives from the White House and US enforcement authorities, and the ongoing increase in international cooperation mentioned above, these developments indicate a progressively interconnected and energetic global enforcement environment that signals sustained and aggressive forthcoming anti-corruption efforts.

## **B. 2021 Enforcement Trends and Priorities**

### **1. Level of Enforcement Activity in 2021**

Following a blockbuster 2020, which saw record high FCPA financial penalties due in part to the multibillion-dollar resolutions with Airbus SE and The Goldman Sachs Group, Inc., 2021 proved to be a less eventful year, with fewer enforcement actions and lower financial penalties. The number of FCPA enforcement actions decreased during 2021 for the second year in a row—possibly attributable, at least in part, to the ongoing global pandemic and the difficulties posed in conducting overseas investigations and coordinating with foreign authorities who likewise are facing pandemic-related challenges.

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<sup>9</sup> David Last, Chief, FCPA Unit, DOJ, and Charles Cain, Chief, FCPA Unit, SEC, General Session: DOJ and SEC Year in Review, American Conference Institute: 39th International Conference on the Foreign Corrupt Practices Act (Dec. 1, 2021).

<sup>10</sup> The William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, 116th Cong. (2020); *see also* NDAA §§ 6401-6403.

<sup>11</sup> Public Law No. 116-283, § 6314; *see also* 31 U.S.C. § 5323(b)(1).

<sup>12</sup> Public Law No. 116-283, § 6308(a)(1)(B); *see also* 31 U.S.C. § 5318(k)(3).

The total number of enforcement actions declined from 43 in 2020 to 24 in 2021.<sup>13</sup> Corporate enforcement actions dropped from 16 in 2020 to seven in 2021,<sup>14</sup> and corporate monetary penalties<sup>15</sup> decreased significantly from \$6.4 billion in 2020 to \$459 million in 2021.<sup>16</sup> The number of individual actions also decreased, falling from 27 in 2020 to 17 in 2021.<sup>17</sup> In 2021, the DOJ charged 16 individuals and resolved three matters against corporate defendants. The SEC settled just one case against an individual and resolved four matters against corporate defendants. Three of the corporate defendants—Amec Foster Wheeler Limited (AFW), Credit Suisse Group AG, and Deutsche Bank Aktiengesellschaft<sup>18</sup>—were parties to parallel settlements with both the DOJ and SEC.

The majority of enforcement actions against individuals in 2021 involved charges related to one of two separate wide-ranging investigations. As discussed below in more detail,<sup>19</sup> five of the 16

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<sup>13</sup> We recognize that other commentators may present slightly different numbers depending on their methodology. For a description of our methodology for counting corporate and individual enforcement actions, please refer to footnotes 14 and 17 below.

<sup>14</sup> To determine the number of corporate enforcement actions for the year, we counted enforcement actions brought by the SEC and DOJ separately (e.g., parallel settlements with the same entity by the SEC and DOJ count as two actions). However, actions brought by a single enforcement authority against related corporate entities (e.g., a parent and subsidiary) for the same core conduct count as only one action. Declinations and case closures are not included within this metric.

<sup>15</sup> To calculate total monetary penalties imposed in FCPA-related actions against companies, we counted the amounts set out in resolution papers that a settling party could be liable to pay to US enforcement authorities, even if those penalties were ultimately offset by payments to other entities (e.g., foreign authorities). We believe that the total penalty number, regardless of offsets, most accurately represents the scope of FCPA liability because US authorities retained the right to collect those amounts. Furthermore, even if in some cases settling parties agreed to larger penalties based on the understanding that there would be an offset, payments made to non-US government authorities can still be traced back to FCPA-related conduct to some degree. In other words, it is unlikely that foreign authorities would have received the same amount without US enforcement activity or the specter of FCPA liability. It is of course impossible to determine how much of a global resolution would have occurred without FCPA enforcement. But because some of those payments are at least partly attributable to FCPA enforcement, we have included them to provide a complete picture of overall FCPA-related liability.

<sup>16</sup> The \$459 million figure for 2021 does not include the criminal monetary penalty, disgorgement, and restitution of \$7.5 million imposed in connection with commodities trading in the Deutsche Bank resolution, nor does it include the \$30 million civil monetary penalty imposed by the Commodity Futures Trading Commission (CFTC) in the same case. Deferred Prosecution Agreement, *United States v. Deutsche Bank Aktiengesellschaft*, No. 20-CR-584, ¶¶ 7-8 (Dec. 18, 2020). The \$459 million total also does not include two payments related to the Credit Suisse resolution: the over \$200 million fine imposed by the UK Financial Conduct Authority (FCA)—which we do not calculate as part of the FCPA resolution because it was not mentioned in the settlement papers with the DOJ and SEC—and the \$200 million of debt owed by the Republic of Mozambique that was forgiven by the bank. See UK Financial Conduct Authority Press Release: Credit Suisse Fined £147,190,276 (US\$200,664,504) and Undertakes to the FCA to Forgive US\$200 Million of Mozambican Debt (Dec. 19, 2021), <https://www.fca.org.uk/news/press-releases/credit-suisse-fined-ps147190276-us200664504-and-undertakes-fca-forgive-us200-million-mozambican-debt>. Even including these additional penalties, however, the 2021 total was substantially below that of 2020.

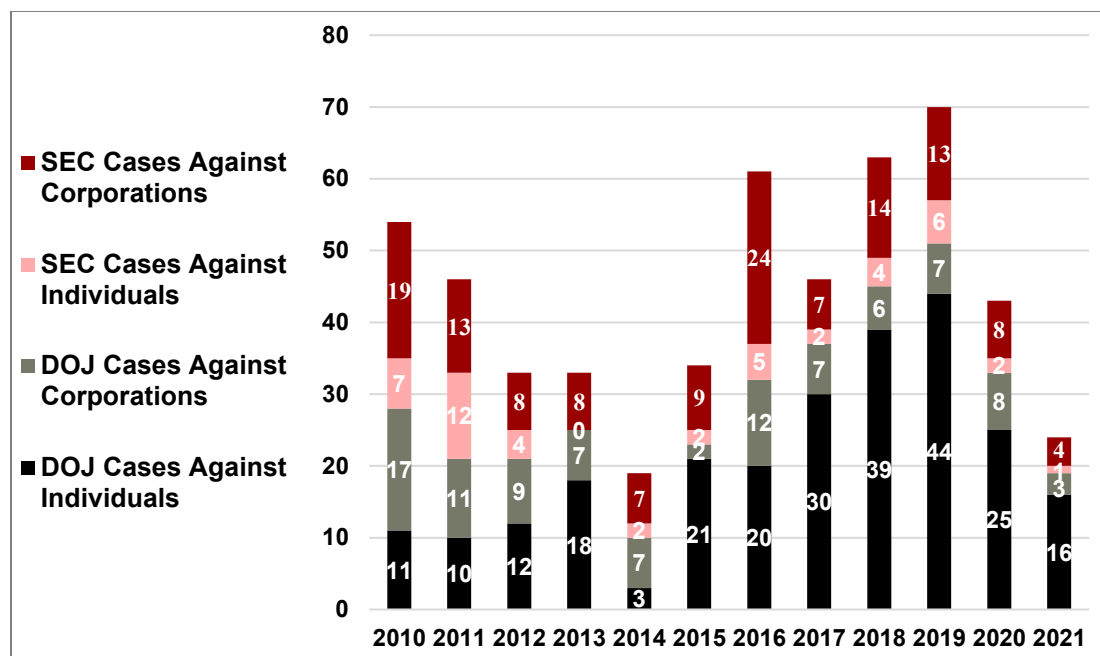
<sup>17</sup> To determine the number of enforcement actions against individuals for the year, we counted charges against individuals in the year they were filed, not the year they were announced (i.e., criminal charges unsealed at a later date are included in the count for the year they were originally filed). As a result, the numbers reported for previous years in this alert are updated and therefore may be different from prior reports. In addition to charges alleging violations of the substantive FCPA provisions, we also included non-FCPA charges for which the allegations relate to bribery schemes. These non-FCPA charges included, but are not limited to, conspiracy to violate the FCPA, money laundering, and conspiracy to commit money laundering.

<sup>18</sup> The DOJ's settlement with Deutsche Bank Aktiengesellschaft was filed in court on December 22, 2020 but was not announced until January 8, 2021. For purposes of this alert, we count both the DOJ and the SEC settlements in the 2021 corporate enforcement numbers, along with their respective total penalties.

<sup>19</sup> See *infra* at Section III.D.

individuals charged by the DOJ allegedly participated in corruption and money laundering schemes through the Comité Local de Abastecimiento y Producción, a Venezuelan state-owned food and medicine distribution program.<sup>20</sup> Another five individuals were charged for their alleged involvement in paying and receiving bribes to secure a government contract from the Bolivian Ministry of Defense.<sup>21</sup>

**DOJ and SEC Enforcement Actions 2010-2021<sup>22</sup>**



As in some prior years, a small number of companies accounted for nearly all of the FCPA penalties imposed by US authorities. In 2021, similar to the 2020 breakdown, the US government's resolutions with two financial institutions together constituted more than 87% of the \$459 million in total penalties noted above.<sup>23</sup> However, unlike 2020, where non-US companies were the focus of approximately 40% of FCPA resolutions against corporate defendants, all four of the FCPA resolutions in 2021 involved non-US companies.

Some of the 2021 monetary penalties for FCPA-related conduct discussed above were offset by payments to foreign authorities, but the majority were imposed and collected by US authorities. In the AFW case, the DOJ agreed to credit up to approximately \$10.6 million for resolution payments

<sup>20</sup> US Department of Justice Press Release No. 21-1036: Five Individuals Charged with Money Laundering in Connection with Alleged Venezuela Bribery Scheme (Oct. 21, 2021).

<sup>21</sup> US Department of Justice Press Release No. 21-489: Former Minister of Government of Bolivia, Owner of Florida-Based Company, and Three Others Charged in Bribery and Money Laundering Scheme (May 26, 2021).

<sup>22</sup> For a description of our methodology for counting corporate and individual enforcement actions, please refer to footnotes 14 and 17 above.

<sup>23</sup> The DOJ and SEC resolutions with Credit Suisse totaled approximately \$276 million, while the resolutions with Deutsche Bank totaled \$123 million. In 2020, the settlements with Airbus and Goldman Sachs together accounted for 84% of corporate monetary FCPA penalties for the year.

made to UK and Brazilian authorities, and the SEC agreed to a disgorgement offset of up to approximately \$12.6 million for resolution payments to UK and Brazilian authorities.<sup>24</sup> This again stands in contrast to 2020, where FCPA penalty amounts credited to foreign authorities reached \$3.2 billion, eclipsing the total paid to US authorities. For a more in-depth discussion of cross-border cooperation and the crediting of penalty payments to foreign authorities, see Section II.E below.

Finally, two 2021 resolutions involved companies that had resolved FCPA-related matters previously, bringing to 18 the total number of companies that have settled more than one FCPA-related matter.<sup>25</sup>

## 2. Biden Administration Made FCPA Enforcement a Priority

The Biden administration has emphasized that anti-corruption enforcement efforts, which include FCPA enforcement actions, are a priority within the government's national security and foreign policy strategies.

In June 2021, President Biden issued a "Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest" (the "National Security Memorandum").<sup>26</sup> As discussed further in Section II.F.1 below, the National Security Memorandum defined countering corruption as a core national security interest and initiated an interagency review aimed at boosting the US government's anti-corruption capabilities.<sup>27</sup> This review culminated in the December 2021 release of a formal Strategy on Countering Corruption (the "Strategy"), which reaffirmed the Biden administration's focus on the fight against corruption and detailed specific anti-corruption objectives.<sup>28</sup> As we noted in a separate analysis published shortly after the Strategy was

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<sup>24</sup> Deferred Prosecution Agreement, *United States v. Amec Foster Wheeler Energy Limited*, No. 21-CR-00298, ¶ 7 (June 25, 2021); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Amec Foster Wheeler Limited*, Rel. No. 92259, File No. 3-20373 (E.D.N.Y. June 25, 2021). Similarly, in the Credit Suisse resolution, the DOJ agreed to credit up to approximately \$25 million for resolution payments to UK authorities. Deferred Prosecution Agreement, *United States v. Credit Suisse Group AG*, No. 21-CR-00521, ¶ 9 (E.D.N.Y. Oct. 19, 2021).

<sup>25</sup> See Order Instituting Cease-and-Desist Proceedings, *In the Matter of Credit Suisse Group AG*, Rel. No. 83593, File No. 3-18571 (July 5, 2018); Non-Prosecution Agreement between the US Department of Justice and Credit Suisse (Hong Kong) Limited (May 24, 2018); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Deutsche Bank AG*, Rel. No. 86740, File No. 3-19373 (Aug. 22, 2019).

<sup>26</sup> Joseph R. Biden Jr., President of the United States, Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest (June 3, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/03/memorandum-on-establishing-the-fight-against-corruption-as-a-core-united-states-national-security-interest>.

<sup>27</sup> Joseph R. Biden Jr., President of the United States, Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest (June 3, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/03/memorandum-on-establishing-the-fight-against-corruption-as-a-core-united-states-national-security-interest>.

<sup>28</sup> The White House, United States Strategy on Countering Corruption, at 17 (Dec. 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf>.

announced, this plan is likely the first of many anti-corruption strategies that the Biden administration will release.<sup>29</sup>

In addition, the DOJ announced broader efforts to step up internal coordination across the Department to combat corruption. In November 2021, at a *Global Investigations Review Live* event in Washington, D.C., Lorinda Laryea, an Acting Principal Deputy Chief in the Fraud Section, commented, “[j]ust like we’re coordinating increasingly with foreign authorities, we’re going to be coordinating increasingly with our domestic counterparts.”<sup>30</sup> Although she was responding to a question about future coordination between the FCPA Unit and the DOJ’s Narcotic and Dangerous Drug Section, she also noted that the Department is “looking carefully at all possible avenues of information that could be relevant,” likely including the DOJ’s National Security Division and Money Laundering and Asset Recovery Section.<sup>31</sup>

President Biden’s nominations to fill key enforcement positions at the DOJ and SEC further reflect these anti-corruption goals. In addition to Merrick Garland as Attorney General, President Biden nominated Lisa O. Monaco as Deputy Attorney General, Kenneth Polite as head of the DOJ’s Criminal Division, and Gurbir S. Grewal as the SEC’s Director of the Division of Enforcement. All four individuals are former federal prosecutors with notable records of enforcement efforts relating to white-collar crime and corruption.<sup>32</sup> Based on their former positions and track records, President Biden’s nominees are likely to continue promoting and implementing his administration’s anti-corruption efforts.

### 3. COVID-19’s Impact on Government Enforcement

In the second year of the COVID-19 pandemic, the US government has maintained that the effects of the pandemic on FCPA enforcement have been limited. Certain aspects of FCPA investigations remain inherently more challenging, including, for example, conducting interviews, interacting with key witnesses and informants, and communicating with the subjects of investigations. Despite these inevitable limitations, the DOJ, SEC, and Biden administration emphasized the increasing

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<sup>29</sup> WilmerHale, *Biden Administration Releases United States Strategy on Countering Corruption* (Dec. 8, 2021), <https://www.wilmerhale.com/en/insights/client-alerts/20211208-biden-administration-releases-united-states-strategy-on-countering-corruption>.

<sup>30</sup> Clara Hudson, *DOJ to step up internal coordination, official says*, GLOBAL INVESTIGATIONS REV. (Nov. 12, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/fcpa/doj-step-internal-coordination-official-says>.

<sup>31</sup> Clara Hudson, *DOJ to step up internal coordination, official says*, GLOBAL INVESTIGATIONS REV. (Nov. 12, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/fcpa/doj-step-internal-coordination-official-says>.

<sup>32</sup> Nina Totenberg and Carrie Johnson, *Merrick Garland Has a Reputation of Collegiality, Record of Republican Support*, NATIONAL PUBLIC RADIO (Mar. 16, 2016), <https://www.npr.org/2016/03/16/126614141/merrick-garland-has-a-reputation-of-collegiality-record-of-republican-support>; Devlin Barrett, *Lisa Monaco will seek to restore Justice Dept. norms attacked by Trump*, WALL ST. J. (Mar. 6, 2021), [https://www.washingtonpost.com/national-security/lisa-monaco-deputy-attorney-general/2021/03/06/7f83aa20-7e85-11eb-85cd-9b7fa90c8873\\_story.html](https://www.washingtonpost.com/national-security/lisa-monaco-deputy-attorney-general/2021/03/06/7f83aa20-7e85-11eb-85cd-9b7fa90c8873_story.html); Peter Finney Jr., *U.S. attorney has De La Salle roots*, CLARION HERALD (Jan. 22, 2014), <https://clarionherald.org/news/u-s-attorney-has-de-la-salle-roots>; US Securities and Exchange Commission Press Release No. 2021-114: SEC Appoints New Jersey Attorney General Gurbir S. Grewal as Director of Enforcement (June 29, 2021).

importance of ongoing FCPA enforcement and anti-corruption efforts more generally. As SEC Enforcement Director Grewal noted, “[d]espite the challenges of a once in a lifetime pandemic,” the government “work[ed] tirelessly to enhance [] trust and make clear that there is only one set of rules by prosecuting the bad actors who break them, without fear or favor.”<sup>33</sup>

The DOJ likewise affirmed that its FCPA enforcement in 2021 was undeterred by the pandemic. In a June conference address, the then-Acting Assistant Attorney General Nicholas McQuaid acknowledged that, in 2020, the “challenges brought by the pandemic had an impact on [the DOJ’s] ability to investigate and prosecute cases,”<sup>34</sup> but he went on to add that FCPA enforcement “is really in an entirely new and very exciting place,” and there would be “more to come” in 2021.<sup>35</sup> The Biden administration’s focus in 2021 on the fight against corruption and the DOJ’s announcement regarding broader efforts to step up internal coordination across the Department to combat corruption appear to support AAG McQuaid’s prediction. Indeed, during 2021, the DOJ’s FCPA Unit grew to a record size and included approximately 39 prosecutors.<sup>36</sup>

#### 4. COVID-19’s Impact on Corporate Compliance

In our 2020 Year-in-Review, we observed that corporations and private organizations across the globe were feeling the impact of the COVID-19 pandemic.<sup>37</sup> Of particular relevance, we noted that many companies had fewer resources to dedicate to compliance programs due to the dramatic economic slowdown resulting from the pandemic.<sup>38</sup> We also noted that corporate compliance departments faced new challenges in engaging their business counterparts remotely, and that increased compliance risks may result from a generally more disconnected work environment.<sup>39</sup>

The shift to remote work prompted by the COVID-19 pandemic carried into 2021. Although many companies around the world are slowly returning to the office, broad-based work-from-home

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<sup>33</sup> Gurbir S. Grewal, Director of the Division of Enforcement, US Securities & Exchange Commission, Remarks at SEC Speaks 2021 (Oct. 13, 2021), <https://www.sec.gov/news/speech/grewal-sec-speaks-101321>.

<sup>34</sup> Nicholas McQuaid, Acting Assistant Attorney General, DOJ, Keynote Address at the Foreign Corrupt Practices Act New York (June 2, 2021), <https://www.americanconference.com/fcpa-new-york/agenda/keynote-address-2>; see also Clara Hudson, *FCPA enforcement is “in an entirely new” place, says acting criminal division chief*, GLOBAL INVESTIGATIONS REV. (June 2, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/fcpa/fcpa-enforcement-in-entirely-new-place-says-acting-criminal-division-chief>.

<sup>35</sup> Nicholas McQuaid, Acting Assistant Attorney General, DOJ, Keynote Address at the Foreign Corrupt Practices Act New York (June 2, 2021), <https://www.americanconference.com/fcpa-new-york/agenda/keynote-address-2>; see also Clara Hudson, *FCPA enforcement is “in an entirely new” place, says acting criminal division chief*, GLOBAL INVESTIGATIONS REV. (June 2, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/fcpa/fcpa-enforcement-in-entirely-new-place-says-acting-criminal-division-chief>.

<sup>36</sup> Dylan Tokar, *Justice Department’s Foreign Bribery Unit Adds Prosecutors, Compliance Expertise*, WALL ST. J. (Mar. 8, 2021), <https://www.wsj.com/articles/justice-departments-foreign-bribery-unit-adds-prosecutors-compliance-expertise-11615199402>.

<sup>37</sup> WilmerHale, *Global Anti-Bribery Year-in-Review: 2020 Developments and Predictions for 2021* (Jan. 28, 2021), <https://www.wilmerhale.com/en/insights/client-alerts/20210126-2020-global-antibribery-yearinreview>.

<sup>38</sup> WilmerHale, *Global Anti-Bribery Year-in-Review: 2020 Developments and Predictions for 2021* (Jan. 28, 2021), <https://www.wilmerhale.com/en/insights/client-alerts/20210126-2020-global-antibribery-yearinreview>.

<sup>39</sup> WilmerHale, *Global Anti-Bribery Year-in-Review: 2020 Developments and Predictions for 2021* (Jan. 28, 2021), <https://www.wilmerhale.com/en/insights/client-alerts/20210126-2020-global-antibribery-yearinreview>.



policies remain in place at many organizations. Companies' abilities to conduct in-person trainings, compliance visits, and audits thus remain severely limited.<sup>40</sup>

Companies will be well-advised to continue carefully evaluating the structure and resourcing of compliance programs and ensuring prompt and robust investigation of allegations despite the pandemic, including consideration of any necessary changes to address limitations on travel and in-person work. Enforcement authorities are unlikely to view pandemic-related compliance breakdowns as legitimate excuses for internal controls shortcomings or inadequate remediation, especially as the DOJ increases its resources for the Fraud Section's Corporate Enforcement, Compliance, and Policy Unit.<sup>41</sup> As DAG Monaco emphasized in her keynote address at the ABA's 36th National Institute on White Collar Crime, "[c]ompanies need to actively review their compliance programs to ensure they adequately monitor for and remediate misconduct—or else it's going to cost them down the line."<sup>42</sup>

## 5. Continued Emphasis on SEC's Whistleblower Program

The SEC continued to utilize its whistleblower program in 2021, issuing large and even record-breaking awards through the program. In November 2021, the SEC announced that it had awarded \$564 million to 108 whistleblowers in its 2021 fiscal year.<sup>43</sup> As a result, approximately 47% of the approximately \$1.2 billion awarded to whistleblowers under the program since 2012 was distributed over the past year.<sup>44</sup>

In April, the SEC announced an award of over \$50 million to joint whistleblowers for information that alerted the Commission to violations involving highly complex transactions that would have been "difficult to detect without their information."<sup>45</sup> The SEC did not disclose the investigation details but noted that the joint whistleblowers voluntarily provided original information that prompted SEC staff to open an investigation, met with staff numerous times, and provided voluminous and detailed documentation.<sup>46</sup>

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<sup>40</sup> WilmerHale, *COVID-19: Investigations in the Time of Coronavirus: Conducting FCPA Investigations in Latin America During the Pandemic* (Aug. 11, 2020), <https://www.wilmerhale.com/en/insights/client-alerts/20200811-investigations-in-the-time-of-coronavirus-conducting-fcpa-investigations-during-the-pandemic>.

<sup>41</sup> Clara Hudson, *Companies are erring on the side of caution, says Criminal Division chief*, GLOBAL INVESTIGATIONS REV. (Dec. 1, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/criminal-division-chief-companies-are-erring-the-side-of-caution>.

<sup>42</sup> Lisa O. Monaco, Deputy Attorney General, DOJ, *Keynote Address at ABA's 36th National Institute on White Collar Crime* (Oct. 28, 2021), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute>.

<sup>43</sup> US Securities and Exchange Commission Press Release No. 2021-238: SEC Announces Enforcement Results for FY 2021 (Nov. 18, 2021).

<sup>44</sup> US Securities and Exchange Commission Press Release No. 2021-253: SEC Issues Whistleblower Nearly \$5 Million Award (Dec. 7, 2021).

<sup>45</sup> US Securities and Exchange Commission Press Release No. 2021-62: SEC Awards Over \$50 Million to Joint Whistleblowers (Apr. 15, 2021).

<sup>46</sup> Order Determining Whistleblower Award Claims, *In the Matter of the Claims for an Award in connection with [Redacted]*, Rel. No. 91568, File No. 2021-39 (Apr. 15, 2021).

In May, the SEC announced a \$28 million dollar award to a whistleblower who provided information that led to the 2018 FCPA enforcement action against Panasonic Avionics Corporation (PAC), a US subsidiary of Panasonic Corporation.<sup>47</sup> The whistleblower notified the SEC about the company's alleged wrongdoing in Asia and Europe, prompting the SEC to open its investigation.<sup>48</sup>

By September 2021, following two awards of approximately \$110 million and \$4 million to two different whistleblowers, the SEC's whistleblower program passed \$1 billion in total awards to 207 whistleblowers since 2012.<sup>49</sup> The \$110 million award consisted of an approximately \$40 million award in connection with an SEC case and an approximately \$70 million award arising out of related actions by another agency.<sup>50</sup> This award is now the second-highest in the program's history, trailing only an award of \$114 million issued in October 2020.<sup>51</sup> And by early December, this figure increased even more—to date, the SEC has awarded approximately \$1.2 billion to 236 individuals since 2012.<sup>52</sup>

In August 2021, SEC Chair Gary Gensler issued a statement concerning program amendments that had been adopted under the Trump administration, noting that “[v]arious members of the whistleblower community, as well as Commissioners [Allison Herren] Lee and [Caroline A.] Crenshaw, have expressed concern that two of these amendments could discourage whistleblowers from coming forward.”<sup>53</sup> Later in August, the SEC released a statement indicating that the Commission would effectively ignore the two amended rules while preparing proposed revisions.<sup>54</sup> Chair Gensler directed SEC staff to prepare for the SEC's consideration of potential changes to Rule 21F-3(b)(3) and Rule 21F-6 to address the policy concerns raised by whistleblower advocates and others about possible adverse effects of the 2020 amendments.<sup>55</sup>

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<sup>47</sup> US Securities and Exchange Commission Press Release No. 2021-86: SEC Awards More Than \$28 Million to Whistleblower Who Aided SEC and Other Agency Actions (May 19, 2021); Order Determining Whistleblower Award Claim, *In the Matter of the Claim for an Award in connection with [Redacted]*, Rel. No. 91933, File No. 2021-50 (May 19, 2021).

<sup>48</sup> Mengqi Sun, *Whistleblower Is Awarded \$28 Million in Panasonic Avionics Case*, WALL ST. J. (May 19, 2021), <https://www.wsj.com/articles/whistleblower-is-awarded-28-million-in-panasonic-avionics-case-11621443228>.

<sup>49</sup> US Securities and Exchange Commission Press Release No. 2021-177: SEC Surpasses \$1 Billion in Awards to Whistleblowers with Two Awards Totaling \$114 Million (Sept. 15, 2021).

<sup>50</sup> US Securities and Exchange Commission Press Release No. 2021-177: SEC Surpasses \$1 Billion in Awards to Whistleblowers with Two Awards Totaling \$114 Million (Sept. 15, 2021).

<sup>51</sup> US Securities and Exchange Commission Press Release No. 2021-177: SEC Surpasses \$1 Billion in Awards to Whistleblowers with Two Awards Totaling \$114 Million (Sept. 15, 2021).

<sup>52</sup> US Securities and Exchange Commission Press Release No. 2021-253: SEC Issues Whistleblower Nearly \$5 Million Award (Dec. 7, 2021).

<sup>53</sup> US Securities and Exchange Commission Statement: Statement in Connection with the SEC's Whistleblower Program (Aug. 2, 2021), <https://www.sec.gov/news/public-statement/gensler-sec-whistleblower-program-2021-08-02>.

<sup>54</sup> US Securities and Exchange Commission Release No. 34-92565: Procedures for the Commission's Use of Certain Authorities Under Rule 21F-3(b)(3) and Rule 21F-6 of the Securities Exchange Act of 1934, (Aug. 5, 2021).

<sup>55</sup> US Securities and Exchange Commission Release No. 34-92565: Procedures for the Commission's Use of Certain Authorities Under Rule 21F-3(b)(3) and Rule 21F-6 of the Securities Exchange Act of 1934, (Aug. 5, 2021).

## 6. Pandora Papers Offer Insight into International Corruption

The Pandora Papers, made public in October 2021, involved the most expansive leak of confidential records in history, revealing millions of financial records from offshore service providers.<sup>56</sup> According to public reports, the records tie 35 current and former world leaders and more than 330 politicians and public officials in 91 countries and territories to shell companies, trusts, foundations, and other entities in low-tax or no-tax jurisdictions.<sup>57</sup> The records also trace the ownership of over 29,000 offshore companies to individuals in Russia, the United Kingdom, Argentina, and China.<sup>58</sup> Over 950 of these offshore entities were found to be tied to high-level public officials, and more than two-thirds of the entities are located in the British Virgin Islands, which has previously been linked to enforcement actions targeting money laundering and corruption.<sup>59</sup>

The Pandora Papers also highlight the involvement of banks and law firms in creating offshore entities that potentially foster corruption. While the use of such entities is legal, records in the Pandora Papers link a number of offshore entities to individuals under investigation for alleged money laundering. Among these are Lebanon's central bank governor Riad Salameh, who is under investigation in France, and United States tech executives Robert F. Smith and Robert T. Brockman, whose trusts have been subject to investigations by US authorities.<sup>60</sup>

Like the 2016 Panama Papers, the Pandora Papers could generate significant leads for anti-corruption investigations and other enforcement actions.<sup>61</sup> In the five years since the Panama Papers were published, government authorities around the world—including in Australia, France, Germany, Spain, and the United Kingdom—have initiated hundreds of enforcement actions and

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<sup>56</sup> Michael W. Hudson et al., *Offshore havens and hidden riches of world leaders and billionaires exposed in unprecedented leak*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Oct. 3, 2021), <https://www.icij.org/investigations/pandora-papers/global-investigation-tax-havens-offshore>.

<sup>57</sup> Michael W. Hudson et al., *Offshore havens and hidden riches of world leaders and billionaires exposed in unprecedented leak*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Oct. 3, 2021), <https://www.icij.org/investigations/pandora-papers/global-investigation-tax-havens-offshore>.

<sup>58</sup> Michael W. Hudson et al., *Offshore havens and hidden riches of world leaders and billionaires exposed in unprecedented leak*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Oct. 3, 2021), <https://www.icij.org/investigations/pandora-papers/global-investigation-tax-havens-offshore>.

<sup>59</sup> For context, more than half of the companies identified in the 2016 Panama Papers were registered in the BVI. Michael W. Hudson et al., *Offshore havens and hidden riches of world leaders and billionaires exposed in unprecedented leak*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Oct. 3, 2021), <https://www.icij.org/investigations/pandora-papers/global-investigation-tax-havens-offshore>; Stephanie Baker, *Sun, Sand, and the \$1.5 Trillion Offshore Economy*, BLOOMBERG BUSINESSWEEK (July 3, 2019), <https://www.bloomberg.com/news/features/2019-07-03/the-bvi-s-struggle-to-protect-its-offshore-economy>.

<sup>60</sup> Michael W. Hudson et al., *Offshore havens and hidden riches of world leaders and billionaires exposed in unprecedented leak*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Oct. 3, 2021), <https://www.icij.org/investigations/pandora-papers/global-investigation-tax-havens-offshore>.

<sup>61</sup> Will Fitzgibbon, *From front pages to prison time: Behind the scenes of a Panama Papers criminal case*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Apr. 3, 2021), <https://www.icij.org/investigations/panama-papers/from-front-pages-to-prison-time-behind-the-scenes-of-a-panama-papers-criminal-case>.

recouped a total of over \$1.36 billion in back taxes and penalties.<sup>62</sup> While the United States has not officially reported recovering any money as a result of the Panama Papers, at least two individuals who were named in the Panama Papers have been convicted and sentenced for financial crimes.<sup>63</sup> With information about more than 800,000 offshore entities, including more than 740,000 names linked to offshore accounts, the Pandora Papers have the potential to lead to more AML and anti-corruption enforcement actions in years to come.

## 7. Updates on 2020 Year-in-Review Predictions

### a) Large Cross-Border Investigations

In our last Year-in-Review, we predicted that large cross-border investigations would continue, with a focus on large resolutions with high dollar values.<sup>64</sup> We based this prediction on an analysis of longer-term trends that appear poised to continue in 2022.

The DOJ and SEC continue to cooperate with foreign authorities to investigate and resolve anti-corruption corporate enforcement actions. The press releases for three of the SEC's four 2021 corporate resolutions recognized the assistance of foreign law enforcement authorities: in the AFW resolution, from Brazil's Controladoria-Geral da União /Advocacia-Geral da União (AGU) and Ministério Público Federal (MPF), and from the UK's Serious Fraud Office (SFO)<sup>65</sup>; in the WPP resolution, from India's Securities and Exchange Board and Brazil's Comissão de Valores Mobiliários<sup>66</sup>; and in the Credit Suisse resolution, from the UK's Financial Conduct Authority (FCA), Switzerland's Financial Market Supervisory Authority (FINMA), and the United Arab Emirates' Securities and Commodities Authority.<sup>67</sup> On the DOJ side, two of the three press releases announcing the Department's 2021 corporate resolutions thanked foreign authorities for their

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<sup>62</sup> Sean McGoey, *Panama Papers revenue recovery reaches \$1.36 billion as investigations continue*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Apr. 6, 2021), <https://www.icij.org/investigations/panama-papers/panama-papers-revenue-recovery-reaches-1-36-billion-as-investigations-continue>.

<sup>63</sup> For example, accountant Richard Gaffey, who was named in the Panama Papers investigation, was sentenced to 39 months in prison for wire fraud, tax fraud, and money laundering, among other charges in 2020. See Sean McGoey, *Panama Papers revenue recovery reaches \$1.36 billion as investigations continue*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Apr. 6, 2021), <https://www.icij.org/investigations/panama-papers/panama-papers-revenue-recovery-reaches-1-36-billion-as-investigations-continue>; US Department of Justice Press Release No. 20-997: U.S. Accountant in Panama Papers Investigation Sentenced to Prison (Sept. 24, 2020). And in March 2021, unsealed court documents showed that Joachim Alexander von der Goltz was sentenced to three years for tax evasion and fraud charges. See Will Fitzgibbon, *Secret guilty plea revealed in US Panama Papers criminal probe*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Mar. 5, 2021), <https://www.icij.org/investigations/panama-papers/secret-guilty-plea-revealed-in-u-s-panama-papers-criminal-probe>; Judgment, *United States v. von der Goltz*, No. 18-CR-00693 (S.D.N.Y. Mar. 4, 2021).

<sup>64</sup> WilmerHale, *Global Anti-Bribery Year-in-Review: 2020 Developments and Predictions for 2021* (Jan. 28, 2021), <https://www.wilmerhale.com/en/insights/client-alerts/20210126-2020-global-antibribery-yearinreview>.

<sup>65</sup> US Securities and Exchange Commission Press Release No. 2021-112: SEC Charges Amec Foster Wheeler Limited With FCPA Violations Related To Brazilian Bribery Scheme (June 25, 2021).

<sup>66</sup> US Securities and Exchange Commission Press Release No. 2021-191: SEC Charges World's Largest Advertising Group with FCPA Violations (Sept. 24, 2021).

<sup>67</sup> US Securities and Exchange Commission Press Release No. 2021-213: Credit Suisse to Pay Nearly \$475 Million to U.S. and U.K. Authorities to Resolve Charges in Connection with Mozambican Bond Offerings (Oct. 19, 2021).

investigative assistance. In the AFW resolution, the DOJ acknowledged “significant assistance” from the UK’s SFO and Brazil’s Comptroller General’s Office (CGU), the MPF, and the AGU<sup>68</sup>, and in the Credit Suisse resolution, the DOJ acknowledged assistance from authorities in Switzerland and the UK in responding to Mutual Legal Assistance requests.<sup>69</sup>

## **b) Use of Agency Theory in Enforcement Actions**

As predicted in the 2020 Year-in-Review, the DOJ and SEC continue to use aggressive agency theories to bring FCPA charges against individual defendants who might not otherwise fall within the jurisdiction of the statute. The strategy has had mixed results; while the SEC secured a final judgment against a former financial services company executive in 2021 using the agency theory, the DOJ has not had similar success.

We previously noted that, in 2020, the SEC charged Asante Berko, a US citizen and former executive of a UK-based financial services company that is a wholly-owned subsidiary of a US-based company (the “Holding Company”), with violating the FCPA as “an agent and/or employee” of the Holding Company. In its complaint, the SEC alleged that Berko “acted on behalf of and for the benefit of the Holding Company” and was “subject to its direction and control.”<sup>70</sup> In June 2021, the SEC entered a final judgment against Berko, settling the FCPA charges and signaling an initial victory for the Commission’s use of the theory.<sup>71</sup>

The DOJ’s use of agency theory, however, has been less successful. In 2017, the DOJ used an agency theory to indict Daisy Teresa Rafoi-Bleuler, a Swiss citizen and asset manager of a Swiss company, on bribery charges related to an investigation into corruption in Venezuela.<sup>72</sup> In November 2021, the District Court for the Southern District of Texas granted a motion to dismiss the indictment for lack of jurisdiction, rejecting the DOJ’s agency theory,<sup>73</sup> and the Department’s appeal of this decision is pending in the Fifth Circuit.<sup>74</sup> Section IV.B.2 below includes further discussion of the Rafoi-Bleuler case.

The differences in outcome in the use of agency theories may be attributable to the distinct procedural posture of the two enforcement actions. While Berko consented to the SEC’s final judgment, Rafoi-Bleuler moved to dismiss the DOJ’s charges for lack of jurisdiction. Given the

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<sup>68</sup> US Department of Justice Press Release No. 21-601: Amec Foster Wheeler Energy Limited Agrees to Pay Over \$18 Million to Resolve Charges Related to Bribery Scheme in Brazil (June 25, 2021).

<sup>69</sup> US Department of Justice Press Release No. 21-1024: Credit Suisse Resolves Fraudulent Mozambique Loan Case in \$547 Million Coordinated Global Resolution (Oct. 19, 2021).

<sup>70</sup> Complaint, *SEC v. Berko*, No. 20-CV-01789, ¶ 39 (E.D.N.Y. Apr. 13, 2020).

<sup>71</sup> Judgment, *SEC v. Berko*, No. 20-CV-01789 (E.D.N.Y. June 23, 2021).

<sup>72</sup> WilmerHale, *Global Anti-Bribery Year-in-Review: 2020 Developments and Predictions for 2021*, at 58 (Jan. 28, 2021), <https://www.wilmerhale.com/en/insights/client-alerts/20210126-2020-global-antibribery-yearinreview>.

<sup>73</sup> Memorandum Opinion and Order, *United States v. Rafoi-Bleuler*, No. 17-CR-00514, at 13-18 (S.D. Tex. Nov. 10, 2021).

<sup>74</sup> Notice of Appeal, *United States v. Rafoi-Bleuler*, No. 17-CR-00514 (S.D. Tex. Dec. 7, 2021).

increase in global investigations, the DOJ and SEC are likely to continue bringing enforcement actions based on foreign conduct, but the effectiveness of agency theories as a jurisdictional hook may somewhat depend on the outcome of the DOJ's appeal in the Fifth Circuit and other cases that may be litigated.

Significantly, while not contained in published court opinions, we continue to see in our own interactions with US enforcement authorities similar aggressive approaches to agency theories in investigations and resolutions of corporations. Because companies almost never litigate, the government's theories are rarely tested, and companies may in some cases acquiesce to resolving cases even if there may be potentially meritorious agency defenses. This dynamic continues to present challenges for companies in the context of negotiating over potential bribery charges.

### **c) Use of Non-FCPA Enforcement Actions to Target Corruption**

As in prior years, US anti-corruption enforcement was not limited solely to FCPA enforcement. In 2021, the DOJ also used a number of non-FCPA statutes, including the money laundering and wire fraud statutes, to target corrupt conduct of both corporations and individuals (see Sections III.A.1 and III.D.2). For example, while the SEC resolution with Credit Suisse centered on alleged violations of the FCPA's accounting provisions, the DOJ's charges against the company were based only on alleged wire fraud.<sup>75</sup> And as we observed in last year's Year-in-Review, the CFTC continues to work with the DOJ to hold companies accountable for bribery misconduct under the Commodity Exchange Act.<sup>76</sup>

### **d) Continued Focus on Data Analytics**

Finally, FCPA enforcement authorities have continued to focus on the use of data analytics in compliance programs as a means of detecting and preventing misconduct. In 2020, the DOJ updated its Compliance Guidance with additional references to the importance of data aggregation and analysis.<sup>77</sup> Several recent deferred prosecution agreements (DPAs) have contained language affirming that the company will "ensure that compliance and control personnel have sufficient direct or indirect access to relevant sources of data to allow for timely and effective monitoring and/or

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<sup>75</sup> US Department of Justice Press Release No. 21-1024: Credit Suisse Resolves Fraudulent Mozambique Loan Case in \$547 Million Coordinated Global Resolution, Credit Suisse Securities (Europe) Limited Pleads Guilty to Conspiracy to Commit Wire Fraud (Oct. 19, 2021).

<sup>76</sup> For example, in January 2021, Deutsche Bank entered into a three-year DPA based on charges of conspiracy to violate the books and records and internal accounting controls provisions of the FCPA, and conspiracy to commit wire fraud in connection with a commodities fraud scheme. US Department of Justice Press Release No. 21-23: Deutsche Bank Agrees to Pay over \$130 Million to Resolve Foreign Corrupt Practices Act and Fraud Case (Jan. 8, 2021).

<sup>77</sup> WilmerHale, *DOJ Issues Further Guidance on Evaluation of Corporate Compliance Programs* (June 4, 2020), <https://www.wilmerhale.com/en/insights/client-alerts/20200604-doj-issues-further-guidance-on-evaluation-of-corporate-compliance-programs>.

testing of transactions” and to facilitate “a thoughtful root cause analysis” of any potential misconduct.<sup>78</sup>

Senior leadership at the DOJ repeatedly reinforce the use of data analytics in white-collar criminal enforcement.<sup>79</sup> The aforementioned anti-corruption Strategy announced by the Biden administration includes an action item for “modernizing, coordinating, and resourcing US government efforts to fight corruption” and affirms that the US government “will work to support and better make use of analysis conducted by external partners, including ... the private sector.”<sup>80</sup>

Non-governmental entities have similarly taken heed of DOJ and SEC guidance regarding the use of data analytics. For example, in 2020, the enforcement arm of the World Bank signaled a plan to invest significant resources into formally evaluating compliance programs during an investigation.<sup>81</sup> Specifically, the organization is shifting from evaluating compliance safeguards after a sanction has been imposed to using data analytics to scrutinize the compliance program before misconduct is identified.<sup>82</sup> The goal for the World Bank as a whole is to better understand fraud and corruption risks and to better anticipate problems as they arise.<sup>83</sup>

## II. KEY POLICY ANNOUNCEMENTS

### A. Introduction

The year 2021 began with expected personnel changes for key DOJ and SEC positions, continued with a series of signals sent by the DOJ and SEC regarding the Biden administration’s heightened priority placed on corporate enforcement, and culminated with the issuance of formal guidance from the DOJ announcing the creation of a “Corporate Crime Advisory Group” and revising the DOJ’s corporate criminal enforcement policies and practices. Also of note, while not specific guidance, the Biden White House made one of the most notable announcements in 2021, through the issuance of its National Security Memorandum in June and the US Strategy on Combating

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<sup>78</sup> Deferred Prosecution Agreement, *United States v. The Goldman Sachs Group, Inc.*, No. 20-CR-00437 (E.D.N.Y. Oct. 22, 2020); Deferred Prosecution Agreement, *United States v. Amec Foster Wheeler Energy Limited*, No. 21-CR-00298 (E.D.N.Y. June 25, 2021); Deferred Prosecution Agreement, *United States v. Credit Suisse Group AG*, No. 21-CR-00521 (E.D.N.Y. Oct. 19, 2021).

<sup>79</sup> Lisa O. Monaco, Deputy Attorney General, DOJ, Keynote Address at ABA’s 36th National Institute on White Collar Crime (Oct. 28, 2021), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute>.

<sup>80</sup> The White House, United States Strategy on Countering Corruption, at 17 (Dec. 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf>.

<sup>81</sup> Joshua Ray, *World Bank follows DOJ by evaluating corporate compliance programs*, FCPA BLOG (Oct. 21, 2020), <https://fcpublog.com/2020/10/21/world-bank-follows-doj-by-evaluating-corporate-compliance-programs>; see also World Bank, *Symposium on Data Analytics and Anticorruption*, <https://www.worldbank.org/en/events/2021/10/25/symposium-on-data-analytics-and-anticorruption>.

<sup>82</sup> Joshua Ray, *World Bank follows DOJ by evaluating corporate compliance programs*, FCPA BLOG (Oct. 21, 2020), <https://fcpublog.com/2020/10/21/world-bank-follows-doj-by-evaluating-corporate-compliance-programs>.

<sup>83</sup> Ethiopis Tafara, *How the World Bank is using data to better detect fraud and corruption*, WORLD BANK (Jan. 21, 2020), <https://blogs.worldbank.org/governance/how-world-bank-using-data-better-detect-fraud-and-corruption>.

Corruption in December, each document indicating the administration's increased attention on anti-corruption enforcement.

## **B. Changes in Relevant Personnel**

During this first year of the Biden administration, we saw the typical transition, departure, and appointment of DOJ and SEC personnel relevant to FCPA enforcement. Noteworthy changes to DOJ personnel in 2021 included:

- Appointment of Nicholas McQuaid as Principal Deputy Assistant Attorney General in January, and he was simultaneously named Acting Assistant Attorney General for the Criminal Division;
- Promotion of Joseph Beemsterboer to Acting Chief of the Fraud Section in June;
- Confirmation of Kenneth Polite, Jr. as Assistant Attorney General for the Criminal Division in July;
- Promotion of David Last to Chief of the FCPA Unit in August;
- Promotion of Lisa Miller to Acting Deputy Assistant Attorney General for the Criminal Division in October.

With regard to the SEC, 2021 brought:

- Confirmation of Gary Gensler as Chair in April;
- Appointment of Gurbir Grewal as Director of the Division of Enforcement in June;
- Promotion of Sanjay Wadhwa to Deputy Director of Enforcement in August.

## **C. Statements on Enforcement Priorities**

### **1. McQuaid Address: DOJ Focus on Foreign Bribery Cases**

In one of the first notable addresses concerning the Biden administration's approach to FCPA matters, Acting Assistant Attorney General for the Criminal Division Nicholas McQuaid confirmed during a keynote address at an American Conference Institute (ACI) FCPA Conference that foreign bribery cases will be a "priority" for the DOJ.<sup>84</sup> AAG McQuaid said that the DOJ is increasingly investigating FCPA violations proactively and developing its own cases, instead of relying

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<sup>84</sup> See Clara Hudson, *FCPA enforcement is 'in an entirely new' place, says acting criminal division chief*, GLOBAL INVESTIGATIONS REV. (June 2, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/fcpa/fcpa-enforcement-in-entirely-new-place-says-acting-criminal-division-chief>.



substantially on self-disclosures from companies, and that these investigations are being driven in part by the DOJ's partnership with foreign counterparts.<sup>85</sup>

AAG McQuaid added that the DOJ's "no-piling on" policy, which encourages coordinated resolutions for similar conduct between both foreign and US authorities, must not be abused by companies that might resolve matters with other regulators before asking for a declination from the DOJ.<sup>86</sup> Instead, AAG McQuaid said that companies should coordinate with the DOJ in "good faith" when resolving matters involving other regulators or governments.<sup>87</sup> He also stated that any such "abuse" of the policy is "not the sort of approach that will find a receptive audience at the Department" and that the DOJ "will not restrict the scope of our enforcement actions in response to tactically front-loaded resolutions."<sup>88</sup>

## 2. **Carlin Address: DOJ Resources for Corporate Criminal Enforcement**

During a speech given at Global Investigation Review's Connect New York Conference in early October, Principal Deputy Attorney General John Carlin provided additional insight into the DOJ's continued prioritization of corporate criminal enforcement.<sup>89</sup> PDAG Carlin noted that the DOJ will "surge resources" for corporate enforcement, providing the example of a new FBI squad that will be dedicated to working with the Fraud Section.<sup>90</sup> He stated that he expected this "resource surge" to be increasingly evident in the coming days and months, and he advised further that the DOJ has "started to redouble [its] commitment to white-collar enforcement."<sup>91</sup>

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<sup>85</sup> See Clara Hudson, *FCPA enforcement is 'in an entirely new' place, says acting criminal division chief*, GLOBAL INVESTIGATIONS REV. (June 2, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/fcpa/fcpa-enforcement-in-entirely-new-place-says-acting-criminal-division-chief>.

<sup>86</sup> See Chris Prentice, *U.S. official to firms: Don't game DOJ policy against multiple penalties*, REUTERS (June 2, 2021) <https://www.reuters.com/business/us-official-firms-dont-game-doj-policy-against-multiple-penalties-2021-06-02>.

<sup>87</sup> See Chris Prentice, *U.S. official to firms: Don't game DOJ policy against multiple penalties*, REUTERS (June 2, 2021) <https://www.reuters.com/business/us-official-firms-dont-game-doj-policy-against-multiple-penalties-2021-06-02>.

<sup>88</sup> See Chris Prentice, *U.S. official to firms: Don't game DOJ policy against multiple penalties*, REUTERS (June 2, 2021), <https://www.reuters.com/business/us-official-firms-dont-game-doj-policy-against-multiple-penalties-2021-06-02>.

<sup>89</sup> See Clara Hudson and Ines Kagubare, *DOJ will "surge resources" to corporate enforcement, official says*, GLOBAL INVESTIGATIONS REV. (Oct. 5, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/doj-will-surge-resources-corporate-enforcement-official-says>.

<sup>90</sup> See Clara Hudson and Ines Kagubare, *DOJ will "surge resources" to corporate enforcement, official says*, GLOBAL INVESTIGATIONS REV. (Oct. 5, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/doj-will-surge-resources-corporate-enforcement-official-says>.

<sup>91</sup> See Clara Hudson and Ines Kagubare, *DOJ will "surge resources" to corporate enforcement, official says*, GLOBAL INVESTIGATIONS REV. (Oct. 5, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/doj-will-surge-resources-corporate-enforcement-official-says>.

PDAG Carlin also flagged likely changes to DOJ policy that would emphasize individual prosecutions for white-collar crimes and reassess how the DOJ considers corporate cooperation.<sup>92</sup> PDAG Carlin highlighted that non-prosecution agreements (NPAs), DPAs, and guilty pleas are “not the end of an obligation” for a company, but rather are “just the start.”<sup>93</sup> Both of these stated priorities—individual prosecutions (which often are used to develop cases against companies), and strict enforcement of negotiated resolutions—appear to signal the DOJ’s intention to use an expansive toolbox when investigating and concluding corruption matters against companies.

### 3. **Monaco Memorandum & Address: Advisory Group, Monitorships, Recidivism, Breaches, and Prosecution of Individuals**

As previewed by PDAG Carlin, Deputy Attorney General Monaco issued a memorandum in late October that created a “Corporate Crime Advisory Group” within the DOJ and revised the Department’s corporate enforcement policies and practices. On the same day, she highlighted and emphasized several of the shifts codified in the memorandum during a keynote address at the ABA’s 36th National Institute on White Collar Crime.<sup>94</sup>

DAG Monaco’s memorandum—now referred to as the “Monaco Memorandum”—accorded the Corporate Crime Advisory Group a “broad mandate” for “updating” the DOJ’s approach to corporate criminal enforcement, including reevaluation of “traditional considerations” like “cooperation credit, corporate recidivism” and the factors that the DOJ relies upon when determining the form of a corporate resolution.<sup>95</sup> The Corporate Crime Advisory Group is also tasked with evaluating internal resources and new technologies that may assist the DOJ in analyzing the often-voluminous datasets involved in corporate criminal investigations.<sup>96</sup> The Monaco Memorandum stated that input from “the business community, academia, and the defense bar” would be solicited to ensure that any resulting policy changes consider multiple points of view.<sup>97</sup>

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<sup>92</sup> See Clara Hudson and Ines Kagubare, *DOJ will “surge resources” to corporate enforcement, official says*, GLOBAL INVESTIGATIONS REV. (Oct. 5, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/doj-will-surge-resources-corporate-enforcement-official-says>.

<sup>93</sup> See Clara Hudson and Ines Kagubare, *DOJ will “surge resources” to corporate enforcement, official says*, GLOBAL INVESTIGATIONS REV. (Oct. 5, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/doj-will-surge-resources-corporate-enforcement-official-says>.

<sup>94</sup> Lisa O. Monaco, Deputy Attorney General, DOJ, Keynote Address at the ABA’s 36th National Institute on White Collar Crime (Oct. 28, 2021), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute>.

<sup>95</sup> Lisa O. Monaco, Deputy Attorney General, DOJ, Memorandum on Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies, at 2 (Oct. 28, 2021), <https://www.justice.gov/dag/page/file/1445106/download>.

<sup>96</sup> Lisa O. Monaco, Deputy Attorney General, DOJ, Memorandum on Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies, at 2 (Oct. 28, 2021), <https://www.justice.gov/dag/page/file/1445106/download>.

<sup>97</sup> Lisa O. Monaco, Deputy Attorney General, DOJ, Memorandum on Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies, at 2 (Oct. 28, 2021), <https://www.justice.gov/dag/page/file/1445106/download>.

The Monaco Memorandum also announced the following specific revisions and clarifications of DOJ policy:

- *Company's History of Misconduct*: The Monaco Memorandum directs prosecutors to “consider *all* misconduct by the corporation discovered during any prior domestic or foreign criminal, civil, or regulatory enforcement actions against it, including any such actions against the target company’s parent, divisions, affiliates, subsidiaries, and other entities within the corporate family.”<sup>98</sup> The memorandum explained that prosecutors must take such a “holistic approach” when considering a company’s history of misconduct, as any and all misconduct “may be indicative of whether the company lacks the appropriate internal controls and corporate culture to disincentivize criminal activity” and of the potential success of any proposed remediation or compliance programs.<sup>99</sup> As DAG Monaco explained during her keynote address, prosecutors previously considered earlier *similar* conduct—namely, prior actions relating to bribery—to constitute recidivism for the purpose of subsequent FCPA enforcement decisions.<sup>100</sup> In short, the Monaco Memorandum directs FCPA prosecutors to consider not only prior FCPA actions in the course of their enforcement, but all of a company’s prior misconduct, no matter the subject area.<sup>101</sup>

During her keynote address, DAG Monaco explained how this change might affect NPAs and DPAs in two key ways. First, she suggested that these agreements may not be appropriate for companies that have previously benefitted from such an arrangement, since “[c]orporate recidivism undermines the purpose of pretrial diversion” for such repeat offenders.<sup>102</sup> When considered in tandem with the broadened directive on recidivism discussed above, this stance suggests that any sort of prior corporate misconduct—regardless of subject area—may diminish a company’s likelihood of receiving an NPA or DPA. Second, DAG Monaco emphasized that the DOJ would be taking a closer look at compliance with NPA and DPA obligations and that the Department now has “no tolerance for companies that take advantage of pre-trial diversion by going on to continue to commit

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<sup>98</sup> Lisa O. Monaco, Deputy Attorney General, DOJ, Memorandum on Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies, at 3 (Oct. 28, 2021), <https://www.justice.gov/dag/page/file/1445106/download>.

<sup>99</sup> Lisa O. Monaco, Deputy Attorney General, DOJ, Memorandum on Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies, at 3 (Oct. 28, 2021), <https://www.justice.gov/dag/page/file/1445106/download>.

<sup>100</sup> Lisa O. Monaco, Deputy Attorney General, DOJ, Keynote Address at the ABA’s 36th National Institute on White Collar Crime (Oct. 28, 2021), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute>.

<sup>101</sup> Lisa O. Monaco, Deputy Attorney General, DOJ, Keynote Address at the ABA’s 36th National Institute on White Collar Crime (Oct. 28, 2021), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute>.

<sup>102</sup> Lisa O. Monaco, Deputy Attorney General, DOJ, Keynote Address at the ABA’s 36th National Institute on White Collar Crime (Oct. 28, 2021), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute>.

crimes.”<sup>103</sup> She pointed to two recent instances where the DOJ had notified multinational corporations of the DOJ’s view that breaches had occurred as an indication of the government’s willingness to take enforcement steps where appropriate.<sup>104</sup>

- *Information about Involved Individuals:* The Monaco Memorandum reiterates prior DOJ guidance issued by former Deputy Attorney General Sally Yates, that “to qualify for any cooperation credit, corporations must provide” to the DOJ “all nonprivileged information relevant to all individuals involved in the misconduct.”<sup>105</sup> The memorandum states that this applies to all individuals, “regardless of their position, status, or seniority,” be they “inside” or “outside of the company,” and that a company “cannot limit disclosure to those individuals believed to be only substantially involved in the criminal conduct.”<sup>106</sup> The Monaco Memorandum expressly rescinded any prior statements or guidance inconsistent with that set forth in the memorandum, including that found in the FCPA Corporate Enforcement Policy (CEP),<sup>107</sup> making clear that providing information about individuals who were “substantially involved” in the criminal conduct would no longer be sufficient for a company to receive cooperation credit.<sup>108</sup>
- *Revisions to Monitorship Guidance:* The Monaco Memorandum rescinded prior guidance that suggested corporate monitorships were disfavored,<sup>109</sup> and instead, stated affirmatively that the DOJ is “committed to imposing monitors where appropriate in corporate criminal matters” and that prosecutors “should favor the imposition of a monitor where there is a demonstrated need for, and clear benefit to be derived from, a

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<sup>103</sup> Lisa O. Monaco, Deputy Attorney General, DOJ, Keynote Address at the ABA’s 36th National Institute on White Collar Crime (Oct. 28, 2021), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute>.

<sup>104</sup> Lisa O. Monaco, Deputy Attorney General, DOJ, Keynote Address at the ABA’s 36th National Institute on White Collar Crime (Oct. 28, 2021), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute>.

<sup>105</sup> Lisa O. Monaco, Deputy Attorney General, DOJ, Memorandum on Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies, at 3 (Oct. 28, 2021), <https://www.justice.gov/dag/page/file/1445106/download>; see also Sally Q. Yates, Deputy Attorney General, DOJ, Memorandum on Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015).

<sup>106</sup> Lisa O. Monaco, Deputy Attorney General, DOJ, Memorandum on Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies, at 3 (Oct. 28, 2021), <https://www.justice.gov/dag/page/file/1445106/download>.

<sup>107</sup> US Department of Justice, FCPA Corporate Enforcement Policy, Justice Manual § 9-47.120 (requiring companies to “disclose[] all relevant facts known to it at the time of the disclosure, including as to any individuals substantially involved in or responsible for the misconduct at issue.” The Monaco Memorandum notes that modifications to JM § 9-47.120 will be forthcoming, consistent with the guidance in the memorandum. See Lisa O. Monaco, Deputy Attorney General, DOJ, Memorandum on Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies, at 2 (Oct. 28, 2021), <https://www.justice.gov/dag/page/file/1445106/download>.

<sup>108</sup> Lisa O. Monaco, Deputy Attorney General, DOJ, Memorandum on Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies, at 3 (Oct. 28, 2021), <https://www.justice.gov/dag/page/file/1445106/download>.

<sup>109</sup> Lisa O. Monaco, Deputy Attorney General, DOJ, Memorandum on Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies, at 4 (Oct. 28, 2021), <https://www.justice.gov/dag/page/file/1445106/download>.

monitorship.”<sup>110</sup> The memorandum notes that a company having untested internal controls or a deficient compliance program may counsel towards the imposition of a monitorship, while a company having a vetted, tested, and effective program may counsel towards a monitor being unnecessary.<sup>111</sup> The memorandum directs that the “scope of any monitorship should be appropriately tailored to address the specific issues and concerns that created the need for the monitor.”<sup>112</sup>

The revisions and clarifications in the Monaco Memorandum, as well as DAG Monaco’s accompanying statements, make clear that the administration seeks to take a more robust approach in examining and evaluating potential corporate misconduct.

#### 4. Last Remarks: Clarification on DOJ Approach to Recidivism

Following the Monaco Memorandum’s directive that prosecutors should not limit their review to prior FCPA violations when evaluating whether a company should be considered a recidivist, David Last, Chief of the DOJ’s FCPA Unit, provided clarification on the Department’s approach at an ACI panel in December.<sup>113</sup> FCPA Chief Last noted that, to the “extent [misconduct is] similar in nature, that’s likely to be more relevant and is going to be weighed more heavily,”<sup>114</sup> suggesting that prior violations *not* involving the FCPA might be given relatively less weight in considering an FCPA resolution. In addition to looking at the substance of past misconduct, the DOJ will also consider the recency, seriousness, and pervasiveness of the issue.<sup>115</sup> Of note, FCPA Chief Last also stated that, if a company had “the same personnel who were involved, even if it was ten years ago, and it’s the same type of conduct, that may be more relevant and certainly that’s something we should be thinking about.”<sup>116</sup>

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<sup>110</sup> Lisa O. Monaco, Deputy Attorney General, DOJ, Memorandum on Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies, at 4 (Oct. 28, 2021), <https://www.justice.gov/dag/page/file/1445106/download>.

<sup>111</sup> Lisa O. Monaco, Deputy Attorney General, DOJ, Memorandum on Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies, at 4 (Oct. 28, 2021), <https://www.justice.gov/dag/page/file/1445106/download>.

<sup>112</sup> Lisa O. Monaco, Deputy Attorney General, DOJ, Memorandum on Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies, at 5 (Oct. 28, 2021), <https://www.justice.gov/dag/page/file/1445106/download>.

<sup>113</sup> See Ines Kagubare, *FCPA Unit chief clarifies DOJ approach to corporate recidivism*, GLOBAL INVESTIGATIONS REV. (Dec. 9, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/corporate-liability/fcpa-unit-chief-clarifies-doj-approach-corporate-recidivism>.

<sup>114</sup> See Ines Kagubare, *FCPA Unit chief clarifies DOJ approach to corporate recidivism*, GLOBAL INVESTIGATIONS REV. (Dec. 9, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/corporate-liability/fcpa-unit-chief-clarifies-doj-approach-corporate-recidivism>.

<sup>115</sup> See Ines Kagubare, *FCPA Unit chief clarifies DOJ approach to corporate recidivism*, GLOBAL INVESTIGATIONS REV. (Dec. 9, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/corporate-liability/fcpa-unit-chief-clarifies-doj-approach-corporate-recidivism>.

<sup>116</sup> See Ines Kagubare, *FCPA Unit chief clarifies DOJ approach to corporate recidivism*, GLOBAL INVESTIGATIONS REV. (Dec. 9, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/corporate-liability/fcpa-unit-chief-clarifies-doj-approach-corporate-recidivism>.

Regarding companies' responses to prior misconduct, FCPA Chief Last emphasized the importance of conducting a root cause analysis and remediating any discovered deficiencies.<sup>117</sup> He stated that DOJ prosecutors will be looking to see whether companies have made such efforts when considering how to weigh prior misconduct.<sup>118</sup>

#### **D. Announcement on Central America Corruption**

In October, the DOJ announced the creation of a tip line to assist its Anticorruption Task Force in its enforcement efforts in El Salvador, Guatemala, and Honduras.<sup>119</sup> The Task Force was created in June to investigate and prosecute corruption cases with a nexus in the United States, Guatemala, and the surrounding region.<sup>120</sup> This joint effort consists of representatives from the DOJ's FCPA Unit as well as representatives from the Kleptocracy Asset Recovery Initiative and the Narcotic and Dangerous Drug Section of the DOJ's Criminal Division.<sup>121</sup> The newly-created tip line enables anyone with information about potentially corrupt actors in El Salvador, Guatemala, and Honduras who are violating US laws or moving proceeds of their crimes through the United States to report the conduct—in either Spanish or English—to an email address. Those tips will then be reviewed by the Task Force to determine if they indicate a possible jurisdictional link to the United States that would allow the Task Force to conduct appropriate enforcement action.<sup>122</sup>

#### **E. Continued Cross-Border Cooperation Between Enforcement Authorities**

In two recent resolutions, the DOJ indicated continued interest in fostering cross-border cooperation among enforcement authorities both during the investigative and resolution phases. In June, AFW agreed to pay a criminal penalty of more than \$18 million to resolve charges stemming from the company's involvement in a bribery scheme with Brazilian officials.<sup>123</sup> The circumstances underlying this case were pursued not only by US prosecutors but by the UK's SFO and by Brazil's MPF, AGU, and CGU.<sup>124</sup> AFW reached provisional settlements with both the UK and Brazilian

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<sup>117</sup> See Ines Kagubare, *FCPA Unit chief clarifies DOJ approach to corporate recidivism*, GLOBAL INVESTIGATIONS REV. (Dec. 9, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/corporate-liability/fcpa-unit-chief-clarifies-doj-approach-corporate-recidivism>.

<sup>118</sup> See Ines Kagubare, *FCPA Unit chief clarifies DOJ approach to corporate recidivism*, GLOBAL INVESTIGATIONS REV. (Dec. 9, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/corporate-liability/fcpa-unit-chief-clarifies-doj-approach-corporate-recidivism>.

<sup>119</sup> US Department of Justice Press Release No. 21-1010: Justice Department Anticorruption Task Force Launches New Measures to Combat Corruption in Central America (Oct. 15, 2021).

<sup>120</sup> White House Fact Sheet: US – Guatemala Cooperation (June 7, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/07/fact-sheet-u-s-guatemala-cooperation>.

<sup>121</sup> US Department of Justice Press Release No. 21-1010: Justice Department Anticorruption Task Force Launches New Measures to Combat Corruption in Central America (Oct. 15, 2021).

<sup>122</sup> US Department of Justice Press Release No. 21-1010: Justice Department Anticorruption Task Force Launches New Measures to Combat Corruption in Central America (Oct. 15, 2021).

<sup>123</sup> US Attorney's Office for the Eastern District of New York Press Release: Amec Foster Wheeler Energy Limited Resolves Foreign Bribery Case and Agrees to Pay Penalty of Over \$18 Million (June 25, 2021).

<sup>124</sup> US Attorney's Office for the Eastern District of New York Press Release: Amec Foster Wheeler Energy Limited Resolves Foreign Bribery Case and Agrees to Pay Penalty of Over \$18 Million (June 25, 2021).

authorities in coordination with the DOJ's resolution. In announcing the resolution, the US Attorney's Office for the Eastern District of New York emphasized international cooperation, referring to the Office's "dedication to work with [its] international partners in the global effort to hold individuals and companies accountable[.]"<sup>125</sup> For more information about the AFW case, see Section III.A.4.

Similarly, in October, Credit Suisse resolved charges that it defrauded US and international investors with the financing of an \$850 million loan for a tuna fishing project in Mozambique.<sup>126</sup> Credit Suisse was assessed more than \$547 million in combined criminal and civil penalties as part of a coordinated resolution with both US and UK authorities. Switzerland's FINMA engaged in a parallel enforcement action, which included the appointment of an independent third party to review the implementation and effectiveness of compliance measures, subject to FINMA's administrative process.

US enforcement authorities' collaboration with international regulators in these cases increasingly includes coordinated penalties across jurisdictions, often involving the crediting of penalty amounts that companies pay to these regulators. In the AFW resolution, for example, the DOJ credited a total of approximately \$10.7 million in penalties paid to foreign regulators,<sup>127</sup> and the SEC also credited AFW with similar payments that reduced the company's penalty to the SEC by more than half.<sup>128</sup>

## **F. President Biden's National Security Memorandum & the US Strategy on Countering Corruption**

### **1. National Security Memorandum**

The White House has also made clear that it views combatting corruption as an urgent and important priority, which may signal heightened FCPA enforcement to come. In June 2021, President Biden issued a National Security Memorandum that established the fight against corruption as a "core" national security interest because "[c]orruption threatens United States national security, economic equity, global anti-poverty and development efforts, and democracy itself."<sup>129</sup> The Memorandum also directed the development of a 200-day interagency review with

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<sup>125</sup> US Attorney's Office for the Eastern District of New York Press Release: Amec Foster Wheeler Energy Limited Resolves Foreign Bribery Case and Agrees to Pay Penalty of Over \$18 Million (June 25, 2021).

<sup>126</sup> US Department of Justice Press Release No. 21-1024: Credit Suisse Resolves Fraudulent Mozambique Loan Case in \$547 Million Coordinated Global Resolution (Oct. 19, 2021).

<sup>127</sup> Specifically, the DOJ credited a total of up to \$10.7 million in penalties paid to UK and Brazilian regulators. See US Department of Justice Press Release No. 21-601: Amec Foster Wheeler Energy Limited Agrees to Pay Over \$18 Million to Resolve Charges Related to Bribery Scheme in Brazil (June 25, 2021).

<sup>128</sup> The SEC credited \$3.5 million AFW paid to the SFO and \$9.1 million paid to Brazilian regulators, leaving AFW's total payments to the SEC at \$10.1 million. See Order Instituting Cease-and-Desist Proceedings, *In the Matter of Amec Foster Wheeler Limited*, Rel. No. 92259, File No. 3-20373, ¶ IV(B) (June 25, 2021).

<sup>129</sup> Joseph R. Biden Jr., President of the United States, Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest (June 3, 2021),

the goal of creating a report and recommendations on how the United States can better combat corruption.

The National Security Memorandum described a multifaceted initiative focused on certain anti-corruption themes: (1) increasing tools available to domestic and foreign anti-corruption efforts; (2) promoting cooperation among US agencies and international partners; (3) creating public-private partnerships to combat corruption; (4) combating illicit financial activities by accelerating regulatory reforms increasing transparency in the beneficial ownership of companies; and (5) holding individuals and organizations accountable through stolen-asset recovery, among other methods.<sup>130</sup>

In relation to current strategies, the National Security Memorandum expresses a readiness to continue the trend of using AML and sanctions tools in concert with the FCPA to counter foreign government corruption, extending the framework recently established by the CTA,<sup>131</sup> a key component of the AMLA. President Biden directed the interagency review described in the Memorandum to use the reporting processes required by the AMLA and CTA to identify and facilitate prosecution of corrupt actors.<sup>132</sup> The Biden administration also announced an increased desire to tackle demands for improper payments using these same tools in tandem with FCPA enforcement.<sup>133</sup>

The National Security Memorandum also seeks to increase cooperation between different agencies and across national borders.<sup>134</sup> This focus on international coordination in anti-corruption enforcement builds on the May 2018 Policy on the Coordination of Corporate Resolution Penalties, which encouraged coordination within the DOJ to prevent the “unnecessary imposition of duplicative fines, penalties, and/or forfeiture,”<sup>135</sup> as well as on the update to the FCPA Resource Guide released by the DOJ and SEC in June 2020.<sup>136</sup> As noted above, recent settlements

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<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/03/memorandum-on-establishing-the-fight-against-corruption-as-a-core-united-states-national-security-interest>.

<sup>130</sup> WilmerHale, *Biden: The Fight Against Foreign and Transnational Corruption Is a National Security Interest* at 1-2 (June 8, 2021), [https://www.wilmerhale.com/-/media/files/shared\\_content/editorial/publications/wh\\_publications/client\\_alert\\_pdfs/20210608-biden-the-fight-against-corruption-is-a-national-security-threat.pdf](https://www.wilmerhale.com/-/media/files/shared_content/editorial/publications/wh_publications/client_alert_pdfs/20210608-biden-the-fight-against-corruption-is-a-national-security-threat.pdf).

<sup>131</sup> NDAA §§ 6401-6403. Relevant provisions of the CTA are discussed in more detail in Section IV.C.1.b below.

<sup>132</sup> WilmerHale, *Biden: The Fight Against Foreign and Transnational Corruption Is a National Security Interest* at 2 (June 8, 2021), [https://www.wilmerhale.com/-/media/files/shared\\_content/editorial/publications/wh\\_publications/client\\_alert\\_pdfs/20210608-biden-the-fight-against-corruption-is-a-national-security-threat.pdf](https://www.wilmerhale.com/-/media/files/shared_content/editorial/publications/wh_publications/client_alert_pdfs/20210608-biden-the-fight-against-corruption-is-a-national-security-threat.pdf).

<sup>133</sup> WilmerHale, *Biden: The Fight Against Foreign and Transnational Corruption Is a National Security Interest* at 5 (June 8, 2021), [https://www.wilmerhale.com/-/media/files/shared\\_content/editorial/publications/wh\\_publications/client\\_alert\\_pdfs/20210608-biden-the-fight-against-corruption-is-a-national-security-threat.pdf](https://www.wilmerhale.com/-/media/files/shared_content/editorial/publications/wh_publications/client_alert_pdfs/20210608-biden-the-fight-against-corruption-is-a-national-security-threat.pdf).

<sup>134</sup> Joseph R. Biden Jr., President of the United States, Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest (June 3, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/03/memorandum-on-establishing-the-fight-against-corruption-as-a-core-united-states-national-security-interest>.

<sup>135</sup> US Department of Justice, Coordination of Corporate Resolution Penalties and/or Joint Investigations and Proceedings Arising from the Same Misconduct, JUSTICE MANUAL § 1-12.100.

<sup>136</sup> The Guide highlighted attempts by the DOJ and the SEC to avoid duplicative penalties and noted one example of positive coordination between the DOJ, the SEC, Brazilian authorities and Swiss authorities in



demonstrate this international coordination among a diverse set of governmental entities, including those from the United States, Brazil, France, the United Kingdom, Singapore and Malaysia.<sup>137</sup>

## 2. United States Strategy on Countering Corruption

In December 2021, the Biden administration released the United States Strategy on Countering Corruption, the first publication of its kind.<sup>138</sup> This Strategy reaffirms the administration's focus on the fight against corruption and represents the culmination of the interagency review that began with the National Security Memorandum issued by the White House in June.<sup>139</sup>

Among its specific provisions, the Strategy calls for increased interagency and international coordination, information sharing, and additional resources to be devoted to anti-corruption efforts, as well as the development of new guidance, strategy, and tools to improve the administration's goal of combatting corruption in the global economy. More specifically, the Strategy targets key gatekeepers to the financial system—like lawyers and accountants—by indicating that the administration will pursue working with Congress to fix the current “[d]eficiencies in the US regulatory framework” that allow these gatekeepers to move clients' funds around without understanding the nature or source of income of their clients,<sup>140</sup> and will also consider ways to increase penalties on gatekeepers who facilitate corruption and money laundering.

The Strategy also outlines the administration's intention to “evaluate and implement measures as needed to further safeguard our financial system, and [to] work with likeminded partners and relevant multilateral institutions to do the same.”<sup>141</sup> Specifically, the administration plans to “make it harder to hide the proceeds of ill-gotten wealth in opaque corporate structures, reduce the ability of individuals involved in corrupt acts to launder funds through anonymous purchases of US real estate,” and “to vigorously enforce the [FCPA] and other statutory and regulatory regimes via criminal and civil enforcement actions.”<sup>142</sup>

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reaching a resolution with Braskem S.A. in 2016. US Department of Justice and US Securities and Exchange Commission, A Resource Guide to the US Foreign Corrupt Practices Act (2020), <https://www.justice.gov/criminal-fraud/file/1292051/download>.

<sup>137</sup> WilmerHale, *Biden: The Fight Against Foreign and Transnational Corruption Is a National Security Interest* at 5 (June 8, 2021), [https://www.wilmerhale.com/-/media/files/shared\\_content/editorial/publications/wh\\_publications/client\\_alert\\_pdfs/20210608-biden-the-fight-against-corruption-is-a-national-security-threat.pdf](https://www.wilmerhale.com/-/media/files/shared_content/editorial/publications/wh_publications/client_alert_pdfs/20210608-biden-the-fight-against-corruption-is-a-national-security-threat.pdf).

<sup>138</sup> The White House, United States Strategy on Countering Corruption (Dec. 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf>.

<sup>139</sup> WilmerHale, *Biden: The Fight Against Foreign and Transnational Corruption Is a National Security Interest* (June 8, 2021), <https://www.wilmerhale.com/en/insights/client-alerts/20210608-biden-the-fight-against-foreign-and-transnational-corruption-is-a-national-security-interest>.

<sup>140</sup> The White House, United States Strategy on Countering Corruption, at 23 (Dec. 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf>.

<sup>141</sup> The White House, United States Strategy on Countering Corruption, at 8 (Dec. 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf>.

<sup>142</sup> The White House, United States Strategy on Countering Corruption, at 8 (Dec. 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf>.

## a) The Strategy's Five Pillars

To guide a cohesive and comprehensive approach, the Strategy focuses on five “pillars” to serve as a basis for combatting corruption:

- (i) Pillar One: Modernizing, Coordinating, and Resourcing US Government Efforts to Fight Corruption

The Strategy outlines the administration's plans to (1) enhance corruption-related research, data collection, and analysis; (2) improve information-sharing both within the US government and with non-US government entities; (3) increase focus on the transnational dimensions of corruption; (4) organize and resource the fight against corruption, both domestically and internationally; and (5) integrate an anti-corruption focus into regional, thematic, and sectoral priorities.

To implement these goals, the administration plans to increase resources for anti-corruption issues, including by allocating a larger budget to the enforcement teams. The Strategy also calls for a new anti-corruption task force at the Department of Commerce to focus on diplomatic outreach and foreign assistance for corruption-related investigations. With this task force, the administration aims to pioneer “innovative solutions” to combat corruption “in the globalized economy.”<sup>143</sup>

- (ii) Pillar Two: Curbing Illicit Finance

To combat illicit financing of misconduct, the administration will seek to address deficiencies in the AML regime and to work with partners and allies to address specified issues, such as cases involving procurement; real estate transactions; investment advisers and private equity funds; and key gatekeepers, such as lawyers, accounts, trust and company service providers, among others. The Strategy indicates that the administration will consider securing additional authorities to monitor gatekeepers and will consider ways to increase penalties on gatekeepers who enable and facilitate corruption and money laundering.<sup>144</sup>

- (iii) Pillar Three: Holding Corrupt Actors Accountable

The administration intends to work with Congress to develop new tools to assist in anti-corruption enforcement and with “the private sector to improve the international business climate by encouraging the adoption and enforcement of anti-corruption compliance programs.”<sup>145</sup> In addition

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<sup>143</sup> The White House, United States Strategy on Countering Corruption, at 9 (Dec. 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf>.

<sup>144</sup> The White House, United States Strategy on Countering Corruption, at 23 (Dec. 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf>.

<sup>145</sup> The White House, United States Strategy on Countering Corruption, at 12 (Dec. 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf>.

to focusing on individuals and entities who participate in paying bribes, the Strategy also targets foreign public officials who request or receive bribes.<sup>146</sup>

(iv) Pillar Four: Preserving and Strengthening the  
Multilateral Anti-Corruption Architecture

To strengthen global partnerships, the administration will participate in several international conferences and alliances to encourage the cross-border implementation of existing anti-corruption frameworks. The Strategy discusses plans to, among other efforts, cooperate in NATO's Building Integrity Program, continue to support the development of anti-corruption policies and processes in the Organization for Economic Cooperation and Development (OECD) Working Group on Bribery, and strengthen the implementation of the United Nations Convention Against Corruption (UNCAC).

(v) Pillar Five: Improving Diplomatic Engagement and  
Leveraging Foreign Assistance Resources to  
Advance Policy Goals

The administration will also continue to develop cross-border coordination by (1) elevating and expanding the scale of diplomatic engagement and foreign assistance that address corruption; (2) protecting anti-corruption actors, such as journalists, activists, and whistleblowers; (3) leveraging innovation in the fight against corruption by mobilizing non-traditional partners and technologies; (4) improving coordination and risk analysis across foreign assistance; and (5) improving security assistance and integrating corruption considerations into military planning, analysis, and operations.

**b) Implementing the Strategy**

The Strategy's five pillars, which envision coordination among the DOJ and the Departments of State, Commerce, and Treasury, underline the administration's focus on increasing enforcement actions relating to corruption and, when combined with the DOJ's intention to "surge resources for corporate enforcement,"<sup>147</sup> foreshadow an increase in corporate investigations. The administration plans to develop metrics to measure progress against each pillar of the Strategy, which will be summarized in an annual report to the President.<sup>148</sup>

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<sup>146</sup> The White House, United States Strategy on Countering Corruption, at 12 (Dec. 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf>.

<sup>147</sup> Dylan Tokar, *Justice Department to Redouble Efforts in Combating White-Collar Crime, Official Says*, WALL ST. J. (Oct. 6, 2021), <https://www.wsj.com/articles/justice-department-to-redouble-efforts-in-combating-white-collar-crime-official-says-11633557791>.

<sup>148</sup> The White House, United States Strategy on Countering Corruption, at 9 (Dec. 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf>.

## **G. Takeaways**

Statements from key personnel and revisions to the DOJ's CEP throughout 2021 provide a clear indication that heightened prioritization of—and perhaps even a more aggressive approach to—FCPA enforcement are important to the Biden administration and US enforcement authorities. At this early point in the administration, the DOJ has already jettisoned guidance disfavoring monitorships, broadened its definition of “recidivism,” and expressed heightened expectations in terms of corporate cooperation during investigations. The prioritization of corporate enforcement can also be seen in the White House’s National Security Memorandum and Strategy, which provide a firm foundation for the DOJ and SEC to make formal policy changes related to anti-corruption enforcement during President Biden’s term. Moreover, prosecutors continue to express and exhibit eagerness to work with their international counterparts to investigate corruption and align cross-border settlements. And with the creation of the Corporate Crime Advisory Group within the DOJ, it is likely that the coming years will see further revisions and “updating” of guidance and policy that reflect this change in approach.

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

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

The year 2021 saw a record low number of corporate FCPA settlements by US enforcement authorities. In 2021, just four corporations entered into FCPA settlements with the DOJ, SEC, or both.

As noted above in Section I.A, however, this lull in the number of corporate enforcement actions will almost certainly be short-lived. Although statistics to date have not yet had the chance to catch up with the new administration’s focus on corporate white-collar crime, the recent guidance from the DOJ indicates that the government will increasingly embrace tougher corporate enforcement. Similar observations were also reiterated by SEC Enforcement Director Grewal in a series of public remarks<sup>149</sup> and by DOJ FCPA Unit Chief Last and SEC FCPA Unit Chief Charles Cain in a December 2021 conference, where both Chiefs emphasized that the US government’s “pipeline” of new and ongoing investigations remains strong.<sup>150</sup>

#### **1. Continued Reliance on Accounting Provisions and Non-FCPA Statutes**

The SEC continued its practice of bringing FCPA charges against companies based solely on violations of the FCPA’s accounting provisions, with three out of four resolutions entered with the

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<sup>149</sup> See, e.g., Gurbir Grewal, Director, Division of Enforcement, SEC, Remarks at Program on Corporate Compliance and Enforcement at the NYU School of Law, The Next Wave of Corporate Enforcement Conference (Nov. 5, 2021).

<sup>150</sup> David Last, Chief, FCPA Unit, DOJ, and Charles Cain, Chief, FCPA Unit, SEC, General Session: DOJ and SEC Year in Review, American Conference Institute: 39th International Conference on the Foreign Corrupt Practices Act (Dec. 1, 2021).

SEC in 2021 involving findings consisting only of internal accounting controls and books and records violations. In each of the three SEC cases, the SEC charged that the parent issuer's internal accounting controls were insufficient to detect or prevent the alleged improper payments. Similarly, in its resolution with Deutsche Bank, the DOJ relied solely on the FCPA's accounting provisions to bring charges, alleging, among other things, that the bank inaccurately recorded payments it made to business development consultants as legitimate business expenses.<sup>151</sup>

While the SEC has continued in recent years to pursue accounting and recordkeeping charges when it cannot establish FCPA jurisdiction over substantive bribery, the DOJ also looked again to the wire fraud statutes in one 2021 settlement to charge corporate entities in a situation that posed jurisdictional issues for an FCPA charge.<sup>152</sup> The DOJ has previously brought or resolved similar FCPA-related enforcement actions using non-FCPA charges, including money laundering or mail and wire fraud, although historically such resolutions were most often reserved for individuals such as foreign officials who accepted bribes.<sup>153</sup> Indeed, the DOJ's FCPA Unit has rarely entered into corporate settlements that rely solely on wire fraud charges to resolve FCPA-related conduct (i.e., without an accompanying charge under the FCPA).<sup>154</sup>

## 2. Continued Focus on Financial Services Firms

With the small number of corporate resolutions occurring in 2021, only four companies accounted for the FCPA penalties imposed by US authorities. The two largest resolutions in 2021—both involving multinational financial institutions—illustrate US authorities' continued focus on the financial services sector and related large-value transactions. Indeed, in recent remarks regarding SEC enforcement, SEC FCPA Chief Cain noted that some of the most significant recent FCPA enforcement actions for the SEC have been against large banks, and he reiterated that the SEC will remain focused on the financial services sector in general.<sup>155</sup>

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<sup>151</sup> US Department of Justice Press Release No. 21-23: Deutsche Bank Agrees to Pay over \$130 Million to Resolve Foreign Corrupt Practices Act and Fraud Case (Jan. 8, 2021).

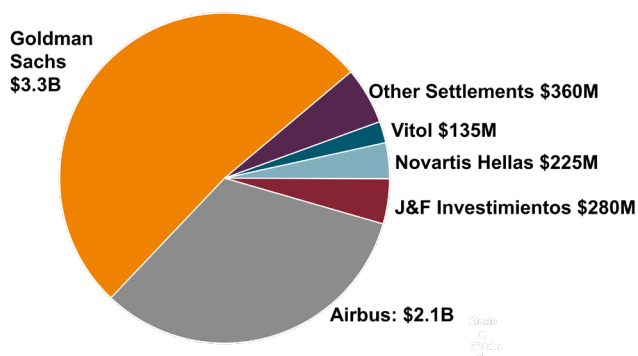
<sup>152</sup> See US Department of Justice Press Release No. 21-1024: Credit Suisse Resolves Fraudulent Mozambique Loan Case in \$547 Million Coordinated Global Resolution (Oct. 19, 2021); US Securities and Exchange Commission Press Release No. 2021-213: Credit Suisse to Pay Nearly \$475 Million to U.S. and U.K. Authorities to Resolve Charges in Connection with Mozambican Bond Offerings (Oct. 19, 2021).

<sup>153</sup> See, e.g., *United States v. Boustani*, No. 18-CR-00681 (E.D.N.Y. Dec. 19, 2018); *United States v. Guedez*, No. 18-CR-00611 (S.D. Tex. Oct. 31, 2018); *United States v. Thiam*, No. 17-CR-00047 (S.D.N.Y. Aug. 28, 2017); *United States v. Camacho*, No. 17-CR-00394 (S.D. Tex. July 6, 2017).

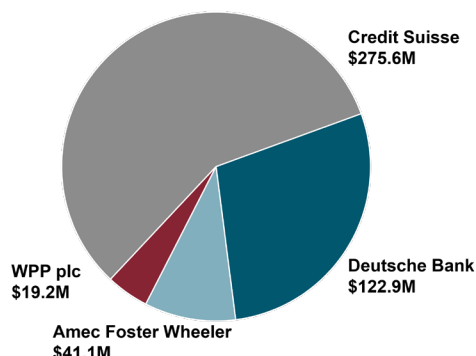
<sup>154</sup> For examples of corporate resolutions where the DOJ has exclusively relied on the mail and wire fraud statutes, see, e.g., *United States v. BAE Systems PLC*, No. 10-CR-00035 (D.D.C. Mar. 1, 2010); *United States v. CNH France S.A.*, No. 1:08-CR-00379 (D.D.C. Dec. 22, 2008).

<sup>155</sup> David Last, Chief, FCPA Unit, DOJ, and Charles Cain, Chief, FCPA Unit, SEC, General Session: DOJ and SEC Year in Review, American Conference Institute: 39th International Conference on the Foreign Corrupt Practices Act (Dec. 1, 2021).

**Total 2020 Corporate Settlements:  
\$6.4 Billion**



**Total 2021 Corporate Settlements:  
\$458.8 Million**



### 3. Deutsche Bank

In January 2021, Germany-based Deutsche Bank reached settlements with both the DOJ and SEC over potential FCPA-related books and records and internal accounting controls charges based on conduct in Saudi Arabia, the United Arab Emirates, Italy, and China.<sup>156</sup>

The DOJ and SEC resolutions described their view of how the bank’s use of third-party “business development consultants” (BDCs)—which it used globally to bring in new clients and business—led to improper payments between 2009 and 2016. The settlement papers alleged that Deutsche Bank hired as a BDC (1) a “senior advisor to [a regional Chinese]... Government” and friend of local government officials to establish an investment fund in China; (2) the relative of a high-ranking official of an Abu Dhabi state-owned enterprise (SOE) who pressured the bank to finance a “mega-yacht” in exchange for “most favoured status” with the Abu Dhabi SOE; and (3) a regional Italian tax judge who referred high-net worth clients to the bank, while the bank was aware of these consultants’ status as government officials or their relationships to foreign governments and without conducting the required due diligence review.<sup>157</sup> Not all of these payments led to business incentives or profits for the bank; the government papers also focused on improper characterization

<sup>156</sup> US Department of Justice Press Release No. 21-23: Deutsche Bank Agrees to Pay over \$130 Million to Resolve Foreign Corrupt Practices Act and Fraud Case (Jan. 8, 2021); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Deutsche Bank AG*, Rel. No. 90875, File No. 3-20200, ¶¶ 12-32 (Jan. 8, 2021). Deutsche Bank’s resolution with the DOJ was filed on December 22, 2020 but was announced on January 8, 2021 in coordination with Deutsche Bank’s resolution with the SEC.

<sup>157</sup> Deferred Prosecution Agreement, *United States v. Deutsche Bank Aktiengesellschaft*, No. 20-CR-00584, Attachment A, ¶¶ 9-41 (E.D.N.Y. Jan. 8, 2021); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Deutsche Bank AG*, Rel. No. 90875, File No. 3-20200, ¶¶ 12-27 (Jan. 8, 2021).

and recording of these relationships.<sup>158</sup> The resolution papers also described how previous managers at the bank did not remediate red flags raised with respect to the use of BDCs.<sup>159</sup>

Notably, the DOJ charged Deutsche Bank solely under the internal accounting controls provisions of the FCPA. The SEC and DOJ resolutions focused on the particular control gaps and inaccurate books and records relating to each country, as well as the lack of a system at the time to address known bribery risks arising from the bank's use of BDCs.<sup>160</sup> Both resolutions noted that Deutsche Bank's internal audit function identified "risk indicators" and related concerns about the bank's use of BDCs during the relevant time period.

Interestingly, some payments and agreements described in the resolution papers, though allegedly conferred to government officials and those with close ties to government officials, were not made to cause the BDCs to influence government action. For example, although the resolution papers allege that Deutsche Bank paid an Italian judge, those payments were allegedly made for actions taken by the judge in a private capacity—including referring bank clients—and not actions in his role as a government official.<sup>161</sup>

Deutsche Bank agreed to a three-year DPA with the DOJ and to pay more than \$130 million in fines, disgorgement, victim compensation, and interest, with \$123 million of the bank's total payments used to settle FCPA charges and \$7 million designated for market manipulation issues.<sup>162</sup> The SEC's order imposed total penalties of \$43 million, including \$35 million in disgorgement and \$8 million in prejudgment interest.<sup>163</sup> The DOJ gave the bank full cooperation credit based on its willingness to provide factual presentations and updates, make non-US employees available for interviews, and produce extensive documentation located both in the

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<sup>158</sup> Deferred Prosecution Agreement, *United States v. Deutsche Bank Aktiengesellschaft*, No. 20-CR-00584, Attachment A, ¶¶ 21, 28 (E.D.N.Y. Jan. 8, 2021); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Deutsche Bank AG*, Rel. No. 90875, File No. 3-20200, ¶¶ 14, 16 (Jan. 8, 2021).

<sup>159</sup> Deferred Prosecution Agreement, *United States v. Deutsche Bank Aktiengesellschaft*, No. 20-CR-00584, Attachment A, ¶¶ 7-8 (E.D.N.Y. Jan. 8, 2021); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Deutsche Bank AG*, Rel. No. 90875, File No. 3-20200, ¶¶ 8-9 (Jan. 8, 2021).

<sup>160</sup> Deferred Prosecution Agreement, *United States v. Deutsche Bank Aktiengesellschaft*, No. 20-CR-00584, Attachment A, ¶¶ 7-8 (E.D.N.Y. Jan. 8, 2021); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Deutsche Bank AG*, Rel. No. 90875, File No. 3-20200, ¶¶ 8-9 (Jan. 8, 2021).

<sup>161</sup> Deferred Prosecution Agreement, *United States v. Deutsche Bank Aktiengesellschaft*, No. 20-CR-00584, Attachment A, ¶¶ 7-8 (E.D.N.Y. Jan. 8, 2021); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Deutsche Bank AG*, Rel. No. 90875, File No. 3-20200, ¶ 37 (Jan. 8, 2021).

<sup>162</sup> US Department of Justice Press Release No. 21-23: Deutsche Bank Agrees to Pay over \$130 Million to Resolve Foreign Corrupt Practices Act and Fraud Case (Jan. 8, 2021). With a separate \$7 million resolution, Deutsche Bank also settled allegations that its precious metals traders in its New York, Singapore, and London desks engaged in a scheme to defraud other traders on two commodity exchanges by placing orders to buy and sell precious metals futures contracts and then canceling, or intending to cancel, those orders before execution. Deutsche Bank also reached a settlement with the CFTC for related conduct. Deferred Prosecution Agreement, *United States v. Deutsche Bank Aktiengesellschaft*, No. 20-CR-00584, Attachment A, ¶¶ 56-59 (E.D.N.Y. Jan. 8, 2021).

<sup>163</sup> US Securities and Exchange Commission Press Release No. 2021-3: SEC Charges Deutsche Bank With FCPA Violations Related to Third-Party Intermediaries (Jan. 8, 2021). The SEC explicitly stated that it did not impose a civil penalty in light of the \$79 million criminal penalty paid to the DOJ. *Id.*

United States and abroad.<sup>164</sup> As a part of these resolutions, the DOJ specifically declined to impose a compliance monitor, noting the bank's significant remediation efforts through its enhancement of its anti-corruption compliance program, reporting obligation under the agreement, and pre-existing compliance monitorship resulting from a prior, unrelated settlement.<sup>165</sup>

#### 4. Amec Foster Wheeler

In June 2021, AFW,<sup>166</sup> a London-based multinational consulting, engineering, and project management company, reached settlements with the DOJ and SEC to resolve potential charges related to (1) a conspiracy to violate the FCPA's anti-bribery provisions, alleged by the DOJ,<sup>167</sup> and (2) anti-bribery, books and records, and internal accounting controls violations, alleged by the SEC.<sup>168</sup> The US government investigated AFW in coordination with Brazilian authorities and the United Kingdom's SFO.<sup>169</sup>

According to the allegations, between 2011 and 2014, AFW—in search of business in Brazil's oil and gas industry—retained an Italian agent connected to a Monaco-based consultant, which was speculated in the media to be Unaoil.<sup>170</sup> AFW continued to work with the Italian agent on a bid for a Petrobras oil-and-gas engineering contract despite the agent's known ties to the Monaco consultant entity, which had failed the company's due diligence processes, even after additional red flags were identified concerning the Italian agent.<sup>171</sup> The company, through both the Italian agent and a Brazilian agent introduced to the company by the Italian agent, paid bribes to a Petrobras

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<sup>164</sup> Deferred Prosecution Agreement, *United States v. Deutsche Bank Aktiengesellschaft*, No. 20-CR-00584, ¶¶ 4(b)-(c) (E.D.N.Y. Jan. 8, 2021).

<sup>165</sup> Deferred Prosecution Agreement, *United States v. Deutsche Bank Aktiengesellschaft*, No. 20-CR-00584, ¶ 4(f)-(h) (E.D.N.Y. Jan. 8, 2021).

<sup>166</sup> At the time of the alleged misconduct, Foster Wheeler was a wholly owned subsidiary of Foster Wheeler AG, a US company that moved its headquarters to Switzerland in 2008. In 2014, Foster Wheeler AG and Amec merged to form AFW. AFW was subsequently acquired by John Wood, a UK-based global engineering company.

<sup>167</sup> US Department of Justice Press Release No. 21-601: Amec Foster Wheeler Energy Limited Agrees to Pay Over \$18 Million to Resolve Charges Related to Bribery Scheme in Brazil (June 25, 2021).

<sup>168</sup> See Deferred Prosecution Agreement, *United States v. Amec Foster Wheeler Energy Limited*, No. 21-CR-00298 (E.D.N.Y. June 25, 2021); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Amec Foster Wheeler Limited*, Rel. No. 92259, File No. 3-20373 (June 25, 2021).

<sup>169</sup> UK Serious Fraud Office Case Update: SFO Enters Into £103m DPA With Amec Foster Wheeler Energy Limited (July 2, 2021), <https://www.sfo.gov.uk/2021/07/02/sfo-enters-into-103m-dpa-with-amec-foster-wheeler-energy-limited-as-part-of-global-resolution-with-us-and-brazilian-authorities>. Amec Foster Wheeler also settled with the Ministério Público Federal (MPF), the Controladoria-Geral da União (CGU), and the Advogado-Geral da União (AGU) in Brazil. See US Department of Justice Press Release No. 21-601: Amec Foster Wheeler Energy Limited Agrees to Pay Over \$18 Million to Resolve Charges Related to Bribery Scheme in Brazil (June 25, 2021).

<sup>170</sup> See Order Instituting Cease-and-Desist Proceedings, *In the Matter of Amec Foster Wheeler Limited*, Rel. No. 92259, File No. 3-20373, ¶¶ 5, 7, 13-14 (June 25, 2021); see also Harry Cassin, *Amec Foster Wheeler pays \$41 million to settle agent-related FCPA offenses*, FCPA BLOG (June 25, 2021), <https://fcpcbog.com/2021/06/25/amec-foster-wheeler-pays-41-million-to-settle-agent-related-fcpa-offenses>.

<sup>171</sup> Deferred Prosecution Agreement, *United States v. Amec Foster Wheeler Energy Limited*, No. 21-CR-00298, Attachment A, ¶¶ 27, 32 (E.D.N.Y. June 25, 2021); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Amec Foster Wheeler Limited*, Rel. No. 92259, File No. 3-20373, ¶¶ 13-14, 17 (June 25, 2021).



official during contract negotiations.<sup>172</sup> The company also agreed to pay fees to the Brazilian agent related to his work on the Petrobras contract—some of which were passed on to the Italian agent by the Brazil agent—and which were falsely recorded as commissions in the company’s books and records.<sup>173</sup> AFW’s subsidiary ultimately won the \$190 million contract, which was later terminated in May 2014 due to Petrobras’ financial difficulties.<sup>174</sup>

AFW agreed to a three-year DPA with the DOJ, and the overall resolution included over \$18 million in fines to the DOJ and \$22.7 million in disgorgement and prejudgment interest to the SEC. Under the DPA, the DOJ agreed to credit up to 25%, or \$4.6 million, of the criminal penalty owed to the United States to payments made to the United Kingdom under the company’s resolution with the SFO, and up to 33%, or \$6.1 million, to payments the company made to Brazilian authorities.<sup>175</sup> Thus, the DOJ collected only approximately \$7.7 million of the criminal fine. The SEC similarly credited \$3.5 million the company paid to the SFO and \$9.1 million paid to Brazilian regulators, leaving AFW’s total payments to the SEC at \$10.1 million.<sup>176</sup>

Despite the allegations spanning several years, the DOJ did not impose a compliance monitor on AFW. Instead, AFW was required to self-report to the government regarding the implementation of its compliance enhancements.<sup>177</sup> The DOJ and SEC both specifically noted remediation efforts by the Wood group, the parent company that acquired AFW after the misconduct occurred, including the “state of Wood’s compliance program” and Wood’s commitment to continue enhancing its compliance controls, which would apply across all Wood companies, including AFW.<sup>178</sup> Similarly, both the DOJ and SEC noted AFW’s and Wood’s cooperation efforts in their resolutions, which ultimately led AFW to receive full cooperation credit and a 25% reduction off the US Sentencing Guidelines from the DOJ.<sup>179</sup>

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<sup>172</sup> Deferred Prosecution Agreement, *United States v. Amec Foster Wheeler Energy Limited*, No. 21-CR-00298, Attachment A, ¶¶ 16, 33-40 (E.D.N.Y. June 25, 2021); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Amec Foster Wheeler Limited*, Rel. No. 92259, File No. 3-20373, ¶¶ 1, 17-19, 27 (June 25, 2021).

<sup>173</sup> Deferred Prosecution Agreement, *United States v. Amec Foster Wheeler Energy Limited*, No. 21-CR-00298, Attachment A, ¶¶ 42-45 (E.D.N.Y. June 25, 2021); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Amec Foster Wheeler Limited*, Rel. No. 92259, File No. 3-20373, ¶¶ 22-23, 27, 30 (June 25, 2021).

<sup>174</sup> Deferred Prosecution Agreement, *United States v. Amec Foster Wheeler Energy Limited*, No. 21-CR-00298, Attachment A, ¶¶ 16, 41 (E.D.N.Y. June 25, 2021); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Amec Foster Wheeler Limited*, Rel. No. 92259, File No. 3-20373, ¶ 30 (June 25, 2021).

<sup>175</sup> US Department of Justice Press Release No. 21-601: Amec Foster Wheeler Energy Limited Agrees to Pay Over \$18 Million to Resolve Charges Related to Bribery Scheme in Brazil (June 25, 2021).

<sup>176</sup> Order Instituting Cease-and-Desist Proceedings, *In the Matter of Amec Foster Wheeler Limited*, Rel. No. 92259, File No. 3-20373, ¶ IV(B) (June 25, 2021).

<sup>177</sup> US Department of Justice Press Release No. 21-601: Amec Foster Wheeler Energy Limited Agrees to Pay Over \$18 Million to Resolve Charges Related to Bribery Scheme in Brazil (June 25, 2021).

<sup>178</sup> Deferred Prosecution Agreement, *United States v. Amec Foster Wheeler Energy Limited*, No. 21-CR-00298, ¶¶ 4(d)-(f), 7 (E.D.N.Y. June 25, 2021); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Amec Foster Wheeler Limited*, Rel. No. 92259, File No. 3-20373, ¶ 36 (June 25, 2021).

<sup>179</sup> Deferred Prosecution Agreement, *United States v. Amec Foster Wheeler Energy Limited*, No. 21-CR-00298, ¶ 4(b) (E.D.N.Y. June 25, 2021); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Amec Foster Wheeler Limited*, Rel. No. 92259, File No. 3-20373, ¶ 35 (June 25, 2021).

The AFW case presents several key takeaways. First, it illustrates the importance of conducting thorough due diligence checks when retaining third parties, reflecting the DOJ's continued focus on third-party relationships. Second, it demonstrates that the DOJ and SEC may continue to rely on broad jurisdictional powers to enter coordinated settlements with foreign authorities, even when the scope of the conduct investigated by other authorities is significantly broader. AFW's settlement with the SFO, which the UK regulator prosecuted as part of its sprawling investigation into Unaoil, concerned a larger set of facts, with the alleged misconduct occurring as early as 1996 and in multiple other countries as well as Brazil.<sup>180</sup> Third, the AFW case, which the DOJ prosecuted under the FCPA's anti-bribery provisions, demonstrates the DOJ's continued long-standing focus on bringing enforcement actions even when the alleged touchpoints to the United States appear more limited.<sup>181</sup> Here, the alleged involvement of AFW employees in the United States served as a sufficient nexus to the United States for the DOJ to assert jurisdiction over the conduct at issue. Finally, the DOJ's decision to award full cooperation credit and refrain from imposing a monitor on AFW, while largely citing Wood's compliance commitments, exemplifies the importance of a parent company's compliance program and risk-based due diligence in mergers and acquisitions. The charges being brought against AFW rather than Wood also is an important reminder for buyers regarding the considerations for maintaining acquired companies as separate subsidiaries post-acquisition, including to ensure that the new parent does not directly assume the liability and thus risk being charged directly with the acquired company's conduct.

## 5. WPP plc

In September 2021, WPP plc, the world's largest advertising group, settled anti-bribery, books and records, and internal accounting controls charges with the SEC on a neither-admit-nor-deny basis.<sup>182</sup> According to the SEC's allegations, WPP did not sufficiently ensure that its subsidiaries operating in high-risk markets, including India, China, Brazil, and Peru, implemented WPP's internal accounting controls and compliance policies. Specifically, the SEC alleged that, among other things, between 2013 and 2018, WPP's local entities engaged in schemes to facilitate improper payments to government officials, and that WPP "lacked sufficient internal accounting controls with respect to its expansive international network."<sup>183</sup>

The SEC order emphasizes that a root cause of the control weaknesses was that former company management employed an aggressive growth strategy, according to which the company acquired

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<sup>180</sup> UK Serious Fraud Office Case Update: SFO Enters Into £103m DPA With Amec Foster Wheeler Energy Limited (July 2, 2021), <https://www.sfo.gov.uk/2021/07/02/sfo-enters-into-103m-dpa-with-amec-foster-wheeler-energy-limited-as-part-of-global-resolution-with-us-and-brazilian-authorities>.

<sup>181</sup> Deferred Prosecution Agreement, *United States v. Amec Foster Wheeler Energy Limited*, No. 21-CR-00298, Attachment A, ¶¶ 1-2 (E.D.N.Y. June 25, 2021). Notably, although the parent company Foster Wheeler AG was a US-listed issuer during the time period of the misconduct, the DOJ did not charge Foster Wheeler as an agent of an issuer.

<sup>182</sup> Order Instituting Cease-and-Desist Proceedings, *In the Matter of WPP plc*, Rel. No. 4257, File No. 3-20595, ¶¶ 1, 3 (Sept. 24, 2021).

<sup>183</sup> Order Instituting Cease-and-Desist Proceedings, *In the Matter of WPP plc*, Rel. No. 4257, File No. 3-20595, ¶¶ 7-9, 21-22, 26-29 (Sept. 24, 2021).

controlling interests in small, localized agencies but left the founders of those agencies in charge without integrating the newly-acquired agencies into the company.<sup>184</sup>

To resolve the matter, WPP agreed to pay approximately \$10.1 million in disgorgement, \$1.1 million in prejudgment interest, and a civil monetary penalty of \$8 million. In reaching the settlement terms, the SEC credited WPP's cooperation, which included "sharing facts developed in the course of its own internal investigations and forensic accounting reviews, translating key documents, and making current and former employees located abroad available for interviews."<sup>185</sup> The SEC also recognized WPP's remedial efforts, which included, among other measures, terminating senior executives and employees involved in the alleged misconduct; strengthening its compliance program, audit function, and risk assessments; conducting proactive reviews of various local entities; and enhancing anti-corruption and third party procedures and trainings.<sup>186</sup>

The WPP case is an important reminder of the need to fully integrate acquired entities into parent companies' compliance programs promptly and to ensure that smaller, local business units are closely monitored, even where those units may make up only a tiny portion of the overall revenue of the global company. In addition, FCPA charges against an advertising/media company—an industry not typically found in DOJ and SEC cases—are a good reminder that virtually no global company is immune from potential corruption risks or the attention of enforcement authorities, and compliance personnel across all industries must assess their business models, identify potential risks, and put in place appropriate controls.

## 6. Credit Suisse

In October 2021, Swiss-headquartered Credit Suisse settled SEC charges relating to violations of the internal accounting controls and books and records provisions of the FCPA arising out of the involvement of its UK-based subsidiary, Credit Suisse Securities (Europe) Limited (CSSEL), in allegedly defrauding investors and making improper payments to Mozambican government officials.<sup>187</sup> To resolve wire fraud conspiracy charges based on the same conduct, Credit Suisse also entered into a three-year DPA with the DOJ.<sup>188</sup> Neither the DOJ nor the SEC brought bribery charges.

According to the SEC's order, between 2013 and 2016, CSSEL raised over \$1 billion in financing for two state-owned entities in Mozambique through bond offerings and a syndicated loan,

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<sup>184</sup> Order Instituting Cease-and-Desist Proceedings, *In the Matter of WPP plc*, Rel. No. 4257, File No. 3-20595, ¶ 4 (Sept. 24, 2021).

<sup>185</sup> Order Instituting Cease-and-Desist Proceedings, *In the Matter of WPP plc*, Rel. No. 4257, File No. 3-20595, ¶ 36 (Sept. 24, 2021).

<sup>186</sup> Order Instituting Cease-and-Desist Proceedings, *In the Matter of WPP plc*, Rel. No. 4257, File No. 3-20595, ¶ 37 (Sept. 24, 2021).

<sup>187</sup> Order Instituting Cease-and-Desist Proceedings, *In the Matter of Credit Suisse Group AG*, Rel. No. 11001, File No. 3-20629, ¶¶ 1, 8 (Oct. 19, 2021).

<sup>188</sup> US Department of Justice Press Release No. 21-1024: Credit Suisse Resolves Fraudulent Mozambique Loan Case in \$547 Million Coordinated Global Resolution (Oct. 19, 2021).

allegedly for the purpose of supporting Mozambique's tuna-fishing industry. According to the SEC, the funds were instead used by three former CSSEL bankers<sup>189</sup> to pay "improper payments and kickbacks [that] totaled at least \$200 million" to themselves and the bank's intermediaries and to bribe Mozambican government officials.<sup>190</sup> According to the SEC, the CSSEL bankers were able to hide the kickbacks from members of Credit Suisse's management and to draft materials falsely representing the purpose of the investments due to the bank's insufficient internal controls, leading the bank to fail to disclose to investors the true nature of the debt from the Mozambican state-owned entities.<sup>191</sup>

As part of its civil settlement with the SEC, Credit Suisse consented to a cease-and-desist order and agreed to pay \$100 million, consisting of approximately \$26.2 million in disgorgement, \$7.8 million in prejudgment interest, and a \$65 million civil penalty.<sup>192</sup> In reaching the settlement terms, the SEC considered Credit Suisse's "substantial" remedial efforts, including (1) "engag[ing] in a review and remediation of its internal controls and procedures relating to the integration of its compliance functions"; (2) establishing "a U.K. Financial Crime Advisory team to conduct due diligence from a financial crimes perspective, and ... a Global Focus Client Committee to assess client risks from a compliance perspective"; and (3) proactively working with "peer banks, civil society organizations, and various international organizations on the design and establishment of a transparent lending portal program."<sup>193</sup>

In the parallel DOJ action, Credit Suisse entered into a three-year DPA to settle wire fraud conspiracy charges under 18 U.S.C. § 1349, while CSSEL pleaded guilty to a one-count criminal information charging it with conspiracy to commit wire fraud.<sup>194</sup> Notably, neither the criminal information nor the DPA alleged FCPA violations, suggesting that the DOJ may have elected to rely on its broader jurisdictional powers under the wire fraud statutes.<sup>195</sup> In the Credit Suisse DPA, the DOJ focused its analysis on Credit Suisse's transmission of inaccurate statements to investors.

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<sup>189</sup> While not named in the SEC's cease-and-desist order, according to Credit Suisse's DPA with the DOJ, the involved CSSEL bankers included Andrew Pearse, Surjan Singh, and Detelina Subeva. Deferred Prosecution Agreement, *United States v. Credit Suisse Group AG*, No. 21-CR-00521, Attachment A, ¶¶ 3-5 (E.D.N.Y. Oct. 19, 2021). In December 2018, Pearse, Singh, and Subeva were charged alongside several other individuals for their role in the scheme, and pleaded guilty in 2019. See Indictment, *United States v. Boustani et al.*, No. 18-CR-00681, ¶¶ 15-17, 25 (E.D.N.Y. Dec. 19, 2018).

<sup>190</sup> Order Instituting Cease-and-Desist Proceedings, *In the Matter of Credit Suisse Group AG*, Rel. No. 11001, File No. 3-20629, ¶¶ 1, 2 (Oct. 19, 2021).

<sup>191</sup> Order Instituting Cease-and-Desist Proceedings, *In the Matter of Credit Suisse Group AG*, Rel. No. 11001, File No. 3-20629, ¶ 3, 5, 38 (Oct. 19, 2021).

<sup>192</sup> Order Instituting Cease-and-Desist Proceedings, *In the Matter of Credit Suisse Group AG*, Rel. No. 11001, File No. 3-20629, Section IV, ¶¶ A-C (Oct. 19, 2021).

<sup>193</sup> Order Instituting Cease-and-Desist Proceedings, *In the Matter of Credit Suisse Group AG*, Rel. No. 11001, File No. 3-20629, ¶ 68 (Oct. 19, 2021).

<sup>194</sup> US Department of Justice Press Release No. 21-1024: Credit Suisse Resolves Fraudulent Mozambique Loan Case in \$547 Million Coordinated Global Resolution (Oct. 19, 2021).

<sup>195</sup> In 2019, the DOJ went to trial against Jean Boustani, a Lebanese shipbuilding executive, alleging that Boustani committed wire fraud, securities fraud, and money laundering to obtain contracts from the Mozambican government that were financed with loans from Credit Suisse. Boustani's acquittal hinged on the

In its DPA, the DOJ awarded Credit Suisse partial cooperation credit of 15% off the bottom of the US Sentencing Guidelines range, acknowledging the bank's efforts in producing voluminous evidence, requiring employees to be available for interviews, and voluntarily providing information and factual presentations.<sup>196</sup> Based on Credit Suisse's remedial efforts—including implementing additional controls, procedures, and policies related to government-backed loans; imposing discipline on involved employees; and implementing additional compliance training—the DOJ determined that an independent monitor was unnecessary.<sup>197</sup> The DOJ assessed a penalty of \$247.5 million against Credit Suisse, but Credit Suisse and CSSEL were required to pay only \$175.6 million of the criminal penalty to the DOJ, as the Department credited the remaining amount of the total criminal penalty for payments made to the SEC and the UK FCA.<sup>198</sup>

## B. Monitorships

The COVID-19 pandemic has continued to present substantial challenges limiting the efforts of companies and monitorship teams that are seeking to comply with the terms of existing monitorships, and it may have also temporarily affected the government's willingness to impose new monitorships during this period. With most audits and site visits being conducted remotely due to travel restrictions in place during 2020 and 2021, certain activities, such as interviewing relevant personnel and shadowing key compliance and control functions, were inevitably made less effective than when conducted via in-person visits. However, as travel restrictions eased and the global rate of vaccination increased, some monitorships resumed in-person visits during the latter half of 2021 and may return to full in-person testing in 2022.

As we reported in the last Year-in-Review, none of the FCPA resolutions in 2020 involved the imposition of an independent compliance monitor, even where companies had previously settled FCPA charges with the government, despite numerous resolutions involving large penalties during the year.<sup>199</sup> Instead, the DOJ required in these resolutions that the corporate entities provide periodic self-reports regarding remediation and implementation of compliance measures. Similarly, in 2021, there were no monitorships imposed by the DOJ or SEC related to the settlement of FCPA charges.<sup>200</sup> In addition to the pandemic-related issues mentioned above, several factors may

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lack of a nexus between Boustani's conduct and the United States. Indictment, *United States v. Jean Boustani et al.*, No. 1:18-CR-00681, at 42 (E.D.N.Y. Dec. 19, 2018); Clara Hudson, *Boustani acquitted in Mozambique corruption case*, GLOBAL INVESTIGATIONS REV. (Dec. 2, 2019), <https://globalinvestigationsreview.com/just-anti-corruption/boustani-acquitted-in-mozambique-corruption-case>.

<sup>196</sup> Deferred Prosecution Agreement, *United States v. Credit Suisse Group AG*, No. 21-CR-00521, ¶¶ 4(a)-(c) (E.D.N.Y. Oct. 19, 2021).

<sup>197</sup> Deferred Prosecution Agreement, *United States v. Credit Suisse Group AG*, No. 21-CR-00521, ¶¶ 4(f), (h), (l) (E.D.N.Y. Oct. 19, 2021).

<sup>198</sup> US Department of Justice Press Release No. 21-1024: Credit Suisse Resolves Fraudulent Mozambique Loan Case in \$547 Million Coordinated Global Resolution (Oct. 19, 2021) (additionally noting that Credit Suisse was assessed more than \$547 million in penalties, fines, and disgorgement, and that the bank would pay approximately \$475 million to US and UK authorities).

<sup>199</sup> WilmerHale, *Global Anti-Bribery Year-in-Review: 2020 Developments and Predictions for 2021*, at 47 (Jan. 28, 2021), <https://www.wilmerhale.com/en/insights/client-alerts/20210126-2020-global-antibribery-yearinreview>.

<sup>200</sup> Only one monitorship was imposed by the DOJ in 2021 by its Market Integrity and Major Frauds (MIMF) Unit on the Bank of Nova Scotia, which entered a deferred prosecution agreement to resolve price manipulation

account for the continued absence of this corrective measure, including the fact that companies may be remediating earlier and investing more in their compliance programs in advance of the resolution phase.

Because no new monitors have been appointed during the last two years, only three FCPA monitorships remain active, including Fresenius Medical Care (initiated in 2019), Mobile TeleSystems PJSC (initiated in 2019), and Telefonaktiebolaget LM Ericsson (Ericsson) (initiated in 2020).<sup>201</sup>

Recent DOJ guidance, however, signals that the government may again impose monitorships more readily in 2022 and beyond. In the October 2021 memorandum and speech discussed in further detail in Section II.C.3 above, DAG Monaco addressed certain aspects of the 2018 guidance articulated by then-Assistant Attorney General Brian Benczkowski regarding the imposition of monitors (the “2018 Monitor Memo”),<sup>202</sup> which had underscored among other points that establishing a corporate monitor should be considered the exception and not the rule. Although DAG Monaco affirmed in her speech that, consistent with the 2018 Monitor Memo, prosecutors should continue to weigh the benefit of a monitor against the associated costs and burdens imposed on the company, she stated that the DOJ would now be “free to require the imposition of independent monitors whenever it is appropriate to do so” in order to satisfy compliance and disclosure obligations in a company’s settlement agreements.<sup>203</sup> In her memorandum, DAG Monaco also emphasized that the DOJ should favor the imposition of a monitor where a corporation’s compliance program and controls were untested, ineffective, or inadequately implemented at the time of resolution.<sup>204</sup>

### **C. Settlement Breaches**

In October 2021, the DOJ outlined several policy and guidance changes that reflected its intention to scrutinize settlements with corporations to identify potential breaches. In his October 2021 speech outlined in Section II.C.2 above, PDAG Carlin previewed these changes with his comment that NPAs, DPAs, and other corporate resolutions are only the start of a company’s obligations,

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charges. See US Department of Justice, List of Independent Compliance Monitors for Active Fraud Section Monitorships (Nov. 4, 2021), <https://www.justice.gov/criminal-fraud/monitorships>; see also US Department of Justice Press Release No. 20-794: The Bank of Nova Scotia Agrees To Pay \$60.4 Million in Connection with Commodities Price Manipulation Scheme (Aug. 19, 2020).

<sup>201</sup> See US Department of Justice, *List of Independent Compliance Monitors for Active Fraud Section Monitorships* (Nov. 4, 2021), <https://www.justice.gov/criminal-fraud/monitorships>.

<sup>202</sup> Brian A. Benczkowski, Assistant Attorney General, DOJ, Selection of Monitors in Criminal Division Matters (Oct. 11, 2018), <https://www.justice.gov/opa/speech/file/1100531/download>.

<sup>203</sup> Lisa O. Monaco, Deputy Attorney General, DOJ, Keynote Address at ABA’s 36th National Institute on White Collar Crime (Oct. 28, 2021), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute>.

<sup>204</sup> Lisa O. Monaco, Deputy Attorney General, DOJ, Memorandum on Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies (Oct. 28, 2021), <https://www.justice.gov/dag/page/file/1445106/download>.

indicating clearly that the DOJ is “going to enforce” in circumstances where companies violate the terms of the resolutions they reach with the DOJ.<sup>205</sup>

This approach was reemphasized by DAG Monaco, who announced that the DOJ will carefully “study[] ... whether companies under the terms of an NPA or DPA take those obligations seriously enough.”<sup>206</sup> DAG Monaco minced no words, explicitly stating that “DPAs and NPAs are not a free pass,” and that the Department will “have no tolerance for companies that take advantage of [DPAs and NPAs] by going on to continue to commit crimes, particularly if they then compound their wrongdoing by knowingly hiding it from the government.” She explained that it would be “hard ... to think of more outrageous behavior by a company that has entered into a DPA or NPA in the first place,” and she promised to “hold accountable any company that breaches the terms of its DPA or NPA.”<sup>207</sup> According to DAG Monaco, the newly created Corporate Crime Advisory Group will also have oversight regarding the DOJ’s considerations about compliance with the terms of NPAs, DPAs, and guilty pleas in corporate resolutions.<sup>208</sup>

DAG Monaco also noted that the DOJ had already begun to deliver on its promise to monitor companies’ compliance with the terms of its resolutions. Indeed, in October, the Department notified two multinational corporations that they had breached the terms of their resolutions with the DOJ.<sup>209</sup> One of these companies, Ericsson, had entered into its DPA in 2019 “for conspir[ing] ... to violate the FCPA” by “bribing government officials,” “falsifying books and records and fail[ing] to implement reasonable internal accounting controls” related to its business conduct in Djibouti, China, Vietnam, Indonesia, and Kuwait.<sup>210</sup> According to Ericsson’s press release, the DOJ’s correspondence indicated the Department’s view “that Ericsson breached its obligations under the DPA by failing to provide certain documents and factual information,” and the government noted that Ericsson would “have the opportunity to respond in writing to explain the nature and

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<sup>205</sup> *John Carlin on stepping up DOJ corporate enforcement*, GLOBAL INVESTIGATIONS REV. (Oct. 11, 2021), <https://globalinvestigationsreview.com/news-and-features/in-house/2020/article/john-carlin-stepping-doj-corporate-enforcement>.

<sup>206</sup> Lisa O. Monaco, Deputy Attorney General, DOJ, Keynote Address at the ABA’s 36th National Institute on White Collar Crime (Oct. 28, 2021), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute>.

<sup>207</sup> Lisa O. Monaco, Deputy Attorney General, DOJ, Keynote Address at the ABA’s 36th National Institute on White Collar Crime (Oct. 28, 2021) <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute>.

<sup>208</sup> Lisa O. Monaco, Deputy Attorney General, DOJ, Keynote Address at the ABA’s 36th National Institute on White Collar Crime (Oct. 28, 2021), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute>.

<sup>209</sup> Lisa O. Monaco, Deputy Attorney General, DOJ, Memorandum on Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies (Oct. 28, 2021), <https://www.justice.gov/dag/page/file/1445106/download>. DAG Monaco alluded to Swedish telecommunications equipment maker Ericsson, which announced on October 21, 2021 that the DOJ stated that it had breached its obligations under its DPA with the DOJ by failing to provide certain documents and factual information. See Telefonaktiebolaget LM Ericsson Press Release: Update on Deferred Prosecution Agreement (Oct. 21, 2021), <https://www.ericsson.com/en/press-releases/2021/10/update-on-deferred-prosecution-agreement>.

<sup>210</sup> US Department of Justice Press Release No. 19-1360: Ericsson Agrees to Pay Over \$1 Billion to Resolve FCPA Case (Dec. 6, 2019).

circumstances of such breach, as well as the actions Ericsson has taken to address and remediate the situation.”<sup>211</sup>

While the DOJ’s recent guidance makes clear that it plans to focus more intensely on companies’ compliance with their settlement terms, it remains unclear exactly *what* the DOJ will require from companies under ongoing disclosure obligations. Indeed, companies have historically struggled to read the tea leaves on what the disclosure obligations entail in practical terms, including the extent and types of potential issues that companies must disclose and the level of detail required in those disclosures. It is not uncommon for large companies to identify and disclose new or additional problematic conduct during the course of an NPA or DPA (and/or following an SEC cease-and-desist order), and in most cases the government has not declared a breach or pursued additional charges. According to AAG Polite, there has been a noticeable uptick in allegations flagged by companies, especially those that have entered into DPAs or NPAs with the DOJ, involving misconduct within the Department’s purview, even when the potential issues are minor in nature, but he stated that “[n]ot everything is going to warrant a DOJ response or even follow up inquiry.”<sup>212</sup>

Additionally, little guidance exists as to the kinds of potential or actual violations that will be viewed by the DOJ as sufficiently serious to constitute a breach. And because issues that come to the attention of the DOJ that do not constitute a breach are typically not made public, outside observers may not see the full picture of conduct that is considered by the DOJ to cross the line. These issues may become further complicated when monitors are more frequently imposed in DOJ resolutions, as the monitorship process may uncover new facts that also need to be considered for disclosure to the Department.

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

##### **1. Renewed Focus on Individual Prosecutions**

2021 marked the second year in a row of a decline in individual enforcement actions, following the 2019 record of 44 DOJ cases. In 2021, the DOJ brought charges against 16 individuals, compared with 25 in 2020.<sup>213</sup> The SEC’s individual enforcement actions have also been on a steady decline, with only one case brought in 2021 compared to three in 2020 and six in 2019.

Perhaps recognizing the drop-off in cases against individuals in recent years, DAG Monaco announced that the DOJ would be reinstating the original language of the 2015 Memorandum on

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<sup>211</sup> Telefonaktiebolaget LM Ericsson Press Release: Update on Deferred Prosecution Agreement (Oct. 21, 2021), <https://www.ericsson.com/en/press-releases/2021/10/update-on-deferred-prosecution-agreement>.

<sup>212</sup> Clara Hudson, *Companies are erring on the side of caution, says Criminal Division chief*, GLOBAL INVESTIGATIONS REV. (Dec. 1, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/criminal-division-chief-companies-are-erring-the-side-of-caution>.

<sup>213</sup> Though our 2020 Global Anti-Bribery Year-in-Review noted that the DOJ charged 24 individuals, this number has been updated to account for criminal charges against individuals that were brought in 2020 but unsealed in 2021.



Individual Accountability for Corporate Wrongdoing, also known as the Yates Memorandum,<sup>214</sup> requiring that corporations disclose non-privileged information about *all* employees involved in misconduct in order to receive *any* cooperation credit.<sup>215</sup> In 2018, the Barr-led DOJ had pared back the Yates Memorandum “all or nothing” guidance, instead allowing companies discretion in evaluating individual involvement and only requiring companies to disclose information regarding individuals “substantially involved in or responsible for” the criminal conduct.<sup>216</sup>

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

The DOJ brought or resolved non-FCPA charges against 13 individuals in 2021, including seven against foreign officials, in connection with their roles in bribery schemes and related conduct. These cases demonstrate a continuing trend of the DOJ using money laundering charges in bribery schemes, not only directed at foreign officials who received bribe payments, but also individuals making such payments, whose conduct may have been covered by the FCPA.<sup>217</sup>

### a) PDVSA Officials

Following Sargeant Marine Inc.’s guilty plea in September 2020,<sup>218</sup> Daniel Comoretto Gomez, a former Manager at PDVSA, pleaded guilty in January 2021 to one count of conspiracy to commit money laundering for accepting bribes in connection with a scheme to aid asphalt companies, including Sargeant Marine, in obtaining and retaining business with PDVSA.<sup>219</sup>

In March 2021, Jose Luis De Jongh Atencio (De Jongh), a former procurement officer and manager of the Special Projects Group at Citgo Petroleum Corporation, a PDVSA subsidiary, pleaded guilty to one count of conspiracy to commit money laundering.<sup>220</sup> De Jongh accepted more than \$7

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<sup>214</sup> Lisa O. Monaco, Deputy Attorney General, DOJ, Memorandum on Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies (Oct. 28, 2021), <https://www.justice.gov/dag/page/file/1445106/download>; Sally Q. Yates, Deputy Attorney General, DOJ, Memorandum on Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), <https://www.justice.gov/archives/dag/file/769036/download>. For further discussion of DAG Monaco’s guidance, see Section II.C.3.

<sup>215</sup> Sally Q. Yates, Deputy Attorney General, DOJ, Memorandum on Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), <https://www.justice.gov/archives/dag/file/769036/download>.

<sup>216</sup> US Department of Justice, Principles of Federal Prosecution, JUSTICE MANUAL § 9-27.700, <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.700>; Rod. J. Rosenstein, Deputy Attorney General, DOJ, Remarks at the American Conference Institute’s 35th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2018), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0>.

<sup>217</sup> WilmerHale, *Global Anti-Bribery Year-in-Review: 2020 Developments and Predictions for 2021*, at 58-60 (Jan. 28, 2021), <https://www.wilmerhale.com/en/insights/client-alerts/20210126-2020-global-antibribery-yearinreview>.

<sup>218</sup> Information, *United States v. Sargeant Marine Inc.*, No. 20-CR-00363 (E.D.N.Y. Sept. 23, 2020).

<sup>219</sup> Information, *United States v. Gomez*, No. 21-CR-00014 (E.D.N.Y. Jan. 27, 2021).

<sup>220</sup> Plea Agreement, *United States v. Jose Luis De Jongh-Atencio*, No. 4:20-CR-00305 (S.D. Tex. Mar. 22, 2021); US Department of Justice Press Release No. 21-258: Former Venezuelan Official Pleads Guilty in Connection with International Bribery and Money Laundering Scheme (Mar. 23, 2021). The Superseding Indictment included nine additional charges, including additional money laundering and conspiracy charges.

million in bribe payments as well as extravagant gifts in exchange for helping individuals and companies obtain Citgo contracts and providing other business advantages.<sup>221</sup> De Jongh laundered the bribe payments by transferring them through bank accounts in the name of shell companies he controlled in Panama and Switzerland, by issuing false invoices to conceal the nature of the illegal proceeds, and by purchasing real property in Houston.<sup>222</sup> As part of his plea agreement, De Jongh agreed to forfeit over \$3 million and 15 real estate holdings.<sup>223</sup> In early 2021, the DOJ unsealed a 2019 plea agreement for former Citgo official Laymar Giosse Peña Torrealba in connection with the same scheme. Though she faced a potential maximum sentence of five years, prosecutors recommended a reduced sentence (three years of probation) for providing substantial assistance in their investigation.<sup>224</sup> Section III.D.7 below includes further discussion of sentencing trends.

Carmelo Antonio Urdaneta Aqui (Urdaneta), the former legal counsel to Venezuela's Ministry of Oil and Mining, pleaded guilty to one charge of conspiracy to commit money laundering.<sup>225</sup> Urdaneta was one of eight defendants charged in connection with a billion-dollar scheme to launder funds embezzled from PDVSA that PDVSA received through bribery and fraud.<sup>226</sup> Urdaneta admitted that, in exchange for receiving a portion of those illicit proceeds, he had created the legal mechanism by which a scheme to manipulate Venezuela's fixed foreign currency exchange rate, which valued Venezuelan Bolivars artificially high compared to the open foreign currency exchange market, operated.<sup>227</sup> As part of the plea agreement, Urdaneta agreed to forfeit \$49.2 million, three Florida real estate holdings, four properties in Panama, and the contents of a Swiss bank account.<sup>228</sup>

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Superseding Indictment, *United States v. Jose Luis De Jongh-Atencio*, No. 4:20-CR-00305 (S.D. Tex. Dec. 16, 2020); see also WilmerHale, *Global Anti-Bribery Year-in-Review: 2020 Developments and Predictions for 2021*, at 52-53 (Jan. 28, 2021), <https://www.wilmerhale.com/en/insights/client-alerts/20210126-2020-global-antibribery-yearinreview>.

<sup>221</sup> Plea Agreement, *United States v. De Jongh-Atencio*, No. 20-CR-00305, ¶ 16 (S.D. Tex. Mar. 22, 2021); Superseding Indictment, *United States v. De Jongh-Atencio*, No. 20-CR-00305, ¶¶ 23-53 (S.D. Tex. Dec. 16, 2020). Two individuals who paid bribes to De Jongh previously pleaded guilty. Jose Manuel Gonzalez Testino (Gonzalez), a dual US-Venezuelan citizen, pleaded guilty in 2019. US Department of Justice Press Release No. 19-593: Business Executive Pleads Guilty to Foreign Bribery Charges in Connection with Venezuela Bribery Scheme (May 29, 2019); see also WilmerHale, *Global Anti-Bribery Year-in-Review: 2020 Developments and Predictions for 2021*, at 52 (Jan. 28, 2021), <https://www.wilmerhale.com/en/insights/client-alerts/20210126-2020-global-antibribery-yearinreview>.

<sup>222</sup> Plea Agreement, *United States v. De Jongh-Atencio*, No. 20-CR-00305, ¶¶ 1, 16 (S.D. Tex. Mar. 22, 2021); Superseding Indictment, *United States v. De Jongh-Atencio*, No. 20-CR-00305, ¶¶ 54-64 (S.D. Tex. Dec. 16, 2020).

<sup>223</sup> Agreed Preliminary Order of Forfeiture, *United States v. De Jongh-Atencio*, No. 20-CR-00305, ¶¶ 1-2 (S.D. Tex. Mar. 22, 2021).

<sup>224</sup> Ines Kagubare, *Former Citgo official sentenced to probation*, GLOBAL INVESTIGATIONS REV. (Nov. 22, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/bribery/former-citgo-official-sentenced-probation>.

<sup>225</sup> Plea Agreement, *United States v. Urdaneta Aqui*, No. 18-CR-20685 (S.D. Fla. July 14, 2021).

<sup>226</sup> *United States v. Gruceaga et al*, No. 18-CR-20685 (S.D. Fla. Aug. 16, 2018).

<sup>227</sup> Plea Agreement, *United States v. Urdaneta Aqui*, No. 18-CR-20685 (S.D. Fla. July 14, 2021); Factual Proffer, *United States v. Urdaneta Aqui*, No. 18-CR-20685, ¶ 2 (S.D. Fla. July 14, 2021).

<sup>228</sup> Preliminary Order of Forfeiture, *United States v. Urdaneta Aqui*, No. 18-CR-20685 (S.D. Fla. Aug. 5, 2021).

**b) John Luzuriaga Aguinaga and Jorge Cherrez Miño**

In March 2021, the DOJ unsealed charges against Ecuadorian citizens John Luzuriaga Aguinaga (Luzuriaga) and Jorge Cherrez Miño (Cherrez).<sup>229</sup> The DOJ charged both with one count of conspiracy to commit money laundering based on underlying conduct that violated the FCPA and Ecuadorian bribery law,<sup>230</sup> but neither was charged with any substantive FCPA violations.

Cherrez was the manager, president, and director of a group of investment companies based in Florida.<sup>231</sup> Luzuriaga was the Risk Director for the Instituto de Seguridad Social de la Policia Nacional (ISSPOL), the public institution that manages Ecuadorian police officers' social security contributions.<sup>232</sup> The DOJ alleged that between 2014 and 2020, Cherrez paid approximately \$2.6 million in bribes to ISSPOL officials, including approximately \$1.4 million to Luzuriaga, for purposes of winning and retaining business from ISSPOL.<sup>233</sup> Among the evidence in the complaints is a text message from Luzuriaga to Cherrez in December 2015: "Thank you for fixing my financial life and that of my family."<sup>234</sup>

**c) Luis Alvarez Villamar**

In a related case, Luis Alvarez Villamar (Alvarez) pleaded guilty in July 2021 to a single count of conspiracy to commit money laundering.<sup>235</sup> Alvarez, a manager at an Ecuadorian securities clearinghouse,<sup>236</sup> received over \$3 million in bribes from Cherrez, including cash and an apartment in Miami, in exchange for allowing Cherrez's companies to take custody and control of ISSPOL's investments.<sup>237</sup> This arrangement allowed Cherrez to directly manage ISSPOL securities without oversight from Alvarez's firm.<sup>238</sup> According to Alvarez's allocution in support of his guilty plea,

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<sup>229</sup> US Department of Justice Press Release No. 21-192: Two Men Charged in Ecuadorian Bribery and Money Laundering Scheme (Mar. 2, 2021).

<sup>230</sup> Complaint, *United States v. Aguinaga*, No. 21-MJ-02270, ¶ 3 (S.D. Fla. Feb. 11, 2021); Complaint, *United States v. Miño*, No. 21-MJ-02326, ¶ 3 (S.D. Fla. Feb. 22, 2021).

<sup>231</sup> Complaint, *United States v. Miño*, No. 21-MJ-02326, ¶ 11 (S.D. Fla. Feb. 22, 2021).

<sup>232</sup> Complaint, *United States v. Aguinaga*, No. 21-MJ-02270, ¶ 9 (S.D. Fla. Feb. 11, 2021).

<sup>233</sup> Complaint, *United States v. Aguinaga*, No. 21-MJ-02270, ¶ 15 (S.D. Fla. Feb. 11, 2021); Complaint, *United States v. Miño*, No. 21-MJ-02326, ¶ 15 (S.D. Fla. Feb. 22, 2021).

<sup>234</sup> Complaint, *United States v. Aguinaga*, No. 21-MJ-02270, ¶ 29 (S.D. Fla. Feb. 11, 2021); Complaint, *United States v. Miño*, No. 21-MJ-02326, ¶ 29 (S.D. Fla. Feb. 22, 2021).

<sup>235</sup> Plea Agreement, *United States v. Villamar*, No. 21-CR-20308 (S.D. Fla. July 7, 2021).

<sup>236</sup> Factual Proffer In Support of Guilty Plea, *United States v. Villamar*, No. 21-CR-20308, 2 (S.D. Fla. July 7, 2021).

<sup>237</sup> Factual Proffer In Support of Guilty Plea, *United States v. Villamar*, No. 21-CR-20308, 2-3 (S.D. Fla. July 7, 2021).

<sup>238</sup> Factual Proffer In Support of Guilty Plea, *United States v. Villamar*, No. 21-CR-20308, 3 (S.D. Fla. July 7, 2021).

Alvarez knew that the bribe payments he received from Cherrez were derived from the ISSPOL bribery scheme.<sup>239</sup> Alvarez is awaiting sentencing.

**d) Arturo Murillo, Sergio Mendez, Luis Berkman, Bryan Berkman, and Philip Lichtenfeld**

In May 2021, Arturo Carlos Murillo Prijic (Murillo), Sergio Rodrigo Mendez Mendizabal (Mendez), Luis Berkman, Bryan Berkman, and Philip Lichtenfeld were arrested for criminal charges related to their alleged roles in a bribery and money laundering scheme that spanned from November 2019 to April 2020.<sup>240</sup>

The DOJ alleged that Luis Berkman, Bryan Berkman, and Lichtenfeld paid at least \$582,000 in bribes to Mendez and at least \$20,000 to an unnamed Bolivian government official so that Bryan Berkman's Florida-based company would obtain and retain a contract, worth approximately \$5.6 million, to provide tear gas and other non-lethal equipment to the Bolivian Ministry of Defense.<sup>241</sup> The DOJ further alleged that the Berkmans and Lichtenfeld laundered payments to Bolivian government officials through bank accounts in Florida and Bolivia.<sup>242</sup>

In September 2021, Mendez and Luis Berkman pleaded guilty to conspiracy to commit money laundering, and Bryan Berkman and Lichtenfeld pleaded guilty to conspiracy to violate the FCPA.<sup>243</sup> According to court documents, Mendez received a \$582,000 bribe<sup>244</sup> and Luis Berkman received approximately \$649,975 in corrupt proceeds.<sup>245</sup> The fact that they received bribes may explain why they pleaded guilty to money laundering charges as opposed to FCPA charges, whereas Lichtenfeld was the primary coordinator of the \$582,000 bribe to Mendez,<sup>246</sup> and Bryan Berkman and Lichtenfeld allegedly coordinated most of the wire transfers to Luis Berkman, perhaps

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<sup>239</sup> Factual Proffer In Support of Guilty Plea, *United States v. Villamar*, No. 21-CR-20308, 3 (S.D. Fla. July 7, 2021).

<sup>240</sup> US Department of Justice Press Release No. 21-489: Former Minister of Government of Bolivia, Owner of Florida-Based Company, and Three Others Charged in Bribery and Money Laundering Scheme (May 26, 2021).

<sup>241</sup> US Department of Justice Press Release No. 21-489: Former Minister of Government of Bolivia, Owner of Florida-Based Company, and Three Others Charged in Bribery and Money Laundering Scheme (May 26, 2021); Complaint, *United States v. United States v. Berkman et al*, No. 21-MJ-06320, ¶¶ 12, 13, 20 (S.D. Fla. May 20, 2021).

<sup>242</sup> US Department of Justice Press Release No. 21-489: Former Minister of Government of Bolivia, Owner of Florida-Based Company, and Three Others Charged in Bribery and Money Laundering Scheme (May 26, 2021); Complaint, *United States v. United States v. Berkman et al*, No. 21-MJ-06320, ¶¶ 12, 21 (S.D. Fla. May, 20, 2021).

<sup>243</sup> Plea Agreement, *United States v. Bryan Berkman*, No. 21-CR-60255, ¶ 2 (S.D. Fla. Sept. 29, 2021); Plea Agreement, *United States v. Lichtenfeld*, No. 21-CR-60256, ¶ 2 (S.D. Fla. Sept. 29, 2021).

<sup>244</sup> Complaint, *United States v. Berkman et al*, No. 21-MJ-06320, ¶ 39 (S.D. Fla. May 20, 2021).

<sup>245</sup> Factual Proffer, *United States v. Luis Berkman*, No. 21-CR-60258, ¶ 24 (S.D. Fla. Sept. 29, 2021).

<sup>246</sup> Complaint, *United States v. Berkman et al*, No. 21-MJ-06320, ¶¶ 39-52 (S.D. Fla. May 20, 2021).

explaining their guilty pleas to the FCPA charges.<sup>247</sup> Murillo, who was also charged with conspiring to commit money laundering, has not entered a plea.

**e) Jose Gregorio Vielma-Mora, Alvaro Pulido Vargas,  
Emmanuel Enrique Rubio Gonzalez, Carlos Rolando  
Lizcano Manrique, and Ana Guillermo Luis**

On October 7, the DOJ filed a five-count indictment against Jose Gregorio Vielma-Mora, the former governor of the Venezuelan state of Táchira, along with Alvaro Pulido Vargas, Emmanuel Enrique Rubio Gonzalez, Carlos Rolando Lizcano Manrique, and Ana Guillermo Luis.<sup>248</sup> The defendants were each charged with one count of conspiracy to commit money laundering and four counts of laundering monetary instruments.<sup>249</sup> Vielma-Mora oversaw Comercializadora de Bienes Y Servicios Del Estado Táchira, the state-owned entity that purchased food for the people in Táchira, and he allegedly received over \$17 million in bribes from his co-defendants in exchange for awarding them inflated contracts to import and distribute food and medicine in Venezuela under the state-run food distribution program Comité Local de Abastecimiento y Producción.<sup>250</sup>

**f) Luis Enrique Martinelli Linares and Ricardo Alberto  
Martinelli Linares**

Finally, in December, Luis Enrique Martinelli Linares and Ricardo Alberto Martinelli Linares, the sons of Panama's former president, both pleaded guilty to one count of conspiracy to commit money laundering for serving as intermediaries for \$28 million in bribe payments from the Brazilian construction conglomerate Odebrecht S.A. to a Panamanian official, in exchange for business advantages in Panama.<sup>251</sup> In addition to the single count of conspiracy to commit money laundering to which they both pleaded guilty, they also were charged with two additional money laundering counts, and Luis Martinelli Linares also was charged with two counts of engaging in transactions in criminally derived property.<sup>252</sup> Following the initial charges in June 2020, the brothers were arrested in Guatemala pursuant to an arrest request from the United States.<sup>253</sup> Luis Enrique Martinelli Linares was ultimately extradited to the United States in November 2021, and Ricardo Alberto

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<sup>247</sup> Factual Proffer, *United States v. Luis Berkman*, No. 21-CR-60258, ¶ 24 (S.D. Fla. Sept. 29, 2021).

<sup>248</sup> Indictment, *United States v. Vargas et al*, 21-CR-20509 (S.D. Fla. Oct. 7, 2021).

<sup>249</sup> Indictment, *United States v. Vargas et al*, 21-CR-20509 (S.D. Fla. Oct. 7, 2021).

<sup>250</sup> Indictment, *United States v. Vargas et al*, 21-CR-20509, ¶¶ 1-35 (S.D. Fla. Oct. 7, 2021); US Department of Justice Press Release No. 21-1036: Five Individuals Charged with Money Laundering in Connection with Alleged Venezuela Bribery Scheme (Oct. 21, 2021).

<sup>251</sup> US Department of Justice Press Release No. 21-1248: Panamanian Intermediary Extradited to the United States Pleads Guilty to International Bribery and Money Laundering Scheme (Dec. 14, 2021); US Department of Justice Press Release No. 21-1195: Panamanian Intermediary Pleads Guilty in Connection with International Bribery and Money Laundering Scheme (Dec. 2, 2021); Indictment, *United States v. Linares et al*, No. 21-CR-00065, ¶ 30 (E.D.N.Y. Feb. 4, 2021).

<sup>252</sup> Indictment, *United States v. Linares et al*, No. 21-CR-00065, ¶ 30 (E.D.N.Y. Feb. 4, 2021).

<sup>253</sup> US Department of Justice Press Release No. 21-1195: Panamanian Intermediary Pleads Guilty in Connection with International Bribery and Money Laundering Scheme (Dec. 2, 2021).

Martinelli Linares was extradited to the United States in December 2021.<sup>254</sup> According to the papers, the Martinelli Linares brothers established offshore bank accounts in the names of offshore shell companies to receive and disguise payments from Odebrecht S.A. made for the benefit of a “close relative” who served from “2009 until in or about 2014,”<sup>255</sup> which matches the time period their father was in office.<sup>256</sup> They also agreed with others to cause the wiring of approximately \$19 million of Odebrecht bribe funds into and out of the United States and used some of the bribe proceeds to buy a yacht and a condominium in the United States.<sup>257</sup> Pursuant to their guilty pleas, the Martinelli Linares brothers agreed to forfeit approximately \$18.9 million and are scheduled to be sentenced in May 2022.<sup>258</sup>

### 3. Bankers as Co-Conspirators

In 2021, the DOJ pursued money laundering charges against foreign bankers who allegedly facilitated corrupt schemes. Peter Weinzierl and Alexander Waldstein, both Austrian bankers, were indicted on charges of conspiracy to commit money laundering, international promotional money laundering, and money laundering spending related to the Odebrecht scheme.<sup>259</sup> According to the indictment, Odebrecht and its co-conspirators—including members of the Division of Structured Operations (DSO), the department created to make unrecorded bribe payments—relied upon Weinzierl and Waldstein to assist in laundering hundreds of millions of dollars.<sup>260</sup>

Weinzierl and Waldstein are alleged to have helped to open Odebrecht shell company accounts for “tax planning,” allowing Odebrecht to move funds off its books and conceal funds in accounts under another name.<sup>261</sup> The bankers also allegedly participated in sham back-to-back transactions that ultimately allowed Odebrecht to conceal funds and lower its tax burden as well as to create slush funds it used to pay bribes to government officials.<sup>262</sup> For example, in exchange for substantial fees, their bank allegedly entered into sham contracts with Odebrecht subsidiaries to purportedly

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<sup>254</sup> US Department of Justice Press Release No. 21-1195: Panamanian Intermediary Pleads Guilty in Connection with International Bribery and Money Laundering Scheme (Dec. 2, 2021); US Department of Justice Press Release No. 21-1248: Panamanian Intermediary Extradited to the United States Pleads Guilty to International Bribery and Money Laundering Scheme (Dec. 14, 2021).

<sup>255</sup> Amended Complaint, *United States v. Linares et al*, No. 21-CR-00065, ¶ 6 (E.D.N.Y. July 20, 2020).

<sup>256</sup> Amended Complaint, *United States v. Linares et al*, No. 21-CR-00065, ¶ 26 (E.D.N.Y. July 20, 2020).

<sup>257</sup> Amended Complaint, *United States v. Linares et al res*, No. 21-CR-00065, ¶ 30 (E.D.N.Y. July 20, 2020); US Department of Justice Press Release No. 21-1195: Panamanian Intermediary Pleads Guilty in Connection with International Bribery and Money Laundering Scheme (Dec. 2, 2021).

<sup>258</sup> US Department of Justice Press Release No. 21-1195: Panamanian Intermediary Pleads Guilty in Connection with International Bribery and Money Laundering Scheme (Dec. 2, 2021); US Department of Justice Press Release No. 21-1248: Panamanian Intermediary Extradited to the United States Pleads Guilty to International Bribery and Money Laundering Scheme (Dec. 14, 2021).

<sup>259</sup> Indictment, *United States v. Weinzierl et al*, No. 20-CR-00383 (E.D.N.Y. Sept. 18, 2020).

<sup>260</sup> Indictment, *United States v. Weinzierl et al*, No. 20-CR-00383, ¶¶ 4, 41-42 (E.D.N.Y. Sept. 18, 2020).

<sup>261</sup> Indictment, *United States v. Weinzierl et al*, No. 20-CR-00383, ¶ 50 (E.D.N.Y. Sept. 18, 2020).

<sup>262</sup> Indictment, *United States v. Weinzierl et al*, No. 20-CR-00383, ¶ 58-59 (E.D.N.Y. Sept. 18, 2020).

provide financial services.<sup>263</sup> Those contracts, and associated payments, were then transferred to third parties controlled by Odebrecht.<sup>264</sup>

Weinzierl was arrested in the UK in May 2021 after flying there on his private jet.<sup>265</sup> Waldstein remains at large.<sup>266</sup>

The Department similarly charged Bank Julius Baer & Co. Ltd. with conspiracy to commit money laundering as part of the sweeping FIFA investigation.<sup>267</sup> The bank admitted that, through its former employee Jose Luis Arzuaga, the bank agreed with sports marketing executives and soccer officials to launder bribes through the United States in furtherance of their scheme by which the marketing companies bribed soccer officials in exchange for grants of broadcasting rights.<sup>268</sup> According to the resolution papers, Arzuaga knowingly executed illegal transactions designed to conceal and disguise bribery proceeds and with the intent to promote honest services wire fraud.<sup>269</sup> The bank entered into a three-year DPA and agreed to pay a fine of over \$43 million and forfeit over \$36 million.<sup>270</sup>

#### 4. Commodities Traders

Following the December 2020 resolution of Vitol Inc.,<sup>271</sup> the DOJ remains focused on its investigations into corruption at global commodities trading firms. In 2021, two former commodities traders entered guilty pleas in connection with their roles in schemes to bribe foreign officials in exchange for oil contracts from state-owned companies.

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<sup>263</sup> Indictment, *United States v. Weinzierl et al.*, No. 20-CR-00383, ¶ 60 (E.D.N.Y. Sept. 18, 2020).

<sup>264</sup> Indictment, *United States v. Weinzierl et al.*, No. 20-CR-00383, ¶ 56 (E.D.N.Y. Sept. 18, 2020).

<sup>265</sup> Jonathan Browning, *Banker Flew Jet to U.K. and Found Cops Waiting With U.S. Charges*, BLOOMBERG (June 2, 2021), <https://www.bloomberg.com/news/articles/2021-06-02/banker-flew-private-jet-to-u-k-airfield-as-cops-lay-in-wait>.

<sup>266</sup> US Department of Justice Press Release No. 21-485: Two Bank Executives Charged for Conspiring to Launder Hundreds of Millions of Dollars Through U.S. Financial System in Connection with Odebrecht Bribery and Fraud Scheme (May 25, 2021).

<sup>267</sup> Information, *United States v. Bank Julius Baer & Co. Ltd.*, No. 21-CR-00273 (May 27, 2021).

<sup>268</sup> Deferred Prosecution Agreement, *United States v. Bank Julius Baer & Co. Ltd.*, No. 21-CR-00273, ¶ 16 (May 27, 2021).

<sup>269</sup> Deferred Prosecution Agreement, *United States v. Bank Julius Baer & Co. Ltd.*, No. 21-CR-00273, ¶ 16 (May 27, 2021).

<sup>270</sup> Deferred Prosecution Agreement, *United States v. Bank Julius Baer & Co. Ltd.*, No. 21-CR-00273, ¶¶ 3, 9, 10 (May 27, 2021).

<sup>271</sup> Deferred Prosecution Agreement, *United States v. Vitol, Inc.*, No. 20-CR-00539 (Dec. 3, 2020); see also WilmerHale, *Global Anti-Bribery Year-in-Review: 2020 Developments and Predictions for 2021*, at 110 (Jan. 28, 2021), <https://www.wilmerhale.com/en/insights/client-alerts/20210126-2020-global-antibribery-yearinreview>.

**a) Raymond Kohut**

Raymond Kohut, a former manager and crude oil trader for Gunvor Group, entered into a guilty plea for money laundering in connection with underlying bribery violations.<sup>272</sup> The DOJ papers alleged that Kohut paid at least \$22 million to PetroEcuador officials in exchange for business from the state-owned oil company. Kohut was a Canadian citizen, who lived in the Bahamas, and was an employee, agent, and independent contractor of Gunvor (described as the Trading Company in the Information), which had subsidiaries around the world, including in the United States. The DOJ alleged that Kohut met with PetroEcuador officials in Florida on multiple occasions to discuss the specifics of contracts for which bribes would be paid.<sup>273</sup> Kohut was ordered to a \$2.2 million forfeiture money judgment.<sup>274</sup>

**b) Anthony Stimler**

In July 2021, Anthony Stimler, a former oil trader at Glencore, pleaded guilty to conspiracy to violate the FCPA and conspiracy to commit money laundering. According to the criminal information, between 2007 and 2018, Stimler and other unnamed co-conspirators paid bribes to foreign officials in multiple countries through the use of intermediaries.<sup>275</sup> Stimler, a UK citizen and resident, worked on the West Africa desk and was responsible for crude oil purchases from Nigeria, among other countries.<sup>276</sup> The information alleged that the co-conspirators used coded language to refer to bribe payments and inflated payments due to intermediaries for the purpose of passing on payments to foreign officials in exchange for more favorable delivery terms and grades of crude.<sup>277</sup>

**5. Use of Intermediaries and Sham Consulting Contracts and Invoices**

As exemplified in some of the cases already discussed above, the use of intermediaries and consultants continues to be an area of significant FCPA risk. The cases below provide examples of using both third party intermediaries as conduits for bribe payments to government officials as well as the use of inflated or sham contracts (not necessarily through the use of a third party) to conceal the purpose of payments.

**a) Carlos Enrique Urbano Fermin**

Carlos Enrique Urbano Fermin (Urbano) pleaded guilty to conspiracy to commit money laundering for paying approximately \$1 million in bribes through an intermediary to a Venezuelan government

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<sup>272</sup> Information, *United States v. Kohut*, No. 21-CR-00115 (E.D.N.Y. Apr. 6, 2021).

<sup>273</sup> Information, *United States v. Kohut*, No. 21-CR-00115 (E.D.N.Y. Apr. 6, 2021).

<sup>274</sup> Order of Forfeiture, *United States v. Kohut*, No. 21-CR-00115 (E.D.N.Y. Apr. 6, 2021).

<sup>275</sup> Information, *United States v. Stimler*, No. 21-CR-00471, ¶ 1 (S.D.N.Y. July 26, 2021).

<sup>276</sup> Information, *United States v. Stimler*, No. 21-CR-00471, ¶ 5 (S.D.N.Y. July 26, 2021).

<sup>277</sup> Information, *United States v. Stimler*, No. 21-CR-00471, ¶ 19 (S.D.N.Y. July 26, 2021).



official in exchange for the official's assistance in preventing criminal charges being brought against Urbano's companies.<sup>278</sup>

**b) Naman Wakil**

Naman Wakil was arrested in August 2021 on charges of conspiracy to violate the FCPA, violating the FCPA, conspiracy to commit money laundering, international laundering of monetary instruments, and three counts of engaging in transactions involving criminally derived property.<sup>279</sup> Wakil is alleged to have owned and controlled various companies that received funds from the Corporacion de Abastecimiento y Servicios Agricola (CASA), the Venezuela state-owned and state-controlled food company, and PDVSA. The DOJ alleged that Wakil paid bribes to CASA and PDVSA officials to secure contracts for his companies worth approximately \$280 million, including highly inflated contracts. In order to conceal the nature of the bribes, Wakil allegedly provided false invoices indicating that the payments were for logistical services and customs paperwork, among other services.<sup>280</sup> Wakil allegedly used the proceeds of the scheme to purchase, among other things, ten apartments in Florida, a \$3.5 million airplane, and a \$1.5 million yacht.<sup>281</sup>

**c) Frederick Cushmore Jr.**

Frederick Cushmore Jr., the former Vice President and Head of International Sales at Pennsylvania-based coal mining company Corsa Coal, pleaded guilty in November 2021 to a single count of conspiracy to violate the anti-bribery provisions of the FCPA.<sup>282</sup> According to the information, Cushmore was responsible for Corsa's business with Al Nasr Company for Coke and Chemicals, a subsidiary of the Egyptian state-owned Metallurgical Industries Holding Company.<sup>283</sup> Cushmore and an unnamed co-conspirator, who was a former Corsa employee, caused the company to pay approximately \$4.8 million in commissions to an agent, intending that a portion of the commissions would be used to pay bribes to Al Nasr officials in exchange for coal contracts and non-public information for Corsa.<sup>284</sup>

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<sup>278</sup> See WilmerHale, *Global Anti-Bribery Year-in-Review: 2020 Developments and Predictions for 2021*, at 52 (Jan. 28, 2021), <https://www.wilmerhale.com/en/insights/client-alerts/20210126-2020-global-antibribery-yearinreview>.

<sup>279</sup> Indictment, *United States v. Wakil*, No. 21-CR-20406 (S.D. Fla. July 29, 2021).

<sup>280</sup> Indictment, *United States v. Wakil*, No. 21-CR-20406, ¶¶ 6, 10 (S.D. Fla. July 29, 2021).

<sup>281</sup> Indictment, *United States v. Wakil*, No. 21-CR-20406, ¶ 11 (S.D. Fla. July 29, 2021).

<sup>282</sup> Ines Kagubare, *Former coal exec pleads guilty in Egyptian corruption case*, GLOBAL INVESTIGATIONS REV. (Nov. 17, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/bribery/former-coal-exec-pleads-guilty-in-egyptian-corruption-case>.

<sup>283</sup> Information, *United States v. Cushmore Jr.*, No. 21-CR-00455, ¶¶ 3, 12-21 (W.D. Pa. Nov. 3, 2021).

<sup>284</sup> Information, *United States v. Cushmore Jr.*, No. 21-CR-00455, ¶¶ 16-17, 19 (W.D. Pa. Nov. 3, 2021).

**d) Naeem Riaz Tyab, Mahamoud Adam Bechir, Youssouf Hamid Takane, Nouracham Bechir Niam**

A 2019 indictment against the Republic of Chad's former Ambassador to the United States and Canada, Mahamoud Adam Bechir, and the country's former Deputy Chief of Mission for the United States and Canada, Youssouf Hamid Takane, was unsealed in May 2021.<sup>285</sup> In exchange for the award of oil contracts and rights from the government of Chad, Naeem Riaz Tyab, the founding shareholder of a Canadian energy company, allegedly made bribe payments to Bechir and Takane.<sup>286</sup> Tyab transferred shares in the company to the two diplomats and paid \$2 million to a company held in the name of Bechir's wife, Nouracham Bechir Niam.<sup>287</sup>

As the alleged bribe recipients, Bechir and Takane were charged with conspiracy to commit money laundering.<sup>288</sup> In addition to the money laundering conspiracy charges, Niam and Tyab were charged with conspiracy to violate the FCPA.<sup>289</sup> Niam and Bechir were also charged with concealment money laundering, and the government is seeking forfeiture against all four defendants.<sup>290</sup> In 2019, Tyab pleaded guilty to one count of conspiracy to violate the FCPA and agreed to forfeit approximately \$27 million.<sup>291</sup> The other three defendants remain at large.

**e) Afework Bereket**

In another indictment unsealed in 2021, the DOJ charged Afework Bereket, a former employee of Telefonaktiebolaget LM Ericsson, with one count of conspiracy to violate the FCPA.<sup>292</sup> The government alleged that Bereket, an employee of Ericsson Egypt, engaged in a scheme to bribe foreign officials in Djibouti in order to obtain business with a state-owned telecommunications company. The approximately \$2.1 million in bribe payments were alleged to have been paid to a consultant company connected to an official in Djibouti, with which Ericsson had entered into a sham contract.<sup>293</sup>

**6. Additional Resolutions in Worldwide Adoption Agency Schemes**

In November 2021, Debra Parris, an employee of an American adoption agency, pleaded guilty to conspiracy to violate the FCPA, conspiracy to commit visa fraud, and conspiracy to defraud the

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<sup>285</sup> Indictment, *United States v. Tyab et al*, No. 19-CR-00038 (D.D.C. Feb. 7, 2019).

<sup>286</sup> Indictment, *United States v. Tyab et al*, No. 19-CR-00038, ¶ 14 (D.D.C. Feb. 7, 2019).

<sup>287</sup> Indictment, *United States v. Tyab et al*, No. 19-CR-00038, ¶¶ 19, 39-56 (D.D.C. Feb. 7, 2019).

<sup>288</sup> Indictment, *United States v. Tyab et al*, No. 19-CR-00038, ¶ 57 (D.D.C. Feb. 7, 2019).

<sup>289</sup> Indictment, *United States v. Tyab et al*, No. 19-CR-00038, ¶¶ 13, 57 (D.D.C. Feb. 7, 2019).

<sup>290</sup> Indictment, *United States v. Tyab et al*, No. 19-CR-00038, ¶¶ 59, 61, 63 (D.D.C. Feb. 7, 2019).

<sup>291</sup> US Department of Justice Press Release No. 21-479: Charges Unsealed Against Former Chadian Diplomats to the U.S. Charged in Connection with International Bribery and Money Laundering Scheme (May 24, 2021).

<sup>292</sup> Indictment, *United States v. Bereket*, No. 20-CR-00283 (S.D.N.Y. June 30, 2020).

<sup>293</sup> Indictment, *United States v. Bereket*, No. 20-CR-00283, ¶ 10 (S.D.N.Y. June 30, 2020).

United States.<sup>294</sup> Parris pleaded guilty to conspiracy to violate the FCPA and conspiracy to commit visa fraud in connection with a scheme by which she and her co-conspirators bribed judges, welfare officers, probation officers, and other Ugandan officials to influence their decisions to place particular children into an orphanage, assign cases to “adoption-friendly” judges, and issue favorable guardianship orders for the agency’s clients.<sup>295</sup> She pleaded guilty to conspiracy to defraud the United States for arranging for the transfer of a child to Parris’s relatives when agency clients determined they could not care for one of two Polish children.<sup>296</sup>

Margaret Cole, the Executive Director of the adoption agency, and Dorah Mirembe, a Ugandan citizen and co-owner of a law firm that provided adoption-related services to the agency, were charged in the same indictment in 2020.<sup>297</sup> Robin Longoria, another employee of the adoption agency who was responsible for managing certain aspects of the Uganda program, was charged separately and pleaded guilty in 2019 to conspiracy to violate the FCPA, conspiracy to commit wire fraud, and conspiracy to commit visa fraud.<sup>298</sup> Cole is scheduled to go to trial on February 7, 2022, while Mirembe remains at large.<sup>299</sup>

## 7. Sentencing Trends

Twenty-two individuals were sentenced in FCPA-related cases in 2021, nine more than in 2020 and five more than in 2019. Defendants in 2021 received an average of approximately 25 months imprisonment, compared to an average of approximately 17 months in 2020, and faced fines ranging from \$10,000 to \$1 million and forfeiture orders ranging from \$36,000 to \$12.3 million. Of the twenty-two individuals, eighteen were sentenced in connection with long-running, cross-jurisdictional investigations into PDVSA (ten individuals), Seguros Sucre (four individuals), PetroEcuador (two individuals), Braskem (one individual) and the United Nations (one individual).

Ten individuals were sentenced in connection with the PDVSA investigation, as compared to two in 2020 and four in 2019. While the ten PDVSA defendants received an average sentence of twenty-two months, two of the defendants avoided prison time entirely due, in part, to their cooperation in the investigation. Edoardo Orsoni, the former General Counsel at PDVSA and PDVSA subsidiary Petrocedeño S.A., received a sentence of only three years’ probation despite the Information noting that he agreed to receive at least \$951,140 in bribes in exchange for his assistance in obtaining

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<sup>294</sup> US Department of Justice Press Release No. 21-1140: Texas Woman Pleads Guilty to Schemes to Procure Adoptions from Uganda and Poland through Bribery and Fraud (Nov. 17, 2021).

<sup>295</sup> Indictment, *United States v. Cole et al*, No. 20-CR-00424, ¶ 7 (N.D. Ohio Aug. 13, 2020).

<sup>296</sup> Indictment, *United States v. Cole et al*, No. 20-CR-00424, ¶ 8 (N.D. Ohio Aug. 13, 2020).

<sup>297</sup> Indictment, *United States v. Cole et al*, No. 20-CR-00424, ¶¶ 2, 4 (N.D. Ohio Aug. 13, 2020).

<sup>298</sup> US Department of Justice Press Release No. 19-921: Texas Woman Pleads Guilty to Conspiracy to Facilitate Adoptions From Uganda Through Bribery and Fraud (Aug. 29, 2019); see also WilmerHale, *Global Anti-Bribery Year-in-Review: 2019 Developments and Predictions for 2021*, at 39 (Jan. 30, 2020), <https://www.wilmerhale.com/en/insights/client-alerts/20200130-global-anti-bribery-year-in-review-2019-developments-and-predictions-for-2020>.

<sup>299</sup> US Department of Justice Press Release No. 21-1140: Texas Woman Pleads Guilty to Schemes to Procure Adoptions from Uganda and Poland through Bribery and Fraud (Nov. 17, 2021).

contracts.<sup>300</sup> Prosecutors pointed to Orsoni's substantial assistance in the prosecution of other defendants in the investigation.<sup>301</sup> In comparison, Lennys Rangel, the former head of procurement for Petrocedeño S.A., who took part in the scheme and admitted to receiving over \$5 million in bribes, was sentenced to twenty-three months in prison.<sup>302</sup>

The sentences issued in connection with the PetroEcuador investigation in 2021 also highlight the importance of cooperation. Businessman Armengol Alfonso Cevallos Diaz (Cevallos) was sentenced to 35 months in prison, followed by three years of supervised release, for sending nearly \$4.4 million in bribes to PetroEcuador officials and laundering money received by PetroEcuador officials in the United States through the use of shell companies and the purchase of Florida real estate.<sup>303</sup> In sentencing him to 35 months in prison, the judge adjusted the sentence significantly downward from the US Sentencing Guidelines range of 108-135 months, citing numerous factors, including Cevallos's cooperation with US authorities.

Another PetroEcuador defendant, Ramiro Andres Luque Flores (Luque) avoided prison despite the DOJ alleging that he made at least \$3.2 million in bribe payments to PetroEcuador officials in exchange for contracts for his hazardous waste removal company.<sup>304</sup> In determining Luque's sentence—four years' probation with the condition of six months monitored home detention—the judge stated that Luque was "first in the door" to cooperate with the government and that his assistance led to the prosecution of five other individuals.<sup>305</sup> Luque cooperated with the investigation by wearing a wire and provided the government with many taped conversations of the targets of the investigation.<sup>306</sup>

Finally, 2021 saw the sentencing of Jose Carlos Grubisich, former CEO of the Brazilian petrochemical company Braskem. This sentencing, which came one year after the conclusion of the Braskem monitorship and almost five years after Braskem settled its case, highlights that individual actions can often reach resolution many years after the company resolves the matter.<sup>307</sup>

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<sup>300</sup> Information, *United States v. Orsoni*, No. 19-CR-20725, ¶¶ 6-8 (S.D. Fla. Nov. 1, 2019).

<sup>301</sup> Judgment, *United States v. Orsoni*, No. 19-CR-20725 (S.D. Fla. Apr. 21, 2021); Clara Hudson, *Former PDVSA general counsel avoids prison*, GLOBAL INVESTIGATIONS REV. (Apr. 21, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/former-pdvsa-general-counsel-avoids-prison>.

<sup>302</sup> Judgment, *United States v. Rangel*, No. 19-CR-20726 (S.D. Fla. Mar. 24, 2021); Plea Agreement, *United States v. Rangel*, No. 19-CR-20726, ¶ 10 (S.D. Fla. Aug. 11, 2020).

<sup>303</sup> Judgment, *United States v. Diaz*, No. 19-CR-20284 (S.D. Fla. Jan. 28, 2021); US Department of Justice Press Release No. 21-107: Businessman Sentenced for Foreign Bribery and Money Laundering Scheme Involving PetroEcuador Officials (Jan. 28, 2021).

<sup>304</sup> Judgment, *United States v. Luque-Flores*, No. 17-CR-00537 (E.D.N.Y. May 17, 2021); Information, *United States v. Luque-Flores*, No. 17-CR-00537, ¶ 15 (E.D.N.Y. Oct. 6, 2017).

<sup>305</sup> Judgment, *United States v. Luque-Flores*, No. 17-CR-00537 (E.D.N.Y. May 17, 2021).

<sup>306</sup> Richard Vanderford, *Petroecuador restitution loss a win for US prosecutors*, MLEX MARKET INSIGHT (Apr. 20, 2021), <https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/anti-bribery-and-corruption/petroecuador-restitution-loss-a-win-for-us-prosecutors>.

<sup>307</sup> US Department of Justice Press Release No. 16-1515: Odebrecht and Braskem Plead Guilty and Agree to Pay at Least \$3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History (Dec. 21, 2016); Clare Hudson, *Braskem's US Settlement Comes to a Close after "Very Positive" Monitorship*, GLOBAL

Grubisich was sentenced to 20 months in prison despite the DOJ seeking a 60-month sentence for his role in diverting approximately \$250 million from Braskem into a secret slush fund that he and his co-conspirators generated through fraudulent contracts and offshore shell companies secretly controlled by Braskem.<sup>308</sup> Grubisich highlighted in his filing in response to the DOJ’s sentencing arguments that “a lengthy sentence in 2021 for what occurred more than a decade earlier seems out of line.”<sup>309</sup>

## E. Declinations and Case Closures

Last year’s Year-in-Review reported that the number of public case closures had dropped significantly compared with certain previous years, and this recent trend continued in 2021. Only four cases were publicly closed in 2021 (as compared to six in 2020, nine in 2019, and 17 in 2018), and the DOJ did not issue any public declinations under its FCPA CEP.<sup>310</sup>

### 1. 2021 FCPA Corporate Enforcement Policy Declinations

As noted above, the DOJ did not issue any public declinations under the CEP in 2021, which continues a downward trend in recent years—from four public declinations in 2018, to two in 2019, to just one in 2020.<sup>311</sup> This steady decline in CEP resolutions may be temporary, or it may be a signal that the DOJ has been receiving fewer voluntary self-disclosures from companies. As discussed above, the DOJ has made numerous public (and non-public) statements regarding a renewed robust approach to white-collar crime. While these statements likely would not have affected voluntary disclosures in 2021, they may well result in this trend continuing (both because companies may be less inclined to voluntarily disclose and because declinations may be less likely for those companies that do choose to voluntarily disclose). For its part, the DOJ has rejected any notion that recent statistics reflect a larger trend. In April 2021, a DOJ spokesperson was quoted as stating that “[t]he precise volume of CEP resolutions—like the volume of individual prosecutions and corporate resolutions—will undoubtedly vary from year to year .... [w]e do not believe the ...

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INVESTIGATIONS REV. (May 20, 2020), <https://globalinvestigationsreview.com/just-anti-corruption/braskemus-settlement-comes-close-after-very-positive-monitorship>.

<sup>308</sup> DOJ Response to Defendant’s Sentencing Memo, *United States v. Grubisich*, No. 19-CR-00102, ¶ 1 (E.D.N.Y. Sept. 15, 2021); US Department of Justice Press Release: Former CEO of Braskem Sentenced to 20 Months in Prison for Foreign Bribery and Securities Law Violations (Oct. 12, 2021).

<sup>309</sup> Letter in Response to Government’s Response, *United States v. Grubisich*, No. 19-CR-00102, ¶¶ 1-2 (E.D.N.Y. Sept. 24, 2021).

<sup>310</sup> For purposes of this publication, instances in which both the DOJ and SEC closed investigations into the same company were counted as a single public case closure. Public declinations under the DOJ FCPA CEP were not included within the total count of public case closures. For clarity, “case closures” are cases in which the DOJ determines not to bring charges, without saying whether that determination was due to lack of evidence or some other discretionary factor. “Declinations,” under the DOJ’s CEP, are cases where the DOJ believes there was a sufficient basis to bring a criminal case but chose to decline to do so based on the factors in the CEP.

<sup>311</sup> US Department of Justice, Declinations (updated Sept. 2, 2021), <https://www.justice.gov/criminal-fraud/corporate-enforcement-policy/declinations>.

results in 2019 and 2020 reflect a ‘lull’ or a downward trend, rather we believe they reflect the natural ebb and flow of our cases.”<sup>312</sup>

## 2. Public Case Closures

In 2021, there were four publicly reported case closures, two fewer than in 2020, and far below the nine reported in 2019 and the 17 reported in 2018.<sup>313</sup> It is worth noting, however, that because many companies do not announce that they are under investigation, they may also not announce a case closure.

In February and May 2021 securities filings, BRF S.A., a global food processing and distribution company, announced that the SEC and DOJ had closed corruption investigations without imposing any sanctions or penalties on the company.<sup>314</sup> Both US authorities had sought information related to BRF’s involvement in the Carne Fraca operation, an investigation by the Brazilian Federal Police into alleged violations that included bribery of government food inspectors.<sup>315</sup> The investigation, announced in March 2017, implicated meat processing companies in Brazil in allegations that the companies had bribed the inspectors in order to sell tainted and/or rotten meat.<sup>316</sup> Initial allegations related to “improper offers and/or promises to government inspectors,” and in 2019, BRF admitted to bribing food inspectors with bank deposits and health benefits.<sup>317</sup> One BRF plant was temporarily suspended, and several current and former BRF employees were arrested in connection with the investigation, including the former CEO and other executives.<sup>318</sup>

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<sup>312</sup> Clara Hudson, *DOJ sees decrease in corporate enforcement policy declinations*, GLOBAL INVESTIGATIONS REV. (Apr. 15, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/fcpa/doj-corporate-enforcement-policy-declinations-decrease>.

<sup>313</sup> WilmerHale, *Global Anti-Bribery Year-in-Review: 2020 Developments and Predictions for 2021* (Jan. 28, 2021), <https://www.wilmerhale.com/en/insights/client-alerts/20210126-2020-global-antibribery-yearinreview>.

<sup>314</sup> BRF S.A., Report of Foreign Private Issuer (Form 6-K) (Feb. 26, 2021), [https://www.sec.gov/Archives/edgar/data/0001122491/000129281421000647/ex99-1.htm#a\\_001](https://www.sec.gov/Archives/edgar/data/0001122491/000129281421000647/ex99-1.htm#a_001) (announcing SEC case closure); BRF S.A., Report of Foreign Private Issuer (Form 6-K) (May 6, 2021), <https://www.sec.gov/Archives/edgar/data/0001122491/000129281421002117/ex99-1.htm> (announcing DOJ case closure).

<sup>315</sup> BRF S.A., Annual and Transition Report of Foreign Private Issuers (Form 20-F) (Apr. 26, 2017), [https://www.sec.gov/Archives/edgar/data/0001122491/000129281417001013/brfform20f\\_2016.htm#\\_Toc479460769](https://www.sec.gov/Archives/edgar/data/0001122491/000129281417001013/brfform20f_2016.htm#_Toc479460769); BRF S.A., Annual and Transition Report of Foreign Private Issuers (Form 20-F) (Apr. 30, 2018), [https://www.sec.gov/Archives/edgar/data/0001122491/000129281418001481/brfform\\_20f.htm](https://www.sec.gov/Archives/edgar/data/0001122491/000129281418001481/brfform_20f.htm).

<sup>316</sup> Brad Haynes and Sergio Spagnuolo, *Brazil police raid BRF and JBS meat plants in bribery probe*, REUTERS (Mar. 17, 2017), <https://www.reuters.com/article/us-brazil-corruption-food/brazil-police-raid-brf-and-jbs-meat-plants-in-bribery-probe-idUSKBN16O1LH>; BRF S.A., Annual and Transition Report of Foreign Private Issuers (Form 20-F) (Apr. 26, 2017), [https://www.sec.gov/Archives/edgar/data/0001122491/000129281417001013/brfform20f\\_2016.htm#\\_Toc479460769](https://www.sec.gov/Archives/edgar/data/0001122491/000129281417001013/brfform20f_2016.htm#_Toc479460769).

<sup>317</sup> BRF S.A., Annual and Transition Report of Foreign Private Issuers (Form 20-F) (Apr. 26, 2017), [https://www.sec.gov/Archives/edgar/data/0001122491/000129281417001013/brfform20f\\_2016.htm#\\_Toc479460769](https://www.sec.gov/Archives/edgar/data/0001122491/000129281417001013/brfform20f_2016.htm#_Toc479460769); Ana Mano, *Brazil meatpacker BRF admits to bribing inspectors with money, benefits*, REUTERS (Oct. 1, 2019), <https://www.reuters.com/article/us-brf-corruption/brazil-meatpacker-brf-admits-to-bribing-inspectors-with-money-benefits-idUSKBN1WG3Z0>.

<sup>318</sup> BRF S.A., Annual and Transition Report of Foreign Private Issuers (Form 20-F) (Apr. 24, 2020), [https://www.sec.gov/Archives/edgar/data/0001122491/000129281420001419/brfform20f\\_2019.htm](https://www.sec.gov/Archives/edgar/data/0001122491/000129281420001419/brfform20f_2019.htm); Pedro Fonseca and Ana Mano, *Ex-CEO of Brazil’s BRF arrested in ‘Weak Flesh’ food safety probe*, REUTERS (Mar. 5,

The DOJ and SEC also ended investigations into Pactiv Evergreen Inc., which had voluntarily disclosed in September 2020 that it was conducting an internal investigation of its business in Shanghai regarding gift cards provided to government officials as well as other gift, travel, and entertainment expenditures that did not comply with company policies.<sup>319</sup> Pactiv reported the DOJ's decision to close its investigation without any action against the company in May 2021, while the SEC closure was not announced until August 2021.<sup>320</sup>

In September 2021, Texas-based energy technology company Baker Hughes Holdings LLC announced that the DOJ and SEC had closed investigations into the company's "operations in Iraq and its dealings with Unaoil Limited and its affiliates" without any enforcement actions.<sup>321</sup> In 2019, two former Unaoil executives pleaded guilty to arranging bribes to government officials in various countries on behalf of a number of companies to secure oil and gas contracts.<sup>322</sup> Since 2016, the DOJ and SEC have launched multiple investigations concerning possible FCPA violations related to several companies' dealings with Unaoil. Although, as with Baker Hughes, certain of these other Unaoil-linked investigations were closed without any enforcement actions,<sup>323</sup> a number of other investigations were resolved in global settlements that included payment of criminal penalties.<sup>324</sup>

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2018), <https://www.reuters.com/article/us-brazil-meat-probe/ex-ceo-of-brazils-brf-arrested-in-weak-flesh-food-safety-probe-idUSKBN1GH1HP>.

<sup>319</sup> Pactiv Evergreen Inc., Annual Report (Form 10-K) (Feb. 25, 2021), [https://www.sec.gov/ix?doc=/Archives/edgar/data/1527508/000156459021008652/ptve-10k\\_20201231.htm](https://www.sec.gov/ix?doc=/Archives/edgar/data/1527508/000156459021008652/ptve-10k_20201231.htm).

<sup>320</sup> Pactiv Evergreen Inc., Quarterly Report (Form 10-Q) (May 6, 2021), <https://investors.pactivevergreen.com/static-files/950a7d05-98a6-4d63-acf6-0e3d12c25b6b>; Pactiv Evergreen Inc., Quarterly Report (Form 10-Q) (Aug. 5, 2021), <https://investors.pactivevergreen.com/static-files/9b18f2c3-d608-482e-bbb9-784a9b353433>.

<sup>321</sup> Baker Hughes Holdings LLC, Quarterly Report (Form 10-Q) (Oct. 22, 2021), [https://files.lbr.cloud/public/2021-10/BHI-OLD%20-%2010-Q%20FY21%20Q3%20-%2010.22.21.pdf?VersionId=cunm1SvM\\_UbCND\\_jt.NHkM5wMlwODzlg](https://files.lbr.cloud/public/2021-10/BHI-OLD%20-%2010-Q%20FY21%20Q3%20-%2010.22.21.pdf?VersionId=cunm1SvM_UbCND_jt.NHkM5wMlwODzlg).

<sup>322</sup> US Department of Justice Press Release No. 19-1,172: Oil Executives Plead Guilty for Roles in Bribery Scheme Involving Foreign Officials (Oct. 30, 2019).

<sup>323</sup> In August 2020, KBR disclosed in its quarterly report that both the DOJ and SEC has closed their investigations into the company's interactions with Unaoil. See KBR, Inc., Quarterly Report (Form 10-Q) (Aug. 6, 2020), <https://www.sec.gov/ix?doc=/Archives/edgar/data/1357615/000135761520000165/kbr0630202010-q.htm>. Previously, the DOJ and SEC informed Core Laboratories in October 2017 and February 2018, respectively, that they had closed their investigations without taking any action. See Core Laboratories N.V., Quarterly Report (Form 10-Q) (Feb. 18, 2018), [https://www.sec.gov/Archives/edgar/data/1000229/000100022918000025/clb-20171231\\_10k.htm](https://www.sec.gov/Archives/edgar/data/1000229/000100022918000025/clb-20171231_10k.htm).

<sup>324</sup> In June 2019, TechnipFMC entered into a DPA with the DOJ and agreed to pay a total criminal penalty of \$296 million (\$81.8 million to the United States) to settle charges in connection with bribery schemes in Iraq, which included payments made through Unaoil, and Brazil. See US Department of Justice Press Release No. 19-714: TechnipFMC Plc and U.S.-Based Subsidiary Agree to Pay Over \$296 Million in Global Penalties to Resolve Foreign Bribery Case (June 25, 2019). In November 2017, SBM Offshore N.V., a Netherlands-based company, entered into a DPA to resolve various bribery allegations, including those in connection with its interactions with Unaoil, and the company agreed to pay a criminal penalty of \$248 million. See US Department of Justice Press Release No. 17-1348: SBM Offshore N.V. And United States-Based Subsidiary Resolve Foreign Corrupt Practices Act Case Involving Bribes in Five Countries (Nov. 29, 2017). As discussed above in Section III.A.4, Amec Foster Wheeler entered into a DPA with the DOJ in June 2021 and agreed to pay over \$18 million to resolve charges in connection with a scheme to pay bribes via a Monaco-based intermediary company that, while not named in the settlement, is likely Unaoil. See US Department of Justice Press Release No. 21-601: Amec Foster Wheeler Energy Limited Agrees to Pay Over \$18 Million to Resolve Charges Related to Bribery Scheme in Brazil (June 25, 2021).

In June 2021, Avianca Airlines announced that the SEC had concluded its investigation into allegations that high-level airline employees gave free and discounted airline tickets and upgrades to government employees in various countries and that the Commission would not recommend an enforcement action against the company.<sup>325</sup> Although Avianca voluntarily disclosed its internal investigation to both the SEC and the DOJ, the company's securities filings noted only that the company was cooperating with both authorities and did not comment on the existence or status of any DOJ investigation.<sup>326</sup>

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

##### **A. Introduction**

In 2021, several key aspects of the FCPA were litigated in the courts, including the use of agency theory, the limits of the DOJ's extraterritorial reach under the statute, and the scope of the internal accounting controls provisions. There were also several legislative developments, including changes that strengthened money laundering laws, expanded the DOJ's subpoena powers, and codified the SEC's ability to order disgorgement while extending the statute of limitations for violations of certain securities laws.

##### **B. Cases**

###### **1. *United States v. Hoskins***

In August 2021, the Second Circuit heard oral arguments in *United States v. Hoskins* ("*Hoskins II*").<sup>327</sup> This is the second time the Second Circuit has entertained an appeal in this long-running case, which arises out of the DOJ's investigation and prosecution of the French power company Alstom. In this appeal, the issues before the Second Circuit included consideration of the scope of the word "agent" under the FCPA.<sup>328</sup>

Lawrence Hoskins is a UK national who formerly worked for a UK subsidiary of Alstom. In 2013, the DOJ indicted Hoskins on charges alleging that, from 2002 until 2009, Alstom's US-based subsidiary, Alstom Power, Inc. (API) had retained consultants to bribe Indonesian officials in order to secure a \$118 million power supply contract.<sup>329</sup> The DOJ alleged that, although Hoskins never worked for API in a direct capacity and had not taken any action within the United States, he was

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<sup>325</sup> Avianca Holdings S.A., Report of Foreign Private Issuer (Form 6-K) (June 2, 2021), <https://www.sec.gov/Archives/edgar/data/0001575969/000119312521180176/d396259d6k.htm>.

<sup>326</sup> See, e.g., Avianca Holdings S.A., Report of Foreign Private Issuer (Form 6-K) (June 2, 2021), <https://www.sec.gov/Archives/edgar/data/0001575969/000119312521180176/d396259d6k.htm>.

<sup>327</sup> Brief for the United States of America, *United States v. Hoskins*, No. 20-CR-842 (2d Cir. July 13, 2020).

<sup>328</sup> See 15 U.S.C. § 78dd-2(a) (rendering certain acts by "any domestic concern, ... or for any officer, director, employee, or agent of such domestic concern" unlawful).

<sup>329</sup> US Department of Justice Press Release No. 13-862: Former Senior Executive of French Power Company Charged in Connection with Foreign Bribery Scheme (July 30, 2013); *United States v. Hoskins*, 902 F.3d 69, 72 (2d Cir. 2018).



nonetheless liable for participating in the conspiracy because he authorized payments to these consultants with the knowledge that portions of the payments were intended to cover bribes.<sup>330</sup>

In 2015, Judge Janet Bond Arterton of the US District Court for the District of Connecticut dismissed one of the conspiracy counts against Hoskins to the extent that it relied upon provisions of the FCPA that apply only to acts taken within the United States or by US nationals abroad (§ 78dd-3). However, Judge Arterton declined to dismiss all of the conspiracy charges to the extent that the DOJ also alleged that Hoskins acted as an agent of a domestic concern under § 78dd-2.<sup>331</sup> On appeal (“*Hoskins I*”), the Second Circuit upheld the dismissal of the § 78dd-3 conspiracy charge but remanded the case for trial on the question of whether Hoskins was guilty as an agent of Alstom’s US-based subsidiary.<sup>332</sup>

In November 2019, a jury convicted Hoskins on FCPA and related conspiracy charges<sup>333</sup> after Judge Arterton gave an instruction stating that they could infer an agency relationship between Hoskins and Alstom’s US subsidiary “circumstantially” and that “control [over the agent by the domestic concern] need not to be present at every moment.”<sup>334</sup> The jury also convicted Hoskins of three counts of money laundering and one count of conspiracy to commit money laundering.<sup>335</sup> Then, in a rare occurrence, Judge Arterton overturned the jury’s FCPA verdict, ruling that the government failed to present sufficient evidence to establish an agency relationship between Hoskins and the US subsidiary.<sup>336</sup> However, she denied Hoskins’s motion for a judgment of acquittal on the money laundering and conspiracy to commit money laundering charges, finding that the jury’s determination that Hoskins would have been aware that the funds would pass through the United States was reasonable.<sup>337</sup> The DOJ appealed Judge Arterton’s ruling with respect to the sufficiency of the evidence as to an agency relationship, with Hoskins cross-applying on issues related to the Speedy Trial Act and Sixth Amendment, the court’s jury instruction regarding withdrawal from a conspiracy, and whether the District of Connecticut was the

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<sup>330</sup> *United States v. Hoskins*, 902 F.3d 69, 72 (2d Cir. 2018).

<sup>331</sup> *United States v. Hoskins*, 123 F. Supp. 3d 316, 327 (D. Conn. 2015), *aff’d in part, rev’d in part*, 902 F.3d 69 (2d Cir. 2018).

<sup>332</sup> *United States v. Hoskins*, 902 F.3d 69, 72-73, 97-98 (2d Cir. 2018).

<sup>333</sup> Verdict Form, *United States v. Lawrence Hoskins*, No. 12-CR-00238, at 1-3 (D. Conn. Nov. 8, 2019); US Department of Justice Press Release No. 19-1219: Former Senior Alstom Executive Convicted at Trial of Violating the Foreign Corrupt Practices Act, Money Laundering and Conspiracy (Nov. 8, 2019).

<sup>334</sup> Transcript of Jury Instructions, *United States v. Lawrence Hoskins*, No. 12-CR-00238, at 1246-48 (D. Conn. Nov. 6, 2019), ECF No. 601; Ruling on Defendant’s Motion for Agency Instruction, *United States v. Lawrence Hoskins*, No. 12-CR-00238, at 2 (D. Conn. Aug. 23, 2019), ECF No. 532.

<sup>335</sup> Verdict Form, *United States v. Lawrence Hoskins*, No. 12-CR-00238, at 1-3 (D. Conn. Nov. 8, 2019); US Department of Justice Press Release No. 19-1219: Former Senior Alstom Executive Convicted at Trial of Violating the Foreign Corrupt Practices Act, Money Laundering and Conspiracy (Nov. 8, 2019); Ruling on Defendant’s Rule 29(C) and Rule 23 Motions, *United States v. Lawrence Hoskins*, No. 12-CR-00238, at 11, 29 (D. Conn. Feb. 26, 2020), ECF No. 617.

<sup>336</sup> Ruling on Defendant’s Rule 29(C) and Rule 23 Motions, *United States v. Lawrence Hoskins*, No. 12-CR-00238, at 18 (D. Conn. Feb. 26, 2020), ECF No. 617.

<sup>337</sup> Ruling on Defendant’s Rule 29(C) and Rule 23 Motions, *United States v. Lawrence Hoskins*, No. 12-CR-00238, at 11, 29 (D. Conn. Feb. 26, 2020), ECF No. 617.

appropriate venue for alleged money laundering offenses.<sup>338</sup> Neither Hoskins nor the DOJ challenged the trial court's jury instruction as to the standard for agency liability on appeal.

A three-judge panel of the Second Circuit heard oral arguments in the case on August 17, 2021.<sup>339</sup> At the outset, the DOJ noted that the appeals court's review of Judge Arterton's ruling was *de novo*, then argued that three points of evidence were independently sufficient to support the jury's determination that Hoskins acted as an agent of API: (1) Hoskins had to seek API's approval before working with the bribed consultants—as further demonstrated by the fact that API initially withdrew this approval as to one of the consultants, (2) when the consulting arrangements were renegotiated in 2003, Hoskins did not have the authority to implement changes without approval and direction from API, and (3) in the course of negotiating the fee schedule with a new consultant, Hoskins continually had to check back with API for approval.<sup>340</sup> The panel inquired whether the DOJ was advocating for an "interim instruction theory of agency."<sup>341</sup> The DOJ said that it was, but added that finding a fiduciary relationship was not necessary—it was sufficient that there were years of interim instructions and that the constant need for Hoskins to check with API for approval before he could do anything on its behalf presented more than sufficient evidence for the jury to conclude that an agency relationship existed.<sup>342</sup>

In response, Hoskins's counsel pointed out that the evidence showed that API could not hire, fire, reassign, promote, or affect Hoskins's compensation. Hoskins's counsel also noted that he was an employee of the international Alstom network, not API, that he was assigned to assist in the selection of and negotiation with consultants, and that API could not hire consultants without network approval—something the panel suggested might have been contradicted by testimony in the case.

Both parties agreed that the agency relationship must be proven beyond a reasonable doubt and that in this case, and in the absence of a definition in the FCPA, the common-law definition of agency controlled.<sup>343</sup>

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<sup>338</sup> Brief of Plaintiff-Appellant-Cross Appellee, *United States v. Hoskins*, No. 20-842 (2d Cir. July 13, 2020), at xi; Brief of Defendant-Appellee-Cross Appellant, *United States v. Hoskins*, No. 20-842 (2d Cir. Oct. 13, 2020), at xi-xii.

<sup>339</sup> See Oral Argument, *United States v. Hoskins*, No. 20-CR-842 (2d Cir. Aug. 17, 2021).

<sup>340</sup> See Oral Argument, *United States v. Hoskins*, No. 20-CR-842 (2d Cir. Aug. 17, 2021).

<sup>341</sup> See Oral Argument, *United States v. Hoskins*, No. 20-CR-842 (2d Cir. Aug. 17, 2021). The interim instruction theory of agency holds that "[t]he power to give interim instructions distinguishes principals in agency relationships from those who contract to receive services provided by persons who are not agents." See Restatement (Third) of Agency § 1.01 cmt. f(1) (2006).

<sup>342</sup> See Oral Argument, *United States v. Hoskins*, No. 20-CR-842 (2d Cir. Aug. 17, 2021).

<sup>343</sup> See Oral Argument, *United States v. Hoskins*, No. 20-CR-842 (2d Cir. Aug. 17, 2021); see also Restatement (Third) Of Agency § 1.01 (2006) ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.").

The Second Circuit has yet to issue its decision in *Hoskins II*. Of note, in *Hoskins I*, nearly 18 months expired between the oral argument and the Second Circuit's decision.<sup>344</sup>

As we stated in last year's Year-in-Review, this case has significant implications regarding the territorial reach of the FCPA.<sup>345</sup> A decision affirming the district court's ruling would limit the DOJ's ability to reach foreign nationals implicated in bribery schemes as well as potentially limit the DOJ's efforts to expand the FCPA's territorial reach to foreign subsidiaries based on a secondary theory of liability (i.e., that some or all foreign subsidiaries can be deemed "agents" of an issuer parent). Such a decision would also likely affect the DOJ's charging decisions and drive it to gather more evidence to support the fact-intensive inquiry into whether a US company exerts sufficient control over any alleged agents.

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

In another case testing the limits of the DOJ's extraterritorial reach under the FCPA, Judge Kenneth Hoyt of the US District Court for the Southern District of Texas dismissed FCPA and Money Laundering Control Act of 1986 (MLCA) charges against defendant Daisy Rafoi-Bleuler, a Swiss citizen.<sup>346</sup> Rafoi-Bleuler was indicted in 2019 in connection with the 2017 indictments of several Venezuelan citizens who were current and former employees of PDVSA or its affiliates.<sup>347</sup> The indictment alleged that the Venezuelans, acting on behalf of PDVSA affiliates that included the US-based PDVSA Services, Inc., "corruptly solicited and participated in selecting vendors for PDVSA in exchange for illegal kickbacks, and for preferred treatment in the order that invoices of those selected were preferentially paid."<sup>348</sup> It further alleged that Rafoi-Bleuler and her wealth management company assisted the other defendants in concealing the proceeds of their scheme in Swiss and other offshore accounts.<sup>349</sup>

Rafoi-Bleuler moved to dismiss the charges against her, arguing that the government lacked jurisdiction to prosecute her, that the indictment was unconstitutionally vague concerning her status as an "agent," and that the indictment failed to state a prosecutable offense.<sup>350</sup> To establish

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<sup>344</sup> See *United States v. Hoskins*, No. 12-CR-238, 2019 WL 3890831, at 3 (D. Conn. Aug. 19, 2019) (noting that in *Hoskins I*, the Second Circuit heard oral argument on March 2, 2017, and issued its opinion on August 24, 2018).

<sup>345</sup> WilmerHale, *Global Anti-Bribery Year-in-Review: 2020 Developments and Predictions for 2021*, at 72-73 (Jan. 28, 2021), <https://www.wilmerhale.com/en/insights/client-alerts/20210126-2020-global-antibribery-yearinreview>.

<sup>346</sup> Memorandum and Order, *United States v. Rafoi-Bleuler*, No. 17-CR-00514, at 2 (S.D. Tex. Nov. 10, 2021), ECF No. 255.

<sup>347</sup> Superseding Indictment, *United States v. De Leon Perez et al.*, No. 17-CR-00514 (S.D. Tex. Apr. 24, 2019), ECF No. 129.

<sup>348</sup> Memorandum and Order, *United States v. Rafoi-Bleuler*, No. 17-CR-00514, at 4 (S.D. Tex. Nov. 10, 2021), ECF No. 255.

<sup>349</sup> Memorandum and Order, *United States v. Rafoi-Bleuler*, No. 17-CR-00514, at 4 (S.D. Tex. Nov. 10, 2021), ECF No. 255.

<sup>350</sup> Memorandum and Order, *United States v. Rafoi-Bleuler*, No. 17-CR-00514, at 6 (S.D. Tex. Nov. 10, 2021), ECF No. 255.

jurisdiction for the money laundering and FCPA claims, the DOJ argued that Rafoi-Bleuler was an agent of PDVSA-US, a domestic concern, for helping PDVSA-US to set up international bank accounts through which PDVSA could launder illegal money.<sup>351</sup> According to Rafoi-Bleuler, she never acted as an agent of PDVSA or its affiliates, none of the acts for which she was charged took place within the United States, and the indictment never charged her with knowingly being involved in the underlying scheme.<sup>352</sup> Because the FCPA and MLCA could not apply to her under such circumstances, she reasoned, the court lacked jurisdiction.<sup>353</sup> The DOJ countered by arguing, among other things, that Rafoi-Bleuler had waived her right to move for dismissal by becoming a fugitive.<sup>354</sup>

Judge Hoyt agreed with Rafoi-Bleuler that, because she argued that the government could not charge her with an offense, the court was “duty bound” to examine its jurisdiction in light of the statutes under which she was charged despite the DOJ’s assertion that she was a fugitive.<sup>355</sup> Citing *Hoskins I*, discussed above, the court noted that “[j]urisdiction over the defendant under the FCPA rests in whether the government can establish that the defendant was an ‘officer, director, employee or agent’ of a domestic concern.”<sup>356</sup> The court went on to conclude that “agency does not exist simply because the government alleges ... that the defendant committed certain acts.”<sup>357</sup> Instead, the judge determined that there must be “undisputed evidence of mutual assent and control over the details of the person and agency, such that the principal controls the details over the assignment.”<sup>358</sup> As to the MLCA, the court concluded that it too did not confer jurisdiction over a foreign national where none of the defendant’s alleged conduct took place within the United States.<sup>359</sup> The court further noted that “any transfer of alleged illegal proceeds was not to the

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<sup>351</sup> Memorandum and Order, *United States v. Rafoi-Bleuler*, No. 17-CR-00514, at 5 (S.D. Tex. Nov. 10, 2021), ECF No. 255.

<sup>352</sup> Memorandum and Order, *United States v. Rafoi-Bleuler*, No. 17-CR-00514, at 7 (S.D. Tex. Nov. 10, 2021), ECF No. 255.

<sup>353</sup> Memorandum and Order, *United States v. Rafoi-Bleuler*, No. 17-CR-00514, at 7 (S.D. Tex. Nov. 10, 2021), ECF No. 255.

<sup>354</sup> Memorandum and Order, *United States v. Rafoi-Bleuler*, No. 17-CR-00514, at 2, 8-9 (S.D. Tex. Nov. 10, 2021), ECF No. 255. Italian authorities arrested Rafoi-Bleuler while she was on vacation in Italy. An Italian court ordered her extradition to the United States but released her from custody on the condition that she remain in Italy pending her appeal of the order. Instead, she returned to Switzerland.

<sup>355</sup> Memorandum and Order, *United States v. Rafoi-Bleuler*, No. 17-CR-00514, at 9, 11-12 (S.D. Tex. Nov. 10, 2021), ECF No. 255.

<sup>356</sup> Memorandum and Order, *United States v. Rafoi-Bleuler*, No. 17-CR-00514, at 14 (S.D. Tex. Nov. 10, 2021), ECF No. 255.

<sup>357</sup> Memorandum and Order, *United States v. Rafoi-Bleuler*, No. 17-CR-00514, at 14 (S.D. Tex. Nov. 10, 2021), ECF No. 255.

<sup>358</sup> Memorandum and Order, *United States v. Rafoi-Bleuler*, No. 17-CR-00514, at 15 (S.D. Tex. Nov. 10, 2021), ECF No. 255.

<sup>359</sup> Memorandum and Order, *United States v. Rafoi-Bleuler*, No. 17-CR-00514, at 19-20 (S.D. Tex. Nov. 10, 2021), ECF No. 255.

defendant or made by the defendant, but instead, occurred between the codefendants and the financial institutions or banks.”<sup>360</sup>

The court further found that the FCPA (and MLCA), as applied to Rafoi-Bleuler, was unconstitutionally vague as to the meaning of the word “agent.”<sup>361</sup> The opinion echoed, without stating conclusively, Rafoi-Bleuler’s assertion that the conduct for which she was charged was lawful under Swiss law and found that “[t]he application of the term ‘agent’ to the defendant, as a basis for jurisdiction, is such a novel application that no court has interpreted the statute or rendered a judicial decision that fairly discloses the manner in which the term may be applied to establish jurisdiction.”<sup>362</sup> The court then concluded “[t]hat fact alone establishes the vagueness of the term” and accordingly dismissed the FCPA and MLCA charges.<sup>363</sup> The DOJ filed a notice of appeal in December 2021.

As with *Hoskins*, this case illustrates the difficulty that the DOJ may face in prosecuting foreign nationals under the FCPA. As a result, the DOJ will likely devote greater effort toward establishing that foreign nationals who assist in FCPA violations are acting under the control of parties over whom its jurisdiction is not in dispute.

### 3. ***United States v. Ng***

In October 2020, Goldman Sachs entered into a DPA with the DOJ and a civil settlement with the SEC to resolve charges related to the bank’s role in underwriting bond transactions for Malaysian sovereign wealth fund 1Malaysia Development Berhad (1MDB).<sup>364</sup> In connection with the matter, in 2018, the DOJ had previously charged Roger Ng, a former Goldman banker in Malaysia, with conspiring to launder money and violate the FCPA in connection with the transactions.<sup>365</sup>

Ng filed a motion to dismiss the charges brought against him based on several arguments, including that he could not have circumvented Goldman’s internal accounting controls in violation of

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<sup>360</sup> Memorandum and Order, *United States v. Rafoi-Bleuler*, No. 17-CR-00514, at 20 (S.D. Tex. Nov. 10, 2021), ECF No. 255.

<sup>361</sup> Memorandum and Order, *United States v. Rafoi-Bleuler*, No. 17-CR-00514, at 21-22 (S.D. Tex. Nov. 10, 2021), ECF No. 255.

<sup>362</sup> Memorandum and Order, *United States v. Rafoi-Bleuler*, No. 17-CR-00514, at 22 (S.D. Tex. Nov. 10, 2021), ECF No. 255.

<sup>363</sup> Memorandum and Order, *United States v. Rafoi-Bleuler*, No. 17-CR-00514, at 22 (S.D. Tex. Nov. 10, 2021), ECF No. 255.

<sup>364</sup> US Attorney’s Office for the Eastern District of New York Press Release: Goldman Sachs Resolves Foreign Bribery Case And Agrees To Pay Over \$2.9 Billion (Oct. 22, 2020).

<sup>365</sup> US Department of Justice Press Release No. 18-1429: Malaysian Financier Low Taek Jho, Also Known As “Jho Low,” and Former Banker Ng Chong Hwa, Also Known As “Roger Ng,” Indicted for Conspiring to Launder Billions of Dollars in Illegal Proceeds and to Pay Hundreds of Millions of Dollars in Bribes (Nov. 1, 2018). The DOJ also previously obtained a guilty plea from, and the SEC entered into a civil settlement with, former Goldman Sachs managing director Tim Leissner in 2018 and 2019, respectively, in connection with the scheme. Information, *United States v. Tim Leissner*, No. 18-CR-00439 (Aug. 28, 2018); US Securities and Exchange Commission Press Release No. 2019-260: SEC Charges Former Goldman Sachs Executive With FCPA Violations (Dec. 16, 2019).

the FCPA because the money paid to Malaysian officials came from funds stolen from 1MDB and not his employer.<sup>366</sup> More specifically, Ng argued that the internal accounting controls provisions refer solely to the issuer, that the indictment alleged that he and others paid bribes using 1MDB's funds, not those of Goldman Sachs, and that "therefore [the bribes] had nothing to do with Goldman's internal accounting controls."<sup>367</sup> Ng stated that any alleged misconduct would have instead circumvented the internal controls of 1MDB, a non-issuer, which would not implicate the FCPA.<sup>368</sup> Ng further stated that the "closest the Government comes" to connecting the violation to controls within the issuer focuses on "compliance and legal groups within" the bank, and not on the type of "accounting" controls required under the FCPA.<sup>369</sup>

In September 2021, Judge Margo Brodie of the US District Court for the Eastern District of New York denied Ng's motion to dismiss and found that the questions of whether "transactions" or "assets" of the issuer were involved and whether the controls at issue are internal "accounting" controls are matters for the jury to decide.<sup>370</sup> Judge Brodie noted the indictment's allegation that Ng and others conspired to circumvent Goldman's internal accounting controls by concealing information regarding the bond transactions at issue from the groups at Goldman responsible for enforcing the internal accounting controls.<sup>371</sup> Accordingly, the "relevant 'transaction' and use of 'assets' are the [bank]'s purchase of the bonds with its own assets," which may not have been authorized if not for the concealment, according to the government.<sup>372</sup> The court held that these allegations are consistent with the FCPA's focus on maintaining "a system of internal accounting controls sufficient to assure management's control, authority, and responsibility over the firm's assets."<sup>373</sup>

Jury selection in Ng's trial is due to begin on February 7, 2022.<sup>374</sup>

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<sup>366</sup> Memorandum of Law in Support of Defendant Roger Ng's Motion to Dismiss the Indictment and Other Relief, *United States v. Ng Chong Hwa aka Roger Ng*, No. 18-CR-00538, § III (E.D.N.Y. Oct. 30, 2020) (memorandum unsealed on Nov. 20, 2020).

<sup>367</sup> Memorandum of Law in Support of Defendant Roger Ng's Motion to Dismiss the Indictment and Other Relief, *United States v. Ng Chong Hwa aka Roger Ng*, No. 18-CR-00538, § III (E.D.N.Y. Oct. 30, 2020) (memorandum unsealed on Nov. 20, 2020), at 44-48.

<sup>368</sup> Memorandum of Law in Support of Defendant Roger Ng's Motion to Dismiss the Indictment and Other Relief, *United States v. Ng Chong Hwa aka Roger Ng*, No. 18-CR-00538, § III (E.D.N.Y. Oct. 30, 2020) (memorandum unsealed on Nov. 20, 2020), at 49.

<sup>369</sup> Memorandum of Law in Support of Defendant Roger Ng's Motion to Dismiss the Indictment and Other Relief, *United States v. Ng Chong Hwa aka Roger Ng*, No. 18-CR-00538, § III (E.D.N.Y. Oct. 30, 2020) (memorandum unsealed on Nov. 20, 2020), at 49.

<sup>370</sup> Memorandum and Order, *United States v. Roger Ng*, No. 18-CR-00538 (E.D.N.Y. Sept. 3, 2021).

<sup>371</sup> Memorandum and Order, *United States v. Roger Ng*, No. 18-CR-00538, at 62-63 (E.D.N.Y. Sept. 3, 2021).

<sup>372</sup> Memorandum and Order, *United States v. Roger Ng*, No. 18-CR-00538, at 70 (E.D.N.Y. Sept. 3, 2021).

<sup>373</sup> Memorandum and Order, *United States v. Roger Ng*, No. 18-CR-00538, at 68 (E.D.N.Y. Sept. 3, 2021).

<sup>374</sup> Minute Entry, *United States v. Roger Ng*, No. 18-CR-00538 (E.D.N.Y. Jan. 7, 2022).

#### 4. ***United States v. Baptiste & Boncy***

In August 2021, the US Court of Appeals for the First Circuit affirmed the grant of new trials for two individuals convicted of conspiring to bribe Haitian officials, issuing decisions based on ineffective assistance of counsel. In *United States v. Baptiste*, Joseph Baptiste and Roger Richard Boncy were convicted in the US District Court for the District of Massachusetts for conspiracy to violate the FCPA's bribery provisions arising from payments to Haitian officials.<sup>375</sup> Judge Allison Burroughs, who also presided over the trial, ordered new trials due to the ineffective assistance provided by Baptiste's attorney.<sup>376</sup> The DOJ appealed the decision, and the First Circuit affirmed the lower court's decision.<sup>377</sup>

The motions for new trials were based on the performance of Baptiste's trial counsel. After an eight-day trial in 2019, Baptiste and Boncy were convicted of conspiring to violate the FCPA and the Travel Act by attempting to bribe Haitian officials to promote an \$84 million port development project in Mole Saint Nicolas.<sup>378</sup> Baptiste subsequently retained new counsel and moved for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure based on ineffective assistance of trial counsel.<sup>379</sup> Boncy also moved for a new trial, arguing that the ineffectiveness of Baptiste's lawyer violated Boncy's due process right to a fair proceeding because it influenced how the jury viewed both defendants.<sup>380</sup>

Following an evidentiary hearing, Judge Burroughs found that Baptiste had shown deficient performance of trial counsel and that the cumulative effect of the deficiencies also caused him prejudice.<sup>381</sup> Judge Burroughs also ordered a new trial for Boncy, because the deficient performance of Baptiste's counsel "resulted in Defendant Boncy's counsel having to play an outsized role at trial rather than pursue his preferred defense strategy for his own client."<sup>382</sup> As a

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<sup>375</sup> Memorandum and Order on Defendants' Motions for Judgment of Acquittal and For a New Trial, *United States v. Baptiste*, No. 17-CR-10305, at 2 (D. Mass. Mar. 11, 2020). The jury also convicted Baptiste of a substantive violation of the Travel Act and conspiring to commit money laundering. See WilmerHale, *Global Anti-Bribery Year-in-Review: 2019 Developments and Predictions for 2020* (Jan. 30, 2020), <https://www.wilmerhale.com/en/insights/client-alerts/20200130-global-anti-bribery-year-in-review-2019-developments-and-predictions-for-2020>.

<sup>376</sup> Memorandum and Order on Defendants' Motions for Judgment of Acquittal and For a New Trial, *United States v. Baptiste*, No. 17-CR-10305, at 7 (D. Mass. Mar. 11, 2020).

<sup>377</sup> *United States v. Baptiste*, 8 F.4th 30 (1st Cir. 2021).

<sup>378</sup> Memorandum and Order on Defendants' Motions for Judgment of Acquittal and For a New Trial, *United States v. Baptiste*, No. 17-CR-10305, at 1-2 (D. Mass. Mar. 11, 2020); US Attorney's Office for the District of Massachusetts Press Release: Businessman Indicted for Conspiring to Bribe Senior Officials of the Republic of Haiti (Oct. 31, 2018).

<sup>379</sup> *United States v. Baptiste*, 8 F.4th 30, 34 (1st Cir. 2021).

<sup>380</sup> Memorandum and Order on Defendants' Motions for Judgment of Acquittal and For a New Trial, *United States v. Baptiste* No. 17-CR-10305, at 7 (D. Mass. Mar. 11, 2020).

<sup>381</sup> Memorandum and Order on Defendants' Motions for Judgment of Acquittal and For a New Trial, *United States v. Baptiste*, No. 17-CR-10305, at 3-5 (D. Mass. Mar. 11, 2020).

<sup>382</sup> Memorandum and Order on Defendants' Motions for Judgment of Acquittal and For a New Trial, *United States v. Baptiste* No. 17-CR-10305, at 14 (D. Mass. Mar. 11, 2020).

result, Judge Burroughs found that justice and fairness required that both new trial motions be granted.<sup>383</sup>

The DOJ appealed, and in its August 2021 decision, the First Circuit affirmed the order of a joint retrial in a unanimous opinion. The DOJ did not challenge the deficiency findings,<sup>384</sup> but raised four main arguments in support of its appeal, none of which persuaded the Court. First, the DOJ argued that the evidence of guilt was overwhelming, and the weight of the evidence should have been addressed by Judge Burroughs. The First Circuit disagreed, holding that the weight of the evidence is one factor but “not the be-all and end-all, for (after all) the chief focus remains on the fundamental fairness of the proceeding.”<sup>385</sup>

Second, the Court rejected the government’s theory that Judge Burroughs erred for not considering the inadequate performance of Baptiste’s counsel in light of Boncy’s complementary defense. Instead, the record showed that Boncy’s counsel “spent much energy trying [to] make Baptiste the real culprit in this conspiracy while distancing Boncy from Baptiste’s deception.”<sup>386</sup> The Court therefore concluded that, “despite what the government thinks, Boncy’s lawyer was hardly defending Baptiste.”<sup>387</sup>

Third, the DOJ argued that Judge Burroughs misapplied the cumulative-error doctrine, which establishes that errors not individually reversible can become so cumulatively.<sup>388</sup> The Court, reciting the list of deficiencies of Baptiste’s trial counsel, rejected this argument as well.<sup>389</sup> As Circuit Judge O. Rogeriee Thompson noted in the First Circuit’s decision: “[W]hat matters is the cumulative effect of counsel’s errors (even if no error in isolation suffices to establish qualifying prejudice) – i.e., the focus must be on the collective impact of counsel’s deficiencies [...]”<sup>390</sup>

Fourth and finally, the Court rejected the DOJ’s claim that Judge Burroughs reversibly erred in finding that the ineffectiveness of Baptiste’s lawyer prejudiced Boncy. In so doing, the Court reasoned that Rule 33’s “interest of justice” standard vests a judge with “‘*broad* powers to grant a new trial’ if she ‘concludes for any reason that the trial resulted in a miscarriage of justice.’”<sup>391</sup> In

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<sup>383</sup> Memorandum and Order on Defendants’ Motions for Judgment of Acquittal and For a New Trial, *United States v. Baptiste* No. 17-CR-10305, at 16 (D. Mass. Mar. 11, 2020).

<sup>384</sup> *United States v. Baptiste*, 8 F.4th 30, 35 (1st Cir. 2021).

<sup>385</sup> *United States v. Baptiste*, 8 F.4th 30, 37 (1st Cir. 2021) (internal quotation marks and citations omitted).

<sup>386</sup> *United States v. Baptiste*, 8 F.4th 30, 38 (1st Cir. 2021).

<sup>387</sup> *United States v. Baptiste*, 8 F.4th 30, 39 (1st Cir. 2021).

<sup>388</sup> *United States v. Baptiste*, 8 F.4th 30, 39 (1st Cir. 2021) (citing *United States v. Sepulveda*, 15 F.3d 1161, 1195-96 (1st Cir. 1993)).

<sup>389</sup> *United States v. Baptiste*, 8 F.4th 30, 39-40 (1st Cir. 2021).

<sup>390</sup> *United States v. Baptiste*, 8 F.4th 30, 37 (1st Cir. 2021).

<sup>391</sup> *United States v. Baptiste*, 8 F.4th 30, 40 (1st Cir. 2021) (quoting Sarah N. Welling, Federal Practice and Procedure § 581 (4th ed. 2021) (emphasis in original)).



addition, because Judge Burroughs oversaw the trial itself, she and not the panel was best positioned “to decide if the interest of justice demanded a new trial.”<sup>392</sup>

Following the First Circuit’s decision, Judge Burroughs set a new trial date for both defendants for July 5, 2022.<sup>393</sup>

## C. Legislative Developments

### 1. National Defense Authorization Act

In January 2021, Congress passed the National Defense Authorization Act (2021 NDAA), an annual defense spending bill that primarily secures pay raises for soldiers and authorizes funding for national security programs.<sup>394</sup> The 2021 NDAA also included provisions that strengthened money laundering laws, expanded the DOJ’s subpoena powers, and codified the SEC’s ability to order disgorgement while extending the statute of limitations for violations of certain securities laws that involve scienter. These reforms are discussed in further detail below.

#### a) Section 6501: Codification of SEC’s disgorgement powers and extension of statute of limitations

The 2021 NDAA expands the powers of the SEC while also reversing in part two recent Supreme Court decisions that restricted the SEC’s ability to obtain disgorgement in actions brought in federal court. In 2017, the Supreme Court held in *Kokesh v. SEC* that disgorgement imposed in the context of an SEC enforcement action is a penalty that is subject to the five-year statute of limitations set forth in 28 U.S.C. § 2462.<sup>395</sup> Three years later, the Supreme Court squarely addressed in *Liu v. SEC* a question broached in *Kokesh*: whether the SEC could seek and obtain disgorgement for violations of securities laws at all.<sup>396</sup> The Court held that the SEC *could* seek disgorgement in civil actions under the language of the Exchange Act, but that it must do so consistent with equitable principles. Accordingly, the Court held further that disgorgement awards must not exceed a wrongdoer’s net profits, that the disgorgement must be ordered “for the benefit of investors,” and that joint and several liability was only available for a disgorgement award if the SEC showed

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<sup>392</sup> *United States v. Baptiste*, 8 F.4th 30, 43 (1st Cir. 2021).

<sup>393</sup> Pretrial Order, *United States v. Baptiste*, No. 17-CR-10305, at 1 (D. Mass. Sept. 18, 2021).

<sup>394</sup> The House and Senate both voted to override President Trump’s veto of the NDAA. See Matthew Daly, *In a first, Congress overrides Trump veto of defense bill*, ASSOCIATED PRESS (Jan. 1, 2021), <https://apnews.com/article/election-2020-donald-trump-defense-policy-bills-85656704ad9ae1f9cf202ee76d7a14fd>.

<sup>395</sup> *Kokesh v. SEC*, 137 S. Ct. 1635 (2017). For a more detailed summary of *Kokesh*, see WilmerHale, *Implications of the Supreme Court’s Kokesh Decision* (June 19, 2017), <https://www.wilmerhale.com/en/insights/client-alerts/2017-06-19-implications-of-the-supreme-courts-kokesh-decision>.

<sup>396</sup> *Liu v. SEC*, 140 S. Ct. 1936 (2020). For a more detailed summary of *Liu*, see WilmerHale, *Liu v. SEC: The U.S. Supreme Court Upholds the SEC’s Power To Obtain Disgorgement in Civil Actions, But With Important Limitations* (June 24, 2020), <https://www.wilmerhale.com/en/insights/client-alerts/20200624-liu-v-sec-the-us-supreme-court-upholds-the-secs-power-to-obtain-disgorgement-in-civil-actions-but-with-important-limitations>.

“concerted wrongdoing” by multiple offenders.<sup>397</sup> Even though the Court left it up to lower courts to detail these guidelines on disgorgement, securities experts were in wide agreement that *Kokesh* and *Liu* represented serious limitations on the SEC’s enforcement powers.

Against this backdrop, Congress’s decision to include provisions in the 2021 NDAA expanding the SEC’s powers appears to be in direct response to these recent Supreme Court decisions. First, Section 6501 of the 2021 NDAA amended Section 21(d) of the Exchange Act of 1934 to set 10-year limitations periods for violations of “securities law for which scienter must be established,” including Section 10(b) of the Exchange Act, Section 17(a)(1) of the Securities Act, and Section 206(1) of the Investment Advisers Act.<sup>398</sup> Further, Section 6501 tolls the statute of limitations for any amount of time that the offender spends outside the United States.<sup>399</sup> These amendments grant additional flexibility to the SEC, which faced pressure to quickly investigate and initiate legal proceedings against offenders so as to comply with the previous five-year limitations period.

Section 6501 also addresses the SEC’s ability to obtain disgorgement by codifying the SEC’s authority to seek disgorgement from parties that violate “any provision of the securities laws.”<sup>400</sup> By passing Section 6501 with the 2021 NDAA, Congress expressly codified what the Supreme Court had already determined that the SEC could do as a matter of equity. Importantly, Section 6501 did not amend Section 21(d)(5) of the Exchange Act, the operative language examined by the Supreme Court in *Liu*, which authorizes the SEC to seek, and “any Federal court [to] grant, ... any equitable relief that may be appropriate or necessary for the benefit of investors.”<sup>401</sup> In fact, Congress did not expressly overrule or even mention the guidelines to disgorgement set forth in *Liu*, which leaves open the question of whether and to what extent the Supreme Court’s guidelines apply to the SEC’s newly granted statutory authority to seek disgorgement in federal court proceedings.<sup>402</sup> It is also worth noting that *Kokesh*, *Liu*, and Section 6501 all apply to federal court proceedings,<sup>403</sup> and thus it is unclear how these various principles apply to the SEC’s authority in administrative proceedings, which are the SEC’s typical enforcement tool in FCPA cases involving corporate entities. However, the SEC has in several recent administrative proceedings applied the equitable principles the Supreme Court laid out in *Liu*.<sup>404</sup>

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<sup>397</sup> See *Liu v. SEC*, 140 S. Ct. 1936, 1945-46, 1948 (2020).

<sup>398</sup> 15 U.S.C. § 78u(d).

<sup>399</sup> See Public Law No. 116-283, § 6501(a)(3).

<sup>400</sup> See Public Law No. 116-283, § 6501(a)(3).

<sup>401</sup> *Liu v. SEC*, 140 S. Ct. 1936, 1940, 1942-44 (2020) (examining the language in 15 U.S.C. § 78u(d)).

<sup>402</sup> See Public Law No. 116-283, § 6501 (no mention of the equitable principles in *Liu v. SEC*).

<sup>403</sup> See *Liu v. SEC*, 140 S. Ct. 1936, 1955 (2020) (“It is unclear whether the majority’s new restrictions on disgorgement will apply to these proceedings as well. If they do not, the result will be that disgorgement has one meaning when the SEC goes to district court and another when it proceeds in-house.”) (Thomas, J., dissenting). The Commission’s authority to order disgorgement in administrative proceedings was already provided by statute, see 15 U.S.C. §77h–1(e), and the NDAA’s changes to the SEC’s disgorgement powers were specific to disgorgement ordered by “any Federal court,” see Public Law No. 116-283, § 6501(a)(3).

<sup>404</sup> See, e.g., Order Instituting Cease-and-Desist Proceedings, *Lightspeed Trading, LLC*, Rel. No. 10924, File No. 3-20216, ¶ 24 (Feb. 2, 2021) (applying “equitable principles” from *Liu* when calculating disgorgement,

## b) Corporate Transparency Act

As part of the 2021 NDAA, Congress also passed the CTA, a law that requires disclosure of companies' beneficial ownership information to FinCEN and directs FinCEN to maintain this information in a nonpublic database that can be accessed by government agencies and financial institutions with Bank Secrecy Act (BSA) obligations, subject to FinCEN rulemaking defining the conditions for such access. The CTA's purpose is to combat efforts by "malign actors to conceal their ownership of corporations, limited liability companies, or other similar entities" in order to facilitate money laundering, terrorism financing, trafficking, serious tax fraud and other illicit activities.<sup>405</sup>

The CTA imposes disclosure obligations on any "reporting company," which—subject to certain statutory exemptions—is defined as a corporation, limited liability company, or similar entity that is (1) created by filing a document with a secretary of state or similar offices in any state, territory or federally recognized Indian Tribe, or (2) formed under the laws of a foreign country and registered to do business in the United States by filing paperwork with a secretary of state or similar offices.<sup>406</sup> Under the CTA, a reporting company must disclose to FinCEN its beneficial owners' names; current residential or business addresses; dates of birth; and unique identifying numbers from driver's license, passports, or similar identification documents.<sup>407</sup> The CTA defines an individual as the "beneficial owner" of an entity if that individual directly or indirectly "(1) exercises substantial control over the entity; or (2) owns or controls not less than 25 percent of the ownership interests of the entity."<sup>408</sup>

The CTA further directs the Treasury Department and FinCEN to maintain beneficial ownership information "in a secure, nonpublic database." The information stored in this database can be accessed by (1) federal law enforcement agencies, in furtherance of national security, intelligence or law enforcement activity; (2) state, local, and tribal law enforcement agencies authorized by a court to seek the information in a civil or criminal investigation; (3) federal agencies acting at the request of law enforcement, judicial or prosecutorial authorities from a foreign country; (4) financial

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without specifically mentioning *Liu*); Order Imposing Remedial Sanctions, ¶ 24, *John Thomas Capital Management*, Exchange Act Rel. No. 10834, 2020 WL 5291417, at 18 (Sept. 4, 2020) (citing to and applying *Liu* principles when calculating disgorgement).

<sup>405</sup> Public Law No. 116-283, § 6403(a).

<sup>406</sup> Public Law No. 116-283, § 6403(a); *see also* 31 U.S.C. § 5336(a)(11)(A). The definition of "reporting company" is subject to numerous inclusions including for banks, federal or state credit unions, insurance companies, investment advisors, etc. *See* 31 U.S.C. § 5336(a)(11)(B).

<sup>407</sup> *See* Public Law No. 116-283, § 6403(a); *see also* 31 U.S.C. § 5336(b)(2).

<sup>408</sup> *See* Public Law No. 116-283, § 6403(a); *see also* 31 U.S.C. § 5336(a)(3)(A). The law specifically excludes from the definition of "beneficial owner" minor children (as long as the information of the parent or guardian of that minor child is reported), individuals acting as intermediaries or agents acting on behalf of others, persons whose interest in a reporting company derives solely from employment or right of inheritance, and a creditor of a reporting company. *See* 31 U.S.C. § 5336(a)(3)(B).

institutions engaging in customer due diligence, with the permission of the reporting company; or (5) financial regulators subject to forthcoming regulations.<sup>409</sup>

In December 2021, FinCEN issued a notice of proposed rulemaking to implement the beneficial ownership information database (BOI database) provisions in the CTA.<sup>410</sup> Under the proposed rule, a reporting company would be required to identify itself and report the names, birthdates, addresses, and a unique identifying number from an acceptable identification document about each of its beneficial owners and company applicants.<sup>411</sup> The proposed rule clarifies the meaning of “substantial control” for the purposes of identifying a beneficial owner as defined by the CTA. Under this interpretation, a person can exercise “substantial control” over a reporting company through (1) service as a senior officer of the reporting company; (2) authority over the appointment or removal of any senior officer or a majority or dominant minority of the board of directors; or (3) direction, determination or decision of, or substantial influence over, important matters affecting the reporting company.<sup>412</sup> The proposed rule further explains that “important matters” for the reporting company would include major expenditures or investments, issuance of any equity, incurrence of any significant debt, approval of its budget; amendments to substantial governing documents; compensation schemes for senior officers; and decisions about the nature of the reporting company’s business ventures.<sup>413</sup> Although the proposed rule did not explain the obligations of banks and other financial institutions with respect to the BOI Database, FinCEN announced that it expects to propose additional rules to address database access.<sup>414</sup> It is worth noting that, in key respects, the CTA is broader than the existing Customer Due Diligence Rule, which took effect in May 2018.<sup>415</sup>

### **c) Anti-Money Laundering Act of 2020**

The 2021 NDAA also included the AMLA, which establishes numerous reforms to existing AML laws. One of the more important changes for FCPA purposes is an expansion of the authority granted to the DOJ and Treasury Department to subpoena foreign banks. Under these provisions,

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<sup>409</sup> See Public Law No. 116-283, § 6403(a); see also 31 U.S.C. § 5336(c)(2)(B), (C).

<sup>410</sup> See Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 69920 (proposed Dec. 8, 2021).

<sup>411</sup> US Financial Crimes Enforcement Network Press Release: Fact Sheet: Beneficial Ownership Information Reporting Notice of Proposed Rulemaking (NPRM) (Dec. 7, 2021), <https://www.fincen.gov/news/news-releases/fact-sheet-beneficial-ownership-information-reporting-notice-proposed-rulemaking>.

<sup>412</sup> Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 69920, 69972 (proposed Dec. 8, 2021).

<sup>413</sup> Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 69920, 69972 (proposed Dec. 8, 2021).

<sup>414</sup> US Department of Treasury, Fact Sheet: Beneficial Ownership Information Reporting Notice of Proposed Rulemaking (NPRM) (Dec. 7, 2021), <https://www.fincen.gov/news/news-releases/fact-sheet-beneficial-ownership-information-reporting-notice-proposed-rulemaking>.

<sup>415</sup> The Customer Due Diligence (CDD) Rule is codified at 31 C.F.R. § 1010.230. For a more detailed summary of the CDD Rule, see WilmerHale, *FinCEN Release: Frequently Asked Questions Regarding Customer Due Diligence and Beneficial Ownership Requirements* (Apr. 10, 2018), <https://www.wilmerhale.com/en/insights/client-alerts/2018-04-10-fincen-releases-frequently-asked-questions-regarding-customer-due-diligence-and-beneficial-ownership-requirements>.

the Attorney General and the Treasury Secretary are now both authorized not only to issue “a subpoena to any foreign bank that maintains a correspondent account in the United States and request any records relating to the correspondent account,” but also to request records relating to “any account at the foreign bank,” including records maintained abroad.<sup>416</sup> In addition, the Treasury Secretary and the Attorney General can require financial institutions covered under the BSA to terminate a correspondent relationship with a foreign bank if that foreign bank fails to comply with a subpoena.<sup>417</sup>

Foreign banks that receive subpoenas pursuant to these amendments are forbidden to inform accountholders or any other individual named in the subpoena about the existence and contents of the subpoena.<sup>418</sup> If the foreign bank does provide such notification, that bank could be subject to a civil penalty equal to double the amount of the criminal proceeds passed through the account in question.<sup>419</sup> While the AMLA allows the foreign bank to petition a federal court to modify or quash either the subpoena or the restriction on disclosure, the law specifically states that a federal court may not grant relief if the “sole basis” to quash or modify the subpoena is an “assertion that compliance with a subpoena” would conflict with a foreign secrecy or confidentiality law.<sup>420</sup> The way that courts will interpret this provision remains to be seen, as the language of the statute could provide an opening for foreign banks to win a motion to quash or modify a subpoena if they go beyond merely asserting that compliance with the subpoena would create a conflict with foreign secrecy or confidentiality laws to actually demonstrating the conflict, or providing other, broader reasons they cannot comply, at an evidentiary hearing.

In addition, Congress included two new criminal offenses in the AMLA related either to money laundering activities of senior foreign political figures or to institutions identified as posing money laundering concerns. First, the AMLA makes it a crime to knowingly misrepresent a material fact to a financial institution concerning the ownership of assets involved in a monetary transaction if (1) the person or entity who owns the asset is either a senior foreign political figure or an immediate family member or close associate of such an official, and (2) the value of the assets involved is at least \$1 million. The AMLA does not, however, provide a clear definition of “senior foreign political figure.” Second, while not as significant as the first change, it is a crime under the AMLA to knowingly misrepresent a material fact to a financial institution concerning the source of funds in a transaction that (1) involves an entity that is a “primary money laundering concern,” and (2) violates certain banking prohibitions or conditions that require US financial institutions to take “special

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<sup>416</sup> Public Law No. 116-283, § 6308(a)(1)(B); *see also* 31 U.S.C. § 5318(k)(3)(A)(i).

<sup>417</sup> Public Law No. 116-283, § 6308(a)(1)(B); *see also* 31 U.S.C. § 5318(k)(3)(E)(i).

<sup>418</sup> Public Law No. 116-283, § 6308(a)(1)(B); *see also* 31 U.S.C. § 5318(k)(3)(C)(i).

<sup>419</sup> Public Law No. 116-283, § 6308(a)(1)(B); *see also* 31 U.S.C. § 5318(k)(3)(C)(ii).

<sup>420</sup> Public Law No. 116-283, § 6308(a)(1)(B); *see also* 31 U.S.C. § 5318(k)(3)(A)(iv).

measures” as required by 31 U.S.C. §5318A.<sup>421</sup> Both crimes are punishable by imprisonment of up to ten years, fines up to \$1 million, or both.

In addition to these changes, the AMLA includes several other reforms to the existing AML framework, including expansion of the AML whistleblower awards and protections;<sup>422</sup> authorization directing FinCEN to develop a pilot program for US financial institutions to share SAR information with foreign branches, subsidiaries and affiliates, except those located in China, Russia or other designated jurisdictions;<sup>423</sup> and amendment of several definitions in the Bank Secrecy Act to account for convertible assets such as antiquities and cryptocurrencies.<sup>424</sup>

## 2. **Countering Russian and Other Overseas Kleptocracy (CROOK) Act**

In January and February 2021, members of both the Senate and the House of Representatives introduced the Countering Russian and Other Overseas Kleptocracy (CROOK) Act, a bill that would establish an anti-corruption fund (the Fund) to “promote international efforts in combating corruption, kleptocracy, and illicit finance” by foreign officials and other foreign nationals.<sup>425</sup> This Fund would be financed by a \$5 million surcharge on criminal fines and penalties greater than \$50 million that are imposed for FCPA violations as part of criminal prosecution, enforcement proceedings, DPAs, NPAs, or any other FCPA resolution.<sup>426</sup> The CROOK Act authorizes the Secretary of State, working with the Attorney General, to use the Fund to support governmental and nongovernmental parties to advance anti-corruption efforts, particularly in countries that are important to US national interests and are “undergoing historic opportunities for democratic transition, combating corruption, and the establishment of the rule of law.”<sup>427</sup>

Cosponsoring Senators Roger Wicker of Mississippi and Ben Cardin of Maryland explained that the CROOK Act addresses a longstanding critique that the FCPA “unfairly targets private companies”

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<sup>421</sup> Under Section 311 of the USA PATRIOT Act, the Treasury Secretary can designate that a foreign jurisdiction, institution, class of transaction or type of account is a “primary money laundering concern,” which authorizes the Treasury Secretary to require domestic financial institutions and agencies to take additional due diligence measures with respect to those designated entities. Such “special measures” can include collection of information, recording and reporting of certain transactions, or prohibiting the opening and maintaining of correspondent or payable-through accounts. See 31 U.S.C. §5318A.

<sup>422</sup> Public Law No. 116-283, § 6314; see also 31 U.S.C. § 5323.

<sup>423</sup> Public Law No. 116-283, § 6212; see also 31 U.S.C. § 5318(g).

<sup>424</sup> Public Law No. 116-283, Section 6110(a)(1), 6201(d). For a more detailed summary of the NDAA’s AML provisions, see WilmerHale, *2021 AML Trends and Developments* (Feb. 11, 2021), <https://www.wilmerhale.com/en/insights/client-alerts/20210211-2021-aml-trends-and-developments>.

<sup>425</sup> H.R. 402, Preamble.

<sup>426</sup> H.R. 402, Sec. 5(b).

<sup>427</sup> H.R. 402, Sec. 5 (d)(1).

that offer bribes rather than adequately addressing the foreign officials who are “the source of demand for those bribes.”<sup>428</sup>

The CROOK Act currently has three cosponsors in the Senate and 17 cosponsors in the House of Representatives. The Senate version of the bill has not yet been introduced into committee, while the House version has been marked up and voted out of the House Foreign Affairs Committee.<sup>429</sup>

## V. COLLATERAL ACTIONS

### A. Shareholder Suits

Over the course of 2021, companies undergoing (or having recently resolved) FCPA investigations also faced shareholder lawsuits claiming that they misled investors by failing to disclose corrupt conduct or that the companies’ directors breached their fiduciary duties by failing to prevent bribery, in all instances purportedly leading to investor harm. Several of these cases demonstrate how investors have successfully secured damages against companies undergoing such investigations. Below, we discuss illustrative instances in the variety of shareholder suits either brought in 2021 or that had important rulings in 2021.

#### 1. Mobile Telesystems PJSC

In March 2021, a judge in the US District Court for the Eastern District of New York granted Mobile Telesystems PJSC’s motion to dismiss a shareholders’ securities class action against the company and three individual defendants, holding that investors did not sufficiently show that the company’s public statements were false or misleading.<sup>430</sup> Investors brought this action in March 2019, alleging that between 2014 and 2019, MTS issued false and misleading statements about (1) the company’s potential liability regarding a bribery scheme involving the company’s payment of bribes to the Uzbek government between 2004 and 2012; (2) the effectiveness of the company’s compliance and internal controls; and (3) the company’s cooperation with US authorities.<sup>431</sup> The investors alleged that the company’s misstatements and omissions led to artificial inflation of MTS’s stock price, causing the plaintiffs to suffer a loss when the company’s stock price fell after MTS entered into a DPA with the DOJ in 2019 and agreed to pay \$850 million in penalties to resolve charges arising from the Uzbekistan bribery scheme.<sup>432</sup>

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<sup>428</sup> See Roger F. Wicker & Ben Cardin, *Corruption Is a National Security Threat. The CROOK Act Is a Smart Way to Fight It*, JUST SECURITY (Mar. 23, 2021), <https://www.justsecurity.org/75468/corruption-is-a-national-security-threat-the-crook-act-is-a-smart-way-to-fight-it>.

<sup>429</sup> *House Foreign Affairs Committee Passes Key Anticorruption Measure in China-Focused Bill*, TRANSPARENCY INT’L (July 15, 2021), <https://us.transparency.org/news/house-foreign-affairs-committee-passes-key-anticorruption-measure-in-china-focused-bill>.

<sup>430</sup> *Salim v. Mobile Telesystems PJSC*, No. 19-CV-1589, 2021 WL 796088, at 1 (E.D.N.Y. Mar. 1, 2021).

<sup>431</sup> *Salim v. Mobile Telesystems PJSC*, No. 19-CV-1589, 2021 WL 796088, at 1-2 (E.D.N.Y. Mar. 1, 2021).

<sup>432</sup> *Salim v. Mobile Telesystems PJSC*, No. 19-CV-1589, 2021 WL 796088, at 1-2 (E.D.N.Y. Mar. 1, 2021).

Plaintiffs alleged that MTS knew that it would likely face a loss before disclosing in November 2018 that the company had reserved approximately \$849 million to resolve parallel DOJ and SEC investigations, arguing further that MTS could have easily estimated its loss as soon as it knew the DOJ was investigating. The court rejected this argument, noting that it is difficult to predict even the minimum amount for which a company may be liable once an investigation is complete. According to the court, “[w]hen MTS learned of the investigation, it could not predict the outcome: whether the government would file charges, what those charges would be, whether the government would have agreed to a [deferred prosecution agreement] at all and, if it did, what its terms would be nor could the company predict whether it would be willing to settle, or would contest the charges, assuming there were charges.”<sup>433</sup> The court also found that MTS could not predict whether the company would ultimately be given cooperation credit. Overall, the court held that the plaintiffs did not plead “sufficient facts to demonstrate the challenged claims were false or misleading” and granted the company’s motion to dismiss in its entirety.<sup>434</sup>

## 2. **Vimpelcom**

In March 2021, the US District Court for the Southern District of New York granted VEON Ltd. (formerly Vimpelcom)’s motion to dismiss a shareholders’ securities class action against the company that was based on the company’s previous DPA with the DOJ to resolve FCPA-related charges.<sup>435</sup> In February 2016, VEON, a telecommunications company headquartered in the Netherlands and incorporated in Bermuda, entered into the DPA while pleading guilty to a two-count criminal information charging two FCPA violations.<sup>436</sup> The charges were a result of conduct that occurred between 2005 and 2012, when, according to the class action complaint, “VEON made, or attempted to make, millions of dollars in improper payments to Gulnara Karimova, the eldest daughter of Uzbekistan’s President, in an effort to achieve favorable treatment in Uzbekistan. Executives disguised these payments in VEON’s books and records as legitimate transactions.”<sup>437</sup>

In the lawsuit, plaintiffs alleged securities fraud claims pursuant to Section 10(b) of the Exchange Act and Rule 10b-5, specifically alleging that VEON made material omissions in its securities filings by failing to disclose the bribery-related conduct to which the company admitted in the DPA and admissions that it made false entries in its books and lacked proper internal accounting controls. Notably, the court found that there was no affirmative duty to disclose the information at issue regarding concerns about potential misconduct. As a result, the court granted VEON’s motion to dismiss, dismissed the lead plaintiff (who lacked standing without a live case or

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<sup>433</sup> *Salim v. Mobile Telesystems PJSC*, No. 19-CV-1589, 2021 WL 796088, at 7 (E.D.N.Y. Mar. 1, 2021).

<sup>434</sup> *Salim v. Mobile Telesystems PJSC*, No. 19-CV-1589, 2021 WL 796088, at 12, 15 (E.D.N.Y. Mar. 1, 2021).

<sup>435</sup> *In re Veon Ltd. Sec. Litig.*, No. 15-CV-08672, 2021 WL 930478, at 1 (S.D.N.Y. Mar. 11, 2021).

<sup>436</sup> *In re Veon Ltd. Sec. Litig.*, No. 15-CV-08672, 2021 WL 930478, at 1 (S.D.N.Y. Mar. 11, 2021).

<sup>437</sup> *In re Veon Ltd. Sec. Litig.*, No. 15-CV-08672, 2021 WL 930478, at 1 (S.D.N.Y. Mar. 11, 2021).



controversy), and re-opened the plaintiff selection process consistent with the decision.<sup>438</sup> The court has yet to rule on the motions to appoint a new lead plaintiff.<sup>439</sup>

### 3. Odebrecht

Also in March 2021, a judge in the US District Court for the Southern District of New York sanctioned Brazilian engineering conglomerate Odebrecht, S.A. for destroying information regarding corrupt payments made by the company.<sup>440</sup> In a lawsuit based on securities fraud claims pursuant to Sections 10(b) and 20(a) of the Exchange Act, plaintiff DoubleLine Capital requested spoliation sanctions and imposition of a mandatory adverse inference instruction at trial for Odebrecht's admitted destruction of physical encryption keys that were required to access one of two accounting systems containing "crucial evidence" regarding Odebrecht's international bribery scheme.<sup>441</sup>

US Magistrate Judge Barbara C. Moses granted DoubleLine's request for sanctions on the grounds that Odebrecht intentionally destroyed the encryption keys in January 2016, but denied the request for a mandatory adverse inference, holding that the company did not intend to impact the subsequent litigation by doing so.<sup>442</sup> Even though the keys were destroyed before the litigation was filed, the court reasoned that Odebrecht knew or should have known at the time of destruction that its intentional bribery scheme was the subject of multiple investigations and that information related to its corrupt payments would likely be relevant to any forthcoming litigation.<sup>443</sup> Nevertheless, the court held that, although the destruction was prejudicial to DoubleLine, the plaintiff was not entitled to the mandatory adverse inference because Odebrecht did not destroy the encryption keys with the intent to deprive DoubleLine of relevant data.<sup>444</sup> The court instead permitted DoubleLine to present evidence concerning Odebrecht's intentional destruction of the physical encryption keys and the information likely contained in the associated accounting system.<sup>445</sup>

In September 2021, the court granted Odebrecht's separate motion for a protective order with respect to plaintiff's discovery requests seeking documents and data from a system used to send

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<sup>438</sup> *In re Veon Ltd. Sec. Litig.*, No. 15-CV-08672, 2021 WL 930478, at 7 (S.D.N.Y. Mar. 11, 2021).

<sup>439</sup> *See In re Veon Ltd. Sec. Litig.*, No. 15-CV-08672 (S.D.N.Y. Mar. 11, 2021), ECF No. 173-83.

<sup>440</sup> *DoubleLine Capital LP v. Odebrecht Fin. Ltd.*, No. 17-CV-4576, 2021 US Dist. LEXIS 60959, at 28-29 (S.D.N.Y. Mar. 30, 2021).

<sup>441</sup> *DoubleLine Capital LP v. Odebrecht Fin. Ltd.*, No. 17-CV-4576, 2021 US Dist. LEXIS 60959, at 9 (S.D.N.Y. Mar. 30, 2021).

<sup>442</sup> *DoubleLine Capital LP v. Odebrecht Fin. Ltd.*, No. 17-CV-4576, 2021 US Dist. LEXIS 60959, at 28-29 (S.D.N.Y. Mar. 30, 2021).

<sup>443</sup> *DoubleLine Capital LP v. Odebrecht Fin. Ltd.*, No. 17-CV-4576, 2021 US Dist. LEXIS 60959, at 17 (S.D.N.Y. Mar. 30, 2021).

<sup>444</sup> *DoubleLine Capital LP v. Odebrecht Fin. Ltd.*, No. 17-CV-4576, 2021 US Dist. LEXIS 60959, at 21-16 (S.D.N.Y. Mar. 30, 2021).

<sup>445</sup> *DoubleLine Capital LP v. Odebrecht Fin. Ltd.*, No. 17-CV-4576, 2021 US Dist. LEXIS 60959, at 26 (S.D.N.Y. Mar. 30, 2021).

secure emails and instant messages in connection with the bribery scheme.<sup>446</sup> Odebrecht argued that producing the requested data would “violate applicable foreign law, including [Odebrecht’s] ongoing obligations to multiple foreign prosecutors and decisions of Brazilian courts,” which prohibited sharing the requested information with third parties.<sup>447</sup> While plaintiffs noted that the court had already ordered Odebrecht to produce responsive materials it previously provided to the DOJ and foreign authorities, the court found that there was a true conflict between American law and that of foreign jurisdictions as to the discoverability of the information.<sup>448</sup> Odebrecht offered “persuasive evidence, through the attestations of Brazilian attorneys, that producing [the data] would risk triggering civil and criminal liability,” and the court held that comity considerations counseled against production of those materials.<sup>449</sup> The case remains pending.

#### 4. OSI Systems

In March 2021, a judge in the Central District of California denied OSI Systems’ motion to dismiss a shareholders’ securities class action.<sup>450</sup> Plaintiffs alleged that OSI, a manufacturer and designer of specialized electronic scanning systems and security components, made false and misleading statements on SEC filings and investor calls about its sole and unencumbered ownership of an Albanian subsidiary and about OSI’s 100% turnkey market share in Albania.<sup>451</sup> The court held that the fact that OSI had sold a 49% ownership stake in the subsidiary (worth approximately \$200 million) to a dentist with no known experience in security for only \$4.50 would have made OSI’s statements asserting ownership of “100% market share” of the turnkey market “misleading at best” and that the sale would have been material to a reasonable investor and should have been disclosed.<sup>452</sup> Although not explicitly mentioned in the court’s order, public reporting indicated that the dentist was connected to the Albanian government.<sup>453</sup> OSI announced in 2019 that the DOJ and SEC had closed their investigations into possible FCPA violations.<sup>454</sup>

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<sup>446</sup> *DoubleLine Capital LP v. Odebrecht Fin. Ltd.*, No. 17-CV-4576, 2021 US Dist. LEXIS 193116, at 3, 5 (S.D.N.Y. Sept. 23, 2021).

<sup>447</sup> *DoubleLine Capital LP v. Odebrecht Fin. Ltd.*, No. 17-CV-4576, 2021 US Dist. LEXIS 193116, at 2 (S.D.N.Y. Sept. 23, 2021).

<sup>448</sup> *DoubleLine Capital LP v. Odebrecht Fin. Ltd.*, No. 17-CV-4576, 2021 US Dist. LEXIS 193116, at 23-29 (S.D.N.Y. Sept. 23, 2021).

<sup>449</sup> *DoubleLine Capital LP v. Odebrecht Fin. Ltd.*, No. 17-CV-4576, 2021 US Dist. LEXIS 193116, at 39-43 (S.D.N.Y. Sept. 23, 2021).

<sup>450</sup> *Longo v. OSI Sys.*, No. CV 17-8841, 2021 US Dist. LEXIS 63773 (C.D. Cal. Mar. 31, 2021).

<sup>451</sup> *Longo v. OSI Sys.*, No. CV 17-8841, 2021 US Dist. LEXIS 63773, at 10 (C.D. Cal. Mar. 31, 2021).

<sup>452</sup> *Longo v. OSI Sys.*, No. CV 17-8841, 2021 US Dist. LEXIS 63773, at 13, 20-21 (C.D. Cal. Mar. 31, 2021).

<sup>453</sup> Clara Hudson, *OSI Fails to Shake Investor Lawsuit Following Corruption Allegations*, GLOBAL INVESTIGATIONS REV. (Apr. 2, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/fcpa/osi-fails-shake-investor-lawsuit-following-corruption-allegations>.

<sup>454</sup> OSI Systems, Inc. Press Release: OSI Systems Notified That U.S. DOJ and SEC FCPA Inquiries Have Been Closed (June 5, 2019), <https://investors.osi-systems.com/news-releases/news-release-details/osi-systems-notified-us-doj-and-sec-fcpa-inquiries-have-been>.

## 5. Cognizant Technology Solutions

In September 2021, Cognizant Technology Solutions agreed to pay \$95 million to settle a shareholder lawsuit following its alleged failure to disclose improper payments made in India.<sup>455</sup> As discussed in the 2019 Year-in-Review, Cognizant agreed in February 2019 to pay \$25 million to settle a civil action brought by the SEC in which the Commission alleged that both the company's former President, Gordon Coburn, and its former Chief Legal Officer, Steven Schwartz, authorized a contractor in India to pay a \$2 million bribe to facilitate construction of the company's campus and "directed their subordinates to conceal the bribe."<sup>456</sup> The SEC further alleged that Coburn and Schwartz authorized the payment of two additional bribes totaling \$1.6 million.<sup>457</sup> Schwartz and Coburn both face criminal charges and denied any wrongdoing in agreeing to settle the civil action.<sup>458</sup>

Plaintiffs filed the suit in October 2016, alleging that Cognizant violated Sections 10(b) and 20(a) of the Exchange Act by filing a materially false Form 10-K that did not disclose that the company lacked effective internal controls over its financial reporting or that improper payments had been made in India.<sup>459</sup> In December 2021, the court approved the \$95 million settlement and awarded attorney's fees and litigation expenses.<sup>460</sup>

### B. RICO Suits

#### 1. Odebrecht

In 2021, a Florida state court dismissed claims against Odebrecht, the Brazilian construction company, after a 2018 lawsuit in which Ecuadorian manufacturing company Plastiquim alleged that it was brought into a money laundering scheme related to bribes paid to secure government contracts in Ecuador. After earlier dismissing the claims against former Odebrecht employees, the court found that the pleadings did not allege facts sufficient to support the RICO claims, that the

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<sup>455</sup> Jonathan Stempel, *Cognizant Reaches \$95 mln Settlement With U.S. Shareholders Over India Bribery Allegations*, REUTERS (Sept. 8, 2021), <https://www.reuters.com/technology/cognizant-reaches-95-mln-settlement-with-us-shareholders-over-india-bribery-2021-09-08>.

<sup>456</sup> US Securities and Exchange Commission Press Release No. 2019-12: SEC Charges Cognizant and Two Former Executives with FCPA Violations (Feb. 15, 2019).

<sup>457</sup> US Securities and Exchange Commission Press Release No. 2019-12: SEC Charges Cognizant and Two Former Executives with FCPA Violations (Feb. 15, 2019).

<sup>458</sup> Jonathan Stempel, *Cognizant Reaches \$95 mln Settlement With U.S. Shareholders Over India Bribery Allegations*, REUTERS (Sept. 8, 2021), <https://www.reuters.com/technology/cognizant-reaches-95-mln-settlement-with-us-shareholders-over-india-bribery-2021-09-08>.

<sup>459</sup> Complaint, *In re Cognizant Tech. Sols. Corp. Sec. Litig.*, No. 16-CV-06509 (D.N.J. Sept. 9, 2021), ECF No. 1.

<sup>460</sup> Judgment Approving Class Action Settlement re Motion for Final Approval of Class Action Settlement, *In re Cognizant Tech. Sols. Corp. Sec. Litig.*, No. 16-CV-06509, (D.N.J. Sept. 9, 2021), ECF No. 183; Order Awarding Attorneys' Fees and Litigation Expenses, *In re Cognizant Tech. Sols. Corp. Sec. Litig.*, No. 16-CV-06509 (D.N.J. Sept. 9, 2021), ECF No. 184.

alleged fraud was not pled with particularity, and that plaintiffs failed to claim that they suffered damages as a direct and proximate cause of the alleged fraud.<sup>461</sup>

## 2. Petrobras

In August 2021, the Fifth Circuit ruled in a unanimous decision that the Southern District of Texas erred in dismissing allegations that Petrobras entered into an unneeded and unfavorable contract as a result of a bribery scheme. The appeal arose out of a complaint filed by Petrobras in March 2019, alleging “that Samsung Heavy Industries, a Korean shipbuilding company, secretly bribed Petrobras executives to finalize a drilling-services contract between Petrobras and Pride Global Limited—the lynchpin to Samsung’s own construction contract with Pride.”<sup>462</sup> The panel found that uncertainty remained about when Petrobras had discovered the alleged injuries and that Samsung failed to establish that the claims accrued before March 5, 2015 and reversed and remanded the case for further proceedings.<sup>463</sup> As discussed in last year’s Year-in-Review, the district court dismissed the suit in June 2020, on the grounds that Petrobras was on notice in 2014 of the facts that underpinned its RICO claims, triggering a four-year statute of limitations that had since expired.<sup>464</sup> Following the September 2021 reversal by the Fifth Circuit, the district court held a status conference and set a schedule for discovery and case management that signals that the case will continue through 2023 before a possible trial.<sup>465</sup>

### C. Restitution

#### 1. United States v. Flores (PetroEcuador)

In April 2021, Ramiro Andres Luque Flores, an Argentine national and businessperson who paid bribes to PetroEcuador officials, was sentenced to four years of probation following a 2017 guilty plea. PetroEcuador filed a motion seeking restitution from Flores, alleging that the company was a victim of his admitted bribe payments. In May 2021, a judge in the Eastern District of New York ruled that he would not be ordered to pay restitution because PetroEcuador failed to establish that it was a victim or, alternatively, that it failed to prove its losses.<sup>466</sup> The court found that

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<sup>461</sup> See *Plastiquim, S.A. v. Polit*, No. 2018-019966-CA-01 (Fla. Cir. Ct. Jan 19, 2021).

<sup>462</sup> *Petrobras Am., Inc. v. Samsung Heavy Indus. Co., Ltd.*, 9 F.4th 247, 251 (5th Cir. 2021).

<sup>463</sup> *Petrobras Am., Inc. v. Samsung Heavy Indus. Co., Ltd.*, 9 F.4th 247, 256 (5th Cir. 2021).

<sup>464</sup> See WilmerHale, *Global Anti-Bribery Year-in-Review: 2020 Developments and Predictions for 2021* (Jan. 28, 2021), <https://www.wilmerhale.com/en/insights/client-alerts/20210126-2020-global-antibribery-yearinreview>; see also Memorandum and Opinion, *Petrobras America, Inc. v. Samsung Heavy Industries Co., Ltd.*, No. 19-CV-01410; (S.D. Tex. June 19, 2020); US Department of Justice Press Release No. 19-1301: Samsung Heavy Industries Company Ltd Agrees to Pay \$75 Million in Global Penalties to Resolve Foreign Bribery Case (Nov. 22, 2019).

<sup>465</sup> See *Petrobras Am., Inc. v. Samsung Heavy Indus. Co.*, No. 4:19-CV-01410 (S.D. Tex. Sept. 17, 2021), ECF No. 84.

<sup>466</sup> Memorandum & Order, *United States v. Luque Flores*, No. 17-CR-537, at 8 (E.D.N.Y. May 14, 2021), ECF No. 80.

PetroEcuador was involved in widespread “pay to play” corruption and was therefore sufficiently implicated in the overall conduct, making restitution in this instance improper.<sup>467</sup>

## 2. PDVSA

In June 2021, the Southern District of Florida denied PDVSA’s restitution claim against Abraham Edgardo Ortega on the basis that the state-owned oil and natural gas company was complicit in the misconduct at issue. Ortega had served as PDVSA’s Executive Director of Financial Planning from January 2014 to March 2016,<sup>468</sup> and in a plea agreement with the government in October 2018,<sup>469</sup> Ortega “pled guilty to charges of conspiracy to commit money laundering”<sup>470</sup> in relation to his activities as a PDVSA official.<sup>471</sup> PDVSA argued that the company was a victim of Ortega’s criminal actions, requesting victim status and a restitution award of \$560,033,118.19 under the Mandatory Victims Restoration Act (MVRA),<sup>472</sup> and the company also claimed it was a victim under the Crime Victims’ Rights Act (CVRA).<sup>473</sup>

In reviewing and applying the MVRA, the court concluded that PDVSA should not be considered a victim or receive restitution.<sup>474</sup> Regarding whether PDVSA should be labeled a victim—which the court defined as “a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered”<sup>475</sup>—PDVSA would have to demonstrate “not only that a particular loss would not have occurred but for the conduct underlying the offense of conviction, but also that the causal connection between the conduct and the loss is not too attenuated (either factually or temporally).”<sup>476</sup> The court also agreed with the government’s position that, if a party is part of the criminal activity, that party cannot be deemed a victim under the statute.<sup>477</sup> The question

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<sup>467</sup> Memorandum & Order, *United States v. Luque Flores*, No. 17-CR-537, at 9 (E.D.N.Y. May 14, 2021), ECF No. 80. *Flores* is not PetroEcuador’s only unsuccessful effort to seek restitution. For example, in 2020, PetroEcuador made a similar motion for restitution in the case of Frank Chatburn Ripalda, who pleaded guilty to a count of conspiracy to commit money laundering for his role in an Ecuadorian bribery scheme from 2011 to 2016. In June 2020, Ripalda and the DOJ jointly argued that PetroEcuador’s motion was barred by collateral estoppel. See Joint Status Report in Response to Court’s May 12, 2020 Order, *United States v. Chatburn Ripalda*, No. 18-CR-20312 (S.D. Fla. June 2, 2020), ECF No. 253. The docket contains no further information regarding the original restitution motion or the joint filing by Ripalda and the DOJ.

<sup>468</sup> Order, *United States v. Ortega*, No. 18-CR-20685, at 2 (S.D. Fla. June 18, 2021), ECF No. 428.

<sup>469</sup> Order, *United States v. Ortega*, No. 18-CR-20685, at 1 (S.D. Fla. June 18, 2021), ECF No. 428.

<sup>470</sup> Order, *United States v. Ortega*, No. 18-CR-20685, at 1 (S.D. Fla. June 18, 2021), ECF No. 428.

<sup>471</sup> Order, *United States v. Ortega*, No. 18-CR-20685, at 1 (S.D. Fla. June 18, 2021), ECF No. 428.

<sup>472</sup> Order, *United States v. Ortega*, No. 18-CR-20685, at 2-3 (S.D. Fla. June 18, 2021), ECF No. 428.

<sup>473</sup> Order, *United States v. Ortega*, No. 18-CR-20685, at 2-3 (S.D. Fla. June 18, 2021), ECF No. 428.

<sup>474</sup> Order, *United States v. Ortega*, No. 18-CR-20685, at 9 (S.D. Fla. June 18, 2021), ECF No. 428.

<sup>475</sup> Order, *United States v. Ortega*, No. 18-CR-20685, at 4 (S.D. Fla. June 18, 2021), ECF No. 428 (citing 18 U.S.C. § 3663A).

<sup>476</sup> Order, *United States v. Ortega*, No. 18-CR-20685, at 4-5 (S.D. Fla. June 18, 2021), ECF No. 428 (citing *United States v. Robertson*, 493 F.3d 1322, 1334 (11th Cir. 2007) (quoting *United States v. Cutter*, 313 F.3d 1, 7 (1st Cir. 2002)).

<sup>477</sup> Order, *United States v. Ortega*, No. 18-CR-20685, at 6 (S.D. Fla. June 18, 2021), ECF No. 428.

therefore depended “on whether PDVSA was complicit in the underlying offense.”<sup>478</sup> PDVSA attempted to paint Ortega as a “rogue employee,”<sup>479</sup> but in pointing to the factual record, the court found that the company itself “was involved in pervasive, constant, and consistent illegal conduct.”<sup>480</sup> As an example of how the company—not solely Ortega—was involved in the scheme, the court highlighted the way that the government had outlined the number of PDVSA contractors, officials, and intermediaries involved.<sup>481</sup> Given the record, PDVSA was not granted victim status.<sup>482</sup>

Next, the court assessed whether a restitution award was permissible under the MVRA. The court found that PDVSA had not shown that a receivership review was appropriate,<sup>483</sup> citing instead an Eleventh Circuit case stating that “a perpetrator cannot be his own victim.”<sup>484</sup> In other words, since a corporation acts through its employees, the company cannot then ask for restitution for its own actions.<sup>485</sup> Despite PDVSA’s assertion “that it [w]as not...charged or named as a conspirator,”<sup>486</sup> the court emphasized that the company was complicit in Ortega’s misconduct by again citing the factual proffer that the government and Ortega reached,<sup>487</sup> which noted that “corrupt foreign currency exchange schemes occurred with significant frequency”<sup>488</sup> at PDVSA.

For PDVSA’s CVRA argument, the court again concluded that PDVSA failed to fall under the statute’s definition of “victim.”<sup>489</sup> The court agreed with the government that the CVRA does not cover state-owned companies, such as PDVSA, even though the statute does not explicitly define “person.”<sup>490</sup> In drawing this conclusion, the court relied on *In re Empresa Publica de Hidrocarburos del Ecuador*, where the Eleventh Circuit wrote, “[i]n the absence of express statutory language suggesting otherwise, the presumption that the definition of ‘person’ excludes the sovereign applies

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<sup>478</sup> Order, *United States v. Ortega*, No. 18-CR-20685, at 6 (S.D. Fla. June 18, 2021), ECF No. 428.

<sup>479</sup> Order, *United States v. Ortega*, No. 18-CR-20685, at 6 (S.D. Fla. June 18, 2021), ECF No. 428.

<sup>480</sup> Order, *United States v. Ortega*, No. 18-CR-20685, at 6 (S.D. Fla. June 18, 2021) (referencing *In re Empresa Publica de Hidrocarburos del Ecuador*, No. 20-11430, at 1 (11th Cir. May 26, 2020)).

<sup>481</sup> Order, *United States v. Ortega*, No. 18-CR-20685, at 7 (S.D. Fla. June 18, 2021), ECF No. 428.

<sup>482</sup> Order, *United States v. Ortega*, No. 18-CR-20685, at 6 (S.D. Fla. June 18, 2021), ECF No. 428.

<sup>483</sup> Order, *United States v. Ortega*, No. 18-CR-20685, at 8 (S.D. Fla. June 18, 2021), ECF No. 428.

<sup>484</sup> Order, *United States v. Ortega*, No. 18-CR-20685, at 8 (S.D. Fla. June 18, 2021), ECF No. 428 (citing *In re Wellcare Health Plans, Inc.*, 754 F.3d 1234, 1239 (11th Cir. 2014)).

<sup>485</sup> Order, *United States v. Ortega*, No. 18-CR-20685, at 8-9 (S.D. Fla. June 18, 2021), ECF No. 428 (citing *In re Wellcare Health Plans, Inc.*, 754 F.3d 1234, 1239 (11th Cir. 2014)).

<sup>486</sup> Order, *United States v. Ortega*, No. 18-CR-20685, at 9 (S.D. Fla. June 18, 2021), ECF No. 428.

<sup>487</sup> Order, *United States v. Ortega*, No. 18-CR-20685, at 9 (S.D. Fla. June 18, 2021), ECF No. 428.

<sup>488</sup> Order, *United States v. Ortega*, No. 18-CR-20685, at 9 (S.D. Fla. June 18, 2021), ECF No. 428 (citing to factual proffer (emphasis added)).

<sup>489</sup> Order, *United States v. Ortega*, No. 18-CR-20685, at 4 (S.D. Fla. June 18, 2021), ECF No. 428.

<sup>490</sup> Order, *United States v. Ortega*, No. 18-CR-20685, at 3 (S.D. Fla. June 18, 2021), ECF No. 428 (referencing Order, *In re Empresa Publica de Hidrocarburos del Ecuador*, No. 20-11052, at 2 (11th Cir. May 26, 2020)).

here and therefore, PetroEcuador—a corporation owned entirely by Ecuador—is not a victim within the meaning of the CVRA.”<sup>491</sup>

In August 2021, a “Joint Notice on Restitution”<sup>492</sup> was filed by the government and Ortega, asserting that, when the court rejected PDVSA’s motion, it had “resolved the only outstanding restitution-related claim and ... no other claims for restitution [were] pending”<sup>493</sup> and that the upcoming restitution hearing was therefore moot.<sup>494</sup>

### 3. FIFA

In August 2021, the DOJ announced that forfeited funds would be returned to victims of the FIFA scandal, including FIFA, CONCACAF, CONMEBOL, and other soccer federations.<sup>495</sup> In May 2015, an unsealed indictment revealed that 14 FIFA officials and marketing executives were charged with crimes, such as racketeering, honest services wire fraud, and money laundering,<sup>496</sup> and a superseding indictment detailing similar charges against 16 more soccer officials was unsealed in December 2015.<sup>497</sup> The marketing companies usually paid the bribes and kickbacks to the FIFA officials, who would then provide the companies with below market contracts for the media and marketing rights to certain international soccer events.<sup>498</sup>

Regarding the resolution, the DOJ stated that “[t]he department granted a joint petition for remission filed by the Victims, recognizing losses and granting remission up to a total of more than \$201 million.”<sup>499</sup> To start, \$32.3 million of the forfeited funds will be given to the victims.<sup>500</sup> The World Football Remission Fund, a new group that falls within the FIFA Foundation, will be

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<sup>491</sup> Order, *United States v. Ortega*, No. 18-CR-20685, at 3-4 (S.D. Fla. June 18, 2021), ECF No. 428 (citing Order, *In re Empresa Publica de Hidrocarburos del Ecuador*, No. 20-11052, at 2 (11th Cir. May 26, 2020)).

<sup>492</sup> Joint Notice on Restitution, *United States v. Ortega*, No. 18-CR-20685 (S.D. Fla. Aug. 2, 2021), ECF No. 456.

<sup>493</sup> Joint Notice on Restitution, *United States v. Ortega*, No. 18-CR-20685 (S.D. Fla. Aug. 2, 2021), ECF No. 456.

<sup>494</sup> Joint Notice on Restitution, *United States v. Ortega*, No. 18-CR-20685 (S.D. Fla. Aug. 2, 2021), ECF No. 456.

<sup>495</sup> US Department of Justice Press Release No. 21-795: Justice Department Approves Remission of Over \$32 Million in Forfeited Funds to Victims in the FIFA Corruption Case (Aug. 24, 2021).

<sup>496</sup> US Department of Justice Press Release No. 21-795: Justice Department Approves Remission of Over \$32 Million in Forfeited Funds to Victims in the FIFA Corruption Case (Aug. 24, 2021).

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<sup>500</sup> US Department of Justice Press Release No. 21-795: Justice Department Approves Remission of Over \$32 Million in Forfeited Funds to Victims in the FIFA Corruption Case (Aug. 24, 2021).

responsible for dispersing the funds,<sup>501</sup> And the group also established the oversight and audit procedures for these remission payments.<sup>502</sup>

While this is *not* an FCPA case, the resolution shows that the DOJ is using other statutes, including racketeering conspiracy, wire fraud conspiracy, wire fraud, money laundering conspiracy, and money laundering, to reach and reprimand bribery in circumstances where the FCPA does not apply. In this case, the FCPA was inapplicable because the bribes were paid to the officers of international non-profit organizations rather than to government officials. AAG Polite noted in the press release that he considered the remission of funds in this instance to be a demonstration of “the department’s commitment to use all tools at its disposal to prosecute corruption and to deprive perpetrators of ill-gotten gains.”<sup>503</sup>

## D. Compensatory Damages

### 1. Telefonaktiebolaget LM Ericsson

Telefonaktiebolaget LM Ericsson released a statement in May 2021, announcing that the Swedish company had settled a damages claim with Nokia.<sup>504</sup> Under the agreement, Ericsson will pay Nokia a total of roughly \$97 million.<sup>505</sup> The settlement stems from investigations conducted by the DOJ and the SEC<sup>506</sup> that focused on Ericsson’s FCPA violations and ultimately resulted in a 2019 resolution.<sup>507</sup> Details of the damages settlement with Nokia remain confidential, but, according to Ericsson, the settlement payment “reflects [the] uncertainty, risk, expense, and potential distraction from business focus associated with a potentially lengthy and complex litigation.”<sup>508</sup> This settlement

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<sup>501</sup> US Department of Justice Press Release No. 21-795: Justice Department Approves Remission of Over \$32 Million in Forfeited Funds to Victims in the FIFA Corruption Case (Aug. 24, 2021).

<sup>502</sup> US Department of Justice Press Release No. 21-795: Justice Department Approves Remission of Over \$32 Million in Forfeited Funds to Victims in the FIFA Corruption Case (Aug. 24, 2021).

<sup>503</sup> US Department of Justice Press Release No. 21-795: Justice Department Approves Remission of Over \$32 Million in Forfeited Funds to Victims in the FIFA Corruption Case (Aug. 24, 2021).

<sup>504</sup> Telefonaktiebolaget LM Ericsson Press Release: Ericsson Announces Settlement With Impact in Second Quarter 2021 (May 12, 2021), <https://www.ericsson.com/en/press-releases/2021/5/ericsson-announces-settlement-with-impact-in-second-quarter-2021>.

<sup>505</sup> Telefonaktiebolaget LM Ericsson Press Release: Ericsson Announces Settlement With Impact in Second Quarter 2021 (May 12, 2021), <https://www.ericsson.com/en/press-releases/2021/5/ericsson-announces-settlement-with-impact-in-second-quarter-2021>; see also Dominic Chopping, *Ericsson to Pay Nokia \$97.2 Million to Settle Damages Claim*, WALL ST. J. (May 12, 2021), <https://www.wsj.com/articles/ericsson-to-pay-nokia-97-2-million-to-settle-damages-claim-11620844017>.

<sup>506</sup> Telefonaktiebolaget LM Ericsson Press Release: Ericsson Announces Settlement With Impact in Second Quarter 2021 (May 12, 2021), <https://www.ericsson.com/en/press-releases/2021/5/ericsson-announces-settlement-with-impact-in-second-quarter-2021>.

<sup>507</sup> Telefonaktiebolaget LM Ericsson Press Release: Ericsson Announces Settlement With Impact in Second Quarter 2021 (May 12, 2021), <https://www.ericsson.com/en/press-releases/2021/5/ericsson-announces-settlement-with-impact-in-second-quarter-2021>; see also US Department of Justice Press Release No. 19-1360: Ericsson Agrees to Pay Over \$1 Billion to Resolve FCPA Case (Dec. 6, 2019); US Securities and Exchange Commission Press Release No. 2019-254: SEC Charges Multinational Telecommunications Company with FCPA Violations (Dec. 6, 2019).

<sup>508</sup> Telefonaktiebolaget LM Ericsson Press Release: Ericsson Announces Settlement With Impact in Second Quarter 2021 (May 12, 2021), <https://www.ericsson.com/en/press-releases/2021/5/ericsson-announces-settlement-with-impact-in-second-quarter-2021>.



shows the importance of recognizing that corruption cases can result in subsequent claims by competitors, even though this type of claim is rare.<sup>509</sup>

## VI. KEY INTERNATIONAL LEGAL DEVELOPMENTS

### A. UK Enforcement & Policy Updates

#### 1. SFO Continues to Focus on Corporate DPAs

In 2021, the negotiation of DPAs remained high on the agenda of the UK SFO, with the SFO entering into three DPAs relating to bribery and corruption offenses: one with Amec Foster Wheeler Energy Limited and two with as-yet-unnamed UK companies. This brings the total number of DPAs to 12 since the SFO introduced them in 2014.

Under the terms of its DPA, AFW took responsibility for ten offenses relating to the use of corrupt agents in the oil and gas sector between 1996 and 2014 in five jurisdictions.<sup>510</sup> As noted in Section III.A.4 above, the DPA was part of a coordinated global resolution with authorities in the United States and Brazil, resulting in a combined penalty of US \$177 million.<sup>511</sup> In the UK, AFW agreed to pay a financial penalty of £99.9 million, as well as a compensation payment of £210,610 to the people of Nigeria and the SFO's costs of £3.4 million.<sup>512</sup> In addition to the financial penalty, AFW will be required to report annually on its group-wide compliance program during the three-year term of the DPA.<sup>513</sup>

In July 2021, the High Court approved two further DPAs with two unnamed UK-based companies for their participation in, and failure to prevent, bribery in violation of sections 1 and 7 of the Bribery Act 2010.<sup>514</sup> The DPAs relate to the use of bribes to obtain UK contracts worth millions of pounds.

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<sup>509</sup> While this type of case is uncommon, chemical company Innospec Inc. settled a similar dispute in 2011 with its competitor, NewMarket, which claimed that it lost out on market opportunities in Iraq and Indonesia after Innospec paid bribes and kickbacks to foreign officials. In that instance, Innospec similarly agreed to pay \$45 million to settle the claims. See Joe Palazzolo, *Innospec to Pay \$45 Million to End Lawsuit Over Bribery*, WALL ST. J. (Sept. 27, 2011), <https://www.wsj.com/articles/BL-CCB-5137>.

<sup>510</sup> UK Serious Fraud Office Case Update: SFO Enters Into £103m DPA With Amec Foster Wheeler Energy Limited (July 2, 2021), <https://www.sfo.gov.uk/2021/07/02/sfo-enters-into-103m-dpa-with-amec-foster-wheeler-energy-limited-as-part-of-global-resolution-with-us-and-brazilian-authorities>. For further discussion of the conduct included in the resolution, see Section III.A.4.

<sup>511</sup> UK Serious Fraud Office Case Update: SFO Enters Into £103m DPA With Amec Foster Wheeler Energy Limited (July 2, 2021), <https://www.sfo.gov.uk/2021/07/02/sfo-enters-into-103m-dpa-with-amec-foster-wheeler-energy-limited-as-part-of-global-resolution-with-us-and-brazilian-authorities>.

<sup>512</sup> UK Serious Fraud Office Case Update: SFO Enters Into £103m DPA With Amec Foster Wheeler Energy Limited (July 2, 2021), <https://www.sfo.gov.uk/2021/07/02/sfo-enters-into-103m-dpa-with-amec-foster-wheeler-energy-limited-as-part-of-global-resolution-with-us-and-brazilian-authorities>.

<sup>513</sup> UK Serious Fraud Office Case Update: SFO Enters Into £103m DPA With Amec Foster Wheeler Energy Limited (July 2, 2021), <https://www.sfo.gov.uk/2021/07/02/sfo-enters-into-103m-dpa-with-amec-foster-wheeler-energy-limited-as-part-of-global-resolution-with-us-and-brazilian-authorities>.

<sup>514</sup> UK Serious Fraud Office News Release: SFO Secures Two DPAs With Companies for Bribery Act Offences (July 20, 2021), <https://www.sfo.gov.uk/2021/07/20/sfo-secures-two-dpas-with-companies-for-bribery-act-offences>. Both DPAs are covered by the same Statement of Facts, but that document, along with the DPAs and the judgment approving them, has not yet been published due to reporting restrictions imposed pending the SFO's prosecution of any relevant individuals. *Id.*

The DPAs, each with a two-year term, are relatively small in value, imposing a combined total of £2.5 million in disgorgement of profits and financial penalties.<sup>515</sup>

The financial benefits of DPAs for the UK Treasury are significant. In November 2021, the SFO's Chief Operating Officer, John Carroll, announced that DPAs had brought in approximately £1.6 billion since 2015, which was enough to fund the SFO four times over during that same period.<sup>516</sup> Despite these apparent financial gains, the Bureau of Investigative Journalism published a report on November 15, 2021, asserting that the SFO's efforts to combat economic crime are being undermined by a lack of funding and the departure of some of its senior officials.<sup>517</sup> SFO Director Lisa Osofsky responded that the SFO has no trouble attracting talented and experienced staff and that its budget does not prevent it from delivering results.<sup>518</sup>

## 2. Individual Prosecutions

Securing individual convictions following these DPAs continues to elude the SFO, which has raised questions about the efficacy and fairness of a DPA regime that incentivizes companies to admit wrongdoing while failing to hold accountable the individuals allegedly responsible for that wrongdoing. To date, the SFO has not secured any individual convictions following a corporate DPA.<sup>519</sup>

When the SFO has brought cases against individuals, it has faced hurdles that seemingly could have been avoided. For example, in April 2021, the SFO's case against two former executives at Serco, which entered into a DPA with the SFO in 2019, collapsed at trial when the office admitted that it had failed to disclose key evidence to the defendants.<sup>520</sup> The SFO's request to adjourn the trial to remedy the situation and hold a retrial was rejected by the judge, and the SFO was left with no choice but to offer no evidence against the individual defendants.<sup>521</sup>

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<sup>515</sup> UK Serious Fraud Office News Release: SFO Secures Two DPAs With Companies for Bribery Act Offences (July 20, 2021), <https://www.sfo.gov.uk/2021/07/20/sfo-secures-two-dpas-with-companies-for-bribery-act-offences>.

<sup>516</sup> Alice Johnson, *SFO Official: DPA Money Easily Covers Agency's Costs*, GLOBAL INVESTIGATIONS REV. (Nov. 11, 2021), <https://globalinvestigationsreview.com/deferred-prosecution-agreement/sfo-official-dpa-money-easily-covers-agencys-costs>.

<sup>517</sup> Ed Siddons & Simon Lock, *City Law Firms Make Millions While Top Corruption Cases Tumble*, BUREAU OF INVESTIGATIVE JOURNALISM (Nov. 15, 2021), <https://www.thebureauinvestigates.com/stories/2021-11-15/city-law-firms-make-millions-while-top-corruption-cases-tumble>.

<sup>518</sup> Lisa Osofsky, *Letter: SFO's Revolving Door Works Better Than a Closed Shop*, FIN. TIMES (Nov. 26, 2021), <https://www.ft.com/content/7459df0a-b10e-48e1-9206-c26ea6d028b1>.

<sup>519</sup> Ellen Milligan, *A Botched Bribery Case Prompts Calls for SFO Reform*, BLOOMBERG (Dec. 30, 2021), <https://www.bloomberg.com/news/articles/2021-12-30/a-botched-bribery-case-prompts-calls-for-sfo-reform>.

<sup>520</sup> UK Serious Fraud Office Case Update: SFO Offers No Evidence Against Nicholas Woods and Simon Marshall (Apr. 26, 2021), <https://www.sfo.gov.uk/2021/04/26/sfo-offers-no-evidence-against-nicholas-woods-and-simon-marshall>.

<sup>521</sup> UK Serious Fraud Office Case Update: SFO Offers No Evidence Against Nicholas Woods and Simon Marshall (Apr. 26, 2021), <https://www.sfo.gov.uk/2021/04/26/sfo-offers-no-evidence-against-nicholas-woods-and-simon-marshall>.

The SFO's track record in bringing individual cases outside of the DPA context has similarly suffered setbacks. In December 2021, the Court of Appeal overturned the conviction of former Unaoil manager Ziad Akle. Akle, who was sentenced in 2020 to five years' imprisonment for bribery, argued that his conviction should be overturned because the SFO had failed to disclose its contacts with David Tinsley, a freelance agent acting for the owner of the Unaoil group of companies, Ata Ahsani, and his sons, Cyrus and Saman Ahsani, who also were suspected of bribery by the SFO.<sup>522</sup> Akle alleged that the SFO encouraged Tinsley to induce Akle to plead guilty at the same time Tinsley was negotiating with UK and US authorities on behalf of the Ahsanis.<sup>523</sup> In December 2021, the Court of Appeal overturned Akle's conviction in a judgment that criticized the SFO's contact with Tinsley and its failure to disclose related documents.<sup>524</sup> The Court refused to order a retrial in part because of its view of the seriousness of the SFO's disclosure failings.<sup>525</sup> Following the decision, the UK Attorney General, Suella Braverman, announced an independent review of the SFO based on the judges' criticisms.<sup>526</sup>

Looking forward, the SFO has a number of additional upcoming trials with individuals. The delayed trial of three former executives at G4S, which reached a DPA with the SFO in 2020, is slated for 2023.<sup>527</sup> During 2021, the SFO charged five individuals with bribery in relation to suspected payments of bribes to win contracts in the UK construction sector, although the names of the companies involved have not yet been disclosed.<sup>528</sup> The five accused will be tried together in September 2022.

### 3. Other SFO Litigation

During the summer of 2021, the High Court heard the long-awaited trial in the civil claims brought by Eurasian Natural Resources Corporation (ENRC) against Dechert LLP, Neil Gerrard (a former

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<sup>522</sup> UK Serious Fraud Office News Release: Former Unaoil Executive Sentenced to Five Years for Bribery in Post-Occupation Iraq (July 23, 2020), <https://www.sfo.gov.uk/2020/07/23/former-unaoil-executive-sentenced-to-five-years-for-bribery-in-post-occupation-iraq>.

<sup>523</sup> Kirstin Ridley, *Unaoil Executive's Conviction Quashed in Heavy Blow to UK Fraud Agency*, REUTERS (Dec. 11, 2021), <https://www.reuters.com/world/uk/conviction-former-unaoil-executive-quashed-sharp-blow-uks-sfo-2021-12-10>.

<sup>524</sup> Kirstin Ridley, *Unaoil Executive's Conviction Quashed in Heavy Blow to UK Fraud Agency*, REUTERS (Dec. 11, 2021), <https://www.reuters.com/world/uk/conviction-former-unaoil-executive-quashed-sharp-blow-uks-sfo-2021-12-10>.

<sup>525</sup> Kirstin Ridley, *Unaoil Executive's Conviction Quashed in Heavy Blow to UK Fraud Agency*, REUTERS (Dec. 11, 2021), <https://www.reuters.com/world/uk/conviction-former-unaoil-executive-quashed-sharp-blow-uks-sfo-2021-12-10>.

<sup>526</sup> Kirstin Ridley, *Unaoil Executive's Conviction Quashed in Heavy Blow to UK Fraud Agency*, REUTERS (Dec. 11, 2021), <https://www.reuters.com/world/uk/conviction-former-unaoil-executive-quashed-sharp-blow-uks-sfo-2021-12-10>.

<sup>527</sup> Sam Fry, *G4S Individuals' Trial Delayed by a Year*, GLOBAL INVESTIGATIONS REV. (Oct. 21, 2021), <https://globalinvestigationsreview.com/enforcement/g4s-individuals-trial-delayed-year>.

<sup>528</sup> UK Serious Fraud Office News Release: Serious Fraud Office Charges Five Persons With Bribery and Money Laundering (Aug. 17, 2021), <https://www.sfo.gov.uk/2021/08/17/serious-fraud-office-charges-five-persons-with-bribery-and-money-laundering>.

Dechert partner), and the SFO.<sup>529</sup> ENRC's allegations relate to the conduct of Mr. Gerrard and the SFO in the SFO's long running investigation into ENRC, which began in 2013. In particular, ENRC alleged that Mr. Gerrard deliberately leaked confidential information to the press and his contacts at the SFO, and that the SFO abused its statutory powers in the conduct of its investigation by (among other things) holding a series of unauthorized meetings with Mr. Gerrard.<sup>530</sup> Judgment of the claims, which are strongly denied by Dechert and the SFO, is expected in early 2022. Meanwhile ENRC continues to be a thorn in the side of the SFO, having brought separate claims in 2021 against the SFO and its former staff alleging that the SFO had an "endemic culture" of leaking information to journalists regarding ongoing investigations.<sup>531</sup>

#### 4. Corporate Guilty Pleas

While the SFO's use of DPAs to resolve cases has drawn a lot of attention in recent years, 2021 saw almost as many guilty pleas from corporations as DPAs. For example, Petrofac, one of the world's largest providers of oilfield services, pleaded guilty to seven offenses of failing to prevent bribery after admitting that its employees paid \$44 million in bribes between 2011 and 2017 to win contracts worth £2.6 billion in Iraq, Saudi Arabia, and the UAE.<sup>532</sup> Petrofac was ordered to pay a £47.2 million fine, a £22.8 million confiscation order, and cover £7 million in costs related to the SFO's four-year investigation.<sup>533</sup>

In her sentencing remarks, the judge commented that "Petrofac would not have pleaded guilty" without the extensive cooperation of David Lufkin, Petrofac's former Head of Sales.<sup>534</sup> The limited corporate cooperation suggested by the Judge's comment may be one of the reasons a DPA was not considered, although the SFO has not given its reasons publicly. Lufkin, who pleaded guilty to 11 counts of bribery in 2019 and 3 further counts of bribery in 2021, was given a two-year sentence, which was suspended for 18 months because of his early guilty plea and the assistance he provided to the SFO investigation.<sup>535</sup> While the leniency afforded to Lufkin may encourage other suspects to cooperate, there is still a risk for individuals in doing so. In the UK, as in the United

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<sup>529</sup> Kirstin Ridley, *Miner ENRC rounds on UK's SFO, Dechert in London court battle*, REUTERS (May 24, 2021), <https://www.reuters.com/business/energy/miner-enrc-rounds-uks-sfo-dechert-london-court-battle-2021-05-24>.

<sup>530</sup> Kirstin Ridley, *Miner ENRC rounds on UK's SFO, Dechert in London court battle*, REUTERS (May 24, 2021), <https://www.reuters.com/business/energy/miner-enrc-rounds-uks-sfo-dechert-london-court-battle-2021-05-24>.

<sup>531</sup> *ENRC Issues Legal Proceedings Against Serious Fraud Office and Former Case Controller John Gibson for Systematic Leaking*, ENRCNEWS (Jan. 29, 2021), <https://enrcnews.com>.

<sup>532</sup> UK Serious Fraud Office Case Update: Serious Fraud Office Secures Third Set of Petrofac Bribery Convictions (Oct. 4, 2021), <https://www.sfo.gov.uk/2021/10/04/serious-fraud-office-secures-third-set-of-petrofac-bribery-convictions>.

<sup>533</sup> UK Serious Fraud Office Case Update: Serious Fraud Office Secures Third Set of Petrofac Bribery Convictions (Oct. 4, 2021), <https://www.sfo.gov.uk/2021/10/04/serious-fraud-office-secures-third-set-of-petrofac-bribery-convictions>.

<sup>534</sup> Katie Beioley, *Petrofac Ordered to Pay \$95m After Admitting Middle East Bribery*, FIN. TIMES (Oct. 4, 2021), <https://www.ft.com/content/553f0f64-6f54-4ec9-92e4-a69ad9490cf9>.

<sup>535</sup> UK Serious Fraud Office News Release: SFO Secures Confiscation Against Former Petrofac Executive (Dec. 15, 2021), <https://www.sfo.gov.uk/2021/12/15/serious-fraud-office-secures-confiscation-against-former-petrofac-executive>.

States, individuals must plead guilty without certainty of the credit they will receive and before being able to argue to the court for leniency.

The SFO also charged Airbus SE subsidiary GPT Special Project Management with corruption in relation to £10 million in bribes paid to win contracts from the Saudi military between 2008 and 2010. This prosecution was separate from the €984 million global settlement that UK, French, and US authorities entered into with GPT's parent company, Airbus, in January 2020.<sup>536</sup> The SFO first launched its investigation into GPT in August 2012 and requested permission to prosecute the company in 2018. GPT pleaded guilty in April 2021, was fined £7.5 million, and was ordered to pay both a £20.6 million confiscation order and the SFO's costs.<sup>537</sup>

## 5. SFO Case Closures and Overall Caseload Decrease

The SFO's caseload appears to have declined in 2021, with five high-profile investigations having been closed with no action taken, including those into KBR Inc.<sup>538</sup> and British American Tobacco (BAT).<sup>539</sup> The SFO has now dropped 30 investigations since 2018 (the year Lisa Osofsky became Director), compared to just 13 cases dropped in the five years before Osofsky's appointment.<sup>540</sup> Osofsky previously has stated that it is the SFO's responsibility to close cases that have diminishing prospects, noting that an investigation that does not lead to a prosecution does not mean that the investigation was a waste of money.<sup>541</sup>

## 6. Legal Developments

In February 2021, the UK Supreme Court unanimously held that the SFO cannot compel a foreign company to produce documents held outside the UK.<sup>542</sup> KBR's American parent company first sought a judicial review of the SFO's powers to compel production of documents in 2018, and the 2021 judgment marked the final resolution of this judicial review. Beyond leading to the closure of

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<sup>536</sup> UK Serious Fraud Office Case Information, *Airbus Group* (May 17, 2021), <https://www.sfo.gov.uk/cases/airbus-group>.

<sup>537</sup> UK Serious Fraud Office News Release: GPT Pleads Guilty to Corruption (Apr. 28, 2021), <https://www.sfo.gov.uk/2021/04/28/gpt-pleads-guilty-to-corruption>.

<sup>538</sup> UK Serious Fraud Office Case Update: SFO Closes Investigation Into KBR Inc.'s UK Subsidiaries (Mar. 18, 2021), <https://www.sfo.gov.uk/2021/03/18/sfo-closes-investigation-into-kbr-inc-s-uk-subsidiaries/#:~:text=Following%20a%20thorough%20investigation%20of,the%20Code%20for%20Crown%20Prosecutors>.

<sup>539</sup> BAT is still being investigated by the DOJ and OFAC in the United States, and the SFO has stated that it will continue to assist the ongoing investigations of other law enforcement partners. UK Serious Fraud Office Case Update: SFO Closes British American Tobacco (BAT) Plc Investigation (Jan. 15, 2021), <https://www.sfo.gov.uk/2021/01/15/sfo-closes-british-american-tobacco-bat-plc-investigation>.

<sup>540</sup> Ed Siddons & Simon Lock, *City Law Firms Make Millions While Top Corruption Cases Tumble*, BUREAU OF INVESTIGATIVE JOURNALISM (Nov. 15, 2021), (Nov. 15, 2021), <https://www.thebureauinvestigates.com/stories/2021-11-15/city-law-firms-make-millions-while-top-corruption-cases-tumble>.

<sup>541</sup> UK Serious Fraud Office Speeches: Lisa Osofsky Address to the Cambridge Symposium on Economic Crime (Sept. 7, 2020), <https://www.sfo.gov.uk/2020/09/07/lisa-osofsky-speaking-at-a-presentation-hosted-by-the-cambridge-symposium-on-economic-crime>.

<sup>542</sup> *R (In re KBR, Inc) v Director of the Serious Fraud Office* [2021] UKSC 2.

the SFO's KBR investigation, this Supreme Court judgment significantly limits the SFO's unilateral investigatory powers and will require it to rely on other methods, including mutual legal assistance treaties (MLATs) or voluntary cooperation, to obtain documents held outside the UK by a foreign company.

Significant legislative changes affecting corporate criminal liability are on the horizon after years of limited reform in this area. The Law Commission is expected to publish the results of its review of corporate criminal responsibility in 2022, following a lengthy consultation period.<sup>543</sup> This review included consideration of the question of whether the "identification principle" is fit for purpose.<sup>544</sup> Under the identification principle, only the acts of a senior person representing the company's "controlling mind and will" can be attributed to the company, and except for certain limited cases, this test determines whether a company is criminally liable for the actions of the individual. In practice, the individuals who can represent a company's controlling mind and will are limited to a small number of directors and senior managers, particularly when the principle is applied to large companies.<sup>545</sup> Although the results of the Law Commission's review are hard to predict, it seems likely that publication of this report will force Parliament to seriously consider making legislative changes to the law in this area.

## **B. Germany**

### **1. Council Report**

In May 2021, the Council of Europe issued a report finding Germany's efforts against corruption to be unsatisfactory.<sup>546</sup> The report criticized Germany's progress with regard to (1) fighting bribes given to members of the German Federal Parliament (*Bundestag*) (MP), and (2) the abuse of authority. The report also cited a lack of adequate measures to improve transparency of the secondary activities (*Nebentätigkeiten*) of federal judges.

### **2. Legislative and Policy Developments**

Various legislative developments during 2021 broadly fall within the scope of Germany's fight against corruption. Most notably, the draft bill on German corporate criminal liability (*Verbandssanktionengesetz*) was not passed prior to the German elections in September. Since then, leaders of Germany's next coalition government agreed on a coalition pact according to which the new government intends to resume work on German corporate criminal liability including

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<sup>543</sup> Law Commission, Corporate Criminal Liability (Dec. 2, 2021), <https://www.lawcom.gov.uk/project/corporate-criminal-liability>.

<sup>544</sup> Law Commission, Corporate Criminal Liability (Dec. 2, 2021), <https://www.lawcom.gov.uk/project/corporate-criminal-liability>.

<sup>545</sup> Law Commission, Corporate Criminal Liability (Dec. 2, 2021), <https://www.lawcom.gov.uk/project/corporate-criminal-liability>.

<sup>546</sup> GRECO, *Interim Compliance Report Germany* (May 10, 2021), <https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680a26425>; *Deutschland tut nicht genug gegen Korruption*, TAGESSCHAU (May 10, 2021), <https://www.tagesschau.de/ausland/europa/europarat-korruption-105.html>.

providing a precise framework on companies' compliance obligations as well as internal investigations.<sup>547</sup> Other legislative initiatives were more successful. For example, the draft bills for the implementation of a competition register (*Wettbewerbsregister*), and for a transparency register (*Transparenzregister- und Finanzinformationsgesetz*), were passed into law. Additionally, the implementation of the EU Whistleblowing Directive into German law is expected in 2022.<sup>548</sup>

In March 2021, the German competition register (*Wettbewerbsregister*)—containing information on companies excluded from procurement procedures—came into operation.<sup>549</sup> Going forward, certain criminal court convictions and penalty orders (including bribery, money laundering, etc.) will trigger a company's inclusion in the register.<sup>550</sup> A public authority is obliged to consult the register prior to awarding a contract in a public procurement procedure involving an estimated order value of €30,000 or more, to ensure that the bidder to whom the public contracting authority intends to award the contract is not listed.<sup>551</sup>

In April 2021, the Lobby Register Act (*Lobbyregistergesetz- LobbyRG*) was published in the German Federal Law Gazette (*Bundesgesetzblatt*).<sup>552</sup> This legislation, which came into force on January 1, 2022,<sup>553</sup> intends to make the influence of lobbyists more transparent.<sup>554</sup> Under the act, lobbyists who represent interests of members or groups of the German Federal Parliament or the German Federal Government<sup>555</sup> will have to provide certain information, including details about the lobbyists and their activities, which interests they represent, annual financial expenditures for lobbying in increments of €10,000, etc.,<sup>556</sup> if (a) lobbying is conducted regularly or intended to be permanent, or if it is carried out commercially for a third party; or (b) more than 50 different lobbying contracts have been concluded within the previous three months.<sup>557</sup>

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<sup>547</sup> Coalition agreement between SPD, Bündnis 90/Die Grünen and FDP for the 20th parliamentary term from Oct. 2021 to 2025, *Mehr Fortschritt Wagen – Bündnis für Freiheit, Gerechtigkeit und Nachhaltigkeit*, at 111.

<sup>548</sup> Cf. Clare McNicholas, *Implementation of EU Whistleblowing Directive: Where Are We Now?*, NAT'L LAW REVIEW (Dec. 17, 2021), <https://www.natlawreview.com/article/implementation-eu-whistleblowing-directive-where-are-we-now>.

<sup>549</sup> Notice by the Federal Cartel Office (*Bundeskartellamt*), *Wettbewerbsregister nimmt Betrieb auf – Start der Registrierung von öffentlichen Stellen* (Mar. 25, 2021), [https://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2021/25\\_03\\_2021\\_Betrieb\\_Wettbewerbsregister.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2021/25_03_2021_Betrieb_Wettbewerbsregister.html).

<sup>550</sup> Cf. Section 2 German Competition Register Law.

<sup>551</sup> Section 6 German Competition Register Law.

<sup>552</sup> Gesetz zur Einführung eines Lobbyregisters für die Interessenvertretung gegenüber dem Deutschen Bundestag und gegenüber der Bundesregierung (Lobbyregistergesetz – LobbyRG) in the version published on April 27, 2021 (BGBl. I S. 818).

<sup>553</sup> Section 10 Lobby Registration Act.

<sup>554</sup> German Federal Parliament, *Beschlussempfehlung und Bericht des Ausschusses für Wahlprüfung, Immunität und Geschäftsordnung (1. Ausschuss)*, BT-Drs 19/27922 (Mar. 24, 2021), at 2.

<sup>555</sup> Section 1 (1) Lobby Registration Act.

<sup>556</sup> Section 3 (1) Lobby Registration Act.

<sup>557</sup> Section 2 (1) Lobby Registration Act.

In August 2021, new legislation on a transparency register and financial information (*Transparenzregister- und Finanzinformationsgesetz - TraFinG*) (Transparency Register and Financial Information Act) came into force.<sup>558</sup> The legislation introduces new obligations for legal entities to provide information on all beneficial owners in order to combat money laundering and terrorist financing and to provide transparency regarding legal entities and their beneficial owners<sup>559</sup> as a key component in combating corruption.<sup>560</sup> It will no longer be possible to fulfill reporting obligations by referring to other registers, such as the commercial register (*Handelsregister*);<sup>561</sup> rather, the act converts the prior “catch all” register into a full register in order to enable European networking and to improve its practical and digital usability.<sup>562</sup>

In October 2021, coalition negotiations between the new government parties started, targeting legislation to protect whistleblowers as a top priority.<sup>563</sup> Germany was obliged to implement the EU Whistleblowing Directive by December 17, 2021,<sup>564</sup> but it did not meet this deadline.<sup>565</sup> Other EU Member States also failed to meet the deadline.<sup>566</sup> While it had been rather unlikely that Germany would be able to meet this deadline, the new government parties nevertheless intended to come to a conclusion on this matter quickly to avoid an infringement proceeding by the EU.<sup>567</sup> In light of this

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<sup>558</sup> Gesetz zur europäischen Vernetzung der Transparenzregister und zur Umsetzung der Richtlinie (EU) 2019/1153 des Europäischen Parlaments und des Rates vom 20. Juni 2019 zur Nutzung von Finanzinformationen für die Bekämpfung von Geldwäsche, Terrorismusfinanzierung und sonstigen schweren Straftaten (*Transparenzregister- und Finanzinformationsgesetz*) in the version published on June 30, 2021 (BGBl. I S. 2083).

<sup>559</sup> German Federal Government, *Entwurf eines Gesetzes zur europäischen Vernetzung der Transparenzregister und zur Umsetzung der Richtlinie 2019/1153 des Europäischen Parlaments und des Rates vom 20. Juni 2019 zur Nutzung von Finanzinformationen für die Bekämpfung von Geldwäsche, Terrorismusfinanzierung und sonstigen schweren Straftaten (Transparenzregister- und Finanzinformationsgesetz)*, BT-Drs 19/28164, at 1 (Mar. 31, 2021).

<sup>560</sup> OECD, *Issues Paper on Corruption and Economic Growth* (2013), <https://www.oecd.org/g20/topics/anti-corruption/Issue-Paper-Corruption-and-Economic-Growth.pdf>.

<sup>561</sup> German Federal Government, *Entwurf eines Gesetzes zur europäischen Vernetzung der Transparenzregister und zur Umsetzung der Richtlinie 2019/1153 des Europäischen Parlaments und des Rates vom 20. Juni 2019 zur Nutzung von Finanzinformationen für die Bekämpfung von Geldwäsche, Terrorismusfinanzierung und sonstigen schweren Straftaten (Transparenzregister- und Finanzinformationsgesetz)*, BT-Drs 19/28164, at 2 (Mar. 31, 2021); such possibility was provided by Section 20 (2) Money Laundering Act (*Geldwäschegesetz*) up to this point.

<sup>562</sup> German Federal Government, *Entwurf eines Gesetzes zur europäischen Vernetzung der Transparenzregister und zur Umsetzung der Richtlinie 2019/1153 des Europäischen Parlaments und des Rates vom 20. Juni 2019 zur Nutzung von Finanzinformationen für die Bekämpfung von Geldwäsche, Terrorismusfinanzierung und sonstigen schweren Straftaten (Transparenzregister- und Finanzinformationsgesetz)*, BT-Drs 19/28164, at 30 (Mar. 31, 2021).

<sup>563</sup> Georg Mascolo, *Ungeliebte Retter*, SÜDDEUTSCHE ZEITUNG (Oct. 26, 2021), <https://www.sueddeutsche.de/meinung/facebook-whistleblower-wirecard-1.5449428?reduced=true>.

<sup>564</sup> Article 26 (1) Directive (EU) 2019/1937.

<sup>565</sup> Marcus Jung, *Schutz vor Kündigung oder Mobbing von Hinweisgebern*, FRANKFURTER ALLGEMEINE ZEITUNG (Dec. 20, 2021), <https://www.faz.net/aktuell/wirtschaft/whistleblower-gesetz-schutz-vor-kuendigung-oder-mobbing-von-hinweisgebern-17692348.html>.

<sup>566</sup> Cf. Clare McNicholas, *Implementation of EU Whistleblowing Directive: Where Are We Now?*, NAT'L LAW REVIEW (Dec. 17, 2021), <https://www.natlawreview.com/article/implementation-eu-whistleblowing-directive-where-are-we-now>.

<sup>567</sup> Georg Mascolo, *Ungeliebte Retter*, SÜDDEUTSCHE ZEITUNG (Oct. 26, 2021), <https://www.sueddeutsche.de/meinung/facebook-whistleblower-wirecard-1.5449428?reduced=true>.



possibility, such legislation will likely be introduced in 2022.<sup>568</sup> A draft bill was introduced by the German Federal Ministry of Justice but remained the subject of debate at the beginning of 2021, as it did not intend to protect only the whistleblowers uncovering violations of EU law<sup>569</sup> (as intended by the EU Whistleblowing Directive),<sup>570</sup> but also those reporting violations against German national law. According to the coalition agreement, the new government parties intend to implement the EU Whistleblowing Directive in a legally consistent and practicable way.<sup>571</sup> More specifically, whistleblowers must be protected from legal disadvantages not only when reporting violations of EU law, but also when reporting significant violations of regulations or other significant misconduct whose disclosure is in the public interest.<sup>572</sup> The enforceability of claims because of reprisals against the wrongdoer is also a topic the new government parties plan to improve, and the coalition is therefore assessing advisory and financial support options.<sup>573</sup>

### 3. Enforcement Efforts

In May 2021, the Munich Public Prosecution Office investigated a former member of Parliament (MP) involved in the so-called “Azerbaijan affair,”<sup>574</sup> which concerned allegations that several politicians from former German governing parties CDU and CSU engaged in improper lobbying and corruption in connection with business dealings in Azerbaijan. The former MP that is the subject of the investigation allegedly received funds amounting to almost €4 million originating from Azerbaijan between 2008 and 2016 which were then supposed to be distributed to members of the Council of Europe Parliamentary Assembly (PACE) in return for pro-Azerbaijani comments in the media.<sup>575</sup> The former MP stated that the allegation that he distributed bribery money from Azerbaijan is “complete nonsense.”<sup>576</sup>

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<sup>568</sup> Cf. Clare McNicholas, *Implementation of EU Whistleblowing Directive: Where Are We Now?*, NAT'L LAW REVIEW (Dec. 17, 2021), <https://www.natlawreview.com/article/implementation-eu-whistleblowing-directive-where-are-we-now>.

<sup>569</sup> Heike Anger/Dietmar Neuerer, *Union und SPD streiten über Schutz von Whistleblowern*, HANDELSBLATT (Feb. 01, 2021), <https://www.handelsblatt.com/politik/deutschland/recht-und-steuern-union-und-spd-streiten-ueber-schutz-von-whistleblowern/26856784.html?ticket=ST-10966832-RRxYw1FbPYkFev43dBbm-ap6>.

<sup>570</sup> Cf. Article 2 (1) Directive (EU) 2019/1937.

<sup>571</sup> Coalition agreement between SPD, Bündnis 90/Die Grünen and FDP for the 20th parliamentary term from Oct. 2021 to 2025, *Mehr Fortschritt Wagen – Bündnis für Freiheit, Gerechtigkeit und Nachhaltigkeit*, at 111.

<sup>572</sup> Coalition agreement between SPD, Bündnis 90/Die Grünen and FDP for the 20th parliamentary term from Oct. 2021 to 2025, *Mehr Fortschritt Wagen – Bündnis für Freiheit, Gerechtigkeit und Nachhaltigkeit*, at 111.

<sup>573</sup> Coalition agreement between SPD, Bündnis 90/Die Grünen and FDP for the 20th parliamentary term from Oct. 2021 to 2025, *Mehr Fortschritt Wagen – Bündnis für Freiheit, Gerechtigkeit und Nachhaltigkeit*, at 111.

<sup>574</sup> Peter Fahrenholz, *Eduard Lintner und die Baku-Connection*, SÜDDEUTSCHE ZEITUNG (May 4, 2021), <https://www.sueddeutsche.de/meinung/korruption-schmiergeld-aserbeidschan-csu-1.5283106>.

<sup>575</sup> Claudia von Salzen, *Staatsanwälte werfen CDU-Politikerin Strenz Bestechlichkeit vor*, DER TAGESSPIEGEL (Jan. 30, 2020), <https://www.tagesspiegel.de/politik/buero-im-bundestag-durchsucht-staatsanwaelte-werfen-cdu-politikerin-strenz-bestechlichkeit-vor/25490730.html>; *Razzia gegen Unionspolitiker wegen Bestechungsverdachts*, FRANKFURTER ALLGEMEINE ZEITUNG (Jan. 30, 2020), <https://www.faz.net/aktuell/politik/inland/aserbeidschan-lobby-razzia-gegen-unionspolitiker-strenz-und-lintner-wegen-bestechungsverdachts-16608568.html>.

<sup>576</sup> Peter Fahrenholz, *Eduard Lintner und die Baku-Connection*, SÜDDEUTSCHE ZEITUNG (May 4, 2021), <https://www.sueddeutsche.de/meinung/korruption-schmiergeld-aserbeidschan-csu-1.5283106>.

In mid-June 2021, the European Court of Human Rights opened proceedings to examine the seizure of documents at the Munich-based office of an international law firm in connection with the Volkswagen emissions controversy in 2017.<sup>577</sup> The proceedings follow constitutional complaints filed in 2018 by the law firm and separately by three of its lawyers with the German Federal Constitutional Court, all of which were unsuccessful.<sup>578</sup> The main question currently before the European Court of Human Rights is whether documents produced by law firms when conducting internal investigations are protected by attorney-client privilege.<sup>579</sup> The judgment by the European Court of Human Rights will most likely not have a direct impact on the case at hand, but will almost certainly have an impact on future seizures of materials from law firms in Germany and will be a key consideration in internal investigations going forward.<sup>580</sup>

In November 2021, the Munich Higher Regional Court ruled that conduct surrounding the so-called “mask affair”—involving payments in connection with the procurement of respiratory masks during the COVID-19 pandemic in Germany—did not constitute an act of illicit bribery, reversing previous attachments totaling nearly €1.9 million in assets that had been imposed as a result of alleged bribery during the COVID-19 pandemic.<sup>581</sup> The mask affair involved alleged offenses in 2020 and 2021 by members of the German Federal Parliament and state parliaments. Two parliamentarians withdrew their memberships in their respective party,<sup>582</sup> and one of the MPs also resigned from parliament.<sup>583</sup> The Munich Prosecutor General’s Office announced that it will file an appeal with the Federal Supreme Court (BGH) regarding the Munich Higher Regional Court’s ruling.<sup>584</sup> The

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<sup>577</sup> European Court of Human Rights (ECtHR), *KOCK and Others v. Germany and JONES DAY v. Germany*, Applications nos. 1022/19 and 1125/19, published on June 14, 2021; Christiane Schiffer, *Razzia Gegen Interne Ermittler: Gerichtshof für Menschenrechte Prüft den Fall Jones Day*, JUVE (July 08, 2021), <https://www.juve.de/nachrichten/verfahren/2021/07/razzia-gegen-interne-ermittler-gerichtshof-fuer-menschenrechte-prueft-den-fall-jones-day>; pursuant to Article 34 ECHR, the law firm as well as three of its lawyers can file an application with the ECtHR, provided they are able to claim that Germany violated their rights set forth in the ECHR. In particular, the ECtHR will decide on whether the search and seizure of documents at the law firm’s office violated the right of the law firm as well as three of its lawyers set in Article 8 ECHR, ECtHR, *KOCK and Others v. Germany and JONES DAY v. Germany*, Applications nos. 1022/19 and 1125/19, published on June 14, 2021. In this regard, Article 8 ECHR also protects offices of law firms, ECtHR, *Niemietz v. Germany*, Application no. 13710/88, as of Dec. 16, 1992, at para. 29.

<sup>578</sup> German Federal Constitutional Court (BVerfG), ruling of June 27, 2018, BvR 1562/17; BVerfG, ruling of June 27, 2018, 2 BvR 1287/17, 2 BvR 1583/17.

<sup>579</sup> ECtHR, *KOCK and Others v. Germany and JONES DAY v. Germany*, Applications nos. 1022/19 and 1125/19, published on June 14, 2021.

<sup>580</sup> Christiane Schiffer, *Razzia Gegen Interne Ermittler: Gerichtshof für Menschenrechte Prüft den Fall Jones Day*, JUVE (July 08, 2021), <https://www.juve.de/nachrichten/verfahren/2021/07/razzia-gegen-interne-ermittler-gerichtshof-fuer-menschenrechte-prueft-den-fall-jones-day>.

<sup>581</sup> Notice by the Munich Higher Regional Court, *Verfahren wegen Bestechlichkeit/Bestechung von Mandatsträgern im Zusammenhang mit dem Ankauf von Corona-Schutzmasken (“Schutzmasken”)* (Nov. 18, 2021), <https://www.justiz.bayern.de/gerichte-und-behoerden/oberlandesgerichte/muenchen/presse/2021/31.php>.

<sup>582</sup> Melanie Amann et al., *Fall from Grace - Merkel’s Conservatives Mired in Scandal and Incompetence*, DER SPIEGEL (Mar. 15, 2021), <https://www.spiegel.de/international/germany/fall-from-grace-merkel-s-conservatives-mired-in-scandal-and-incompetence-a-b3b33c92-9855-4a92-9e3f-f1f6667de531>.

<sup>583</sup> *Nikolas Löbel legt Mandat wegen Maskenaffäre sofort nieder*, ZEIT (Mar. 8, 2021), [https://www.zeit.de/politik/deutschland/2021-03/cdu-abgeordneter-loebel-legt-mandat-wegen-maskenaffaere-sofort-nieder?utm\\_referrer=https%3A%2F%2Fwww.google.com%2F](https://www.zeit.de/politik/deutschland/2021-03/cdu-abgeordneter-loebel-legt-mandat-wegen-maskenaffaere-sofort-nieder?utm_referrer=https%3A%2F%2Fwww.google.com%2F).

<sup>584</sup> *BGH muss sich mit Maskenaffäre befassen*, SÜDDEUTSCHE ZEITUNG (Nov. 18, 2021), <https://www.sueddeutsche.de/bayern/kriminalitaet-muenchen-bgh-muss-sich-mit-maskenaffaere-befassen->

investigation into alleged bribery will continue, and we expect that BGH's ruling on this matter will be a landmark decision on whether the acts at issue reflect potential misconduct.<sup>585</sup> It remains unclear whether criminal charges will be filed against the two parliamentarians who were subject to the initial attachments of assets.<sup>586</sup>

### C. France

In January 2021, the Agence Française Anticorruption (AFA)—France's anti-corruption agency—published its revised anti-corruption compliance Guidelines,<sup>587</sup> updating its prior guidelines from December 2017.<sup>588</sup> The revised Guidelines reflect three years of the AFA's implementation of the anti-corruption provisions set out in France's anti-corruption law, Sapin Law II,<sup>589</sup> including sanction decisions issued by the AFA's sanction commission. The revised Guidelines are not legally binding. Rather, the revised Guidelines provide advice to public and private entities on preventing anti-corruption offenses by implementing strong anti-corruption compliance programs based on three pillars: (1) senior management's commitment, (2) the use of risk mapping, and (3) the management of identified risks through effective measures and procedures to prevent potential violations. The English version of the revised anti-corruption compliance Guidelines was released in March.<sup>590</sup>

In March 2021, the AFA also updated its Practical Guide on due diligence for mergers and acquisitions in order to account for an important case decision rendered by the French Supreme Court (*Cour de cassation*). As reported in last year's Year-in-Review,<sup>591</sup> the Court ruled that an acquiring company may be held liable for illicit acts committed by the company it has acquired,

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[dpa.urn-newsml-dpa-com-20090101-211118-99-49770](https://www.dpa.urn-newsml-dpa-com-20090101-211118-99-49770); *Oberlandesgericht München sieht in Maskenaffäre keine Bestechlichkeit*, FRANKFURTER ALLGEMEINE ZEITUNG (Nov. 18, 2021), <https://www.faz.net/aktuell/politik/inland/maskenaffaere-oberlandesgericht-muenchen-gibt-csu-politikern-recht-17640473.html>.

<sup>585</sup> *BGH muss sich mit Maskenaffäre befassen*, SÜDDEUTSCHE ZEITUNG (Nov. 18, 2021), <https://www.sueddeutsche.de/bayern/kriminalitaet-muenchen-bgh-muss-sich-mit-maskenaffaere-befassen-dpa.urn-newsml-dpa-com-20090101-211118-99-49770>.

<sup>586</sup> *Oberlandesgericht München sieht keine Bestechlichkeit bei Nüßlein und Sauter*, DER SPIEGEL (Nov. 18, 2021), <https://www.spiegel.de/politik/deutschland/georg-nuesslein-und-alfred-sauter-oberlandesgericht-muenchen-sieht-keine-bestechnlichkeit-a-294e303d-bc56-45bb-bcc4-4ad14d6ab747>.

<sup>587</sup> Agence Française Anticorruption, *Avis relatif aux recommandations de l'Agence française anticorruption destinées à aider les personnes morales de droit public et de droit privé à prévenir et à détecter les faits de corruption, de trafic d'influence, de concussion, de prise illégale d'intérêts, de détournement de fonds publics et de favoritisme*.

<sup>588</sup> Agence Française Anticorruption, *Recommandations de l'Agence française anticorruption destinées à aider les personnes morales de droit public et de droit privé à prévenir et à détecter les faits de corruption, de trafic d'influence, de concussion, de prise illégale d'intérêt, de détournement de fonds publics et de favoritisme* (Dec. 2017), [https://www.agence-francaise-anticorruption.gouv.fr/files/2018-10/2017\\_-\\_Recommandations\\_AFA.pdf](https://www.agence-francaise-anticorruption.gouv.fr/files/2018-10/2017_-_Recommandations_AFA.pdf).

<sup>589</sup> Loi n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, publiée au Journal officiel n°0287 du 10 Décembre 2016.

<sup>590</sup> Agence Française Anticorruption, *The French Anticorruption Agency Guidelines* (Dec. 2020) <https://www.agence-francaise-anticorruption.gouv.fr/files/files/French%20AC%20Agency%20Guidelines%20.pdf>.

<sup>591</sup> WilmerHale, *Global Anti-Bribery Year-in-Review: 2020 Developments and Predictions for 2021*, at 99 (Jan. 28, 2021), <https://www.wilmerhale.com/en/insights/client-alerts/20210126-2020-global-antibribery-yearinreview>.

even where these acts were committed before the acquisition.<sup>592</sup> That principle is now included and further discussed in the relevant section of the 2021 Practical Guide.<sup>593</sup>

Also in March 2021, the AFA published its 2020 Annual Activity Report. The Report provides that since AFA was created in 2017, it has conducted 125 audits and reviews. Of those 125, 84 focused on private sector whereas 41 targeted the public sector. In the year 2020 alone, AFA initiated 19 audits targeting private businesses and ten audits targeting the public sector. In addition, AFA processed nearly 300 reports in 2020. Nine of these reports contained information useful to investigative or judiciary authorities and were transmitted to the competent authorities.<sup>594</sup>

## **D. Switzerland**

### **1. Legal Developments**

The year 2021 saw a number of developments in Switzerland, including in a FIFA-related criminal investigation. In 2019, the Swiss Federal Criminal Court recused the former Swiss Attorney General, Michael Lauber, and other federal prosecutors from leading an investigation into bribery and corruption at FIFA after they allegedly met FIFA representatives, including the FIFA President, Gianni Infantino, informally on several different occasions. These events forced Lauber's resignation in July 2020 and triggered a new investigation by the Swiss prosecutors.<sup>595</sup>

On a related note, the Swiss office of the Attorney General filed an indictment in November 2021 against former FIFA President, Joseph Blatter, and against the former UEFA President, Michael Platini, for alleged fraud, criminal mismanagement, forgery of documents and misappropriation when they allegedly unlawfully arranged a payment of CHF 2 million from FIFA to Platini.<sup>596</sup>

In June 2021, the Swiss Federal Tribunal (the Swiss Supreme Court) ruled that, in criminal proceedings, communications between a person who has not been charged and his or her lawyer are protected from seizure by prosecuting authorities only if the lawyer is a practitioner based in

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<sup>592</sup> Cour de cassation, chambre criminelle, arrêt n°2333 du 25 novembre 2020 (18-86.955).

<sup>593</sup> See Agence Française Anticorruption, Practical Guide on Due Diligence for Mergers and Acquisitions, Section 1.2.3 on Transfer of criminal liability (2021).

<sup>594</sup> Agence Française Anticorruption, Rapport Annuel D'Activité 2020 (Mar. 31, 2021), [https://www.agence-francaise-anticorruption.gouv.fr/files/files/RA\\_AFA\\_2020\\_V2\\_WEB.pdf](https://www.agence-francaise-anticorruption.gouv.fr/files/files/RA_AFA_2020_V2_WEB.pdf); Agence Française Anticorruption, Publication du rapport annuel d'activité 2020 (Mar. 31, 2021), <https://www.agence-francaise-anticorruption.gouv.fr/publication-rapport-annuel-dactivite-2020>.

<sup>595</sup> Pierre Bydzovsky & Ludivine Kaiser, *Update on FIFA-Related Proceedings in Switzerland*, EXPERT GUIDES (July 10, 2021), <https://www.expertguides.com/articles/update-on-fifa-related-proceedings-in-switzerland/arukwggs>; Office of the Attorney General of Switzerland Press Release: Persönliche Erklärung des Bundesanwalts (July 24, 2020), <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-79914.html>. The position of the Swiss Attorney General remained vacant until Stefan Blätter was appointed as the new Swiss Attorney General in September 2021, more than a year after Michael Lauber resigned. *Swiss Elect New Attorney General After FIFA Scandal*, KHMER TIMES (Sept. 30, 2021), <https://www.khmertimeskh.com/50944535/swiss-elect-new-attorney-general-after-fifa-scandal>.

<sup>596</sup> Office of the Attorney General of Switzerland Press Release: Football: Indictment for a Payment of CHF 2 Million by FIFA to the Former President of UEFA (Nov. 2, 2021), <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-85688.html>.

Switzerland, the EU, or in the territory of a state party to the European Free Trade Association (EFTA).<sup>597</sup>

The tribunal's ruling was issued in connection with an investigation by the Office of the Attorney General of Switzerland (OAG) that was opened in July 2013 against several individuals suspected of money laundering and potential bribery of foreign public officials. During the investigation, the OAG ordered a dawn raid of a company that was not party to the criminal proceedings and seized many documents located at that company's premises. The company opposed the seizure by arguing that some of the documents were covered by the attorney-client privilege. The relevant documents were sealed upon request from the company. The OAG then asked a lower court to order the unsealing of these documents by arguing that the documents were communications with non-Swiss/EU/EFTA lawyers, which it contended were not covered by the privilege.

The lower court agreed with the OAG that the communications were not covered by the attorney-client privilege and could therefore be disclosed to the OAG.<sup>598</sup> In June, the Swiss Federal Tribunal rejected the company's appeal of the lower court order.<sup>599</sup> The Swiss Federal Tribunal held that where a person is accused in Swiss criminal proceedings, the attorney-client privilege applies to the communications with his or her lawyer irrespective of the country of origin of that lawyer (i.e., such communications are absolutely protected).<sup>600</sup> However, the tribunal's ruling also suggests that if a person is not accused by Swiss authorities, communications with a non-Swiss/EU/EFTA lawyer are *not* covered by the attorney-client privilege protection.<sup>601</sup> Under such circumstances, the Swiss prosecuting authorities therefore may seize and use such communications as evidence. This ruling could significantly impact the protection of communications between US lawyers and their Swiss-based clients.

## 2. **Blocking Statute**

In November 2021, the Swiss Federal Supreme Court confirmed the conviction of an asset manager for illegal acts on behalf of a foreign state. The asset manager had personally transferred client data from Switzerland to the United States and handed it over to the DOJ in the context of a tax dispute between these two countries.<sup>602</sup> The Swiss Federal Supreme Court closely examined

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<sup>597</sup> Tribunal Fédéral, première Cour de droit public, arrêt du 22 juin 2021 (1B\_333/2020).

<sup>598</sup> Ordonnance du Tribunal des mesures de contrainte du canton de Vaud du 28 mai 2020 (PC18.005863-CPB).

<sup>599</sup> Ordonnance du Tribunal des mesures de contrainte du canton de Vaud du 28 mai 2020 (PC18.005863-CPB).

<sup>600</sup> Ordonnance du Tribunal des mesures de contrainte du canton de Vaud du 28 mai 2020 (PC18.005863-CPB).

<sup>601</sup> Ordonnance du Tribunal des mesures de contrainte du canton de Vaud du 28 mai 2020 (PC18.005863-CPB).

<sup>602</sup> Dominique Müller et al., *Switzerland: New Precedent Does Not Provide Clear Guidance On The Boundaries Of The Swiss Blocking Statute*, MONDAQ (Dec. 8, 2021), <https://www.mondaq.com/trials-appeals-compensation/1139146/new-precedent-does-not-provide-clear-guidance-on-the-boundaries-of-the-swiss-blocking-statute>.

the Swiss blocking statute, focusing on Article 271 of the Swiss Criminal Code, which provides that anyone who performs acts on behalf of a foreign state on Swiss territory without authorization, or who aids and abets such acts, is liable to punishment.<sup>603</sup>

In this case, the facts that the transfer of the client files to the DOJ had taken place in the interest of a foreign state (the United States) and that the acts were initiated on Swiss territory without authorization from the competent authorities were undisputed. The Supreme Court focused its examination on whether the transfer of the client files to the DOJ qualified as a prohibited “official act.” The Court concluded that both an act involving or circumventing Swiss and/or international administrative and judicial assistance rules and an act being within the jurisdiction of a Swiss authority fall within the category of such a prohibited “official act.”<sup>604</sup>

The Supreme Court considered that the disclosure of information and documents, which could only be lawfully obtained in Switzerland pursuant to an order of Swiss authorities, was punishable under the blocking statute. The Court further noted that the relevant information constituted identifiable personal information regarding these parties that was not publicly available. Therefore, only administrative or judicial assistance procedures can ensure the secrecy and disclosure obligations of such information.<sup>605</sup> The Chairman thus was not allowed to hand over these files directly to the DOJ, and the DOJ should have pursued legal or administrative assistance and contacted the competent Swiss authorities to request this information. As a result, the Chairman infringed the blocking statute (Article 271(1) of the Swiss Criminal Code).<sup>606</sup>

The Supreme Court noted that the fact that some of the data transmitted to the DOJ was already available in a third country at the time of the offense did not exclude criminal charges, and the Court considered irrelevant whether it would have been possible or permissible to transmit the data located in a third state to the DOJ from that state.<sup>607</sup> Interestingly, the decision did not clarify

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<sup>603</sup> Dominique Müller et al., *Switzerland: New Precedent Does Not Provide Clear Guidance On The Boundaries Of The Swiss Blocking Statute*, MONDAQ (Dec. 8, 2021), <https://www.mondaq.com/trials-appeals-compensation/1139146/new-precedent-does-not-provide-clear-guidance-on-the-boundaries-of-the-swiss-blocking-statute>.

<sup>604</sup> Dominique Müller et al., *Switzerland: New Precedent Does Not Provide Clear Guidance On The Boundaries Of The Swiss Blocking Statute*, MONDAQ (Dec. 8, 2021), <https://www.mondaq.com/trials-appeals-compensation/1139146/new-precedent-does-not-provide-clear-guidance-on-the-boundaries-of-the-swiss-blocking-statute>.

<sup>605</sup> It was established that the documents in dispute had originally been made available to the company in Switzerland under clear contractual conditions.

<sup>606</sup> Dominique Müller et al., *Switzerland: New Precedent Does Not Provide Clear Guidance On The Boundaries Of The Swiss Blocking Statute*, MONDAQ (Dec. 8, 2021), <https://www.mondaq.com/trials-appeals-compensation/1139146/new-precedent-does-not-provide-clear-guidance-on-the-boundaries-of-the-swiss-blocking-statute>.

<sup>607</sup> The Supreme Court emphasized the fact that the data was located in Switzerland and that the defendant started its journey to transmit this data there.

whether the blocking statute applies if the relevant data, located in a third state, is accessed in the course of a specific investigation abroad.<sup>608</sup>

Under the current interpretation of the blocking statute, persons acting on behalf of international companies in Switzerland may be exposed to the risk of criminal prosecution if they decide (or are required) to use documents and data from Switzerland in connection with proceedings abroad.<sup>609</sup>

## E. Italy

In March 2021, an Italian court acquitted Royal Dutch Shell, Eni, and several current and former executives of both companies of charges that they paid millions in bribes to Nigerian officials to secure prospecting rights to a lucrative oil field.<sup>610</sup> Italian prosecutors had alleged that most of the \$1.3 billion purchase price for the license for the Nigerian offshore oilfield (OPL 245) was funneled to politicians and middlemen. The prosecutors had asked the Italian court to fine Eni and Shell €900,000 each and impose prison time for certain current and former executives of both companies. The Nigerian government—which was registered as a victim in the case—demanded \$1.1 billion in damages from the defendants. All of the defendants denied any wrongdoing in connection with the matter.<sup>611</sup>

After three years of trial, during which a total of 74 hearings were held, the Italian court delivered its judgment, stating that there was no case to answer and acquitting the companies and all other defendants.<sup>612</sup> The Italian prosecutors and the Nigerian government have appealed the court's

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<sup>608</sup> Dominique Müller et al., *Switzerland: New Precedent Does Not Provide Clear Guidance On The Boundaries Of The Swiss Blocking Statute*, MONDAQ (Dec. 8, 2021), <https://www.mondaq.com/trials-appeals-compensation/1139146/new-precedent-does-not-provide-clear-guidance-on-the-boundaries-of-the-swiss-blocking-statute>.

<sup>609</sup> Dominique Müller et al., *Switzerland: New Precedent Does Not Provide Clear Guidance On The Boundaries Of The Swiss Blocking Statute*, MONDAQ (Dec. 8, 2021), <https://www.mondaq.com/trials-appeals-compensation/1139146/new-precedent-does-not-provide-clear-guidance-on-the-boundaries-of-the-swiss-blocking-statute>.

<sup>610</sup> *La sentenza del Tribunale di Milano del 17 marzo 2021* (Mar. 17, 2021), <https://www.eni.com/assets/documents/documents-en/sentenza-opl.pdf>; *Motivazioni della sentenza della Corte d'Appello di Milano del 24 giugno 2021* (June 24, 2021), <https://www.eni.com/assets/documents/documents-en/Motivazioni-della-sentenza-della-Corte-d-Appello-di-Milano-del-24-giugno-2021.pdf>; Emilio Parodi & Stephen Jewkes, *Italian Court Acquits Eni and Shell in Nigerian Corruption Case*, REUTERS (Mar. 18, 2021), <https://www.reuters.com/article/uk-eni-shell-nigeria-idUSKBN2BA0XF>; James Thomas & Sam Fry, *Shell and Eni Acquitted in Nigerian Bribery Case*, GLOBAL INVESTIGATIONS REV. (Mar. 17, 2021), <https://globalinvestigationsreview.com/anti-corruption/shell-and-eni-acquitted-in-nigerian-bribery-case>.

<sup>611</sup> Emilio Parodi & Stephen Jewkes, *Italian Court Acquits Eni and Shell in Nigerian Corruption Case*, REUTERS (Mar. 18, 2021), <https://www.reuters.com/article/uk-eni-shell-nigeria-idUSKBN2BA0XF>; James Thomas & Sam Fry, *Shell and Eni Acquitted in Nigerian Bribery Case*, GLOBAL INVESTIGATIONS REV. (Mar. 17, 2021), <https://globalinvestigationsreview.com/anti-corruption/shell-and-eni-acquitted-in-nigerian-bribery-case>.

<sup>612</sup> Emilio Parodi & Stephen Jewkes, *Italian Court Acquits Eni and Shell in Nigerian Corruption Case*, REUTERS (Mar. 18, 2021), <https://www.reuters.com/article/uk-eni-shell-nigeria-idUSKBN2BA0XF>; James Thomas & Sam Fry, *Shell and Eni Acquitted in Nigerian Bribery Case*, GLOBAL INVESTIGATIONS REV. (Mar. 17, 2021), <https://globalinvestigationsreview.com/anti-corruption/shell-and-eni-acquitted-in-nigerian-bribery-case>.

acquittal,<sup>613</sup> and Italy has also initiated an investigation against two prosecutors for allegedly not filing documents that would have supported Eni's position.<sup>614</sup>

## F. European Union

The European Public Prosecutor's Office (EPPO) was launched officially as an independent public prosecution office of the European Union (EU) in June 2021.<sup>615</sup> The primary responsibility of the EPPO is to investigate and prosecute criminal offenses affecting the EU's financial interests, including VAT fraud with damages above €10 million, money laundering, corruption, and other types of fraud. To fulfill these responsibilities, the EPPO now has the authority to undertake investigations, pursue prosecutions, and generally exercise the function of prosecutor in the competent courts of the 22 participating EU Member States.<sup>616</sup> The EPPO has already appointed over 100 prosecutors from the participating countries and has signed working arrangements with Eurojust, Europol, the European Commission, the European Anti-Fraud Office (OLAF), the European Court of Auditors and the European Investment Bank Group.<sup>617</sup>

In its first six months of existence, the EPPO processed more than 1,700 crime reports affecting the financial interests of the EU and opened 300 investigations into activities implicating a total of almost €4.5 billion in estimated damages to the EU budget.<sup>618</sup> In addition, the EPPO has coordinated simultaneous searches, seizures, and arrests in several EU Member States (e.g., Germany, the Netherlands, Slovakia, Italy, Bulgaria, Hungary, and Romania) in connection with

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<sup>613</sup> Emilio Parodi & Stephen Jewkes, *Acquittal of Eni and Shell in Nigeria Case Faces Legal Challenge*, REUTERS (July 29, 2021), <https://www.reuters.com/business/energy/acquittal-eni-shell-nigeria-case-faces-legal-challenge-2021-07-29>.

<sup>614</sup> Emilio Parodi & Stephen Jewkes, *Italy Orders Inquiry Into Eni-Shell Nigeria Corruption Prosecutors*, REUTERS (June 15, 2021), <https://www.reuters.com/business/energy/italy-orders-inquiry-into-eni-shell-nigeria-corruption-prosecutors-2021-06-15>.

<sup>615</sup> European Commission Press Release IP/21/2591: Protecting the EU budget: European Public Prosecutor's Office will start operating on 1 June (May 26, 2021), [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_21\\_2591](https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2591).

<sup>616</sup> There are currently 22 member states participating in the EPPO: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Romania, Slovenia, Slovakia, and Spain. Denmark, Ireland, Hungary, Poland, and Sweden have so far not joined.

<sup>617</sup> European Public Prosecutor's Office Press Release: Europol and EPPO Establish Working Relationship (Jan. 21, 2021), <https://www.eppo.europa.eu/en/news/europol-and-eppo-establish-working-relationship>; European Public Prosecutor's Office Press Release: Eurojust and EPPO Sign Working Arrangement to Facilitate Cooperation (Feb. 15, 2021), <https://www.eppo.europa.eu/en/news/eurojust-and-eppo-sign-working-arrangement-facilitate-cooperation>; European Public Prosecutor's Office Press Release: EPPO and OLAF Working Arrangement: Ensuring No Case Goes Undetected (July 5, 2021), <https://www.eppo.europa.eu/en/news/eppo-and-olaf-working-arrangement-ensuring-no-case-goes-undetected>; European Public Prosecutor's Office Press Release: EPPO Signs Working Agreement With the European Commission (July 28, 2021), <https://www.eppo.europa.eu/en/news/eppo-signs-working-agreement-european-commission>; European Public Prosecutor's Office Press Release: EPPO Signs Working Arrangement With the European Court of Auditors (Sept. 3, 2021), <https://www.eppo.europa.eu/en/news/eppo-signs-working-arrangement-european-court-auditors>; European Public Prosecutor's Office Press Release: EPPO signs working arrangement with European Investment Bank Group (Dec. 7, 2021), <https://www.eppo.europa.eu/en/news/eppo-signs-working-arrangement-european-investment-bank-group>.

<sup>618</sup> European Public Prosecutor's Office Press Release: Estimated Damages to EU Budget in Ongoing EPPO Investigations: Almost €4.5 Billion (Sept. 14, 2021), <https://www.eppo.europa.eu/en/news/estimated-damages-eu-budget-ongoing-eppo-investigations-almost-eu45-billion>.



various investigations involving potential cross-border violations. The investigations reported to date focused mostly on VAT fraud, the evasion of customs duties, and EU funds misuse. Only a handful of investigations involving money laundering or official corruption have been reported so far.<sup>619</sup> Given the recent creation of the EPPO, it remains to be seen whether this remains the focus of the body or whether it will become more active in anti-corruption efforts.

## G. China

### 1. Legislative Developments

In September 2021, the Central Commission for Discipline Inspection (CCDI) and the National Supervision Commission (NSC), together with the Party's Central Organization Department, Central United Front Work Department, Central Political and Legal Affairs Commission, and the Supreme People's Court and the Supreme People's Procuratorate, jointly issued Opinions on Furthering the Investigations on Both Bribe Giving and Bribe Taking (the "Opinions").<sup>620</sup> According to the Opinions, the investigation and prosecution of bribery activities will focus on individuals who pay multiple bribes, offer bribes in large amounts, or bribe a large number of people.<sup>621</sup> Particular emphasis will be placed on investigations of individuals who were involved in misconduct following the Party's 18<sup>th</sup> National Congress (2012), Party members and state functionaries who pay bribes, and bribery in connection with major state projects or programs or in such important areas as environmental protection, finance, food and drugs, education, and medical care.<sup>622</sup>

The Opinions also focus on the illegal benefits received from giving bribes, stating that any illegal interests or benefits received in exchange for bribes given to others shall be confiscated, revoked,

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<sup>619</sup> European Public Prosecutor's Office Press Release: Six Arrests and Seizures Worth €23 Million in Czechia, Romania and Slovakia (Nov. 4, 2021), <https://www.eppo.europa.eu/en/news/six-arrests-and-seizures-worth-eu23-million-czechia-romania-slovakia>; European Public Prosecutor's Office Press Release: Four Arrested for Suspected Fraud at Croatian Ministry of Regional Development and EU Funds (Nov. 10, 2021), <https://www.eppo.europa.eu/en/news/four-arrested-suspected-fraud-croatian-ministry-regional-development-and-eu-funds>; European Public Prosecutor's Office Press Release: Former Minister and 3 Others Arrested for Suspected Fraud at Croatian Ministry of Regional Development and EU Funds (Nov. 11, 2021), <https://www.eppo.europa.eu/en/news/former-minister-and-3-others-arrested-suspected-fraud-croatian-ministry-regional-development>; European Public Prosecutor's Office Press Release: First Conviction in EPPO Case: Former Slovak Mayor Sentenced to 3 Years of Conditional Imprisonment (Nov. 23, 2021), <https://www.eppo.europa.eu/en/news/first-conviction-eppo-case-former-slovak-mayor-sentenced-3-years-conditional-imprisonment>; European Public Prosecutor's Office Press Release: Corruption and Manipulation of Public Contracts at Museum in Czechia (Nov. 30, 2021), <https://www.eppo.europa.eu/en/news/corruption-and-manipulation-public-contracts-museum-czechia>.

<sup>620</sup> CCDI: CCDI, NSC Together With Applicable Authorities Jointly Issued the Opinions on Furthering [the Endeavor] to Punish Both the Giving and Taking Bribes (Sept. 8, 2021), [https://www.ccdi.gov.cn/toutiao/202109/t20210908\\_249687.html?mc\\_cid=d56a98fe49&mc\\_eid=ef0502fbf0](https://www.ccdi.gov.cn/toutiao/202109/t20210908_249687.html?mc_cid=d56a98fe49&mc_eid=ef0502fbf0).

<sup>621</sup> SPC: CCDI, NSC and several other authorities jointly issued the Opinions on Furthering [the Endeavor] to Punish Both the Giving and Taking Bribes (Sept. 8, 2021), <http://www.court.gov.cn/zixun-xiangqing-321401.html>.

<sup>622</sup> SPC: CCDI, NSC and several other authorities jointly issued the Opinions on Furthering [the Endeavor] to Punish Both the Giving and Taking Bribes (Sept. 8, 2021), <http://www.court.gov.cn/zixun-xiangqing-321401.html>.

or returned.<sup>623</sup> For example, improper benefits such as political positions, job titles, political recognitions, business qualifications, and other advantages obtained through bribery will be revoked or canceled. The Opinions call upon disciplinary supervision agencies and relevant Party and government departments to establish a joint mechanism for investigating and punishing those who commit bribery and to conduct further study on penalties such as restrictions on market entry, the removal of qualifications for violators, and the creation of a blacklist.<sup>624</sup> In sum, the Opinions place more emphasis on investigating and penalizing payors of bribes than was previously the case.

In December 2021, the Standing Committee of the National People's Congress (NPC) promulgated China's Organized Crime Law.<sup>625</sup> As the first specialized law against organized crime in China, the Law aims to combat organized crime and the "protection umbrellas" that shelter such crimes.<sup>626</sup> Government officials who organize or participate in organized crime will be subject to severe penalties. Under Article 294 of the PRC Criminal Law, participants in organized crime may be subject to imprisonment up to three years, and organizers, leaders, and key members in organized crimes may be subject to imprisonment of three to ten years. Government officials who play a leading role or who otherwise provide shelter to organized crime may be subject to imprisonment up to ten years. While the Law addresses a broad range of criminal activity, its focus on group corruption is due to deep-seated corruption in recent years that has often involved groups rather than single individuals. The Law also requires that regulators of relevant industrial sectors work together to strengthen AML enforcement to prevent the provision of financial support to organized crime.<sup>627</sup>

In August 2021, the NPC Standing Committee promulgated the Supervisors Law, which is formulated in accordance with the 2018 Supervision Law, and which took effect on January 1, 2022.<sup>628</sup> The Supervisors Law specifies rights and obligations of individuals designated by the State, and organized in supervisory commissions, to supervise and monitor the conduct of public officials, with a particular emphasis on anti-corruption.

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<sup>623</sup> SPC: CCDI, NSC and several other authorities jointly issued the *Opinions on Furthering [the Endeavor] to Punish Both the Giving and Taking Bribes* (Sept. 8, 2021), <http://www.court.gov.cn/zixun-xiangqing-321401.html>.

<sup>624</sup> SPC: CCDI, NSC and several other authorities jointly issued the *Opinions on Furthering [the Endeavor] to Punish Both the Giving and Taking Bribes* (Sept. 8, 2021), <http://www.court.gov.cn/zixun-xiangqing-321401.html>.

<sup>625</sup> Organized Crime Law (反有组织犯罪法), promulgated Dec. 24, 2021 to be effective May 1, 2022, <http://www.npc.gov.cn/npc/c30834/202112/2559182067b641c4bb1bea5edec858bd.shtml>.

<sup>626</sup> Sun Mengshuang, *Provide legal safeguards for regular practice of fight against criminal gangs*, National People's Congress of China the journal, issue 16, 2021, <http://www.npc.gov.cn/npc/c30834/202109/81684161142a49d3a400c02dd78437a3.shtml>.

<sup>627</sup> Sun Mengshuang, *Provide legal safeguards for regular practice of fight against criminal gangs*, National People's Congress of China the journal, issue 16, 2021, <http://www.npc.gov.cn/npc/c30834/202109/81684161142a49d3a400c02dd78437a3.shtml>.

<sup>628</sup> Supervisors Law (监察官法), approved Aug. 20, 2021, effective Jan. 1, 2022, <http://www.npc.gov.cn/npc/c30834/202108/91238854e20c430d94c1b22297116f0e.shtml>.

The key responsibilities of supervisors include organizing integrity and ethics trainings for government officials and public servants, conducting supervision and inspection on potential corruption or abuse of power activities, conducting formal investigations according to law, and coordinating on international anti-corruption enforcement. The Supervisors Law aims to supplement China's existing legislation on inspection and supervision of potentially corrupt activities of government officials and public servants—including the Supervision Law and the 2020 Law on the Administrative Disciplinary of Public Officials—and to improve standards and procedures of anti-corruption mechanisms.

## 2. Enforcement

The Party and Chinese government continued to work on decreasing corruption in the country by maintaining and strengthening punishment on corruption activities while shifting the emphasis of its enforcement from “punishing the few” to “educating the majority.”<sup>629</sup>

According to a report from the CCDI and NSC on the period from January to September 2021, the national discipline inspection and supervision agencies received 2,842,000 complaints and reports, processed 1,364,000 case clues, conducted approximately 250,000 interviews and letter inquiries, filed and prosecuted 470,000 cases, and imposed penalties on 414,000 people (of which 345,000 were penalized under Party disciplinary rules), including 22 officials at provincial and ministerial levels and 2,058 at department and bureau levels.<sup>630</sup>

Compared to 2020, enforcement efforts against senior government officials increased in 2021. The most high-profile cases involved senior government officials, several of whom were expelled from the Party. For example, Sun Lijun, former Member of the Party Committee and Vice Minister of Public Security, was expelled from the Party and public office for receiving bribes and serious violations of law and Party discipline,<sup>631</sup> Cai Esheng, former Member of the Party Committee and Vice Chairman of the China Banking Regulatory Commission, is under disciplinary review and supervisory investigation for potential corruption activities,<sup>632</sup> and Li Jinzao, former Deputy

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<sup>629</sup> Central Commission for Discipline Inspection (CCDI) and the National Supervision Commission (NSC): *Interpretation of the Supervision, Inspection and Investigation of the National Discipline Inspection and Supervision Agencies in the First Three Quarters* (Oct. 29, 2021), [https://www.ccdi.gov.cn/toutiao/202110/t20211029\\_253120.html](https://www.ccdi.gov.cn/toutiao/202110/t20211029_253120.html).

<sup>630</sup> CCDI and NSC: *Supervision, Inspection, Review and Investigation Report of the National Discipline Inspection and Supervision Agencies from January to September 2021* (Oct. 26, 2021), [https://www.ccdi.gov.cn/toutiao/202110/t20211025\\_252880.html](https://www.ccdi.gov.cn/toutiao/202110/t20211025_252880.html). The other individuals who received penalties included 17,000 at the county level, 60,000 at the township level, 67,000 at the general level, and 268,000 rural, business and other personnel. See *id.*

<sup>631</sup> CCDI and NSC: *Sun Lijun, former Member of the Party Committee and Vice Minister of the Ministry of Public Security, was expelled from the Party and public office for serious violations of discipline and law* (Sept. 30, 2021), [https://www.ccdi.gov.cn/scdc/zggb/djcf/202109/t20210930\\_251652.html](https://www.ccdi.gov.cn/scdc/zggb/djcf/202109/t20210930_251652.html).

<sup>632</sup> CCDI and NSC: *Cai Esheng, former Member of the Party Committee and Vice Chairman of the China Banking Regulatory Commission, is under disciplinary review and supervisory investigation* (July 30, 2021), [https://www.ccdi.gov.cn/scdc/zggb/zjsc/202107/t20210730\\_247334.html](https://www.ccdi.gov.cn/scdc/zggb/zjsc/202107/t20210730_247334.html).

Secretary of the Party Group and Vice Minister of Culture and Tourism, was expelled from the Party and public office for accepting bribes, abuse of power, and other violations.<sup>633</sup>

### 3. Data Privacy

In 2021, the Chinese government promulgated the Data Security Law (DSL)<sup>634</sup> and Personal Information Protection Law (PIPL)<sup>635</sup> which together with China's Cybersecurity Law in 2018, established a complex data protection and cybersecurity regulatory framework governing, among others, cross-border transfers of personal and non-personal data.

Both the DSL and PIPL prohibit any organizations or individuals within China from providing foreign judicial or law enforcement authorities with data or personal information stored within the territory of China absent Chinese government approval. The DSL and PIPL will complicate the ability of multinational companies in China to comply with foreign legal requirements (such as the FCPA) and to defend themselves in foreign legal proceedings. These laws effectively serve as a blocking statute to block export of any China-based data in response to requests from foreign judicial and law enforcement agencies absent the Chinese government's approval. Interestingly, while enforcement efforts within China relating to corruption are increasing, these data security laws may make enforcement for non-Chinese authorities such as the DOJ and SEC more challenging.

## H. Brazil

### 1. Legislative and Policy Developments

Throughout 2021, there have been some indications that Brazil has stalled in its efforts to root out corruption,<sup>636</sup> although other indicators suggest that enforcement efforts remain strong. In light of these developments, the OECD created a permanent subgroup in early 2021 to monitor anti-corruption enforcement efforts in Brazil.<sup>637</sup>

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<sup>633</sup> CCDI and NSC: *Li Jinzao, former Deputy Secretary of the Party Group and Vice Minister of the Ministry of Culture and Tourism, was expelled from the Party and public office for serious violations of discipline and law* (Jan. 25, 2021), [https://www.ccdi.gov.cn/scdc/zggb/djcf/202101/t20210125\\_234721.html](https://www.ccdi.gov.cn/scdc/zggb/djcf/202101/t20210125_234721.html).

<sup>634</sup> The Standing Committee of China's National People's Congress on June 10, 2021 enacted the Data Security Law (DSL), which took effect on September 1, 2021, <http://www.npc.gov.cn/npc/c30834/202106/7c9af12f51334a73b56d7938f99a788a.shtml>.

<sup>635</sup> The Standing Committee of China's National People's Congress on August 20, 2021 adopted the Personal Information Protection Law, which took effect on November 1, 2021, <http://www.npc.gov.cn/npc/c30834/202108/a8c4e3672c74491a80b53a172bb753fe.shtml>.

<sup>636</sup> See, e.g., Luisa Leme, *LatAm in Focus: What Happened to Latin America's Anti-Corruption Push?*, AMERICAS SOCIETY (June 23, 2021), <https://www.as-coa.org/articles/latam-focus-what-happened-latin-americas-anti-corruption-push>; Geert Aalbers & Brian Winter, *One-Man Crusades Against Corruption in Latin America Aren't Working*, AMERICAS QUARTERLY (June 14, 2021), <https://americasquarterly.org/article/one-man-crusades-against-corruption-in-latin-america-arent-working>.

<sup>637</sup> Mariana Sanches, *OCDE Adota Medida Inédita Contra o Brasil Após Sinais de Retrocesso no Combate à Corrupção no País*, BBC NEWS BRASIL (Mar. 15, 2021), <https://www.bbc.com/portuguese/brasil-56406033>.

In February 2021, after seven years in existence, the unit of prosecutors tasked with carrying out Operação Lava Jato (or “Operation Car Wash”)—the expansive investigation into corruption at Brazil’s state-owned oil company Petrobras and into money laundering more broadly—was shut down.<sup>638</sup> While the unit successfully prosecuted corruption at major corporations such as Petrobras and Maersk, and was able to ensnare former presidents from Panama and Peru, the political class in Brazil soured on the long-running investigation.<sup>639</sup> Left-leaning Brazilians disapproved of the jailing of popular former President Luiz Inacio Lula da Silva, while more conservative Brazilians were concerned by investigations into President Jair Bolsonaro’s family.<sup>640</sup>

Additionally, the Supreme Court annulled former president Luiz Inacio Lula da Silva’s conviction for corruption, allowing him to run for president in 2022.<sup>641</sup> In March, a single judge on the Brazilian Court ruled that the court that originally heard President Da Silva’s case, in the southern city of Curitiba, lacked jurisdiction, and the former president should instead have been tried in the Federal Court in Brasilia.<sup>642</sup> The next month the full Supreme Court affirmed the decision, paving the way for President Da Silva to run for office again.<sup>643</sup>

## 2. Enforcement Efforts

Despite the shutdown of the Operation Car Wash prosecution team, Brazilian authorities were involved in several high-profile resolutions during 2021. For example, in an investigation that grew out of Operation Car Wash, South Korean shipbuilder Samsung Heavy Industries entered into a leniency agreement in February with Brazil’s Office of the Comptroller General (CGU), Office of the Attorney General (AGU), and the Federal Prosecution Service (MPF) in relation to bribes paid in

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<sup>638</sup> Ricardo Brito & Gram Slattery, *After Seven Years, Brazil Shuts Down Car Wash Anti-Corruption Squad*, REUTERS (Feb. 3, 2021), <https://www.reuters.com/article/us-brazil-corruption/after-seven-years-brazil-shuts-down-car-wash-anti-corruption-squad-idUSKBN2A4068>.

<sup>639</sup> Mariana Sanches, *OCDE Adota Medida Inédita Contra o Brasil Após Sinais de Retrocesso no Combate à Corrupção no País*, BBC NEWS BRASIL (Mar. 15, 2021), <https://www.bbc.com/portuguese/brasil-56406033>.

<sup>639</sup> Ricardo Brito & Gram Slattery, *After Seven Years, Brazil Shuts Down Car Wash Anti-Corruption Squad*, REUTERS (Feb. 3, 2021), <https://www.reuters.com/article/us-brazil-corruption/after-seven-years-brazil-shuts-down-car-wash-anti-corruption-squad-idUSKBN2A4068>.

<sup>640</sup> Mariana Sanches, *OCDE Adota Medida Inédita Contra o Brasil Após Sinais de Retrocesso no Combate à Corrupção no País*, BBC NEWS BRASIL (Mar. 15, 2021), <https://www.bbc.com/portuguese/brasil-56406033>.

<sup>640</sup> Ricardo Brito & Gram Slattery, *After Seven Years, Brazil Shuts Down Car Wash Anti-Corruption Squad*, REUTERS (Feb. 3, 2021), <https://www.reuters.com/article/us-brazil-corruption/after-seven-years-brazil-shuts-down-car-wash-anti-corruption-squad-idUSKBN2A4068>.

<sup>641</sup> Ricardo Brito, *Brazil’s Supreme Court Confirms Decision to Annul Lula Convictions*, REUTERS (Apr. 15, 2021), <https://www.reuters.com/world/americas/brazils-supreme-court-confirms-decision-annul-lula-convictions-2021-04-15>.

<sup>642</sup> Ricardo Brito, *Brazil Judge Annuls Lula’s Convictions, Opens Door to 2022 Run*, REUTERS (Mar. 8, 2021), <https://www.reuters.com/world/americas/brazil-judge-annuls-lulas-convictions-opens-door-2022-run-2021-03-08>.

<sup>643</sup> Ricardo Brito, *Brazil’s Supreme Court Confirms Decision to Annul Lula Convictions*, REUTERS (Apr. 15, 2021), <https://www.reuters.com/world/americas/brazils-supreme-court-confirms-decision-annul-lula-convictions-2021-04-15>.

connection with contracts with Petrobras.<sup>644</sup> The company agreed to pay a penalty of almost \$150 million, of which over \$130 million was returned to Petrobras as damages.<sup>645</sup> Samsung also agreed to improve its compliance and governance policies.<sup>646</sup>

In October 2021, CGU and the AGU also entered into a settlement agreement with Rolls Royce, ending the final strand of the long-running investigation into the British engine maker related to bribes paid to secure contracts with Petrobras in 2004.<sup>647</sup> Rolls Royce agreed to pay \$27.8 million to the Brazilian authorities, most of which will be credited against the fine it paid to Brazil for the same underlying conduct in 2017.<sup>648</sup> Rolls Royce had previously paid over \$800 million to settle claims brought by the UK's SFO, the DOJ, and Brazil's MPF.<sup>649</sup>

Brazilian authorities brought additional new enforcement actions in 2021 as well. In August, Brazil's MPF filed criminal complaints against two executives at the Brazilian subsidiary of French engineering company Doris Group for allegedly paying bribes in connection with a \$200 million contract to build platform ships for Petrobras.<sup>650</sup> According to the complaint, the two executives funneled bribes by using a contract between Doris's subsidiary and a consulting firm owned by an unnamed financial operator, who then transferred the funds to a Swiss bank account owned by a former manager at Petrobras.<sup>651</sup> The complaint also alleged that the executives paid bribes to a former treasurer of Brazil's Worker's Party as part of the same scheme.<sup>652</sup> The financial operator

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<sup>644</sup> Jaclyn Jaeger, *Samsung Heavy Industries Settles Brazil Bribery Probe for \$150M*, COMPLIANCE WEEK (Feb. 24, 2021), <https://www.complianceweek.com/regulatory-enforcement/samsung-heavy-industries-settles-brazil-bribery-probe-for-150m/30077.article>.

<sup>645</sup> Jaclyn Jaeger, *Samsung Heavy Industries Settles Brazil Bribery Probe for \$150M*, COMPLIANCE WEEK (Feb. 24, 2021), <https://www.complianceweek.com/regulatory-enforcement/samsung-heavy-industries-settles-brazil-bribery-probe-for-150m/30077.article>.

<sup>646</sup> Jaclyn Jaeger, *Samsung Heavy Industries Settles Brazil Bribery Probe for \$150M*, COMPLIANCE WEEK (Feb. 24, 2021), <https://www.complianceweek.com/regulatory-enforcement/samsung-heavy-industries-settles-brazil-bribery-probe-for-150m/30077.article>.

<sup>647</sup> Sam Fry, *Rolls-Royce Settles Brazilian Bribery Case*, GLOBAL INVESTIGATIONS REV. (Oct. 27, 2021), <https://globalinvestigationsreview.com/anti-corruption/rolls-royce-settles-brazilian-bribery-case>.

<sup>648</sup> Sam Fry, *Rolls-Royce Settles Brazilian Bribery Case*, GLOBAL INVESTIGATIONS REV. (Oct. 27, 2021), <https://globalinvestigationsreview.com/anti-corruption/rolls-royce-settles-brazilian-bribery-case>.

<sup>649</sup> Sam Fry, *Rolls-Royce Settles Brazilian Bribery Case*, GLOBAL INVESTIGATIONS REV. (Oct. 27, 2021), <https://globalinvestigationsreview.com/anti-corruption/rolls-royce-settles-brazilian-bribery-case>.

<sup>650</sup> James Thomas, *Brazil Charges French Engineering Company Execs With Corruption*, GLOBAL INVESTIGATIONS REV. (Aug. 27, 2021), <https://globalinvestigationsreview.com/anti-corruption/brazil-charges-french-engineering-company-execs-corruption>.

<sup>651</sup> James Thomas, *Brazil Charges French Engineering Company Execs With Corruption*, GLOBAL INVESTIGATIONS REV. (Aug. 27, 2021), <https://globalinvestigationsreview.com/anti-corruption/brazil-charges-french-engineering-company-execs-corruption>.

<sup>652</sup> James Thomas, *Brazil Charges French Engineering Company Execs With Corruption*, GLOBAL INVESTIGATIONS REV. (Aug. 27, 2021), <https://globalinvestigationsreview.com/anti-corruption/brazil-charges-french-engineering-company-execs-corruption>.

and the former Petrobras manager have reportedly signed collaboration agreements with Brazilian prosecutors and have confessed to their roles in the scheme.<sup>653</sup>

## I. Mexico

### 1. Legislative and Policy Developments

Despite Mexican President Andrés Manuel López Obrador's promise when he was elected in 2018 to root out corruption in Mexico, some observers question whether progress has actually been made.<sup>654</sup>

One of President Obrador's signature anti-corruption measures, a referendum aimed at ending immunity for ex-presidents, failed, with only 7% of the electorate voting for the measure—far less than the 40% needed for the referendum to be legally binding.<sup>655</sup> The referendum originally asked whether former presidents should be investigated for alleged corruption while they were in office, but the Supreme Court modified the language and made the actual question posed to the public less clear.<sup>656</sup> The referendum was widely criticized as having scant legal merit, and news reports suggested that Obrador was vague as to what he would actually do to implement the guidance from the referendum if it passed.<sup>657</sup>

### 2. Enforcement Efforts

In May, it was revealed that Mexico's attorney general's office had accused a number of prominent Mexican politicians, including former president Enrique Peña Nieto, of paying bribes to various senators to secure their support for a landmark reform of the country's energy sector,<sup>658</sup> which opened the previously state-owned sector to private investment.<sup>659</sup> The money to pay for the bribes

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<sup>653</sup> James Thomas, *Brazil Charges French Engineering Company Execs With Corruption*, GLOBAL INVESTIGATIONS REV. (Aug. 27, 2021), <https://globalinvestigationsreview.com/anti-corruption/brazil-charges-french-engineering-company-execs-corruption>.

<sup>654</sup> *59% of Mexicans Unimpressed with AMLO's Fight Against Corruption*, MEXICO DAILY NEWS (May 11, 2021), <https://mexiconewsdaily.com/news/59-of-mexicans-unimpressed-with-amlos-fight-against-corruption>.

<sup>655</sup> *In Mexico, AMLO's Anti-Corruption Referendum Falls Flat*, GLOBAL AMERICANS (Aug. 6, 2021), <https://theglobalamericans.org/2021/08/in-mexico-amlos-anti-corruption-referendum-falls-flat>.

<sup>656</sup> *Mexico Holds Referendum on Whether to Investigate Ex-Presidents*, AL JAZEERA (Aug. 1, 2021), <https://www.aljazeera.com/news/2021/8/1/mexico-holds-referendum-on-whether-to-investigate-ex-presidents>.

<sup>657</sup> *Mexico Holds Referendum on Whether to Investigate Ex-Presidents*, AL JAZEERA (Aug. 1, 2021), <https://www.aljazeera.com/news/2021/8/1/mexico-holds-referendum-on-whether-to-investigate-ex-presidents>.

<sup>658</sup> Victoria Dittmar, *Mexico's Unreachable Elites Targeted by Rare Corruption Investigation*, INSIGHT CRIME (May 26, 2021), <https://insightcrime.org/news/mexico-unreachable-elites-targeted-rare-corruption-investigation>.

<sup>659</sup> Sonia Corona, *Peña Nieto Unveils his Long-Awaited Petroleum Reform Plan*, EL PAIS (Aug. 12, 2013), [https://english.elpais.com/elpais/2013/08/12/inenglish/1376334289\\_264891.html](https://english.elpais.com/elpais/2013/08/12/inenglish/1376334289_264891.html).

allegedly came from Brazilian construction company Odebrecht.<sup>660</sup> Pedro Nieto is the first former Mexican president to be publicly linked to the Odebrecht scandal.<sup>661</sup>

At the same time, Mexican authorities have continued to pursue some long-running investigations. For example, Alonso Ancira, the chairman of Mexican steelmaker Altos Hornos de México (AHMSA) agreed to pay over \$216 million to settle accusations of corruption related to the 2014 sale of a fertilizer plant to the Mexican state-owned oil company PEMEX.<sup>662</sup> Similarly, Mexico continues to prosecute a corruption and money laundering case against Emilio Lozoya, the former CEO of PEMEX, who was extradited back to Mexico from Spain.<sup>663</sup> Lozoya had previously provided evidence to the Mexican government and had confessed to channeling bribes to help secure support for president Nieto's energy reform efforts.<sup>664</sup> Until November of 2021, he had been kept under house arrest, but he was jailed after photos of him dining out at a fancy restaurant sparked public outrage.<sup>665</sup>

## J. Other Latin America Enforcement Updates

### 1. Colombia

Colombian authorities brought a series of enforcement actions in relation to the construction and financing of the Ruta Del Sol highway in the country. In late 2020, the Superintendency of Industry and Commerce (SIC), which enforces the country's antitrust laws, fined a consortium led by Odebrecht and including Colombian banking giant Grupo Aval over \$84 million for breaking competition laws.<sup>666</sup> The consortium allegedly bribed former deputy Transport Minister Gabriel Garcia in 2009 in order to secure the bid.<sup>667</sup> However, in March of 2021 Colombian prosecutors closed an investigation into Grupo Aval Acciones y Valores SA CEO Luis Carlos Sarmiento

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<sup>660</sup> Victoria Dittmar, *Mexico's Unreachable Elites Targeted by Rare Corruption Investigation*, INSIGHT CRIME (May 26, 2021), <https://insightcrime.org/news/mexico-unreachable-elites-targeted-rare-corruption-investigation>.

<sup>661</sup> Victoria Dittmar, *Mexico's Unreachable Elites Targeted by Rare Corruption Investigation*, INSIGHT CRIME (May 26, 2021), <https://insightcrime.org/news/mexico-unreachable-elites-targeted-rare-corruption-investigation>.

<sup>662</sup> Adriana Barrera, *Mexican Steel Magnate Pays \$217 Mln Damages in Graft Case, Walks Free*, NASDAQ (Apr. 19, 2021), <https://www.nasdaq.com/articles/mexican-steel-magnate-pays-%24217-mln-damages-in-graft-case-walks-free-2021-04-19>.

<sup>663</sup> *Mexican Judge Jails Ex-Pemex Boss at Center of Corruption Case*, REUTERS (Nov. 3, 2021), <https://www.reuters.com/world/americas/mexican-judge-orders-ex-pemex-boss-lozoya-taken-into-custody-2021-11-03>.

<sup>664</sup> *Mexican Judge Jails Ex-Pemex Boss at Center of Corruption Case*, REUTERS (Nov. 3, 2021), <https://www.reuters.com/world/americas/mexican-judge-orders-ex-pemex-boss-lozoya-taken-into-custody-2021-11-03>.

<sup>665</sup> *Mexican Judge Jails Ex-Pemex Boss at Center of Corruption Case*, REUTERS (Nov. 3, 2021), <https://www.reuters.com/world/americas/mexican-judge-orders-ex-pemex-boss-lozoya-taken-into-custody-2021-11-03>.

<sup>666</sup> *UPDATE 1-Colombia Regulator Fines Odebrecht, Consortium Members \$84.5 Million*, REUTERS (Dec. 28, 2020), <https://www.reuters.com/article/odebrecht-colombia/update-1-colombia-regulator-fines-odebrecht-consortium-members-84-5-million-idUKL1N2J81G9>.

<sup>667</sup> Adriaan Alsema, *Colombia's Prosecution Under Fire for Absolving CEO of Corrupt Banking Giant*, COLOMBIA REPORTS (Mar. 15, 2021), <https://colombiareports.com/amp/colombias-prosecution-under-fire-for-absolving-ceo-of-corrupt-banking-giant>.



Gutiérrez, concluding there was no evidence linking him to the bribery scheme surrounding the Ruta Del Sol.<sup>668</sup> The construction of the highway was cancelled in 2017 after evidence of the bribes paid to secure the contract surfaced.<sup>669</sup>

## 2. Argentina

Argentinian businessman Lázaro Báez was sentenced to 12 years in jail for laundering the proceeds of corruption and tax fraud related to public contracts awarded during the Presidencies of Néstor Kirchner and Cristina Fernández de Kirchner, who is currently serving as the country's vice president.<sup>670</sup> The laundered money was used to pay bribes to secure government contracts for a construction company run by Báez called Austral Construcciones worth almost \$500 million.<sup>671</sup> The ruling itself was historic: it marked the first time that the Argentinian courts adopted a leniency agreement with a cooperating defendant, and imposed a \$4.3 billion sanction, calculated by applying a new statutory enhancement on corruption cases.<sup>672</sup> A case concerning some of the same underlying conduct against Vice President Kirchner and her children was dismissed in November.<sup>673</sup> There has been international fallout from the Báez conviction. For example, Panama has reportedly opened an investigation into Báez and the companies he controls for money laundering as well.<sup>674</sup> The Báez sentencing is just the latest in a string of corruption probes involving the Kirchner family. Perhaps the most well-known is the “Notebook” scandal—so called because the scheme was uncovered when a series of detailed notebooks maintained by the driver of a close advisor to the Minister of Federal Planning was leaked to an Argentinian newspaper.<sup>675</sup> However, while these scandals spread into multiple sectors of the Argentinian economy, they did not lead to prosecutions for corporate entities, in large part because Argentina only passed a law

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<sup>668</sup> Atif Hussain, *Prosecutors Drop Odebrecht-Linked Probe into Grupo Aval's CEO*, S&P GLOBAL MARKET INTELLIGENCE (Mar. 12, 2021), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/prosecutors-drop-odebrecht-linked-probe-into-grupo-aval-s-ceo-63156692>.

<sup>669</sup> Atif Hussain, *Prosecutors Drop Odebrecht-Linked Probe into Grupo Aval's CEO*, S&P GLOBAL MARKET INTELLIGENCE (Mar. 12, 2021), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/prosecutors-drop-odebrecht-linked-probe-into-grupo-aval-s-ceo-63156692>.

<sup>670</sup> *Lázaro Báez Sentenced to 12 Years in Jail for Money-Laundering*, BUENOS AIRES TIMES (Feb. 24, 2021), <https://www.batimes.com.ar/news/argentina/lazaro-baez-sentenced-to-12-years-in-jail-for-money-laundering.phtml>.

<sup>671</sup> *Lázaro Báez Sentenced to 12 Years in Jail for Money-Laundering*, BUENOS AIRES TIMES (Feb. 24, 2021), <https://www.batimes.com.ar/news/argentina/lazaro-baez-sentenced-to-12-years-in-jail-for-money-laundering.phtml>.

<sup>672</sup> Guillermo Jorge, *Argentina: A Look at the Case of Lázaro Báez - Laundering the Proceeds of Corruption and Tax Fraud*, JDSUPRA (Aug. 23, 2021), <https://www.jdsupra.com/legalnews/argentina-a-look-at-the-case-of-lazaro-08651>.

<sup>673</sup> *Cristina Fernández de Kirchner and her Children Cleared in Money-Laundering Case*, BUENOS AIRES TIMES (Nov. 27, 2021), <https://www.batimes.com.ar/news/argentina/vice-president-cristina-fernandez-de-kirchner-and-her-children-acquitted-in-money-laundering-case.phtml>.

<sup>674</sup> Hernan Cappiello, *Panamá Pidió Informes a la Argentina Sobre Lázaro Báez y Cristóbal López por Lavado de Dinero*, LA NACION (Mar. 4, 2021), <https://www.lanacion.com.ar/politica/panama-pidio-informes-a-la-argentina-sobre-lazaro-baez-y-cristobal-lopez-por-lavado-de-dinero-nid04032021>.

<sup>675</sup> Jaclyn Jaeger, *The Compliance Side of Argentina's “Notebook” Scandal*, COMPLIANCE WEEKLY (May 15, 2019), <https://www.complianceweek.com/anti-corruption/the-compliance-side-of-argentinias-notebook-scandal/27072.article>.

creating corporate liability for bribery offenses in 2018, after many of the bribes in question had already been paid.<sup>676</sup>

## **K. The Russian Federation**

### **1. Legislative and Regulatory Developments**

On January 1, 2021, a new law came into effect allowing and regulating the mining, trading, and holding of cryptocurrencies while simultaneously prohibiting cryptocurrency from being used as tender for goods and services within Russia in response to concerns raised by the Russian Central Bank about the potential for cryptocurrencies to be used to launder money.<sup>677</sup> Signaling potential openness to cryptocurrency for use as legal tender within Russia, Russian President Vladimir Putin stated in an interview with CNBC in October 2021 that cryptocurrency has the right to exist as a means of payment and can be used as a unit of currency; that said, he noted in the same interview that it was too early to discuss use of cryptocurrency for purposes of trading natural resources such as oil.<sup>678</sup>

In February, a law was adopted amending Articles 201 (abuse of power) and 285 (abuse of office) of Russia's Criminal Code to expand the list of people who qualify as "public officials" to include persons performing organizational and administrative functions in companies that are state-owned, state subsidiaries, or in which the federal or local government has the right, directly or indirectly, to exercise more than 50% of the voting rights, or to appoint more than 50% of the Board.<sup>679</sup>

In March 2021, a 2020 amendment signed by President Putin creating criminal penalties for individuals who fail to register as foreign agents, which had previously been an administrative offense, came into effect.<sup>680</sup> There are indications that this law will be used to further increase

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<sup>676</sup> Jaclyn Jaeger, *The Compliance Side of Argentina's "Notebook" Scandal*, COMPLIANCE WEEKLY (May 15, 2019), <https://www.complianceweek.com/anti-corruption/the-compliance-side-of-argentinas-notebook-scandal/27072.article>.

<sup>677</sup> See WilmerHale, *Global Anti-Bribery Year-in-Review: 2020 Developments and Predictions for 2021*, at 115 (Jan. 28, 2021), <https://www.wilmerhale.com/en/insights/client-alerts/20210126-2020-global-antibribery-yearinreview>.

<sup>678</sup> *Russia's Putin: It's too early to talk about using Cryptocurrencies for Oil Contracts*, CNBC (Oct. 14, 2021), <https://www.cnbc.com/video/2021/10/14/putin-its-too-early-to-talk-about-using-crypto-for-oil-contracts.html>; see also WilmerHale, *Global Anti-Bribery Year-in-Review: 2020 Developments and Predictions for 2021*, at 115 (Jan. 28, 2021), <https://www.wilmerhale.com/en/insights/client-alerts/20210126-2020-global-antibribery-yearinreview>.

<sup>679</sup> Federal Law No. 16-FZ, dated February 24, 2021, on Amendments to Articles 201 and 285 of the Criminal Code of the Russian Federation; see also President of Russia Press Release, *A Law Was Signed Aimed at Improving the Legal Framework for Combatting Corruption* (Feb. 24, 2021), <http://kremlin.ru/catalog/keywords/93/events/65065>.

<sup>680</sup> Sam Fry, *Russia Introduced Criminal Penalties for Unregistered Foreign Agents*, GLOBAL INVESTIGATIONS REV. (Jan. 8, 2021), <https://globalinvestigationsreview.com/export-control/russia-introduces-criminal-penalties-unregistered-foreign-agents>.

government pressure against dissidents and human rights activists throughout the country, which would likely further limit independent efforts to combat government corruption in Russia.<sup>681</sup>

In August 2021, President Putin signed a decree approving Russia's National Anti-Corruption Plan for 2021 to 2024.<sup>682</sup> Divided into 16 sections, the Plan enhances income and expense reporting procedures for government officials, expands information about official income published on the internet, increases restrictions on the receipt of gifts by certain categories of officials, introduces measures to detect and suppress corruption-related crimes conducted with digital financial assets or currency, bans certain categories of persons who have committed corruption-related crimes from public services, and creates an anti-corruption education program. In December, the State Duma adopted and the Federation Council approved a law implementing the income reporting measures outlined in the Plan.<sup>683</sup>

On January 1, 2022, a law amending the public procurement process came into force.<sup>684</sup> Among other things, the law expands an existing ban on offshore companies from participating in public tenders to include any company in which an offshore company directly or indirectly owns more than 10% of the voting shares or charter capital.<sup>685</sup>

## 2. Enforcement Efforts

The Investigative Committee (IC), Russia's top federal prosecutorial authority, initiated 17,563 criminal corruption cases in the first nine months of 2021, a 15% increase from the same period in 2020.<sup>686</sup> Of the 7,405 cases initiated against individuals that ultimately were brought before a court, 27% included charges alleging that individuals had given bribes, 16% included charges alleging that the individuals had accepted bribes, 15% included fraud charges, and 7% included charges of misappropriation or embezzlement.<sup>687</sup>

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<sup>681</sup> Robyn Dixon, *Russia's "Foreign Agent" law now Threatens Rights Group that Survived Even Soviet Pressures*, WASH. POST (Apr. 3, 2021), [https://www.washingtonpost.com/world/europe/russia-putin-foreign-agents-kremlin/2021/04/02/17dedadc-8cdd-11eb-a33e-da28941cb9ac\\_story.html](https://www.washingtonpost.com/world/europe/russia-putin-foreign-agents-kremlin/2021/04/02/17dedadc-8cdd-11eb-a33e-da28941cb9ac_story.html).

<sup>682</sup> Decree No. 478 of the President of the Russian Federation, dated 16 August 2021, on the National Anti-Corruption Plan for 2021-2024.

<sup>683</sup> President of Russia Press Release: Amendments to Legislation Aimed at the Implementation of the Provisions of the National Anti-Corruption Plan for 2021-2024 (Dec. 30, 2021), <http://kremlin.ru/acts/news/67513/print>.

<sup>684</sup> Federal Law No. 360-FZ, dated 2 July 2021, on Amendments to Certain Legislative acts of the Russian Federation.

<sup>685</sup> Federal Law No. 360-FZ, dated 2 July 2021, on Amendments to Certain Legislative acts of the Russian Federation.

<sup>686</sup> *Alexander Bastrykin Spoke About the Investigation of High-Profile Corruption Cases*, ROSSIYSKAYA GAZETA (Dec. 9, 2021), <https://rg.ru/2021/12/09/aleksandr-bastrykin-rasskazal-o-rassledovanii-gromkih-korrupcionnyh-del.html>.

<sup>687</sup> *Alexander Bastrykin Spoke About the Investigation of High-Profile Corruption Cases*, ROSSIYSKAYA GAZETA (Dec. 9, 2021) <https://rg.ru/2021/12/09/aleksandr-bastrykin-rasskazal-o-rassledovanii-gromkih-korrupcionnyh-del.html>.

In April 2021, charges were resolved in the IC's years-long investigation of bribery surrounding the construction of Gazprom Arena, a stadium in St. Petersburg built for the 2018 FIFA World Cup.<sup>688</sup> Specifically, the former deputy governor of St. Petersburg, Marat Hovhannisyan, was sentenced to five and a half years in prison and fined RUB 20 million (approximately USD 268,000) after he pleaded guilty to one count of large-scale fraud and two counts of bribery. In 2014, Hovhannisyan accepted bribes in the amount of RUB 28 million (approximately USD 375,000) and RUB 20 million (approximately USD 268,000) from vendors in connection with the construction of the arena. Additionally, the former Head of the Construction Committee of St. Petersburg, Alexander Yanchik, was found guilty of mediating the bribes; Yanchik was sentenced to five years in prison and fined RUB 5 million (approximately USD 67,000). Certain individuals associated with vendors that made the relevant bribe payments were sentenced to prison or fined as a result of their involvement.

### 3. Other Legal Developments

The Russian government increased pressure against anti-corruption activist Alexey Navalny and his organization, the Foundation for Fighting Corruption, in 2021.<sup>689</sup> In January 2021, Navalny, who was poisoned with a chemical nerve agent in Russia by a Russian government agent from the FSB security service in August 2020 (although the Russian government denies its involvement in the poisoning), returned to Russia. He was detained by Russian authorities immediately upon arrival and sentenced to over two years in prison.<sup>690</sup> In April 2021, the Moscow Prosecutor's office issued an injunction after petitioning a Moscow court to label the Foundation as an extremist group, thereby suspending the organization's activities throughout the country. The Moscow court issued an order in the same month barring the Foundation from engaging in many activities, including distributing content via the internet and participating in elections, and, in June, a court ruled that the Foundation's activities were extremist.<sup>691</sup> In September 2021, a new case was opened against Navalny, alleging that he was the founder and leader of an extremist group, a crime punishable by up to ten years in prison.<sup>692</sup> In October 2021, Navalny announced that he had been designated by

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<sup>688</sup> Investigative Committee Press Release: Sentence Handed Down in Stadium Construction Fraud and Bribery Case (May 19, 2021), <http://sledcom.ru/news/item/1571269>.

<sup>689</sup> Ilya Lozovsky, *How Alexei Navalny Exposed Russian Corruption*, OCCRP (Aug. 21, 2020), <https://www.occrp.org/en/investigations/how-alexei-navalny-exposed-russian-corruption>.

<sup>690</sup> Ilya Lozovsky, *How Alexei Navalny Exposed Russian Corruption*, OCCRP (Aug. 21, 2020), <https://www.occrp.org/en/investigations/how-alexei-navalny-exposed-russian-corruption>; CNN Editorial Research, *Alexey Navalny Fast Facts*, CNN (Nov. 2, 2021), <https://www.cnn.com/2021/03/18/europe/alexey-navalny-fast-facts/index.html>.

<sup>691</sup> Daria Litvinova, *Moscow Court Restricts Navalny's Anti-Corruption Foundation*, AP NEWS (Apr. 27, 2021), <https://apnews.com/article/russia-government-and-politics-europe-philanthropy-a37aef94c42afd26e4043f60f9c2a230>; CNN Editorial Research, *Alexey Navalny Fast Facts*, CNN (Nov. 2, 2021), <https://www.cnn.com/2021/03/18/europe/alexey-navalny-fast-facts/index.html>.

<sup>692</sup> Andrew Osborn & Polina Devitt, *Russia Opens New Criminal Case Against Kremlin Critic Navalny, Threatens More Jail Time*, REUTERS (Sept. 29, 2021), <https://www.reuters.com/world/russia-launches-new-case-against-jailed-kremlin-critic-navalny-2021-09-28>.

a prison commission as an “extremist and terrorist,” further escalating the Russian government’s pressure against him.<sup>693</sup>

## L. Canada

Airplane manufacturer Bombardier disclosed, in its August 2021 financial report, that the Royal Canadian Mounted Police had sent a letter in July advising the company that it had initiated an investigation over potential bribery in Indonesia with respect to its interactions with Garuda Indonesia, the Indonesian state airline.<sup>694</sup> The UK’s SFO and the DOJ both previously opened investigations into Bombardier’s transactions with the same entity, Garuda Indonesia, in 2020.<sup>695</sup>

In September 2021, SNC Lavalin announced in a press release that it had become the first Canadian company to be invited to negotiate a remediation agreement with the Canadian authorities pursuant to the 2018 amendments to the Country’s criminal code.<sup>696</sup> These amendments provide for a new process for remediation agreements, which would function like DPAs do in the United States.<sup>697</sup> With this agreement, SNC Lavalin is seeking to resolve forgery, fraud, and related charges that were brought on the same day that SNC Lavalin announced the remediation agreement negotiations. These charges were brought against two of the company’s subsidiaries, as well as against two former executives, in connection with activities that occurred between 1997 and 2004 related to the refurbishment of the Jacques Cartier Bridge in Montreal.<sup>698</sup>

Canadian authorities’ invitation to the company to negotiate a remediation agreement is particularly notable given that Jody Wilson-Raybould, then the Attorney General of Canada, declined to negotiate such a remediation agreement with SNC Lavalin in late 2018 with respect to different, unrelated charges that were brought against the company and two of its subsidiaries—including one of the subsidiaries charged in connection with the September 2021 charges (SNC-Lavalin

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<sup>693</sup> *Russia’s Navalny Says Prison Has Changed his Status to “Terrorist”*, REUTERS (Oct. 11, 2021), <https://www.reuters.com/world/europe/russias-navalny-says-his-prison-status-changed-terrorist-2021-10-11>.

<sup>694</sup> Michael Griffiths, *RCMP Opens Bribery Investigation into Bombardier*, GLOBAL INVESTIGATIONS REV. (Aug. 5, 2021), <https://globalinvestigationsreview.com/anti-corruption/rcmp-opens-bribery-investigation-bombardier>.

<sup>695</sup> Michael Griffiths, *RCMP Opens Bribery Investigation into Bombardier*, GLOBAL INVESTIGATIONS REV. (Aug. 5, 2021), <https://globalinvestigationsreview.com/anti-corruption/rcmp-opens-bribery-investigation-bombardier>.

<sup>696</sup> SNC Lavalin Press Release, *SNC-Lavalin acknowledges the charges relating to alleged events that took place nearly two decades ago and welcomes the Directeur des poursuites criminelles et pénales (DPCP) invitation to negotiate a remediation agreement* (Sept. 23, 2021), <https://www.snclavalin.com/en/media/press-releases/2021/23-09-2021>.

<sup>697</sup> SNC Lavalin Press Release, *SNC-Lavalin acknowledges the charges relating to alleged events that took place nearly two decades ago and welcomes the Directeur des poursuites criminelles et pénales (DPCP) invitation to negotiate a remediation agreement* (Sept. 23, 2021), <https://www.snclavalin.com/en/media/press-releases/2021/23-09-2021>.

<sup>698</sup> SNC Lavalin Press Release, *SNC-Lavalin acknowledges the charges relating to alleged events that took place nearly two decades ago and welcomes the Directeur des poursuites criminelles et pénales (DPCP) invitation to negotiate a remediation agreement* (Sept. 23, 2021), <https://www.snclavalin.com/en/media/press-releases/2021/23-09-2021>; see WilmerHale, *Global Anti-Bribery Year-in-Review: 2020 Developments and Predictions for 2021*, at 116 (Jan. 28, 2021), <https://www.wilmerhale.com/en/insights/client-alerts/20210126-2020-global-antibribery-yearinreview>.

International Inc.)—in 2015 with respect to activities in Libya.<sup>699</sup> A division of SNC Lavalin (SNC-Lavalin Construction) ultimately pleaded guilty to a single fraud charge in connection with the Libya allegations.<sup>700</sup>

## M. Malaysia

The Malaysian Ministry of Finance has continued its efforts to take action against individuals and entities connected either directly or indirectly to a scheme through which billions of dollars were siphoned out of sovereign wealth fund 1Malaysia Development Berhad (1MDB) by senior officials and those associated with senior officials, an enterprise that ultimately resulted in the shuttering of 1MDB in 2016.<sup>701</sup> In March 2021, the Ministry of Finance announced that it had reached an \$80 million resolution with Deloitte PLT (a Deloitte group entity incorporated in Malaysia) resolving all claims related to the audit work it had conducted for 1MDB and its subsidiary SRC International Sdn Bhd between 2011 and 2014.<sup>702</sup>

2021 also saw Malaysia's first prosecution under the country's corporate criminal liability law, Section 17A of the Malaysian Anti-Corruption Commission Act 2009, which came into force in June 2020 and enables the Malaysian Anti-Corruption Commission (MACC) to impose corporate liability directly on commercial organizations where a person associated with the company engages in corrupt practices in order to benefit the entity.<sup>703</sup> In March 2021, the MACC charged shipping company Pristine Offshore and a former director of the entity in connection with alleged bribes made by the former director to the Chief Operating Officer of Deleum Primera Sdn Bhd in order to secure a contract from Deleum's 60% shareholder, Petronas Carigali, the subsidiary of a Malaysian state-owned entity. The only statutory defense for an entity charged under Section 17A is that it has adequate procedures that were designed to prevent individuals associated with the entity from engaging in corrupt acts.

Potential bribery with respect to government tenders also continues to be the subject of scrutiny by Malaysian authorities. In April 2021, the Malaysian Ministry of Finance announced that MACC arrested members of a conspiracy that had, since 2014, allegedly submitted tender applications

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<sup>699</sup> See WilmerHale, *Global Anti-Bribery Year-in-Review: 2020 Developments and Predictions for 2021*, at 116 (Jan. 28, 2021), <https://www.wilmerhale.com/en/insights/client-alerts/20210126-2020-global-antibribery-yearinreview>.

<sup>700</sup> Allison Lampert, *Canada's SNC-Lavalin Unit Pleads Guilty to Fraud Charge in Libya Case*, REUTERS (Dec. 18, 2019), <https://www.reuters.com/article/us-snc-lavalin-court/canadas-snc-lavalin-unit-pleads-guilty-to-fraud-charge-in-libya-case-idUSKBN1YM1V0>.

<sup>701</sup> US Department of Justice Press Release No.21-740: Over \$1 Billion in Misappropriated 1MDB Funds Now Repatriated to Malaysia (Aug. 5, 2021).

<sup>702</sup> Malaysia Ministry of Finance Press Release, *Deloitte to Pay RM324 Million to The Malaysian Government for 1MDB and SRC Settlement* (Mar. 3, 2021), <https://www.mof.gov.my/portal/en/news/press-release/deloitte-to-pay-rm324-million-to-the-malaysian-government-for-1mdb-and-src-settlement>; & Matthew Goldstein, *Goldman Sachs and Malaysia Reach \$3.9 Billion Settlement in 1MDB Scandal*, N.Y. TIMES (July 24, 2020), <https://www.nytimes.com/2020/07/24/business/goldman-sachs-malaysia-1mdb.html>.

<sup>703</sup> Mohamed Basyir, *Malaysia Made Notable Progress in Battle Against Corruption*, NEW STRAITS TIMES (May 19, 2021), <https://api.nst.com.my/news/nation/2021/05/691443/malaysia-made-notable-progress-battle-against-corruption>.

through over 150 shell companies after paying bribes to government employees responsible for evaluating tender submissions. Through this scheme, the co-conspirators allegedly procured government contracts worth nearly USD one billion.<sup>704</sup> Additionally, the Malaysian Competition Commission announced that it was investigating over 3,000 companies for the rigging of various public and other tenders.<sup>705</sup>

## N. South Africa

In January 2021, the Constitutional Court of South Africa ordered former President Jacob Zuma to comply with a summons issued by the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector (the “Commission”).<sup>706</sup> The Commission was investigating allegations of improper conduct and corruption on the part of Zuma during his presidency from 2009 to 2018, and on the part of members of the Gupta family. Zuma refused to appear before the Commission as ordered and, in June 2021, the Constitutional Court found him guilty of contempt of court and sentenced him to 15 months imprisonment.<sup>707</sup> In the days that followed, hundreds of supporters gathered outside Zuma’s family compound in KwaZulu-Natal in an effort to prevent his arrest, and Zuma ultimately turned himself in to police in July 2021.<sup>708</sup> Zuma’s imprisonment sparked several days of protests, looting, and riots—the South African Army was deployed to help contain the unrest, which led to more than 300 deaths and 3,000 arrests.<sup>709</sup>

Since its creation in 2018 to investigate alleged government corruption, the Commission has conducted 430 hearings and collected over 170,000 pages of evidence.<sup>710</sup> Although the Commission was initially scheduled to dissolve on July 23, 2018, it received several extensions,

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<sup>704</sup> Ben Tan, *MACC Cripples Cartel with Monopoly over RM 3.8b Worth of Government Tenders*, YAHOO! NEWS (Apr. 4, 2021), <https://malaysia.news.yahoo.com/macc-cripples-cartel-monopoly-over-094312020.html>.

<sup>705</sup> Kalbana Perimbanayagam, *More Arrests Expected in “Project Tender Cartel” Case*, NEW STRAITS TIMES (Apr. 7, 2021), <https://www.nst.com.my/news/crime-courts/2021/04/680417/more-arrests-expected-project-tender-cartel-case>.

<sup>706</sup> Post Judgment Media Summary of Secretary of the Judicial Commission of Inquiry into Allegation of State Capture, Corruption and Fraud in the Public Sector Including Organ of State v. Jacob Gedleyihlekisa, Case CCT 52/21, [2021] ZACC 18, <https://www.concourt.org.za/index.php/judgement/398-secretary-of-the-judicial-commission-of-inquiry-into-allegation-of-state-capture-corruption-and-fraud-in-the-public-sector-including-organ-of-state-v-jacob-gedleyihlekisa-zuma-cct52-21>.

<sup>707</sup> John Eligon & Lynsey Chutel, *South African Court Orders Arrest of Ex-President Jacob Zuma for Contempt*, N.Y. TIMES (June 29, 2021), <https://www.nytimes.com/2021/06/29/world/africa/jacob-zuma-prison.html>.

<sup>708</sup> Mark Gevisser, *Jacob Zuma’s Imprisonment is a Victory for South Africa’s Post-Apartheid Constitution*, GUARDIAN (July 9, 2021), <https://www.theguardian.com/commentisfree/2021/jul/09/jacob-zumas-arrest-south-africas-post-apartheid-constitution>.

<sup>709</sup> Gabriele Steinhauser, *South Africa Deploys Army to Contain Unrest Over Former President Zuma’s Arrest*, WALL ST. J. (July 12, 2021), <https://www.wsj.com/articles/south-africa-deploys-army-to-contain-unrest-over-former-presidents-arrest-11626100885>; Michael Day, *South Africa Riots Map: Where Looting and Violence are Tearing Through Nation After Ex-President Zuma Jailed*, INEWS (July 14, 2021), <https://inews.co.uk/news/world/south-africa-riots-map-where-looting-violence-unrest-president-zuma-jailed-latest-1103528>; Shingai Nyoka, *South African Riots Over Zuma Jailing Pre-Planned - Cyril Ramaphosa*, BBC NEWS (July 17, 2021), <https://www.bbc.co.uk/news/world-africa-57863558>.

<sup>710</sup> Commission of Inquiry into State Capture, Interesting Information and Stats, <https://www.statecapture.org.za/site/information/stats> (last visited Jan. 21, 2021).

through the end of 2021.<sup>711</sup> On January 4, 2022, the Commission released its initial findings report of 874 pages, which concluded that Zuma was involved in improper and corrupt conduct to help the Gupta brothers, who were his friends and business partners of his son, illicitly secure state contracts and tenders, and fired officials who tried to stand in their way.<sup>712</sup>

## O. Nigeria

In April 2021, Lagos State Governor Babajide Sanwo-Olu signed the Public Complaints and Anti-Corruption Commission Bill into law, establishing an agency that will investigate and prosecute state government officials and registered contractors accused of economic crimes and financial misappropriation.<sup>713</sup> The legislation's objective is "to deepen the culture of accountability and transparency in the expenditure of appropriated public funds."<sup>714</sup> Governor Sanwo-Olu said that the law was "a testimony to the State Government's effort towards entrenching accountability in governance and checking malfeasance among officers entrusted with public resources."<sup>715</sup>

One provision of the new legislation, which has faced opposition from the federal government, states that the commission shall have exclusive rights to investigate corruption and financial crimes cases involving the finances and assets of the Lagos State Government, and the power to "take over" the investigation of such cases being investigated by any other agency.<sup>716</sup> Nigeria's Minister of Justice and Attorney-General Abubakar Malami criticized the law, indicating that federally-mandated anti-corruption agencies, such as the Economic and Financial Crimes Commission (EFCC) and the Independent Corrupt Practices and Other Related Offences Commission (ICPC) would not be handing over their investigations to the Lagos State commission.<sup>717</sup> Lagos State has yet to announce any members of the newly created commission.

Lagos is not the first state in Nigeria to establish an anti-corruption agency. Kano State set up the Kano State Public Complaints and Anti-Corruption Commission in 2009. Oyo State passed its own anti-corruption agency law in 2019 and confirmed the board members of the Oyo State Anti-

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<sup>711</sup> *In re Chairperson of the Judicial Commission of Inquiry Into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State*, Case No. 46878/2021 (H.C. S. Afr. Sept. 29, 2021), [https://www.statecapture.org.za/site/files/judgments/16/Granting\\_of\\_Extension\\_to\\_31\\_Dec\\_2021.pdf](https://www.statecapture.org.za/site/files/judgments/16/Granting_of_Extension_to_31_Dec_2021.pdf).

<sup>712</sup> Judicial Commission of Inquiry into State Capture Report: Part 1 (Jan. 4, 2022), [https://www.statecapture.org.za/site/files/announcements/638/Judicial\\_Commission\\_of\\_Inquiry\\_into\\_State\\_Capture\\_Report\\_Part\\_1\\_Vol\\_1:\\_SAA\\_\(18\\_MB\).pdf](https://www.statecapture.org.za/site/files/announcements/638/Judicial_Commission_of_Inquiry_into_State_Capture_Report_Part_1_Vol_1:_SAA_(18_MB).pdf).

<sup>713</sup> *Lagos to establish Anti-Corruption Commission*, VANGUARD NEWS NIGERIA (Apr. 19, 2021), <https://www.vanguardngr.com/2021/04/lagos-to-establish-anti-corruption-commission>.

<sup>714</sup> *Lagos to establish Anti-Corruption Commission*, VANGUARD NEWS NIGERIA (Apr. 19, 2021), <https://www.vanguardngr.com/2021/04/lagos-to-establish-anti-corruption-commission>.

<sup>715</sup> *Lagos To Establish Anti-Corruption Agency, As Sanwo-Olu Signs Bill Deepening Accountability in Governance*, LAGOS STATE GOVERNMENT OFFICIAL WEB PORTAL (Apr. 19, 2021), <https://lagosstate.gov.ng/blog/2021/04/19/lagos-to-establish-anti-corruption-agency-as-sanwo-olu-signs-bill-deepening-accountability-in-governance>.

<sup>716</sup> Lagos State Public Complaints and Anti-Corruption Commission Law 2021, § 13(3).

<sup>717</sup> Leke Baiyewu, *FG Moves Against Proposed Lagos Anti-Graft Commission*, PUNCH (May 20, 2021), <https://punchng.com/fg-moves-against-proposed-lagos-anti-graft-commission>.



Corruption Agency more than a year later in December 2020. However, little has been reported about the activities of the agency since its establishment.<sup>718</sup>

## **P. International Organizations**

### **1. The World Bank**

In 2021, international organizations continued to push governments to rigorously enforce anti-bribery laws and to collect data on the state of anti-corruption efforts. For example, and despite the continuing global pandemic, the World Bank Vice Group's Integrity Vice Presidency (INT) continued to vigorously investigate allegations of fraud and corruption arising in the context of World Bank Group projects, and to levy sanctions against parties who engaged in fraud or corruption in connection with World Bank projects. The INT received 4,311 complaint submissions and opened 347 new external preliminary investigations in 2021.<sup>719</sup> The INT also pursued 45 cases of alleged fraud and corruption involving World Bank staff and 14 cases involving corporate vendors.<sup>720</sup> Further, the INT substantiated misconduct allegations in five World Bank staff cases and in three corporate vendor cases.<sup>721</sup>

In addition to the support of enforcement work, the World Bank instituted further reforms of its internal enforcement structures. It restructured the INT to bring together the Preventive Services, Forensic Audits, Digital Forensics, Integrity Risk Assessment, and Data Analytics functions of INT under a new Prevention, Risk & Knowledge (PRK) team.<sup>722</sup> The aim of this reform was to build a more robust knowledge base and analytic support for INT operations.<sup>723</sup>

The World Bank also made efforts to increase cooperation among member countries. The Bank's Office of Suspension and Debarment (OSD), for the first time, published a Global Suspension & Debarment Directory, a resource for enforcement officials that collects data and information on the

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<sup>718</sup> Wale Akinselure, *Makinde Inaugurates Oyo State Anti-Corruption Agency*, NIGERIAN TRIBUNE (Dec. 22, 2020), <https://tribuneonlineeng.com/makinde-inaugurates-oyo-state-anti-corruption-agency>.

<sup>719</sup> World Bank Group, *Sanctions System Annual Report for Fiscal Year 2021*, at 4 (2021), <https://documents1.worldbank.org/curated/en/284891634566178252/pdf/World-Bank-Group-Sanctions-System-FY21.pdf>.

<sup>720</sup> World Bank Group, *Sanctions System Annual Report for Fiscal Year 2021*, at 4 (2021), <https://documents1.worldbank.org/curated/en/284891634566178252/pdf/World-Bank-Group-Sanctions-System-FY21.pdf>.

<sup>721</sup> World Bank Group, *Sanctions System Annual Report for Fiscal Year 2021*, at 4 (2021), <https://documents1.worldbank.org/curated/en/284891634566178252/pdf/World-Bank-Group-Sanctions-System-FY21.pdf>.

<sup>722</sup> World Bank Group, *Sanctions System Annual Report for Fiscal Year 2021*, at 11 (2021), <https://documents1.worldbank.org/curated/en/284891634566178252/pdf/World-Bank-Group-Sanctions-System-FY21.pdf>.

<sup>723</sup> World Bank Group, *Sanctions System Annual Report for Fiscal Year 2021*, at 11 (2021), <https://documents1.worldbank.org/curated/en/284891634566178252/pdf/World-Bank-Group-Sanctions-System-FY21.pdf>.

exclusion systems of 23 different countries and institutions.<sup>724</sup> As part of its emphasis on cross-border collaboration, the OSD continued its series of webinars and panel discussions aimed at educating both Bank staff and the wider public about the Bank’s anti-corruption efforts and to foster collaboration.<sup>725</sup>

## 2. The Organisation for Economic Co-operation and Development (OECD)

2021 saw major changes in the way the OECD tracked bribery and anti-corruption efforts. In November 2021, the OECD released an amended “Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions,” aimed at significantly enhancing global anti-corruption enforcement in international business.<sup>726</sup> The amended recommendation now includes a section on “demand” side corruption—i.e., the government officials who receive bribes. The OECD explained that it considered this a necessary change in light of a 2018 report by the OECD that found that an official receiving a bribe was five times less likely to be sanctioned than the provider of the bribe.<sup>727</sup> The amended recommendation also includes a section on “non-trial resolutions” such as DPAs, as well as new provisions on whistleblower protection and international cooperation.<sup>728</sup>

The new focus on DPAs in particular is historic. While DPAs were pioneered by the United States and are slowly catching on in other parts of the world,<sup>729</sup> the OECD’s new emphasis on non-prosecution resolutions to bribery offenses and encouraging corporations to cooperate could cause this trend to accelerate. In fact, China has already begun to implement a program involving NPAs for low-level corporate offenses.<sup>730</sup> While this recommendation is not legally binding, the OECD Working Group on Bribery has begun monitoring how its members implement the recommendation

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<sup>724</sup> World Bank Group, Sanctions System Annual Report for Fiscal Year 2021, at 5 (2021), <https://documents1.worldbank.org/curated/en/284891634566178252/pdf/World-Bank-Group-Sanctions-System-FY21.pdf>.

<sup>725</sup> World Bank Group, Sanctions System Annual Report for Fiscal Year 2021, at 35-36 (2021), <https://documents1.worldbank.org/curated/en/284891634566178252/pdf/World-Bank-Group-Sanctions-System-FY21.pdf>.

<sup>726</sup> *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, OECD LEGAL INSTRUMENTS (Nov. 25, 2021), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0378#mainText>.

<sup>727</sup> OECD, *Foreign Bribery Enforcement: What Happens to the Public Officials on the Receiving End?* (Dec. 11, 2018), <https://www.oecd.org/fr/corruption/foreign-bribery-enforcement-what-happens-to-the-public-officials-on-the-receiving-end.htm>.

<sup>728</sup> Nicola Bonucci & Nathaniel Edmonds, *Practice Alert: What to Know About the New OECD Anti-Bribery Recommendation*, THE FCPA BLOG (Nov. 30, 2021), <https://fcpablog.com/2021/11/30/practice-alert-what-to-know-about-the-new-oecd-anti-bribery-recommendation>.

<sup>729</sup> Emma Li, *Chinese NPAs Target the Wrong Firms*, THE GLOBAL ANTICORRUPTION BLOG (Jan. 3, 2022), <https://globalanticorruptionblog.com/tag/deferred-prosecution-agreements>.

<sup>730</sup> Emma Li, *Chinese NPAs Target the Wrong Firms*, THE GLOBAL ANTICORRUPTION BLOG (Jan. 3, 2022), <https://globalanticorruptionblog.com/tag/deferred-prosecution-agreements>.

and plans to consider that issue during its evaluations and monitoring of individual countries' compliance with the OECD Anti-Bribery Convention.<sup>731</sup>

The OECD took other steps to improve international anti-corruption monitoring. In December 2021, the OECD launched a new Public Integrity Indicators portal that includes a “benchmark for government resilience to corruption risks and for strengthening public integrity.”<sup>732</sup> The aim of the benchmark is to use data validated by participating governments to provide a new way of measuring “countries’ anti-corruption strategies, how accountable the policy making process is, [and] how strong are government audit practices.”<sup>733</sup> Whether this new benchmark provides any additional insights beyond the data already collected and published by the OECD and similar organizations remains to be seen.

The OECD also continued its ongoing country monitoring work. In December 2020, the OECD produced its much anticipated Phase 4 Report of the United States’ adherence to the OECD Treaty regarding transnational corruption, which focused on the FCPA.<sup>734</sup> In 2021, the OECD published Phase 4 Reports on France and Italy, among others, as well as a Phase 2 report on Peru.<sup>735</sup> The France report noted that the country had made significant progress in enforcing its laws against foreign bribery, and in particular noted the increase in investigations opened and sanctions imposed since France’s Phase 3 Report was published in 2012.<sup>736</sup> However, the report also noted that a statutory limit on investigations of two or three years adopted by the French Parliament in November of 2021, and an overhaul of AFA, the French anti-corruption agency, proposed in a bill introduced in October 2021, threatened to hamper France’s future progress.<sup>737</sup> Peru’s Phase 2 report commended the country for the importance it places on fighting domestic corruption—including through the work of the Country’s “Lava Jato Special Team” that investigates and prosecutes corruption cases stemming from bribes paid by Brazilian companies such as Odebrecht.<sup>738</sup> But it also noted that enforcement of existing laws remains lacking, that Peruvian

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<sup>731</sup> Nicola Bonucci & Nathaniel Edmonds, *Practice Alert: What to Know About the New OECD Anti-Bribery Recommendation*, FCPA BLOG (Nov. 30, 2021), <https://fcpublog.com/2021/11/30/practice-alert-what-to-know-about-the-new-oecd-anti-bribery-recommendation>.

<sup>732</sup> OECD, *Evidence for Action against Corruption* (Dec. 9, 2021), <https://www.oecd.org/governance/ethics/integrity-indicators-launch.htm>.

<sup>733</sup> OECD, *Evidence for Action against Corruption* (Dec. 9, 2021), <https://www.oecd.org/governance/ethics/integrity-indicators-launch.htm>.

<sup>734</sup> See WilmerHale, *Global Anti-Bribery Year-in-Review: 2020 Developments and Predictions for 2021*, at 122-23

(Jan. 28, 2021), <https://www.wilmerhale.com/en/insights/client-alerts/20210126-2020-global-antibribery-yearinreview>.

<sup>735</sup> OECD, *Working Group on Bribery in International Business Transactions Monitoring Schedule December 2016 - June 2026* (June 2020), <https://www.oecd.org/daf/anti-bribery/Phase-4-Evaluation-Calendar.pdf>.

<sup>736</sup> OECD, *Implementing the OECD Anti-Bribery Convention: Phase 4 Report: France*, at 6 (Dec. 9, 2021), <https://www.oecd.org/daf/anti-bribery/France-Phase-4-Report-EN.pdf>.

<sup>737</sup> OECD, *Implementing the OECD Anti-Bribery Convention: Phase 4 Report: France*, at 6 (Dec. 9, 2021), <https://www.oecd.org/daf/anti-bribery/France-Phase-4-Report-EN.pdf>.

<sup>738</sup> OECD, *Implementing the OECD Anti-Bribery Convention: Phase 2 Report: Peru*, at 5 (June 30, 2021), <https://www.oecd.org/daf/anti-bribery/peru-phase-2-report.pdf>.

companies operating abroad are at risk of engaging in bribery themselves, and that none of the recommendations put forward in the OECD's Phase 1 report had been implemented to date.<sup>739</sup>

## VII. CONCLUSION AND PREDICTIONS FOR 2022

As we look ahead to 2022, we predict that companies, individuals, and enforcement authorities will continue to grapple with the impact of COVID-19 for at least the early months of the year. We anticipate, however, that the DOJ and SEC will increasingly prioritize FCPA enforcement, as signaled by the recent guidance articulated by the Biden administration and detailed in announcements by enforcement authorities, and that enforcement will return to the higher levels we have seen in prior years.

Observations on anti-corruption enforcement by the DOJ and SEC during the latter half of 2021 suggest that the FCPA will very much remain an enforcement priority throughout 2022 and beyond. The US government has indicated that it will aggressively and proactively investigate FCPA concerns, increase resources aimed at FCPA enforcement, and increase coordination with other federal agencies and foreign authorities. Further clarification of the US government's enforcement policies may also be on the horizon, as additional steps authorities may take towards establishing heightened enforcement in practice remain to be seen.

As we predicted in last year's Year-in-Review, we have observed and will continue to see large cross-border investigations, coordinated resolutions, and a sustained focus on individual prosecutions linked to such investigations. In cases where FCPA jurisdiction cannot be established over substantive bribery, US authorities will likely continue to turn to the accounting and recordkeeping provisions or increasingly look to the wire fraud or money laundering statutes in order to pursue enforcement actions.

The unique pressures that have surfaced due to COVID-19 may also result in an increase in government investigations into industries that have been significantly impacted by, or are critical in responding to, the pandemic, including the airline industry, medical and life sciences, and pharmaceutical companies. The recently released Pandora Papers could also generate additional leads for FCPA and other anti-corruption investigations, and new legislative tools such as the CTA and AMLA will provide prosecutors with additional leads for new cases and broad authority to access data and records that can be used to investigate potential corruption.

Finally, with respect to corporate resolutions, we anticipate that corporations entering into settlement agreements with US enforcement authorities will face increased obligations and enhanced monitoring regarding their compliance with the terms of their DPAs and NPAs. Large fines and globally coordinated resolutions will likely continue to dominate the FCPA landscape, as the DOJ has indicated in recent remarks that it will continue to encourage cooperation by crediting

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<sup>739</sup> OECD, *Implementing the OECD Anti-Bribery Convention: Phase 2 Report: Peru*, at 5 (June 30, 2021), <https://www.oecd.org/daf/anti-bribery/peru-phase-2-report.pdf>.

penalties paid to other domestic and foreign regulators. Recent guidance signals that the US government may return to imposing monitorships more actively in 2022 and that FCPA enforcement authorities will continue to focus on the use of data analytics within corporate compliance programs as a means of detecting and preventing misconduct. Enforcement authorities will also likely increase their own post-settlement monitoring efforts aimed at proactively identifying ongoing issues, further FCPA-related problems, and potential settlement breaches.

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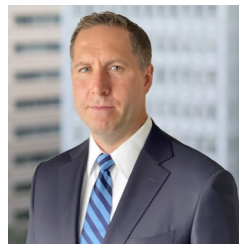
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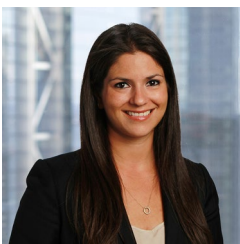
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