GIBSON DUNN

FCPA 2021 Year-End Update

February 1, 2022

Panelists:

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MCLE Certificate Information

- Most participants should anticipate receiving their certificate of attendance approximately eight weeks following the webcast.
- Please complete the form within one week to receive credit.
- All questions regarding MCLE Information should be directed to CLE@gibsondunn.com.

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Gibson Dunn Programs & Resources

Upcoming Programs

- Corporate Compliance and U.S. Sentencing Guidelines (March 30, 2022)

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- Webcast: FCPA Trends in Emerging Markets
- Webcast: Bank Secrecy Act / Anti-Money Laundering and Sanctions Enforcement and Compliance in 2022 and Beyond
- Webcast: 2021 – Managing Internal Audit and Investigations

Resources

- 2021 Year-End FCPA Update
- Gibson Dunn FCPA Practice Group
- COVID-19 Resource Center
- Gibson Dunn Webcasts (*CLE Credit Available*)
- Subscribe to Gibson Dunn Alerts

Agenda

1. **FCPA Overview**
2. **Anti-Corruption Policy and Enforcement Updates**
3. **Corporate Enforcement Framework**
4. **FCPA Trends and Enforcement Actions**
5. **Takeaways for Anti-Corruption Compliance Programs**

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FCPA Overview

FCPA – Overview

The FCPA was enacted in 1977 in the wake of reports that numerous U.S. businesses were making payments to foreign government officials to secure business overseas.

- **Anti-Bribery Provisions.** The FCPA prohibits corruptly giving, promising, or offering anything of value to a foreign government official, political party, or party official with the intent to influence that official in his or her official capacity or to secure an improper advantage in order to obtain or retain business.
- **Accounting Provisions.** The FCPA also requires issuers to maintain accurate "books and records" and reasonably effective internal controls.

U.S. Enforcement Agencies

Department of Justice

- Criminal enforcement of anti-bribery provisions
- Civil enforcement of anti-bribery provisions (except issuers)
- Criminal enforcement of the accounting provisions (books and records and internal controls)
- 35 prosecutors in the Criminal Division

Securities and Exchange Commission

- Civil enforcement of the anti-bribery provision (issuers)
- Civil enforcement of the accounting provisions (books and records and internal controls)

FCPA – Anti-Bribery Provisions

- The FCPA prohibits not only completed payments, but also **any offer, promise, or authorization of the provision of anything of value**.
  - An offer to make a prohibited payment or gift, even if rejected, may violate the FCPA.
- The FCPA also prohibits **indirect corrupt payments**.
  - The FCPA imposes liability if a covered company or person authorizes a payment to a third party while "knowing" that the third party will make a corrupt payment.
  - Third parties include local agents, attorneys, brokers, consultants, distributors, joint-venture partners, liaisons, and subsidiaries.
- There is **no "de minimis" exception**, and **a "thing of value" can include**:

Charitable / Political Contributions	Consulting Fees	Entertainment / Sporting Events
Education / Internships / Training	Free Goods	Gifts
Grants / Research Support	Meals	Travel

FCPA – Accounting Provisions

- **Connection to Bribery Allegations.** Unlike the FCPA's anti-bribery provisions, the books-and-records and internal controls provisions do not require a nexus between:
  - An inaccurate book or record or a weak control, and
  - An improper payment.
- **DOJ / SEC Approach.** The government often invokes the accounting provisions where it lacks jurisdiction to bring a bribery charge or when it is seeking to compromise in the context of settlement negotiations.
  - The SEC has shown a greater willingness to bring charges based on the accounting provisions even where it lacks sufficient evidence to conclude that bribery occurred.
  - The SEC brings accounting provision charges against issuers, whereas DOJ may bring parent or subsidiary accounting provision charges.
- **Compliance Controls.** The SEC takes an expansive approach to the internal controls provision, including non-accounting-related deficiencies and issues traditionally that it perceives as associated with weak corporate compliance programs.

Key DOJ Personnel

Attorney General
Merrick Garland

Deputy Attorney General
Lisa Monaco

Criminal Division
Assistant Attorney General
Kenneth Polite, Jr.

Fraud Section
Acting Chief Joseph Beemsterboer

FCPA Unit
Chief – David Last

Key SEC Personnel

Commissioner
Allison Herren Lee
(Term expires 2022)

Commissioner
Caroline Crenshaw
(Term expires 2024)

Chairman
Gary Gensler

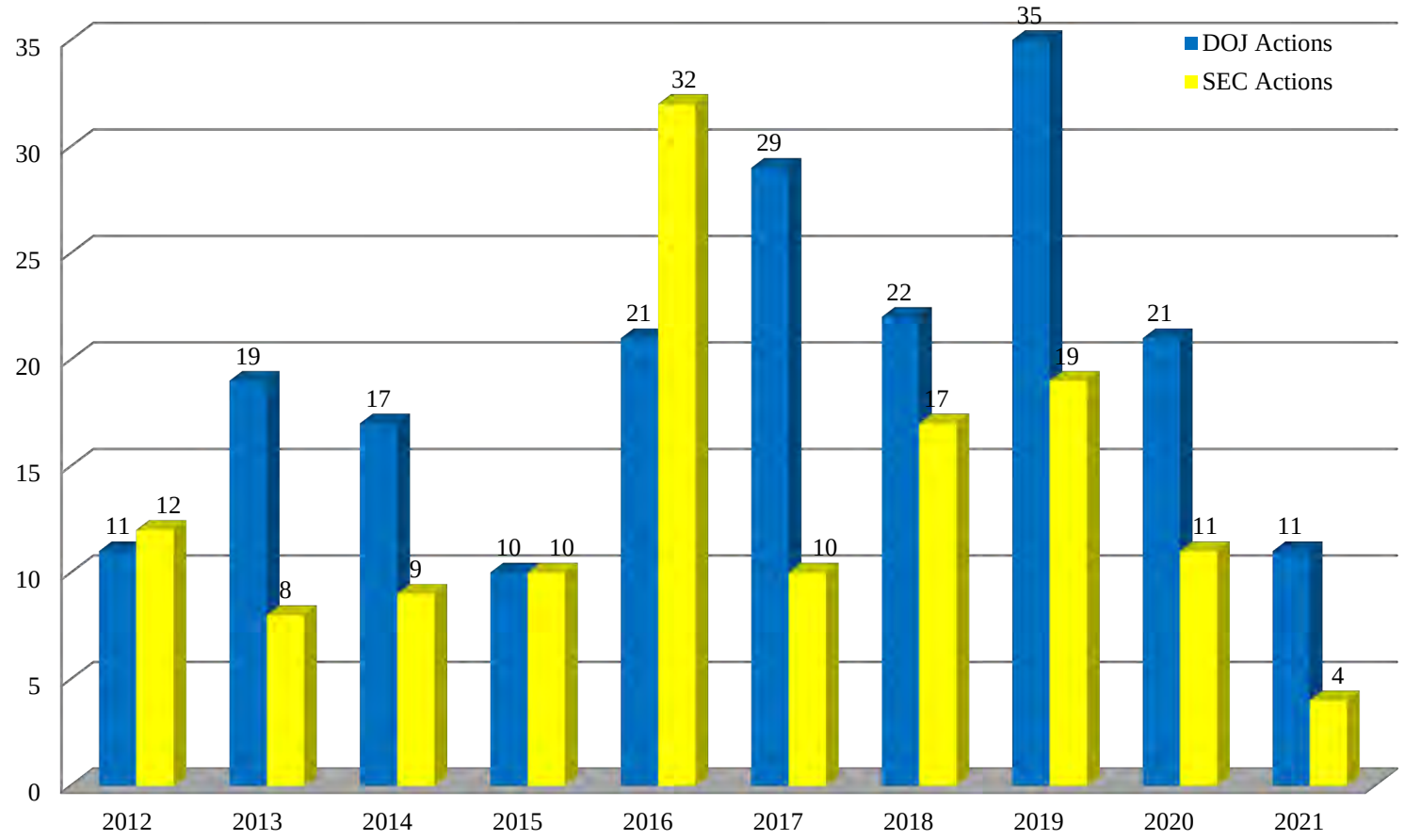
Commissioner
Hester M. Peirce
(Term expires 2025)

Commissioner
Currently Vacant

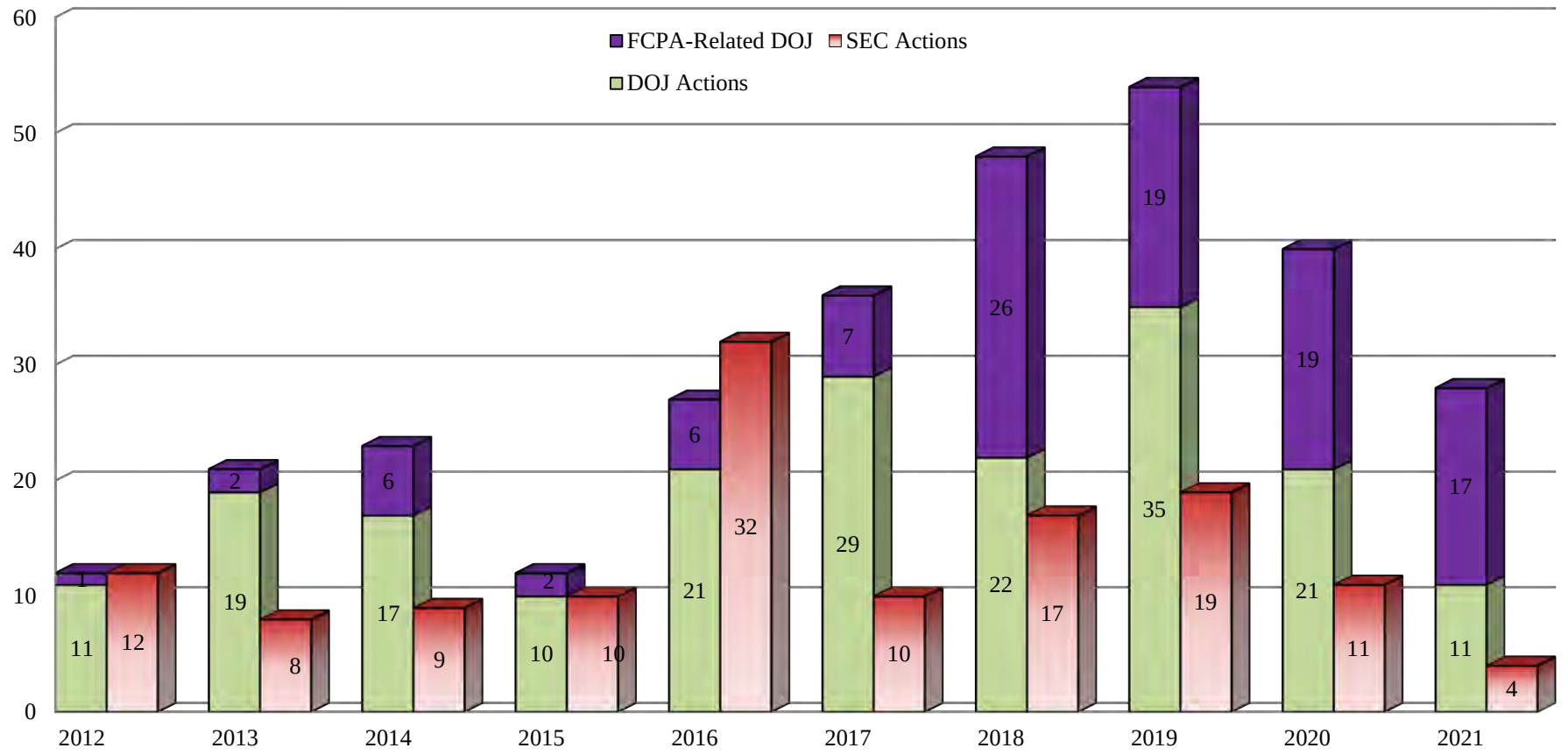
Enforcement
Director - Gurbir Grewal

FCPA Unit
Chief – Charles Cain

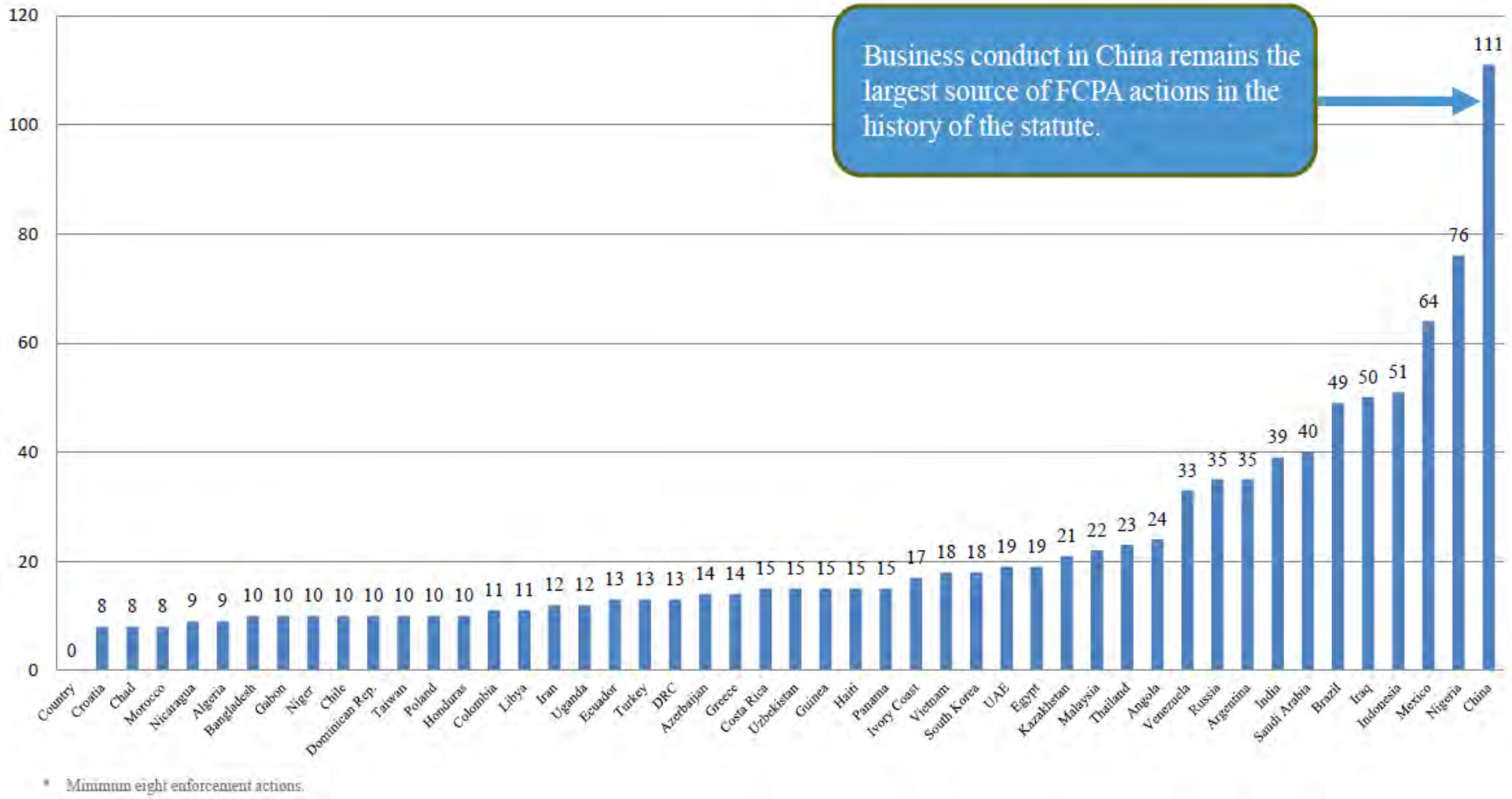
FCPA Enforcement Actions (2012 - 2021)



FCPA + FCPA-Related Enforcement Actions (2012-2021)



Number of FCPA Enforcement Actions by Country (1978 to Present*)



* Minimum eight enforcement actions.

Global Dimension of Anti-Corruption Enforcement Actions

Company	Total U.S. Resolution	Year	Non-U.S. Resolution
Goldman Sachs	USD 1,663,088,000	2020	Goldman Sachs agreed to pay over ***USD 3 billion*** to U.S. government bodies and foreign authorities in countries including the ***United Kingdom, Singapore, Hong Kong and Malaysia.***
Siemens AG	USD 800,000,000	2008	Siemens's U.S. FCPA resolutions were coordinated with a ***€395 million (USD 569 million)*** anti-corruption settlement with the ***Munich Public Prosecutor***.
Telia Company AB	USD 483,000,000	2017	The total combined amount of ***United States, Dutch, and Swedish*** penalties was ***USD 965.8 million***.
Airbus SE	USD 294,488,085	2020	Airbus's total sanctions, paid to ***United States, United Kingdom, and French authorities***, totaled ***around USD 4 billion.***
Société Générale S.A.	USD 292,800,000	2018	While the DOJ assessed the full USD 585 million penalty against SocGen, approximately half of it (***USD 292.8 million***) was paid to the French regulator, ***Parquet National Financier*** and credited against the U.S. fine.
Credit Suisse	USD 274,000,000	2021	DOJ, **United Kingdom's Financial Conduct Authority (FCA),** and the SEC coordinated an approximate USD 475 million penalty. **Switzerland's Financial Market Supervisory Authority (FINMA)** also brought a matter resulting in a monitor.

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Anti-Corruption Policy and Enforcement Updates

U.S. Anti-Corruption Strategy

- In June 2021, Biden established the fight against **global corruption as a "core national security interest of the United States."** Pursuant to presidential directive, Federal departments and agencies conducted an interagency review of existing anti-corruption efforts.
- On December 6, 2021, the Biden Administration published the first **United States Strategy on Countering Corruption**, building on the findings of the review.
  - The strategy identifies five pillars for combating corruption:
    - Modernizing, Coordinating, and Resourcing U.S. Government Efforts to Better Fight Corruption
    - Curbing Illicit Finance
    - Holding Corrupt Actors Accountable
    - Preserving and Strengthening the Multilateral Anti-Corruption Architecture
    - Improving Diplomatic Engagement and Leveraging Foreign Assistance Resources to Advance Policy Goals

U.S. Anti-Corruption Strategy

- U.S. Strategy to Combat Corruption includes the following iniatives:
  - Vigorously enforcing the FCPA via criminal and civil enforcement actions.
  - Increasing coordination across the U.S. Government, and with **foreign government partners** (e.g., through joint investigations and coordinated prosecutions) and the **private sector** (e.g., to identify industries, geographic areas, or governmental entities for increase scrutiny).
  - Updating available anti-corruption enforcement tools, such as criminalizing the demand side of bribery.
  - Using anti-money laundering charges and tools to go after corrupt conduct.
  - Increased international and domestic information sharing.
  - Leveraging innovation.

U.S. Anti-Corruption Strategy
Increased Enforcement Via International Coordination

Strategic Objective 1.2: Improve information sharing within the U.S. Government, with non-U.S.-Governmental entities, and internationally

STRATEGIC OBJECTIVE 3.2: Update tools available to hold corrupt actors accountable at home and abroad

STRATEGIC OBJECTIVE 3.3: Work with partner countries to bolster anti-corruption enforcement to amplify the use of tools

STRATEGIC OBJECTIVE 3.4: Strengthen the ability of foreign partner governments to pursue accountability in a just and equitable manner

Strategic Objective 4.2: Redoubling efforts at multilateral fora

Strategic Objective 5.1: Elevate and expand the scale of diplomatic engagement and foreign assistance that address corruption[14]

Strategic Objective 5.4: Improve coordination and risk analysis across foreign assistance

Creation of Anti-Corruption Task Forces

- In June 2021, the **U.S. Agency for International Development** created an **Anti-Corruption Task Force,** which will work across the agency and in partnership with missions to:
  - Develop ambitious and innovative anti-corruption programs and partnerships;
  - Update relevant strategies, enhance communications, and forge new policy directions;
  - Promote the integration of anti-corruption across foreign assistance sectors, including health, education, climate change, infrastructure, and humanitarian response—and develop tailored safeguards against corruption risk in U.S. assistance; and
  - Build additional long-term anti-corruption capacity, tools, and resources at USAID.

Creation of Anti-Corruption Task Forces

- Also in June 2021, DOJ announced a new **Anticorruption Task Force focused on El Salvador, Guatemala, and Honduras** (Northern Triangle countries) and in October, announced an associated tip line.
- The task force's mandates include:
  - Increased focus on prosecution of bribery cases in the region and recovery of illicitly gained assets arising from corruption in Guatemala, El Salvador, and Honduras;
  - Expand the number of Resident Legal Advisors to provide capacity-building, training, and case-based mentoring to the Guatemalan Public Ministry, including the Special Prosecution Against Impunity (FECI), to build corruption cases; and
  - Rapid response capability to deploy US prosecutors and law enforcement experts to provide mentorship to develop corruption cases.
- On the same day, the **Joint Task Force Alpha** was also established to "complement the Justice Department's efforts to fight corruption" by focusing on transnational criminal organizations and smuggling and trafficking enterprises.

AML Act of 2020

- Legislation passed on January 1, 2021, **the AML Act of 2020**, strengthened the government's ability to investigate and prosecute corruption-related money laundering and expanded FinCEN's authority, tools, and budget.
- Pursuant to the AML Act of 2020, in coordination with the Attorney General, regulators, and national security agencies, **FinCEN** published its first set of **National AML/CFT Priorities** on June 30, 2021.
  - **Corruption** is the first listed National AML/CFT Priority.
- The AML Act **also significantly expanded the AML whistleblower award program**, providing that a whistleblower "shall" get an award of up to 30% of what was collected in AML enforcement actions resulting in monetary sanctions over $1 million.

AML Act of 2020
Expanded Subpoena Authority for Foreign Bank Records

- The AML Act significantly expanded the scope of DOJ's and Treasury's authority to seek and enforce **correspondent account subpoenas** under 31 U.S.C. § 5318(k).
  - DOJ and Treasury are now allowed to seek "any records relating to the correspondent account or any account at the foreign bank, including records maintained outside of the United States," if the records are the subject of an investigation that relates to a violation of U.S. criminal laws, a violation of the BSA, a civil forfeiture action, or a Section 5318A investigation.
  - A foreign bank can petition a federal court to modify or quash the subpoena, but conflict with foreign confidentiality or bank secrecy law cannot be the sole basis for relief.
- The law includes a nondisclosure provision, meaning that the foreign bank is prohibited from notifying account holders involved, or any person named in the subpoena about the existence or contents thereof.
- The AML Act also contains **stronger enforcement mechanisms** – noncompliance can result in civil contempt and a civil penalty of up to $50,000 per day, as well as the loss of access to the correspondent account.

Congress Strengthens SEC Disgorgement Authority

- On January 1, 2021, Congress passed the National Defense Authorization Act ("NDAA"), which included a provision **expanding the SEC's statutory authority to seek disgorgement.**
  - Response to the Supreme Court decisions in *Kokesh* and *Liu* that narrowed the scope of SEC's disgorgement power.
- **Section 6501** authorizes the SEC to seek "disgorgement . . . of any unjust enrichment by the person who received such unjust enrichment," establishing that the SEC has statutory power to seek disgorgement in federal court. And it provides that "a claim for disgorgement" may be brought within ten years of a scienter-based violation—twice as long as the statute of limitations after *Kokesh*.

Record-Setting SEC Whistleblower Reports and Awards

- In 2021, the SEC Office of the Whistleblower ("OWB") made more awards—in number and dollar amount—than in the prior combined history of the whistleblower program, and included in that was a **$28 million award to a whistleblower who provided information related to 2018 FCPA settlements** with Panasonic Avionics Corporation.
  - **10th largest whistleblower award** in the program's history.
  - The SEC Order for the award noted that the information provided was based on conduct in different geographic regions than the conduct that was ultimately charged by DOJ and SEC. It also noted that "**there [was] not a strong nexus between the Claimant's information and the Commission's and [DOJ's] charges,**" but nonetheless OWB made the award since the whistleblower's information caused DOJ and SEC to investigate the company.
- According to its November 2021 Whistleblower Annual Report, the SEC received 12,210 whistleblower tips in 2021, a 76% increase over 2020, and **258 of those tips related to FCPA allegations,** compared to 208 in 2020 and 200 in 2019.

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DOJ Corporate Enforcement Framework

DOJ FCPA Corporate Enforcement Policy

- DOJ's FCPA Corporate Enforcement Policy outlines the requirements for companies to receive credit for cooperation, disclosure, and remediation in FCPA investigations.
- To qualify for a presumption of a declination: (i) self-disclosure, without aggravating circumstances; (ii) full cooperation; and (iii) timely and appropriate remediation. No declination if there is no self-disclosure or aggravating circumstances.
  - Since 2016, there have been 14 publicized declinations under this policy.
- Where a company (1) voluntarily self-discloses, (2) fully cooperates, and (3) appropriately remediates, DOJ will recommend a 50% reduction off the low end of the USSG fine range and generally not require a monitor.
- Even when a company does not voluntarily disclose, full cooperation and appropriate remediation will result in an up to 25% reduction off the low end of the USSG fine range.
  - However, prior criminal history has been increasingly impacting this to more of a mid-point in the USSG range.
- USAM 9-28.000 has additional corporate enforcement guidance, applicable across DOJ.

DOJ Corporate Enforcement Policy Updates

- In October 2021, Deputy Attorney General Lisa Monaco signaled that an increase in corporate enforcement is forthcoming and announced changes to **toughen DOJ's approach to corporate enforcement and resolution decisions**.
  - Monaco highlighted **DOJ's increasing scrutiny of companies that have received pretrial diversion (such as deferred or non-prosecution agreements) in the past,** including to determine whether they continue their criminal conduct during the period of those agreements. Close in time to Monaco's speech, several companies announced that DOJ is investigating breach allegations.
  - Monaco also announced the creation of a **Corporate Crime Advisory Group** to consider updates to DOJ's corporate criminal enforcement practices and a **review to determine whether NPAs and DPAs are appropriate** for certain recidivist companies.
- In November 2021, Deputy Attorney General Lisa Monaco followed up that speech with a departmental Memorandum entitled **Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies** reinforcing these principles and announcing corresponding forthcoming changes to DOJ Corporate Enforcement policies.

DOJ Corporate Enforcement Policy Updates

- Monaco's Memorandum restored prior Yates Memo guidance concerning the need for corporations to provide ***all*** **relevant, non-privileged information** about ***all*** **individuals involved in misconduct** to be eligible for cooperation credit, rather than just disclosures that are "substantially involved" in the misconduct.

> To receive any consideration for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status, or seniority, and provide to the Department all nonprivileged information relating to that misconduct. To receive such consideration, companies cannot limit disclosure to those individuals believed to be only substantially involved in the criminal conduct. This requirement includes individuals inside and outside of the company. Department attorneys are best situated to assess the relative culpability of, and involvement by, individuals involved in misconduct, to include those individuals who, while deemed by a corporation to be less than substantially involved in misconduct, may nonetheless have important information to provide.

DOJ Corporate Enforcement Policy Updates

- Monaco's Memorandum requires that prosecutors take into account a corporation's full criminal, civil, and regulatory record in making charging decisions, **even if dissimilar from the conduct at issue**.

> A corporation's record of past misconduct—including violations of criminal laws, civil laws, or regulatory rules—may be indicative of whether the company lacks the appropriate internal controls and corporate culture to disincentivize criminal activity, and whether any proposed remediation or compliance programs, if implemented, will succeed. Prosecutors must therefore take a holistic approach when considering a company's characteristics, including its history of corporate misconduct, without limiting their consideration to whether past misconduct is similar to the instant offense.
>
> To that end, when making determinations about criminal charges and resolutions for a corporate target, prosecutors are directed 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. Some prior instances of misconduct may ultimately prove less significant, but prosecutors must start from the position that all prior misconduct is potentially relevant.

DOJ Corporate Enforcement Policy Updates

- Monaco's Memorandum made it clear that prosecutors should **analyze whether to impose a corporate monitor on a case-by-case basis**, favoring one where a Company's compliance program is "untested, ineffective, inadequately resourced, or not fully implemented," or found to be "deficient or inadequate in numerous or significant respects."

In recent years, some have suggested that monitors would be the exception and not the rule. To the extent that prior Justice Department guidance suggested that monitorships are disfavored or are the exception, I am rescinding that guidance.

The Department is committed to imposing monitors where appropriate in corporate criminal matters. Department attorneys should analyze and carefully assess the need for the imposition of a monitor on a case-by-case basis. As explained in prior guidance, two broad considerations should guide prosecutors when assessing the need for and propriety of a monitor: (1) the potential benefits that employing a monitor may have for the corporation and the public, and (2) the cost of a monitor and its impact on the operations of a corporation.

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FCPA Trends and Enforcement Actions

2021 FCPA Enforcement Trends

- Below are enforcement trends seen in 2021:
  - Marked one-year decrease in corporate enforcement actions
  - Continued focus on individual enforcement actions
  - Multinational and multi-agency coordinated resolutions
  - No compliance monitors
  - Continued use of anti-money laundering charges

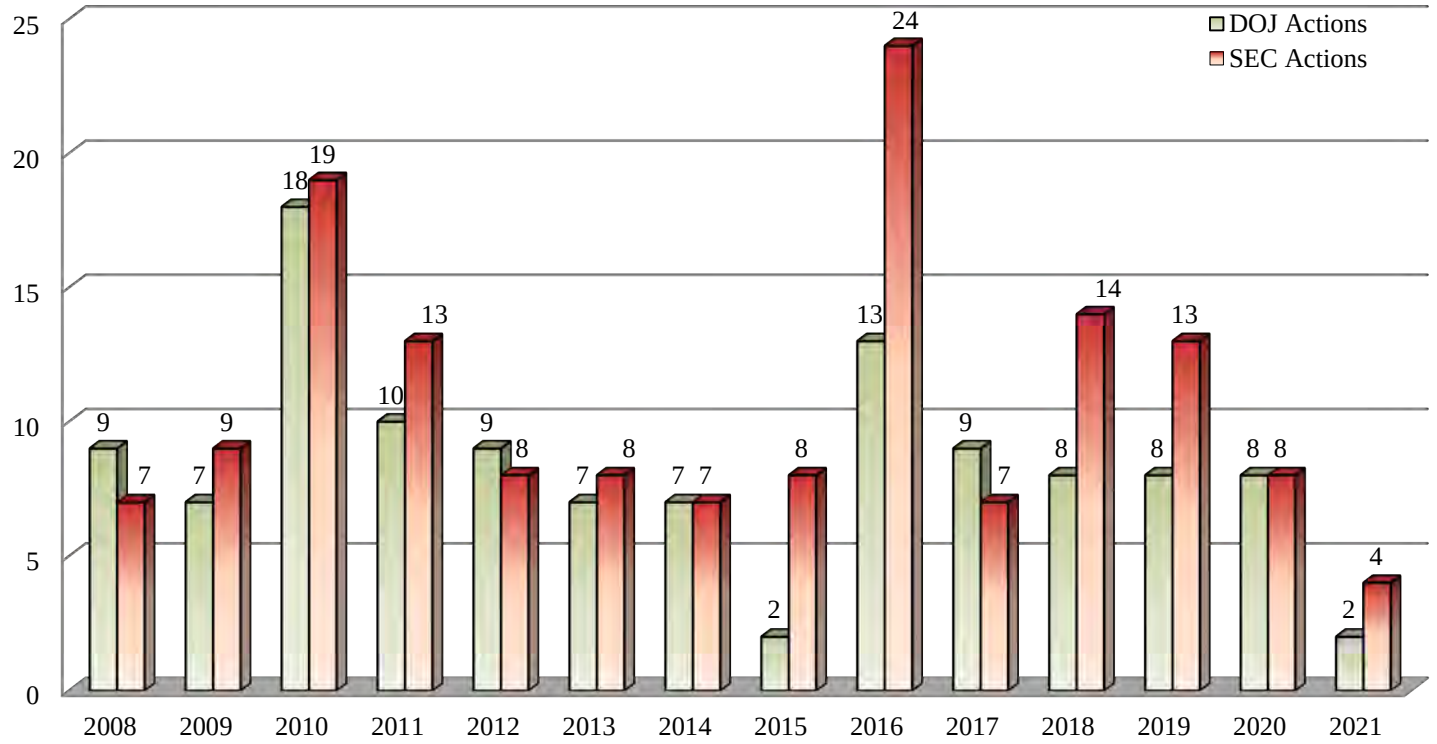
Fact Scenarios Highlighted in 2021

- DOJ and the SEC continued to emphasize high-risk areas and anti-corruption controls breakdowns in resolutions:
  - Disregarding red flags raised by due diligence, audit findings, and complaints
  - Failure to implement recommendations from internal audit or legal
  - Use of risky third party intermediaries in connection with government-related business
  - Deficiencies in global and/or post-deal compliance integration
  - Departures from internal policies and procedures

Decrease in Corporate Enforcement Actions

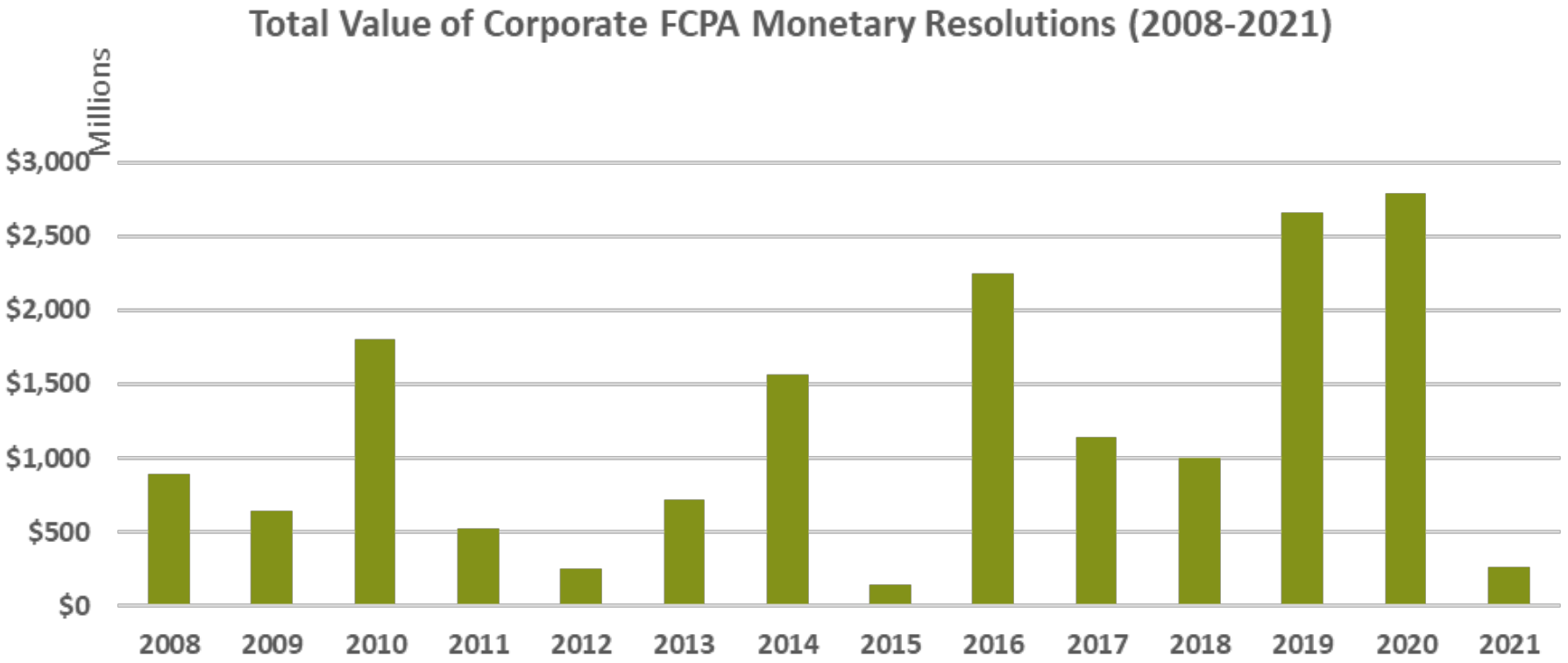
- In 2021, there was a significant decrease in the number of corporate enforcement matters and penalties. Based on Monaco's speech and the U.S. Anti-Corruption Strategy, we anticipate this will be an aberration and corporate enforcement will return to prior levels in future years.

Corporate FCPA Enforcement Actions (2008-2021)



Decrease in Corporate FCPA Penalties

- In December 2021, officials from DOJ and the SEC at the ACI FCPA Conference said the number of 2021 resolutions is not indicative of their strong pipeline of FCPA cases, and the SEC said they anticipate more resolutions in 2022.



AFW – Facts

- On June 25, 2021, global engineering services firm **Amec Foster Wheeler Energy Ltd. ("AFW")**, which during the relevant period was principally based in the UK but whose then-parent's ADRs were traded on a U.S. exchange, reached a $177 million coordinated resolution with anti-corruption authorities in Brazil, the United Kingdom, and the United States.
- An AFW subsidiary is alleged to have used agents to make improper payments to win a contract with state-owned oil company Petrobras.
  - One of the agents is alleged to have failed AFW's due diligence process based on compliance concerns, but to have continued working "unofficially" on the project.

AFW– Key Resolution Takeaways

- DOJ's DPA with AFW highlights the following:
  - No voluntary disclosure credit.
  - Full cooperation credit of 25%.
  - No monitorship, but compliance reporting and enhancement obligations apply to the parent company.
  - Cooperation and disclosure provisions only apply to AFW and not to the parent company.
  - Breach provisions apply to AFW and, in part, the parent company.

AFW – Penalties

- To resolve the SEC's investigation, a related entity, Amec Foster Wheeler Ltd., consented to the entry of an administrative cease-and-desist order charging FCPA bribery and accounting violations and ordering approximately **$22.76 million** in disgorgement and prejudgment interest.
- To resolve a criminal FCPA bribery conspiracy charge, AFW entered into a three-year DPA with DOJ and agreed to a criminal penalty of **$18.375 million**.
- Both the SEC and DOJ applied offsetting credits for payments to authorities in Brazil and the UK in connection with the coordinated resolution. The credits for payments to Brazilian and UK authorities were approximately **$6.13 million** and **$4.59 million**, respectively. for payments to UK authorities.
  - AFW agreed to pay a fine in connection with the UK SFO resolution of approximately **$142 million.**
  - AFW agreed to pay a fine in connection with resolutions in Brazil of approximately **$17.5 million.**

AFW– Notable Observations
Multinational Coordination and Anti-Piling On

- This was a coordinated resolution involving multiple authorities in Brazil, the UK Serious Fraud Office, DOJ, and the SEC.
- **Brazilian Authorities**
  - $6,125,000 payment offset against DOJ penalty (33%).
  - ~$17.5 million to Brazilian authorities.
- **UK Serious Fraud Office**
  - $4,593,750 payment offset against DOJ penalty (25%).
  - ~$142 million to UK authorities.
- **DOJ**
  - Criminal penalty of $18.375 million effectively reduced to $7,656,250, after crediting the payments to UK and Brazilian authorities.
- **SEC**
  - SEC did not impose a civil penalty in light of DOJ's criminal penalty.
  - Disgorgement and prejudgment interest totaling approximately $22.7 million, with offsets due to payments to UK and Brazilian authorities.

AFW – Notable Observations
Establishing U.S. Nexus

- DOJ established U.S. nexus under U.S.C. §78dd-3 by use of meetings, employees' locations in the U.S., home offices, and use of U.S. banks.

18. In or about September 2011, Italian Agent and Brazil Intermediary Company Executive 1 met in New York, New York to discuss pitching themselves as sales agents for Foster Wheeler in connection with the upcoming bid on the UFN-IV contract. After the meeting, Brazil Intermediary Company Executi documents concerning its planned UFI Petrobras documents with the New Yo

29. On or about April 26, 2012, Brazil Intermediary Company also submitted due diligence forms to Foster Wheeler. On or about August 16, 2012, Foster Wheeler Employee 2, who was based in Houston, Texas, told the Brazil Executive to take action that prevented the disclosure, in due diligence materials, of Italian Agent's involvement with Brazil Intermediary ary Company was not working

43. On or about and between June 25, 2013 and October 19, 2014, Foster Wheeler Energy made four payments to Brazil Intermediary Company totaling approximately $1.1 million through a correspondent account at an American bank in New York, New York. The payments were credited to the Brazil Intermediary Company's bank account in Brazil.

AFW– Notable Observations
Successor Liability & Application of DPA to Current Parent

- DOJ used successor liability against a subsidiary, AFW Energy Ltd., but not against the current parent company.

Corporate Compliance Program

9. The Company and Wood represent that they have implemented and will continue to implement a compliance and ethics program designed to prevent and detect violations of the FCPA and other applicable anti-corruption laws throughout their operations, including those of their affiliates, subsidiaries, agents, and joint ventures, and those of their contractors and subcontractors whose responsibilities include interacting with foreign officials or other activities carrying a high risk of corruption, including, but not limited to, the minimum elements set forth in Attachment C.

Future Cooperation and Disclosure Requirements

5. The Company shall cooperate fully with the Fraud Section and the Office in any and all matters relating to the conduct described in the Statement of Facts and other conduct under investigation by the Fraud Section and the Office at any time during the Term, subject to applicable laws and regulations, until the later of the date upon which all investigations and prosecutions arising out of such conduct are concluded, or the end of the Term. At the request of

6. In addition to the obligations in Paragraph 5, during the Term, should the Company learn of any evidence or allegation of conduct that may constitute a violation of the FCPA anti-bribery provisions had the conduct occurred within the jurisdiction of the United States, the Company shall promptly report such evidence or allegation to the Fraud Section and the Office.

AFW – Notable Observations
Third Party Intermediary Risks & Previously Raised Red Flags

- DOJ alleged that AFW interacted with an agent after red flags were raised in due diligence.

> 32. On or about May 4, 2012, Foster Wheeler received a third-party due diligence report on Italian Agent stating that the investigators were "not . . . able to verify any of the information that [Italian Agent] presents in his CV," and found it "surprising" that "none of the dozen or so contacts [they] spoke to had ever heard of [Italian Agent] . . . includ[ing] senior executives . . . who have worked on projects . . . that [Italian Agent] claims to have consulted on." A high-level Foster Wheeler executive called the report "very concerning."

- In a press release, DOJ issued a warning to other companies:

> Director in Charge Steven M. D'Antuono of the FBI's Washington Field Office. "When companies like Amec Foster Wheeler attempt to cheat the system, it creates an uneven playing field for businesses who don't pay bribes. **This deferred prosecution agreement, which includes both a substantial criminal penalty and other provisions, should serve as a warning to companies that even using a third-party intermediary to pay bribes will not preclude them from being held responsible for international corruption."**

Credit Suisse – Facts

- On October 19, 2021, **Credit Suisse Group AG**, a Swiss-based financial institution and U.S.-issuer, resolved fraud and corruption investigations with US and UK authorities, paying global penalties of nearly $547 million.

- The alleged conduct involved two bond offerings and a syndicated loan to raise funds for Mozambiquan state-owned companies developing the country's tuna fishing industry. A portion of the funds raised were used to pay kickbacks to Credit Suisse investment bankers and to bribe Mozambiquan government officials.
- Credit Suisse entered into a three-year DPA with DOJ for a conspiracy to commit wire fraud charge, agreed to an SEC cease-and-desist order for FCPA accounting provisions and securities fraud, and resolved parallel charges with the Swiss Financial Market Supervisory Authority (FINMA) and the United Kingdom Financial Conduct Authority (FCA).

Credit Suisse – Penalties

- **SEC Resolution:**
  - Disgorgement and prejudgment interest of **$34 million**, and
  - A civil penalty of **$65 million.**
- **DOJ Resolution:**
  - Criminal penalty of approximately **$247.5 million**, and
  - Restitution to victims.
- **FCA Resolution:**
  - Regulatory enforcement of approximately **$200 million.**

Credit Suisse – Notable Observations
Previously Raised Red Flags

- The SEC Cease-and-Desist Order highlighted at several points Credit Suisse's alleged internal accounting failures related to its alleged **failure to account for red flags raised in internal audits and diligence.**

38. At the time of the Extension, Credit Suisse was aware of several risks and continued to maintain deficient internal accounting controls. Specifically, Credit Suisse was aware that: (a) ProIndicus was operating at a loss, was about to default on its next interest payment, and that its auditor had doubts concerning its ability to continue as a going concern; (b) the due diligence for the ProIndicus and EMATUM deals had revealed potential risks that the transactions could be executed outside of management's general or specific authorization; (c) press outlets had reported that funds from the EMATUM LPN financing (which was structured similarly to ProIndicus), may have been diverted; and (d) Bankers 1 and 2,who had structured the ProIndicus deal, had left Credit Suisse to work at an entity ("Intermediary Related Entity"), owned and controlled by Intermediary Principal—and were now representing Mozambique in negotiating the Extension. In approving the Extension

Credit Suisse – Notable Observations
Previously Raised Red Flags

- The SEC Cease-and-Desist Order highlighted at several points Credit Suisse's alleged internal accounting failures related to its alleged **failure to account for red flags raised in internal audits and diligence.**

46. As early as July 2015, the bank's reputational risk group warned about risks associated with Credit Suisse's continued association with Mozambique following the EMATUM "bad deal." Credit Suisse, in fact, recognized that the "reputational damage would be significant if CS

49. In preliminary due diligence concerning the Exchange Offer, Credit Suisse's Bribery and Anti-Corruption ("BACC") and Sustainability Affairs functions were concerned about the use of proceeds from the original EMATUM transaction and noted "too many significant disparities" between the value of equipment received and the invoices for that equipment. BACC conditioned approval of the Exchange on completing a reconciliation of the gaps concerning the use of proceeds and "whether there is a duty to disclose any of the findings to the noteholders." Credit Suisse, however, failed to conduct the reconciliation process outlined in the email.

Credit Suisse – Notable Observations
Delayed Productions

- The DOJ DPA noted Credit Suisse's **partial cooperation**, but cooperation credit was reduced because Credit Suisse delayed producing evidence regarding key phone calls.

- The fine was **15% off the bottom of the guideline range** for the alleged conduct.

b. the Company received partial credit for its cooperation with the Offices' investigation, including, among other things: (i) collecting and producing voluminous evidence located in other countries; (ii) voluntarily making foreign-based employees available for interviews in the United States; (iii) making regular factual presentations and updates to the Offices; (iv) ultimately meeting requests from the Offices promptly; and (v) voluntarily providing information and making foreign-based employees available to testify at trial;

c. the Company did not receive full credit for its cooperation because the Company significantly delayed producing relevant evidence, including recorded phone calls in which the Company's employees discussed concerns relating to conduct set forth in the Statement of Facts;

8. The Offices and the Company agree, based on the application of the Sentencing Guidelines to the misconduct, that the appropriate monetary penalty is $247,520,000 (the "Total Criminal Penalty"), $500,000 of which will be paid as a criminal fine by CSSEL pursuant to its plea agreement entered into simultaneously herewith, and that the appropriate forfeiture is $10,344,865 (the "Forfeiture Amount"). The Total Criminal Penalty reflects a 15 percent discount off the bottom of the applicable Sentencing Guidelines fine range. The Company and the Offices further agree that the Company will pay the United States $175,568,000, $500,000 of which will be paid as a criminal fine by CSSEL, to the United States Treasury within ten (10) business days

WPP Plc – Facts

- On September 24, 2021, **WPP Plc ("WPP")**, the world's largest advertising group and an ADS issuer, consented to the entry of a cease-and-desist order by the SEC to resolve allegations of FCPA bribery and accounting violations.
- WPP is alleged to have deployed a global growth strategy by which it entered markets through acquisitions of majority interests in many localized advertising agencies in high-risk markets.
- The SEC alleged that WPP:
  - Failed to ensure that these subsidiaries implemented WPP's internal accounting controls and compliance policies.
  - Failed to promptly or adequately respond to repeated warning signs of corruption or control failures at certain subsidiaries.
- WPP's subsidiary in China allegedly avoided paying taxes to a Chinese tax authority by making payments to a vendor identified by tax officials and providing gifts and entertainment to tax officials.

WPP Plc – Penalties

- To resolve the FCPA-related charges, WPP agreed to
  - Pay **$10.1 million** in disgorgement, **$1.1 million** in prejudgment interest, and an **$8 million** civil penalty, without admitting or denying the SEC's allegations.
  - Cease and desist from committing violations of the anti-bribery, books and records, and internal accounting controls provisions of the FCPA.
- A DOJ investigation reportedly is ongoing.

WPP Plc – Notable Observations
Acquisition and Integration Risks

- SEC's order reflects the importance of internal coordination across a company, the role of internal audit in compliance efforts, and the significance of post-deal compliance integration efforts.

7. Despite the known corruption and fraud risks inherent in WPP's FIC acquisitions, WPP lacked sufficient internal accounting controls with respect to its expansive international network. Additionally, WPP had no compliance department during the relevant period, and it lacked meaningful coordination between its legal and internal audit departments and Network management. While WPP charged Network management with remediating deficiencies identified by WPP's legal and internal audit departments, in practice, neither WPP nor the Networks provided adequate oversight of the FIC entities to ensure that the FIC entities implemented WPP's internal accounting controls and compliance policies. As a result of these structural deficiencies, WPP failed to promptly or adequately respond to repeated warning signs of corruption or identified control failures at certain FIC entities. Described below are examples of the schemes and circumvention of WPP's internal accounting controls and compliance policies that occurred at FIC entities.

WPP Plc – Notable Observations
Previously Raised Red Flags

- The SEC Cease-and-Desist Order highlighted at several points WPP's alleged failure to address red flags raised by internal audit and anonymous complaints and similarly allegedly failed to investigate these red flags and conduct sufficient due diligence.

17. Despite having notice of these potential problems with Vendor B in early 2016 through the same anonymous complaints described above, WPP failed to uncover that the supposed June 2015 DIPR campaign was, in actuality, a mechanism for bribery.

23. In 2017 and 2018, WPP was aware of significant red flags related to China Subsidiary and CEO B. First, an internal audit in 2017 determined that China Subsidiary was employing tax avoidance schemes and other significant violations of WPP's internal accounting controls resulting from CEO B's actions. Second, in May 2018, a China Subsidiary employee informed the Network CFO in charge of APAC ("Network APAC CFO") and WPP's regional tax director in China ("WPP China Tax Director") that China Subsidiary was in the midst of a tax audit and China Subsidiary management could face criminal charges for its tax avoidance schemes. In the same communication, the China Subsidiary employee informed –without

WPP Plc – Notable Observations
Departures from Internal Policies and Procedures

- The SEC Cease-and-Desist Order highlighted how conduct at the center of the allegations violated WPP's internal policies and procedures.

27. WPP had an adviser payment policy that prohibited its companies from paying third parties to assist in obtaining or retaining government contracts without WPP's approval. Despite the policy, Brazil Subsidiary made improper payments to vendors in connection with securing government contracts at CEO C's direction. These payments directly violated WPP's adviser payment policies and were made in circumstances in which there was a high probability that a portion of the payments may have been passed to the government officials with the authority to award the contracts. To disguise the fact that Brazil Subsidiary's payments to the vendors related to obtaining or retaining government contracts, Brazil Subsidiary falsified its books and records to reflect that the vendors performed bonafide services, such as marketing or IT related services. As a result of this misconduct, WPP was unjustly enriched by $891,457.

Deutsche Bank – Facts

- On January 7, 2021, **Deutsche Bank AG**, a German financial institution and U.S.-issuer, reached resolutions with DOJ and the SEC regarding alleged violations of the FCPA's accounting provisions.

Deutsche Bank

- The resolutions allege internal control deficiencies and inaccurate control record-keeping associated with the use of third-party business development consultants ("BDCs") between 2009 and 2016 in Abu Dhabi, Italy, and Saudi Arabia.
    - DOJ alleged that Bank employees knew the relevant BDCs were relatives or close associates of government officials who would pass portions of their consulting payments on to the officials in exchange for business awarded to the bank.
    - The SEC resolution addressed allegations regarding an additional BDC relationship in China.

Deutsche Bank – Penalties

- To resolve the FCPA-related charges, Deutsche Bank agreed to a three-year DPA.
  - As part of the agreement, Deutsche Bank paid a criminal penalty of ~**$79.6 million**, which reflected a 25% cooperation discount taken from the middle of the applicable fine range under the Sentencing Guidelines.
  - The discount was taken from the middle of the range, rather than the bottom, due to a prior criminal resolution in 2015.
  - Deutsche Bank also agreed to report to DOJ for three years regarding the company's remediation and corporate compliance measures.
- To resolve the SEC charge, Deutsche Bank consented to an administrative cease-and-desist order charging FCPA accounting violations and requiring the payment of **$43.3 million** in disgorgement and prejudgment interest.

Deutsche Bank – Key Resolution Takeaways

- DOJ's DPA with Deutsche Bank highlights the following:
  - No voluntary disclosure credit.
  - Full cooperation credit of 25%.
  - No monitorship, but compliance reporting and enhancement obligations apply.
  - Reporting requirement for any evidence or allegation of conduct that may violate the FCPA anti-bribery and accounting provisions.

Deutsche Bank – Notable Observations
Third Party Business Development and Sales Risks

- DOJ charged Deutsche Bank with conduct relating to third party business development consultants.

Overview of the Criminal FCPA Scheme

2. During the Relevant FCPA Period, Deutsche Bank contracted with third-party intermediaries, which it called "Business Development Consultants" or "BDCs," to obtain and retain business globally. The BDCs were approved by then-high-level Deutsche Bank management and various regional committees.

False Books and Records

3. Beginning in or about at least 2009 through in or about at least 2016, Deutsche Bank AG, acting through its employees and agents, knowingly and willfully conspired and agreed with others to maintain false books, records, and accounts that did not accurately and fairly reflect the transactions and dispositions of Deutsche Bank AG's assets, by, among other things, (1) falsely concealing bribes paid to a client's decisionmaker in Saudi Arabia to retain that client's business by recording the payments as "referral fees" paid to a BDC; and (2) falsely concealing millions of dollars of payments made to an intermediary acting as a proxy for a foreign official in Abu Dhabi by recording the payments as "consultancy" payments to a BDC.

Deutsche Bank – Notable Observations
Previously Raised Red Flags

- The DPA points out concerns previously raised to Deutsche Bank through internal audits and investigations.

8. In approximately 2008, as part of the Bank's anti-corruption program, a group within Deutsche Bank's internal audit function conducted a review of business arrangements in its Asia-Pacific region in order to assess the integrity and legitimacy of certain transactions. In 2009, the internal audit group issued a report ("2009 Report") in which it identified certain concerns with the Bank's use of one BDC including insufficient oversight over that BDC engagement to ensure it was not being used for corrupt purposes and a lack of documentation detailing what actual services were rendered by the BDC. The 2009 Report recommended that Deutsche Bank's global BDC Policy be revised and that the internal accounting controls around BDCs be enhanced to include centralized and thoroughly documented due diligence to demonstrate that a BDC was qualified to perform the services for which it was contracted, maintenance of detailed records of all work performed by the BDC, and a requirement that BDC engagements include books and recordkeeping provisions giving Deutsche Bank inspection rights. The 2009 Report was provided to senior management at Deutsche Bank, including members of the Management Board; however, only limited steps were taken in response.

9. In 2011, the same group conducted another internal investigation into the Bank's BDC relationships and identified numerous internal accounting control failures. Those failures were identified in a report ("2011 Report") and included: problems related to specific BDC engagements; lack of due diligence; general lack of training and awareness of Deutsche Bank's BDC Policy and due diligence requirements among employees; failure by business sponsors to appropriately assess, document, and mitigate corruption risks and conflicts of interests; and failure to document the proportionality and justification for certain BDC payments. The 2011 Report was also distributed to senior management at Deutsche Bank, including members of the Management Board, and again only limited steps were taken in response.

Deutsche Bank – Notable Observations
Departures from Internal Policies and Procedures

- The alleged conduct include conduct inconsistent with internal policies and procedures.

10. Contrary to its internal policies and with known failures in its relevant internal accounting controls, between 2009 and 2016, Deutsche Bank engaged some BDCs: 1) with no demonstrated expertise or qualifications; 2) who simultaneously worked for a government entity from which Deutsche Bank sought business; 3) without a written agreement; 4) using form agreements with no substantive description of the services to be performed and/or provisions calling for "success fee" payments; 5) at rates that were unreasonably high as compared to the work allegedly being performed; and 6) in circumstances where either adequate due diligence was not performed or where due diligence was conducted more than a year after the BDC was retained and paid.

some instances, BDCs were paid in excess of what was provided for pursuant to their contract with Deutsche Bank and some BDCs were paid even though they had no contract at the time certain of the services were purportedly performed. Amongst the BDC payments made in these circumstances were those that were bribes.

14. Between April 2011 and May 2013, Consultant A was paid at least $1.6 million. This included payments for services purportedly performed before he was engaged. Consultant A submitted invoices for gifts and entertainment provided to foreign government officials that were reimbursed without adequate review or advance approval by Compliance, as required under Deutsche Bank's policies. Moreover, Deutsche Bank did not fully document the services Consultant A purportedly performed and paid him without appropriate documentation. For

Deutsche Bank – Notable Observations
No Monitor Despite Prior Resolution and Controls and Compliance Findings

- DOJ did not require a monitor due to the Bank's commitment to continued enhancement of its anti-bribery and corruption program and controls, and its compliance with monitor obligations under a separate resolution.

g. although the Company had inadequate anti-corruption controls and an inadequate anti-corruption compliance program during the period of the conduct described in the Statement of Facts, the Company has enhanced and has committed to continuing to enhance its anti-bribery and anti-corruption program and internal controls, including ensuring that its compliance program satisfies the minimum elements set forth in Attachment C to this Agreement (Corporate Compliance Program);

h. based on the Company's remediation and the current state of its anti-corruption compliance program, the Company's agreement to report to the Offices as set forth in Attachment D to this Agreement (Corporate Compliance Reporting), and the Company's independent compliance monitor obligations in connection with the LIBOR Resolution, the Offices determined that an independent compliance monitor was unnecessary;

Continued Focus on Individual Enforcement Actions

- In 2021, DOJ filed or unsealed **FCPA or FCPA-related charges against 25 individual defendants,** and Attorney General Garland, Deputy Attorney General Monaco, and Criminal Division Assistant Attorney General Kenneth Polite emphasized that **individual prosecutions are the department's "first priority."**
- Many of these matters stem from longstanding investigations involving PDVSA, PetroEcuador, and Odebrecht, with two others also involving the oil and gas sector.
- DOJ will target top-level executives, foreign officials, and gatekeepers in bribery matters, e.g., bank executives Peter Weinzierl and Alexander Waldstein and Ericsson Horn of Africa Account Manager Afework Bereket.
- FCPA matters may also be brought against foreign officials in the U.S., e.g., diplomats Mahamoud Adam Bechir and Youssouf Hamid Takane.

"Accountability starts with the individuals responsible for criminal conduct. Attorney General Garland has made clear it is unambiguously this department's first priority in corporate criminal matters to prosecute the individuals who commit and profit from corporate malfeasance." - Deputy Attorney General Lisa Monaco, October 28, 2021

Increased Intersection Between Anti-Corruption and Anti-Money Laundering

- DOJ continues to use **anti-money laundering ("AML") charges** for foreign corruption-related conduct. AML offenses can be easier to capture and can be brought against certain conduct and individuals that the FCPA doesn't reach.
  - For instance, AML charges can be brought against the foreign official recipient of a bribe payment.
- AML statutes generally criminalize **conducting or attempting to conduct a transaction involving proceeds of "specified unlawful activity"** with knowledge they are proceeds of "unlawful activity."
  - **Unlawful Activity** – Generally any violation of criminal law – federal, state, local or foreign.
  - **Specified Unlawful Activities** – There are over 200 specified unlawful activities consisting of U.S. (e.g., FCPA) and certain foreign crimes (e.g., bribery of a public official, embezzlement of public funds, fraud, and defrauding a foreign bank).
  - **Knowledge includes "willful blindness"** – Ignoring red flags.

Increased Intersection Between Anti-Corruption and Anti-Money Laundering

- The U.S. Strategy on Countering Corruption includes a significant focus on AML-related initiatives to combat corruption.
  - Closing gaps in U.S. AML regulatory regime coverage.
  - Requiring smaller companies to report beneficial ownership information.

PILLAR TWO:
Curbing Illicit Finance

For too long, corrupt actors and their financial facilitators have taken advantage of vulnerabilities in the U.S. and international financial systems to launder their assets and obscure the proceeds of crime.[1] Similarly, corrupt actors amass ill-gotten wealth through illicit gains of other resources, including minerals and wildlife. To counter corruption effectively around the globe, the U.S. Government must, at home and abroad, combat money laundering, illicit trafficking, and other forms of criminal activity that fuel corruption and allow criminal actors to launder and shelter the proceeds of their illicit activities.

As the largest economy in the international financial system, the United States bears particular responsibility to address our own regulatory deficiencies, including in our AML/CFT regime, in order to strengthen global efforts to limit the proceeds of corruption and other illicit financial activity. We will therefore **address deficiencies in the U.S. anti-money laundering regime**

Increased Intersection Between Anti-Corruption and Anti-Money Laundering

- The U.S. Strategy on Countering Corruption includes a significant focus on AML-related initiatives to combat corruption.

PILLAR THREE: Holding Corrupt Actors Accountable

STRATEGIC OBJECTIVE 3.1: Enhance enforcement efforts

- **Enforcement of anti-money laundering criminal and civil laws:** The United States will implement newly established tools for investigating and prosecuting money laundering offenses. For example, the Department of Justice (DOJ) and its investigative partners now have expanded subpoena power for certain financial records maintained abroad, and new disclosure requirements for beneficial ownership information, as well as financial rewards to incentivize reporting on Bank Secrecy Act violations in financial institutions and for information leading to the identification and seizure of illicit proceeds.

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International Anti-Corruption Policy and Enforcement Updates

International Anti-Corruption Policy and Enforcement Updates in Asia

- **China**
  - Pilot Program for Corporate Criminal Compliance ("Pilot Program"): Encourages local procuratorates to grant non-arrest or non-prosecution decisions, or propose lighter penalties for corporate criminal cases, in exchange for companies implementing compliance and remediation plans. China's Supreme People's Procuratorate confirmed that commercial bribery is a "typical" case under the Pilot Program. Both corporations and their principals can qualify for the Pilot Program. Compliance undertakings can include reporting periods, compliance agreements, and implementing compliance and reporting programs.
  - Third-Party Supervision and Evaluation Mechanism (Supplement to the Pilot Program): Allows companies that qualify for the Pilot Program to apply for or be nominated for a third-party compliance monitoring program in the hope of obtaining a non-arrest or non-prosecution decision or lighter penalty.
  - In September 2021, the National Supervision Commission promulgated the Implementing Regulations for the Supervision Law, which seek to strengthen supervision over anti-corruption work by standardizing the scope, jurisdiction, and procedures of China's supervisory organs at the provincial and local levels.
  - In September 2021, the Central Commission for Discipline Inspection ("CCDI") and the National Supervisory Commission issued the Opinions regarding the investigation of and punishment for bribery. The Opinions note that investigations should focus on bribe-givers as well as bribe-receivers, particularly those concerning high value bribes, Party or state officials, and major state projects.
  - The CCDI and the National Supervisory Commission will explore the implementation of a "blacklist" for bribe givers and explore joint punishments with other departments or agencies.
  - Chinese regulators have continued to focus on the tech and healthcare sectors.

International Anti-Corruption Policy and Enforcement Updates in Asia

- **India**
  - Lokpal, the new federal anti-corruption watchdog, commenced operations in March 2020, but has only registered 122 of a total 1,549 complaints received.
  - Anti-corruption enforcement against public officials has declined, potentially as a result of a new requirement of approval from the relevant government to commence an investigation, where previously approval was only required for prosecution.
- **Japan**
  - The Ministry of Economy, Trade and Industry ("METI") revised the Guidelines for the Prevention of Bribery of Foreign Public Officials, due diligence sections closely track those in the *FCPA Resource Guide*.
- **Malaysia**
  - The first company was charged by the Malaysia Anti-Corruption Commission ("MACC") under a new law allowing for corporate liability.
- **South Korea**
  - The government launched the Corruption Investigation Office for High-Ranking Officials ("CIO"), an independent investigative agency with jurisdiction to prosecute corruption cases involving high-ranking public officials.

International Anti-Corruption Policy and Enforcement Updates in Europe

- **France**
  - A bill was registered at the National Assembly with many anti-corruption provisions, including extension of anti-corruption obligations to subsidiaries of large foreign organizations and application of criminal liability to companies and public entities if a lack of supervision led to the commission of offenses by an employee.
- **Russia**
  - The Duma approved the National Plan For Countering Corruption, including proposals to prohibit anyone who has been fined for corrupt activities from holding government positions.
- **Ukraine**
  - After the IMF refused to release funds to bolster Ukraine's economy, Ukraine's parliament passed bills reestablishing a commission to appoint judges and imposing jail sentences for public officials who lie in asset disclosures, and the president signed legislation providing for independence of the anti-corruption bureau.

International Anti-Corruption Policy and Enforcement Updates in Latin America

- **Brazil**
  - Anti-bribery prosecutions in Brazil have slowed down. The Lava Jato task force was officially dissolved in February 2021.
  - There appears to be a growing trend to conduct investigations through civil and administrative enforcement. Through December 13, 2021, Brazil's anti-corruption body has filed 204 administrative liability proceedings against corporate entities. The proceedings are aimed towards investigating corruption and fraud in bidding procedures and contracts.
  - The Administrative Improbity Law, one of Brazil's anti-corruption laws, went through a substantial reform this year. In some respects, the amendment weakens some of the anti-corruption provisions in existing law.
- **Mexico**
  - President López Obrador's flagship anti-corruption referendum did not draw sufficient voter turnout and thus did not become legally binding. If passed, it would have allowed for former government officials (currently immunized from prosecution) to be investigated for past corrupt practices.

Other International Anti-Corruption Policy and Enforcement Updates

- **OECD**
  - In November 2021, the OECD Working Group on Bribery published an updated Anti-Bribery Recommendation for countries to consider adopting new measures to prevent, detect, and investigate foreign bribery cases.
  - Address the demand side of bribery
  - Non-trial resolutions
  - Strengthen enforcement, including through international cooperation
  - Provide comprehensive and effective whistleblower protections
  - Incentivize corporate compliance efforts

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Takeaways for Anti-Corruption Compliance Programs

Focus on Compliance Programs, Controls, and Internal Audit

- In legislation, regulations, and enforcement decisions, authorities continue to increasingly emphasize the need for a **well-developed risk-based compliance program that is regularly tested, updated, and supported by sufficient resources.**
- Compliance programs should account for **global standards**, not just the FCPA.
- As recent U.S. enforcement actions show, **authorities will not credit companies for having internal controls if they are easily circumvented**. On the other hand, they have shown a willingness to credit the state of a compliance program after remediation following the discovery of misconduct.
- FCPA enforcement actions have also highlighted **the importance of Internal Audit** and **effective coordination between Internal Audit, Legal, and Compliance.**
  - Consider implementing best practices for a working relationship between internal audit, legal, and compliance.
  - Include compliance- and corruption-related areas in audit cycles.

Focus on Compliance Programs, Controls, and Internal Audit

- DOJ and the SEC regularly request and review **audit reports and internal and independent assessments.**
  - Establish guidelines to keep reports strictly factual with precise wording.
  - Ensure that remedial steps are practical and workable, and there is a process to follow through on action items.
  - Have guidelines for when to involve Legal and properly label privileged and confidential documents.
- Recent enforcement actions emphasize the need for companies to **fully address compliance red flags, risks, and recommendations flagged** by auditors, due diligence, complaints, and other creditable sources. Decisions to reject such findings or recommendations should be well-supported and fully documented.
- Government officials increasingly expect that compliance programs will be supported by **updated technology and automation**, with particular emphasis recently on the use of **data analytics for monitoring and testing a compliance program**.

Importance of Updated Risk Assessments

- Having a **properly developed risk-based risk assessment that is regularly updated is the backbone of an effective and efficient compliance program**.
- A **documented risk assessment procedure** should detail steps to review existing data, gather additional information, and analyze and report findings on a regular cadence.
  - **Sources of information should be broad across operations and jurisdictions.** They may include interviews, visits, surveys, due diligence files, audit reports, complaints, transaction data, compliance program testing and monitoring results, and so on.
  - However, more information may be sought for higher risk areas, in accordance with a risk-based approach.
- Compliance program policies, procedures, and controls should be designed and updated based on risk assessment findings.

Corruption Risks Associated with Third Parties

- **Third parties**—such as intermediaries, individuals and shell companies, agents, offshore entities, and distributors— **continue to pose the greatest FCPA risk** and feature in enforcement actions.
  - Higher risk third parties include those interacting with government officials, distributors and resellers, and business development agents.
  - Other high risk scenarios include: commission-based compensation, handling licensing, permits, or customs formalities, operating in jurisdictions high-risk for corruption, and engagement of subcontractors.
- **Pre-engagement diligence, compliance contract provisions, and close monitoring** can help offset the decreased transparency and control that comes with agents and intermediaries.
- Additional best practices that can help mitigate third party risks: (i) Train employees on risks and red flags associated with third parties; (ii) Ensure payments are to the contracted party; (iii) Have and use audit rights; (iv) Track denied third parties.

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Panelists

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F. Joseph Warin is chair of the nearly 200-person Litigation Department of Gibson Dunn's Washington, D.C., office, and he is co-chair of the firm's global White Collar Defense and Investigations Practice Group. Mr. Warin's practice includes representation of corporations in complex civil litigation, white collar crime, and regulatory and securities enforcement – including Foreign Corrupt Practices Act investigations, False Claims Act cases, special committee representations, compliance counseling, and class action civil litigation.

Mr. Warin is continually recognized annually in the top-tier by *Chambers USA*, *Chambers Global*, and *Chambers Latin America* for his FCPA, fraud and corporate investigations expertise. *Who's Who Legal* named Mr. Warin a "Global Elite Thought Leader" in its 2020 and 2019 Investigations guides list for Business Crime Defense - Corporate and Investigations. In 2018, Mr. Warin was selected by *Chambers USA* as a "Star" in FCPA, a "Leading Lawyer" in the nation in Securities Regulation: Enforcement, and a "Leading Lawyer" in the District of Columbia in Securities Litigation and White Collar Crime and Government Investigations. In 2017, *Chambers USA* honored Mr. Warin with the Outstanding Contribution to the Legal Profession Award, calling him a "true titan of the FCPA and securities enforcement arenas." He has been listed in *The Best Lawyers in America*® every year from 2006 - 2020 for White Collar Criminal Defense. *U.S. Legal 500* has repeatedly named him as a "Leading Lawyer" for Corporate Investigations and White Collar Criminal Defense Litigation. He has been recognized by *Benchmark Litigation* as a U.S. White Collar Crime Litigator "Star" for ten consecutive years (2011-2020), and was named to *Securities Docket's* "Enforcement 40" for 2017.

Mr. Warin's group was recognized by *Global Investigations Review* in 2019 as the leading global investigations law firm in the world. This is the fourth time in five years to be so named. *Global Investigations Review* reported that Mr. Warin has now advised on more FCPA resolutions than any other lawyer since 2008. *Best Lawyers*® named Mr. Warin the Lawyer of the Year in 2020 and in 2016 for White Collar Criminal Defense in the District of Columbia, and he was named among the *Lawdragon* 500 Leading Lawyers in America in 2016.

Mr. Warin has handled cases and investigations in more than 40 states and dozens of countries. His clients include corporations, officers, directors and professionals in regulatory, investigative and trials involving federal regulatory inquiries, criminal investigations and cross-border inquiries by dozens of international enforcers, including UK's SFO and FCA, and government regulators in Germany, Switzerland, Hong Kong, and the Middle East. His credibility at DOJ and the SEC is unsurpassed among private practitioners – a reputation based in large part on his experience as the only person ever to serve as a compliance monitor or counsel to the compliance monitor in three separate FCPA monitorships, pursuant to settlements with the SEC and DOJ: Statoil ASA (2007-2009); Siemens AG (2009-2012); and Alliance One International (2011-2013). He has been hired by audit committees or special committees of public companies to conduct investigations into allegations of wrongdoing in a wide variety of industries including energy, oil services, financial services, healthcare and telecommunications.

Mr. Warin's civil practice includes representation of clients in complex litigation in federal courts and international arbitrations. He has tried 10b-5 securities and RICO claim lawsuits, hostile takeovers and commercial disputes. He has handled more than 40 class action cases across the United States for investment banking firms, global corporations, Big 4 accounting firms, broker-dealers and hedge funds.

Early in his career, Mr. Warin served as Assistant United States Attorney in Washington, D.C. As a prosecutor, he tried more than 50 jury trials and was awarded a Special Achievement award by the Attorney General. Mr. Warin was awarded the Best FCPA Client Service Award by Main Justice in 2013 and he joined the publication's FCPA Masters list. He was named a Special Prosecutor by the District of Columbia Superior Court in 1988.

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Patrick Stokes is a litigation partner in Gibson, Dunn & Crutcher's Washington, D.C. office. He is the co-chair of the Anti-Corruption and FCPA Practice Group and a member of the firm's White Collar Defense and Investigations, Securities Enforcement, and Litigation Practice Groups.

Mr. Stokes' practice focuses on internal corporate investigations, government investigations, enforcement actions regarding corruption, securities fraud, and financial institutions fraud, and compliance reviews. He has tried more than 30 federal jury trials as first chair, including high-profile white-collar cases, and handled 16 appeals before the U.S. Court of Appeals for the Fourth Circuit. Mr. Stokes regularly represents companies and individuals before DOJ and the SEC, and is equally comfortable leading confidential internal investigations, negotiating with government enforcement authorities, or advocating in court proceedings.

Prior to joining Gibson Dunn, Mr. Stokes spent nearly 18 years with the U.S. Department of Justice (DOJ). From 2014 to 2016 he headed the FCPA Unit, managing the DOJ's FCPA enforcement program and all criminal FCPA matters throughout the United States, covering every significant business sector, and including investigations, trials, and the assessment of corporate anti-corruption compliance programs and monitorships. Mr. Stokes also served as the DOJ's principal representative at the OECD Working Group on Bribery working with law enforcement and policy setters from 41 signatory countries on anti-corruption enforcement policy issues.

From 2010 to 2014, he served as Co-Chief of the DOJ's Securities and Financial Fraud Unit. In this role, he oversaw investigations and prosecutions of financial fraud schemes involving market manipulation, accounting fraud, benchmark interest rate manipulations, insider trading, Troubled Asset Relief Program (TARP) fraud, government contract and procurement fraud, and large-scale mortgage fraud, among others. Mr. Stokes also led the successful prosecution of one of the largest bank and securities fraud cases to come out of the financial crisis.

From 2002 to 2008, Mr. Stokes served as an Assistant United States Attorney in the Eastern District of Virginia, where he prosecuted a wide variety of financial fraud, immigration, and violent crime cases. From 1998 to 2002, he served in the DOJ's Tax Division as a trial attorney in the Western Criminal Enforcement Section where he prosecuted a wide variety of tax and financial fraud schemes.

Mr. Stokes received various awards while at the DOJ, including the Attorney General's Distinguished Service Award in 2013 and 2014 and the Assistant Attorney General's Exceptional Service Award (Criminal Division) in 2011 and 2014.

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John Chesley is a litigation partner in Gibson Dunn's Washington, D.C. Office. He focuses his practice on white collar criminal enforcement and government contracts litigation. He represents corporations, audit committees, and executives in internal investigations and before government agencies in matters involving the Foreign Corrupt Practices Act, procurement fraud, environmental crimes, securities violations, sanctions enforcement, antitrust violations, and whistleblower claims. He also has significant trial experience and appears regularly in federal and state courts and administrative tribunals throughout the Washington Metropolitan Region and nationwide.

Among his recent engagements, Mr. Chesley served as the Interim Chief Ethics & Compliance Officer of a publicly-traded, multi-national corporation, responsible for managing a global team of compliance personnel. In this role, Mr. Chesley conducted and oversaw internal investigations, managed a whistleblower hotline, provided compliance advice, created and updated compliance policies, and administered compliance training for tens of thousands of employees worldwide. This opportunity provided Mr. Chesley with first-hand insights into the day-to-day challenges experienced by in-house counsel, which he uses to bring practical solutions to the table for all of his clients.

Mr. Chesley has been recognized repeatedly as one of the leading lawyers of his generation. Specifically, he was named one of the "world's leading young investigations specialists" by Global Investigations Review "40 Under 40," as well as a "Rising Star" in the Government Contracts field by Law 360. Most recently, Mr. Chesley was recognized by Benchmark Litigation as a "Future Litigation Star" in Washington, D.C. (2019) and by Who's Who Legal Investigations guide as a "Future Leader" in Investigations (2018). Mr. Chesley is also recognized in Legal Media Group's 2021 Expert Guide to the World's Leading White Collar Lawyers. The National Law Journal named Mr. Chesley to its list of 2015 D.C. Rising Stars, noting his white-collar defense practice and pro bono work, and Legal Bisnow identified him as one of "Washington's 2015 Trending 40 Lawyers Under 40." Mr. Chesley also has been recognized as a "Rising Star" by LMG 500 (2015-2018) and Washington DC Super Lawyers (2014-2018).

Mr. Chesley publishes and speaks regularly on legal developments, particularly involving the FCPA. In addition, he is frequently quoted in print publications such as Bloomberg BNA, Compliance Week, Corporate Counsel, Global Investigations Review, Law 360, The FCPA Report, and SEC Today and has appeared as a legal commentator on the Fox News Channel.

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Ella Alves Capone is a senior associate in the Washington, D.C. office of Gibson, Dunn & Crutcher. She is a member of the White Collar Defense and Investigations and Anti-Money Laundering practice groups. Her practice focuses primarily in the areas of white collar criminal defense and corporate compliance.

Ms. Capone regularly conducts internal investigations and advises multinational corporations and financial institutions, including major banks and casinos, on compliance with anti-corruption and anti-money laundering laws and regulations. She has significant experience representing clients in white collar and securities matters involving the U.S. Department of Justice (DOJ), U.S. Securities and Exchange Commission (SEC), Financial Crimes Enforcement Network (FinCEN), Office of the Comptroller of the Currency (OCC), Office of Foreign Assets Control (OFAC), and the Federal Reserve Board. Additionally, Ms. Capone has experience representing individuals and financial institutions in a variety of criminal and civil litigation, particularly including alleged securities fraud.

Ms. Capone's practice additionally includes advising clients on the effectiveness of their internal controls and compliance programs, as well as conducting and advising on compliance due diligence for corporate deals.

Ms. Capone regularly works on international matters, with particular expertise in Latin America. Her representative matters include several anti-corruption and corporate compliance matters in Brazil. She is proficient in Portuguese and regularly uses Portuguese in professional contexts.

Ms. Capone frequently writes and presents on anti-corruption and compliance issues. Her recent written work includes the 2018 edition of Bloomberg BNA's Securities Practice Series Portfolio No. 285, The U.S. Foreign Corrupt Practices Act: Enforcement and Compliance; the 2017, 2018, 2019, and 2020 ABA Treatise, Practice Under the Federal Sentencing Guidelines; and ICLG To: Anti-Money Laundering 2018, USA.

Ms. Capone graduated from New York University School of Law in 2011, where she was a member of the Honorary Moot Court Board. She graduated summa cum laude and with departmental honors for all years from Fordham University, where she earned a dual degree in Psychology and Sociology and was inducted into Phi Beta Kappa. Prior to joining Gibson Dunn, she practiced at a major international law firm in Washington, D.C. and New York, where she specialized in white collar criminal defense, securities litigation, and internal investigations.

Ms. Capone is admitted to practice law in the District of Columbia and New York, as well as before the United States District Courts for the Eastern and Southern Districts of New York.

Acknowledgements

The panelists would like to extend our thanks to our excellent colleagues who contributed to this webcast.

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Josiah Clarke is an associate in the Denver office, practicing in the firm's Litigation Department. His primary focus is data privacy and cybersecurity compliance. He has worked with large multinational corporations as well as small non-profits to address GDPR, HIPAA, and CCPA requirements, as well as other state and federal privacy and cybersecurity laws. He has experience drafting policies, evaluating privacy and cybersecurity compliance programs, and assisting clients who have experienced a data breach. He has also assisted a client with company- and industry-specific privacy requirements under an agreement with regulatory bodies.

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