GIBSON DUNN

February 15, 2024

2023 Year-End FCPA Update

An overview of key FCPA and other domestic and international anti-corruption enforcement, litigation, and policy developments from 2023.

2023 was another dynamic year of international anti-corruption enforcement. Although U.S. Foreign Corrupt Practice Act ("FCPA") enforcement actions have remained moderate at each of the U.S. Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC"), we are seeing more enforcement activity and legal reform with a broader group of international enforcers in the global fight against cross-border corruption. This past year also saw the passage of the first U.S. federal law to address international corruption in decades, as well as the implementation of numerous DOJ policies designed to drive change in companies and within C-Suites. As the heft of this update will evidence, there are many FCPA and FCPA-related developments to discuss.

Gibson Dunn's expertise in this area is a reflection of the complex, cutting-edge anti-corruption challenges we have the privilege of advising clients on every day, and we are honored to once again be ranked Number 1 in the *Global Investigations Review* "GIR 30" ranking of the world's top investigations practices for the sixth consecutive year and eighth of the last nine years.

For further analysis on anti-corruption enforcement and related developments in 2023, we invite you to register and join us for our upcoming complimentary webcast presentation on February 29, 2024: "2023 Year-End FCPA Update."

FCPA OVERVIEW

The FCPA's anti-bribery provisions make it illegal to offer or provide money or anything else of value to officials of foreign governments, foreign political parties, or public international organizations with corrupt intent, for the purpose of obtaining or retaining business. These provisions apply to "issuers," "domestic concerns," and those acting on behalf of issuers and domestic concerns, as well as to "any person" who acts while in the territory of the United States. The term "issuer" covers any business entity that is registered under 15 U.S.C. § 78l or that is required to file reports under 15 U.S.C. § 78o(d) (typically referring to companies whose shares are listed on a national exchange). In this context, foreign issuers whose American Depositary Receipts ("ADRs") or American Depositary Shares ("ADSs") are also listed on a U.S. exchange are "issuers" for purposes of the FCPA. The term "domestic concern" is even broader and includes any U.S. citizen, national, or resident, as well as any business entity that is organized under the laws of a U.S. state or that has its principal place of business in the United States.

In addition to the anti-bribery provisions, the FCPA also has "accounting provisions" that apply to issuers and those acting on their behalf, and that are comprised of two core components. First, the books-and-records provision requires issuers to make and keep accurate books, records, and accounts that, in reasonable detail, accurately and fairly reflect the issuer's transactions and disposition of assets. Second, the FCPA's internal accounting

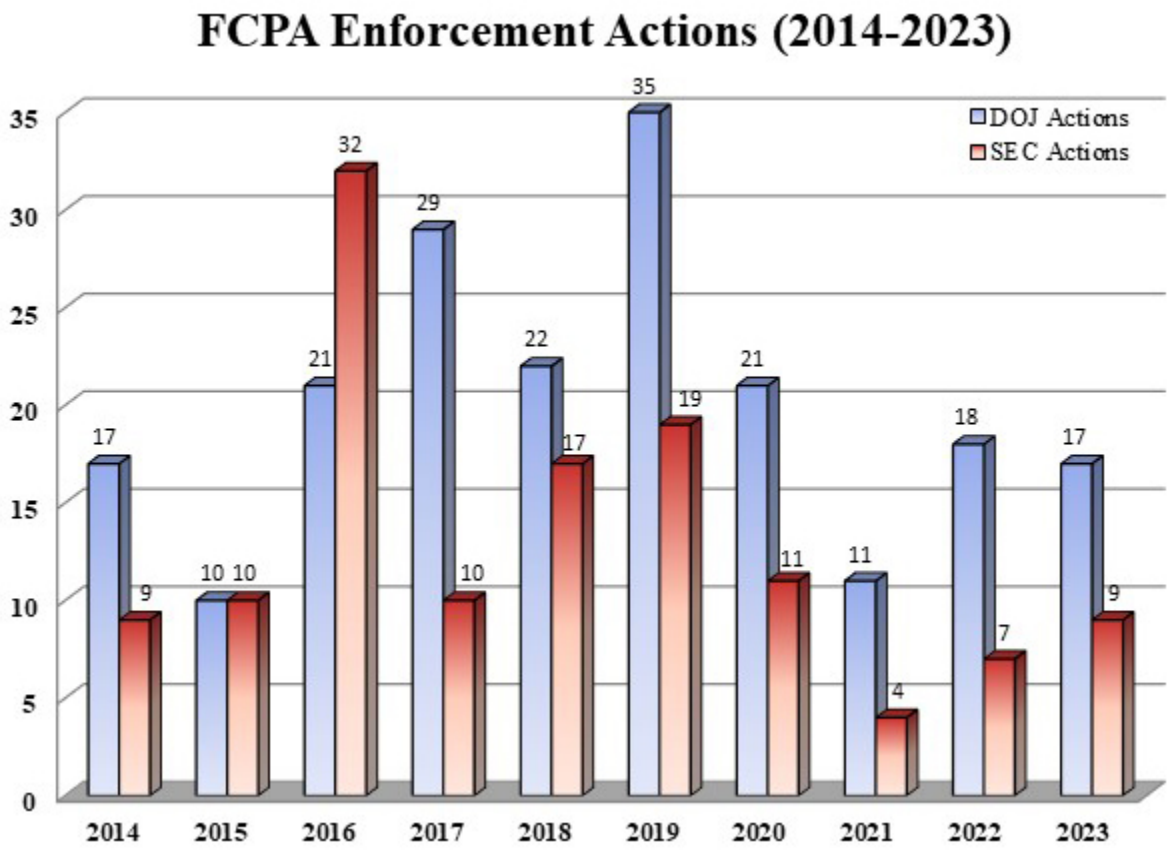
controls provision requires that issuers devise and maintain reasonable internal accounting controls aimed at preventing and detecting FCPA violations. Prosecutors and regulators frequently invoke these latter two sections when they cannot establish the elements for an anti-bribery prosecution or as a mechanism for compromise in settlement negotiations. Because there is no requirement that a false record or deficient control be linked to an improper payment, even a transaction that does not constitute a violation of the anti-bribery provisions can lead to prosecution under the accounting provisions if inaccurately recorded or attributable to an internal accounting controls deficiency.

International corruption also may implicate other U.S. criminal laws. Frequently, prosecutors from the FCPA Unit of DOJ charge non-FCPA crimes such as money laundering, mail and wire fraud, Travel Act violations, tax violations, and even false statements, in addition to or instead of FCPA charges. Without question, the most prevalent amongst these "FCPA-related" charges is money laundering—a generic term used as shorthand for statutory provisions, including 18 U.S.C. § 1956, that generally criminalize conducting or attempting to conduct a transaction involving proceeds of "specified unlawful activity" or transferring funds to or from the United States, in either case to promote the carrying on of specified unlawful activity; to conceal or disguise the nature, location, source, ownership or control of the proceeds; or to avoid a transaction reporting requirement. "Specified unlawful activity" includes over 200 enumerated U.S. crimes and certain foreign crimes, including the FCPA, fraud, and corruption offenses under the laws of foreign nations. Although this has not always been the case, in recent history DOJ has frequently deployed the money laundering statutes to charge "foreign officials" who are not themselves subject to the FCPA. It is not unusual for DOJ to charge the alleged provider of a corrupt payment under the FCPA and the alleged recipient with money laundering violations, particularly if the recipient is employed by a state-owned enterprise. Finally, as covered in greater detail below, 2023 saw the passage of the Foreign Extortion Prevention Act, which directly criminalizes the solicitation or receipt of bribes by foreign officials under the federal domestic bribery statute (18 U.S.C. § 201).

FCPA AND FCPA-RELATED ENFORCEMENT STATISTICS

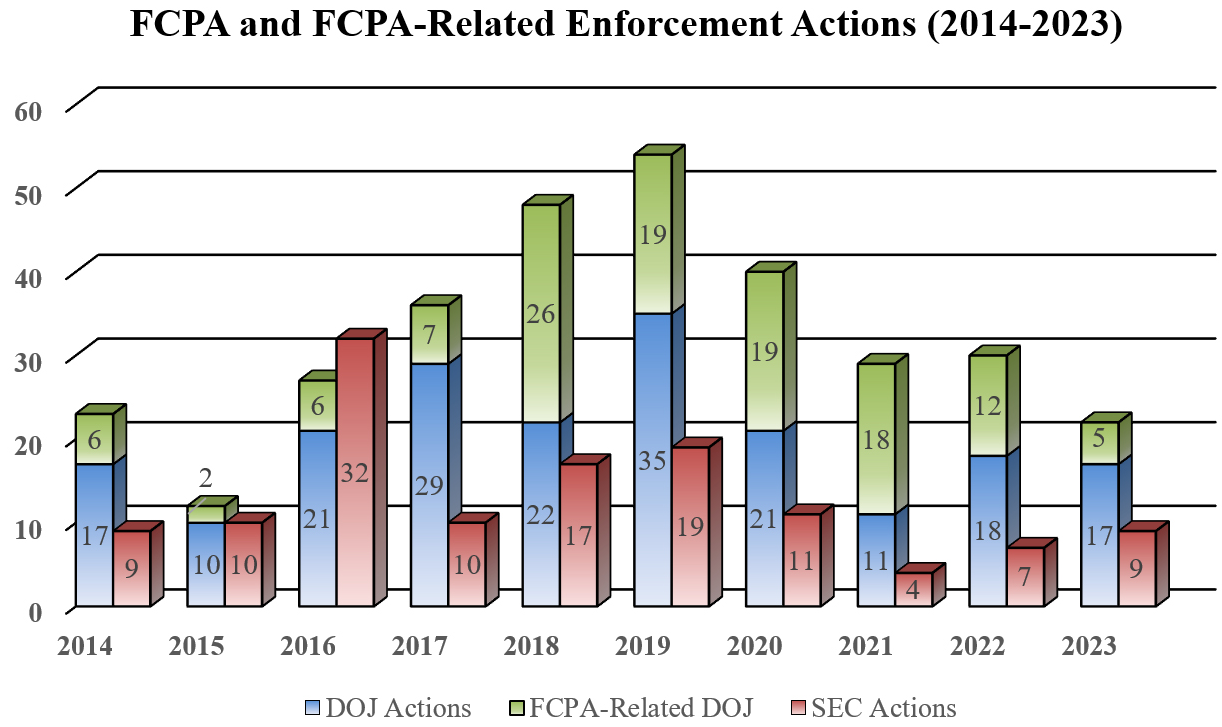
The below table and graph detail the number of FCPA enforcement actions initiated by DOJ and the SEC, the statute's dual enforcers, during the past 10 years.

2014		2015		2016		2017		2018		2019		2020		2021		2022		2023	
DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC
17	9	10	10	21	32	29	10	22	17	35	19	21	11	11	4	18	7	17	9



But as our readers know, the number of enforcement actions predicated on substantive FCPA charges represents only a portion of the full scope of international anti-corruption enforcement efforts by DOJ. This publication has remarked on the increasing proportion of "FCPA-related" charges for years, which can sometimes equal or even exceed criminal FCPA charges, although the relative percentage of such cases brought in 2023 was less pronounced than in recent years. The past 10 years of FCPA plus FCPA-related enforcement activity is illustrated in the following table and graph.

2014		2015		2016		2017		2018		2019		2020		2021		2022		2023	
DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC
23	9	12	10	27	32	36	10	48	17	54	19	40	11	29	4	30	7	22	9



2023 FCPA-RELATED ENFORCEMENT TRENDS

As our readers know, our year-end FCPA updates endeavor not only to describe the year's FCPA enforcement actions, but also to explain the patterns and trends underlying this enforcement activity. For 2023, we have identified five notable patterns from the year in FCPA enforcement, though whether they represent longer-term trends or only single-year aberrations varies by the pattern in question and may require additional time to determine:

1. Tracking early returns in DOJ Corporate Enforcement Policy discounts;
2. DOJ's new forfeiture practice continues;
3. A year of DOJ deferred and non-prosecution agreements;
4. The FCPA's dual enforcers largely go it alone; and
5. LATAM continues to dominate FCPA-plus individual prosecutions.

1. Tracking Early Returns in DOJ Corporate Enforcement Policy Discounts

In a "bonus" supplement to our 2022 Year-End FCPA Update, accelerated for coverage there even though DOJ announced the policy on January 17, 2023, we covered the issuance of an updated Criminal Division Corporate Enforcement & Voluntary Self-Disclosure Policy ("Corporate Enforcement Policy"). We refer our readers to that prior update for a more fulsome analysis of this important development. But one key aspect that we have followed closely

throughout the year 2023 for discussion here is DOJ's ability to grant enhanced cooperation and remediation credit pursuant to the updated Corporate Enforcement Policy.

As covered in our 2022 Year-End FCPA Update, perhaps the most significant update to the Corporate Enforcement Policy was to substantially increase the discount from criminal penalties that companies can receive as credit for cooperating in DOJ investigations and remediating from prior compliance lapses. Under the Corporate Enforcement Policy, DOJ can now grant up to a 75% discount in voluntary disclosure cases, and 50% in non-voluntary disclosure cases, up from 50% and 25%, respectively. In most instances, this discount is applied from the bottom of the U.S. Sentencing Guidelines ("USSG" or "Guidelines") range, although the Corporate Enforcement Policy includes enhanced guidance for increasing the point-of-departure for so-called "recidivists."

An interesting thought exercise that becomes more and more relevant in an age of enhanced DOJ assertions of jurisdiction over even foreign-sited companies is how DOJ would treat a voluntary disclosure to a non-U.S. regulator with primary cognizance over the entity. The Corporate Enforcement Policy states that although voluntary disclosures "must ordinarily be to the Criminal Division . . . , the Criminal Division will also apply the provisions of this Policy where a company made a good faith disclosure to another office or component of the Department of Justice." This leaves silent how DOJ would treat voluntary disclosure to a foreign regulator that only later comes to the attention of DOJ.

In 2023, there were five corporate FCPA enforcement actions resolved with criminal fines pursuant to DOJ's Corporate Enforcement Policy. None of the five cases involved "voluntary disclosures" eligible for the enhanced 75% discount (but see the Albemarle discussion below), and indeed typically such cases are resolved as "declinations with disgorgement" where there is no criminal fine as in the Corsa Coal and Lifecore Biomedical cases discussed separately herein. In all five cases, the discount was applied from the bottom of the Guidelines range. But consistent with DOJ's prognostication in announcing the enhanced discounts, the maximum 50% credit available in non-disclosure cases has not become "the new norm"—indeed, there is yet to be a 50% credit granted under the Corporate Enforcement Policy. The discounts awarded to date have ranged from a low of 15% to a high of 45% in corporate FCPA enforcement actions. The average discount across the five FCPA cases is 28%, which translates to an average $25.9 million in savings to the five companies.

To explain the basis for its varied discounts, DOJ has taken in each case to including a detailed list of "Relevant Considerations." In all cases, this includes statements regarding the seriousness of the underlying offense, a recitation of the various ways in which the company cooperated, in which the company remediated, and the company's criminal and regulatory history. Standard cooperation comments common to the five corporate FCPA prosecutions of 2023 include, among others, that the defendant:

- responded to DOJ requests;
- made factual presentations to DOJ on the company's internal investigation findings;

- produced relevant documents (typically noting that the documents were produced from foreign jurisdictions in manner that complied with local data privacy laws, and frequently further noting that courtesy translations were provided); and

- facilitated DOJ interviews of relevant employees (frequently noting the retention of separate counsel to represent these employees).

Standard remediation comments common to the resolutions include, among others, that the defendant:

- conducted a root cause analysis of the illegal conduct identified during the investigation;

- invested in improving its compliance program governance and resources;

- took appropriate disciplinary action against employees found to have been involved in misconduct; and

- committed to continue enhancing its compliance program and internal controls, consistent with the minimum elements set forth in the standard Attachment C (Corporate Compliance Program) to the resolution agreement.

Where companies appear to have distinguished themselves in this early set of cases is on the cooperation side by providing "proactive" updates to DOJ, especially where it enabled DOJ to preserve and collect further evidence on its own, and on the remediation side by terminating and/or withholding bonuses from numerous culpable employees, and also by restructuring the company's go-to-market strategy to reduce reliance on third parties. Below is a chart summarizing the Corporate Enforcement Policy discount details across the five DOJ corporate FCPA resolutions of 2023, followed by descriptions of the first two cases (with the remaining three covered in the following section):

Company	Date	Resolution Type	Criminal Fine	Discount % ($ savings)	Point of Departure	Select Key Factor(s) per DOJ
Grupo Aval	08/10/23	DPA	$40.6 million	30% ($17.4 million)	Bottom of USSG range	• the company's internal investigation was "extensive and robust"; and • "proactive[]" factual updates that enabled DOJ to preserve and collect its own evidence.
Albemarle	09/29/23	NPA	$98.2 million	45% ($80.6 million)	Bottom of USSG range	• "voluntarily disclosing the conduct . . . before it came to [DOJ's] attention" (though still not in a "reasonably prompt" manner); • "proactive" factual updates that enabled DOJ to preserve and collect its own evidence; and • terminating 11 employees, withholding bonuses from 16 employees, and terminating hundreds of third parties and moving to a direct sales model.
H.W. Wood	11/20/23	DPA	$22.5 million	25% ($7.5 million)	Bottom of USSG range	• emphasis on "timely" and "prompt" cooperation and remediation measures.
Tysers Insurance	11/20/23	DPA	$36 million	25% ($12 million)	Bottom of USSG range	• emphasis on "timely" and "prompt" cooperation and remediation measures.
Freepoint Commodities	12/14/23	DPA	$68 million	15% ($12 million)	Bottom of USSG range	• "in the initial phases, Freepoint's cooperation was limited in degree and impact, and largely reactive."

Grupo Aval S.A.

In the first corporate criminal FCPA prosecution announced under the new Corporate Enforcement Policy, Colombian financial holding company and U.S. issuer Grupo Aval reached a joint FCPA resolution with DOJ and the SEC on August 10, 2023. According to the charging documents, a senior executive of a minority-owned joint venture established by Grupo Aval to bid on the largest highway construction project in Colombia's history (Ruta del Sol II) became aware of bribes that the majority joint venture partner agreed to pay government officials to obtain additional work in connection with the project. In total, the executive caused the joint venture to pay more than $20 million in corrupt payments to Colombian officials between 2014 and 2016, funded through sham invoices.

To resolve the matter, Grupo Aval subsidiary Corficolombiana entered into a deferred prosecution agreement with DOJ charging a conspiracy to violate the FCPA's anti-bribery provisions and agreed to pay a $40.6 million criminal penalty, which as noted above reflected a 30% Corporate Enforcement Policy discount from the bottom of the Guidelines range. But DOJ agreed to credit up to half of that amount to a penalty imposed by Colombia's Superintendencia de Industria y Comercio, so long as the subsidiary dropped its appeal of this penalty in Colombia, leading DOJ to proclaim this as the first coordinated anti-corruption resolution of its kind with Colombian authorities. As part of the three-year agreement, Corficolombiana agreed

to provide periodic reports to DOJ regarding its remedial efforts, but there was no compliance monitor imposed. Simultaneously, Grupo Aval consented to an SEC order finding FCPA bribery and accounting violations and imposing more than $40.2 million in disgorgement plus prejudgment interest, bringing the combined financial resolution to greater than $80 million. DOJ alleged that the majority joint venture partner who coordinated much of the alleged bribery was Brazilian construction company Odebrecht S.A., whose multi-country anti-corruption resolution covered in our 2016 Year-End FCPA Update continues to reverberate the better part of a decade later.

Albemarle Corporation

In the only other joint FCPA enforcement action of the year, on September 29, 2023 DOJ and the SEC announced FCPA resolutions with North Carolina-based specialty chemicals manufacturing company Albemarle. The charging documents collectively allege that Albemarle engaged in a conspiracy to make millions of dollars in corrupt payments to government officials in India, Indonesia, and Vietnam between 2009 and 2017 to obtain business from state-owned entities in these countries, including by structuring tender requirements to favor Albemarle, providing confidential information about competitors, and to keep the company from being blacklisted. The SEC then alone extended its allegations to contend that the company additionally engaged in private-sector bribery in India and failed to maintain adequate controls and accurate and complete records regarding third-party payments in China and the United Arab Emirates.

To resolve DOJ's allegations of conspiracy to violate the FCPA's anti-bribery provision, Albemarle entered into a three-year non-prosecution agreement and agreed to pay a criminal fine of $98.2 million plus forfeiture of $98.5 million, the former of which reflected a 45% Corporate Enforcement Policy discount from the bottom of the Guidelines range and the latter of which was substantially offset by the SEC disgorgement resolution. To resolve the SEC's charges of FCPA bribery and accounting violations, Albemarle consented to the filing of an administrative cease-and-desist proceeding and to pay $103.6 million in disgorgement plus prejudgment interest, with no penalty assessed in light of the DOJ criminal fine. After offsets between the two resolutions, the total resolution amount was approximately $218 million.

Far and away the most controversial aspect of the Albemarle resolution was DOJ's refusal to credit the company's voluntary disclosure as such. There was no dispute that Albemarle voluntarily disclosed the conduct to DOJ and the SEC prior to either agency being aware of it. But DOJ took the position that the voluntary disclosure was not "reasonably prompt," a prerequisite for getting voluntary disclosure treatment under the Corporate Enforcement Policy. Specifically, DOJ alleged that Albemarle learned of the initial allegations in Vietnam 16 months prior to disclosure, and was able to confirm the conduct at least nine months prior to the disclosure. The company then took remedial action and expanded the investigation to cover other geographies, but did not disclose the initial conduct in Vietnam until it disclosed four geographies all at once 16 months after the initial allegations. Reminiscent of the ABB resolution covered in our 2022 Year-End FCPA Update—where DOJ refused to credit a disclosure as voluntary where counsel had contacted DOJ to schedule a disclosure meeting without naming the subject matter, and then after the initial contact but before the meeting the underlying allegations were reported in the press—DOJ refused to treat Albemarle's disclosure as voluntary for purposes of the Corporate Enforcement Policy, which would have entitled the

company to a presumption of a declination. Nonetheless, DOJ did purport to give "significant weight" to the disclosure, including in determining the appropriate disposition (non-prosecution agreement) and Corporate Enforcement Policy discount (45% below the bottom of the Guidelines range), the latter of which is the highest figure granted to date under the Corporate Enforcement Policy and its predecessors.

Of final note from the Albemarle resolution is that it represented the first credit pursuant to Part II of the Criminal Division's Compensation Incentives and Clawbacks Pilot Program from March 2023, discussed below. Specifically, DOJ reduced Albemarle's criminal fine by $763,453 as dollar-for-dollar credit in bonuses the company withheld from employees deemed by the company to be culpable for the misconduct. These credits can under the right circumstances have a double impact, in that companies may both save the bonus (assuming litigation does not ensue and overtake the benefit) and get the reduction from their penalty. But the fact that the credit amounts to a fraction of one percent of the overall resolution, or even just the criminal penalty, underscores the commentary that this program has received as not being meaningful in most cases.

2. DOJ's New Forfeiture Practice Continues.

In our 2022 Mid-Year FCPA Update, we noted an unusual and even unprecedented aspect of the May 2022 Glencore FCPA enforcement action. Specifically, Glencore was the first corporate defendant in the history of the FCPA (to our knowledge) to agree to pay a gain-based criminal forfeiture judgment on top of a criminal fine that was itself premised on gain. To be sure, there have been many other examples of modest forfeiture components of FCPA corporate criminal enforcement actions, as well as certain DOJ components (*e.g.*, the U.S. Attorney's Office for the Southern District of New York) that have a history of imposing forfeiture on top of gain-based criminal fines in non-FCPA cases. Further, our readers will be familiar with the fact that issuers have long been required to disgorge profits to the SEC on top of gain-based criminal fines imposed by DOJ in joint FCPA enforcement actions. But our research shows that in the first 45 years of the FCPA—and across nearly 50 different cases against non-issuer companies pre-Glencore—DOJ did not impose gain-based forfeiture on top of a gain-based criminal fine.

At the time, Glencore was just a single example, and DOJ made no announcement to suggest it had changed its approach in FCPA cases. Indeed, quite to the contrary as covered in these updates, DOJ's corporate FCPA enforcement policy announcements of recent years had been heavily seasoned with the flavor of all the benefits companies may receive from disclosure, cooperation, and remediation. But DOJ's final three corporate FCPA prosecutions of 2023 (all against non-issuers) continued the "Glencore trend," imposing sizeable gain-based forfeiture on top of sizeable criminal penalties. And then finally, at the ACI FCPA Conference in November 2023, Acting Assistant Attorney General Nicole M. Argentieri confirmed the practice by stating that in non-issuer cases DOJ is now "requiring . . . that, in addition to paying any required criminal penalty, companies must pay appropriate forfeiture" such that "issuers and non-issuers [will be treated] alike" in "both pay[ing] applicable fines and forego[ing] the proceeds of their criminal activity." DOJ has yet to issue an official policy to this effect, which stands in stark contrast to the proliferation of more "corporate-friendly" policies issued in 2023 as discussed herein, but clearly this appears to be DOJ's position until it is challenged.

H.W. Wood Ltd. & Tysers Insurance Brokers Ltd.

On November 20, 2023, DOJ announced separate but related FCPA conspiracy charges against UK reinsurance brokers H.W. Wood and Tysers Insurance. DOJ alleged that each company paid millions of dollars to an intermediary between 2013 and 2017 while knowing the intermediary would bribe various Ecuadorian government officials to secure insurance and reinsurance business with state-owned insurance companies Seguros Sucre S.A. and Seguros Rocafuerte S.A.

To resolve the charges, each company entered into a three-year deferred prosecution agreement. H.W. Wood agreed to a criminal fine of $22.5 million and $2.3 million in forfeiture, but established an inability to pay under DOJ policy that reduced the financial penalty to only a $508,000 fine. Tysers Insurance agreed to pay a criminal fine of $36 million plus approximately $10.5 million in forfeiture. Both companies' criminal fines reflected a 25% Corporate Enforcement Policy discount for cooperation and remediation, and neither company received a compliance monitor.

Both of these resolutions arise out of the same matter in which Gibson Dunn negotiated a "declination with disgorgement" resolution for Jardine Lloyd Thompson Group Holdings Ltd., as reported in our 2022 Year-End FCPA Update. There and in prior updates we also covered separate criminal FCPA and money laundering charges brought against eight individual defendants, including the former chairman of Seguros Sucre and Seguros Rocafuerte who allegedly received the H.W. Wood and Tysers insurance bribes, as well as intermediary Esteban Merlo Hidalgo who allegedly paid them.

Freepoint Commodities LLC

In the final corporate FCPA enforcement action of the year, on December 14, 2023 DOJ and the Commodity Futures Trading Commission ("CFTC") announced a joint resolution with Connecticut-based commodities trading company Freepoint Commodities arising out of allegations that it paid bribes to secure business with Brazilian state-owned oil company, Petróleo Brasileiro S.A. – Petrobras ("Petrobras"). The government alleged that between 2012 and 2018, Freepoint made nearly $4 million in corrupt payments to Petrobras officials in exchange for confidential information about pricing and bids submitted to Petrobras by Freepoint's competitors.

To resolve the corruption allegations, Freepoint entered into a deferred prosecution agreement with DOJ and agreed to pay a $68 million criminal fine, reflecting a 15% Corporate Enforcement Policy discount from the bottom of the Guidelines range, and additionally pay $30.5 million in criminal forfeiture. In parallel, Freepoint also entered into a civil resolution with the CFTC agreeing to pay a $61 million civil penalty and $30.5 million in disgorgement, but the civil penalty was completely offset by the DOJ criminal fine and DOJ and the CFTC agreed to offsetting credits between the forfeiture and disgorgement such that 75% went to DOJ and 25% to the CFTC. In total, Freepoint paid $98.5 million between the two U.S. settlements, and DOJ has provisioned for a credit of up to $22.4 million off of the criminal fine for a resolution with Brazilian authorities, although no such resolution has yet been announced. The joint DOJ / CFTC corruption-related resolution in Freepoint—in which the corruption is charged by the latter as "manipulative and deceptive conduct" under the Commodity Exchange Act—is the third of its

kind following Glencore (discussed in our 2022 Year-End FCPA Update) and Vitol (discussed in our 2020 Year-End FCPA Update).

Related to the Freepoint Commodities case, in 2023 DOJ announced criminal charges against three individual defendants: ***Gary Oztemel***, ***Glenn Oztemel***, and ***Eduardo Innecco***. An indictment charging Freepoint trader Glenn Oztemel and third-party agent Innecco with FCPA and money laundering arising out of the alleged Petrobras corruption scheme was unsealed on February 17. Glenn's brother Gary Oztemel, who works at another oil trading company, was subsequently indicted on similar charges on August 29. The two Oztemel brothers have been released on bail, pending a September 2024 trial date. Innecco has yet to make an appearance and appears to be outside of the United States. In a final case connection, it appears that one of the officials who allegedly received the corrupt payments was Rodrigo Berkowitz, who worked at Petrobras' U.S. arm in Houston, Texas, and previously pleaded guilty to conspiracy to commit money laundering as covered in our 2020 Year-End FCPA Update.

3. A Year of DOJ Deferred and Non-Prosecution Agreements.

The careful reader of our Corporate Enforcement Policy chart in Section 1 above will note that all of the new corporate FCPA prosecutions of 2023 were resolved (at least at the top level) as deferred and non-prosecution agreements. In a vacuum, this may seem in tension with pronouncements by DOJ officials purporting to scrutinize more carefully the grant of these so-called pretrial diversion agreements under the various memoranda issued by Deputy Attorney General Lisa O. Monaco discussed in our 2021 and 2022 year-end FCPA updates. Time will tell whether 2023 was an aberration or the start of a more permissive trend in corporate enforcement. But it is notable that the one parent-level guilty plea in an FCPA case from 2023 was a breach declaration from a 2019 deferred prosecution agreement.

We discuss this, and the two "declination with disgorgement" letters issued in 2023, below.

Telefonaktiebolaget LM Ericsson DPA Breach

On March 2, 2023, DOJ announced that Swedish multinational telecommunications company Ericsson had agreed to plead guilty in connection with its 2019 FCPA resolution following DOJ's determination that the Company had breached its prior deferred prosecution agreement. As covered in our 2019 Year-End FCPA Update, Ericsson entered into the earlier deferred prosecution agreement to resolve FCPA charges with DOJ arising out of alleged corruption in China, Djibouti, Indonesia, Kuwait, Saudi Arabia, and Vietnam. In 2023, DOJ revoked the 2019 deferred prosecution agreement and Ericsson agreed to plead guilty to the original criminal charges, pay a fine of $206,728,848, and agreed to extend its pre-existing monitorship and associated term of probation by one year, through June 2024.

The Ericsson breach declaration demonstrates DOJ's focus on corporate compliance with post-resolution terms imposed by deferred prosecution and other "pretrial diversion" agreements. Notably, DOJ does not charge or even allege new criminal conduct (which is why this case is not reflected in the 2023 statistics above). Rather, DOJ asserts that Ericsson violated the cooperation and disclosure provisions of the 2019 agreement by failing to disclose promptly all evidence related to the previously charged conduct in Djibouti and China, as well as failing to disclose adequately certain other activities in Iraq. Of further note, DOJ alleged that

company leadership instructed its counsel to disclose to DOJ the conduct in Iraq, but that "prior outside counsel omitted material facts and information" in their reporting. DOJ credited Ericsson for "significantly enhanc[ing] its cooperation and information sharing efforts" after this matter came to light. Gibson Dunn represented the company in the 2023 resolution (but was not "prior outside counsel").

The Ericsson case is only one of two cases in which DOJ has revoked a deferred prosecution agreement and demanded a guilty plea in a corporate FCPA case. As reported in our 2008 Year-End FCPA Update, in November 2008 DOJ alleged a breach of Aibel Group's 2007 deferred prosecution agreement arising out of alleged corruption in Nigeria, after which Aibel Group pleaded guilty to the underlying charges. Further, as discussed in our 2017 Mid-Year FCPA Update, DOJ once entered into a second deferred prosecution agreement based in part on allegations of breaches arising during the term of the first agreement in the January 2017 Zimmer Biomet case.

Corsa Coal Corp. Declination with Disgorgement

On March 8, 2023, DOJ issued its first "declination with disgorgement" letter of the year to Pennsylvania coal company Corsa Coal. The letter alleges that between 2016 and 2020, Corsa Coal employees paid $4.8 million to a consultant while knowing that portions of those fees would be used to make corrupt payments to officials of an Egyptian state-owned coke and chemical production company, including its chairman. Corsa Coal allegedly secured $143 million in contracts as a result of these payments, and earned $32.7 million in illicit profits.

In conjunction with DOJ's declination, Corsa Coal agreed to pay $1.2 million in disgorgement, an amount substantially reduced from realized gains based on DOJ's Inability-to-Pay Guidance and a determination that further payment would "substantially threaten" the company's ongoing viability. In declining to prosecute Corsa Coal, DOJ noted the company's voluntary disclosure, cooperation, and remediation efforts.

We covered the guilty plea of former Corsa Coal International Sales Head Frederick Cushmore, Jr. and indictment of former Vice President Charles Hunter Hobson, respectively, in our 2021 Year-End and 2022 Mid-Year FCPA updates. As of this writing, there is yet to be a trial date set in the Hobson case.

Lifecore Biomedical, Inc. Declination with Disgorgement

In the year's second of two "declinations with disgorgement," on November 16, 2023 DOJ announced that it was declining to prosecute Lifecore for allegedly corrupt payments made in 2018 and 2019 by a former subsidiary to Mexican government officials to secure a wastewater discharge permit and avoid various wastewater discharge expenses. Notably, the alleged payments began prior to Lifecore's acquisition of the subsidiary, were affirmatively hidden from Lifecore during due diligence, and then were discovered during post-acquisition integration as the payments continued under the ownership of Lifecore. Relevant to the Albemarle disclosure discussion above, DOJ made a point of noting that Lifecore reported the matter to DOJ within three months of discovering the possible misconduct, and within hours of the internal investigation confirming the alleged corruption. This was deemed to be a "reasonably prompt" report qualifying as a "voluntary disclosure" for purposes of the Corporate Enforcement Policy.

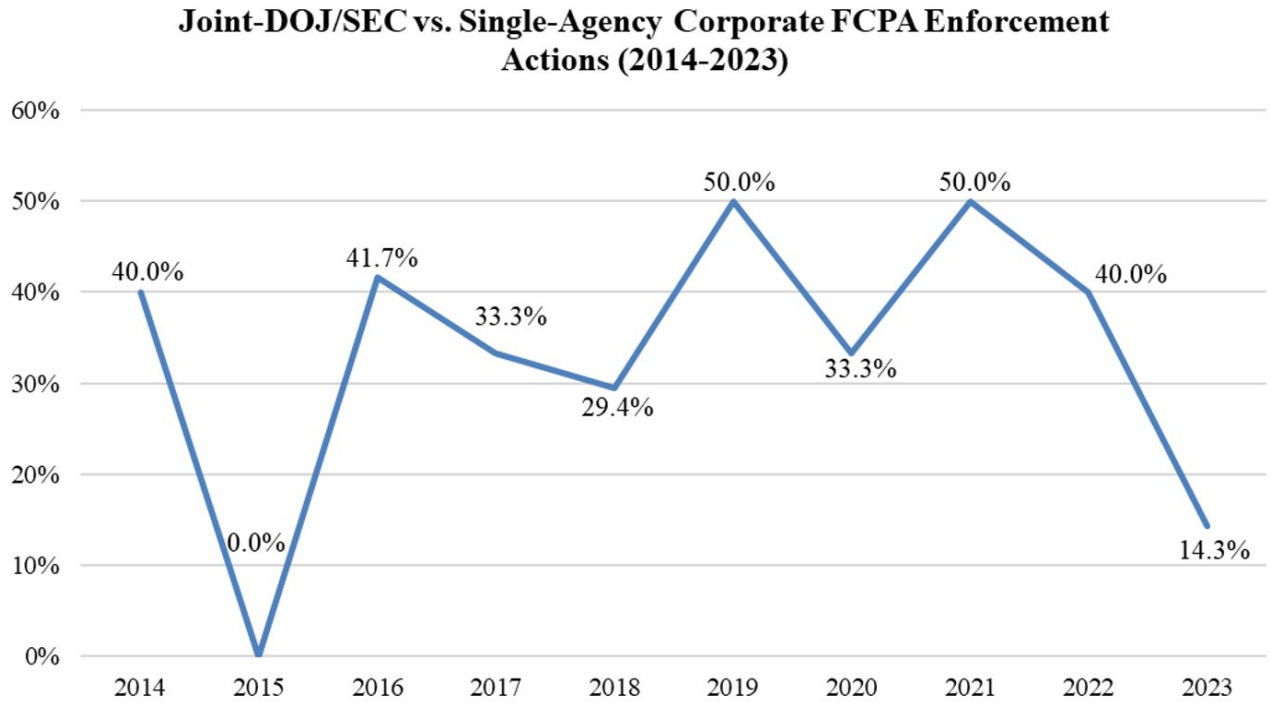
To resolve the matter, Lifecore agreed to DOJ's statement of facts and consented to disgorge just over $400,000. The disgorgement amount was set based on the costs Lifecore allegedly avoided having to pay to Mexican regulatory authorities through the purported corrupt payments, with credits for remediation costs Lifecore already had paid after discovering the misconduct.

4. The FCPA's Dual Enforcers Largely Go it Alone in 2023.

Several of the principal authors of this update have been known to say on more than one occasion that DOJ and the SEC—the FCPA's dual enforcers—"work hand in glove." The closeness of the working relationship between the specialized FCPA Units of each agency has historically been borne out in a heavy overlap in enforcement actions—especially corporate enforcement actions. But that was not the case in 2023.

In 2023, only 2 of 14 corporate FCPA enforcement actions were dually brought by DOJ and the SEC. That is substantially lower than historical averages, and indeed is the lowest percentage of overlap in corporate enforcement actions since 2015, where we also noted the lack of duality in our 2015 Year-End FCPA Update. There will always be corporate cases that cannot, or should not, be brought jointly by both agencies, such as prosecutions against non-issuers or where the evidence of non-compliant conduct does not meet the higher standard required for criminal prosecution. Nonetheless, those dynamics have been static over the years studied and the departure in 2023 enforcement numbers is noteworthy, though we expect more a blip than a trend.

A line graph summarizing the percentage of overlap in DOJ / SEC corporate FCPA enforcement actions over the past 10 years follows. The two examples of joint actions in 2023 (Albemarle and Grupo Aval) are covered above, and the seven SEC-only actions are covered below the graph. We will continue to study the degree of overlap in corporate FCPA enforcement in the year ahead to see if this is a blip or a trend.



Flutter Entertainment plc

The first SEC-only FCPA enforcement action of the year came on March 6, 2023, when Irish sports betting and gaming company Flutter resolved a corruption case arising out of Russia. According to the SEC's order, Flutter (then operating as The Stars Group, Inc.) paid nearly $9 million to Russian consultants between 2015 and 2020 in an apparently unsuccessful effort to legalize online poker in the country. The SEC alleged that Flutter failed to perform risk-based diligence prior to hiring the consultants, entered into contracts that did not contain anti-corruption provisions, and failed to review expense reimbursements submitted by the consultants, which caused the company to reimburse expenses that did not comply with its own policies.

To resolve the FCPA books-and-records and internal controls charges, and without admitting or denying the findings, Flutter agreed to pay a $4 million civil penalty. The SEC noted the company's cooperation and remediation efforts, which included exiting the Russian market following Russia's invasion of Ukraine, and did not require any further, forward-looking compliance undertakings. The status of any DOJ investigation, if there is one, is not known.

Rio Tinto plc

Also on March 6, 2023, the SEC announced FCPA books-and-records and internal controls charges against global mining and metals company and ADS issuer Rio Tinto arising out of its iron ore operations in Guinea. According to the SEC's order, Rio Tinto hired a consultant who had no experience in the industry or country because he was a former classmate with close connections to a senior Guinean official who had influence over a disputed mining concession belonging to Rio Tinto. Without substantial evidence of services performed, the company

allegedly paid the consultant $10.5 million, several days after which the consultant attempted to transfer over $800,000 to a Hong Kong company purportedly owned by someone with ties to the senior government official and other Guinean officials. The processing bank blocked that payment, but thereafter the same Hong Kong company allegedly commissioned $200,000 worth of t-shirts to support the senior Guinean official's reelection campaign.

To resolve the charges, Rio Tinto agreed to pay a $15 million civil penalty. There was no disgorgement because the company did not ultimately develop the mining concession. The SEC credited Rio Tinto's cooperation and remedial efforts, and did not require any further, forward-looking compliance undertakings. There is no indication that DOJ will take separate action. For its part, the UK Serious Fraud Office has announced the closure of its investigation, in part due to the company's resolution with the SEC and a separate enforcement action described below against the consultant who allegedly made the payment to the senior Guinean official by the French National Financial Prosecutor's Office.

Frank's International N.V.

On April 26, 2023, the SEC announced a resolved FCPA enforcement action against Dutch oilfield services provider Frank's International. The SEC alleged that Frank's International retained and paid substantial commissions to an agent while allegedly knowing the agent had close relationships with officials of Angola's state-owned oil company Sonangol, and further that the agent did not have any relevant technical expertise. Notably, the company retained the agent prior to listing on the New York Stock Exchange, but allegedly continued the commission payments after becoming an issuer. The SEC also asserted that Frank's International did not perform any due diligence on the agent, and only created a backdated agreement long after engaging the agent.

Without admitting or denying the SEC's allegations, Frank's International agreed to pay a $3 million civil penalty plus nearly $5 million in disgorgement and prejudgment interest. The SEC acknowledged the company's self-reporting and cooperation, which appear to have occurred after Frank's was acquired by another company, and did not require any further, forward-looking compliance undertakings. Frank's International's successor has reported that DOJ has closed its parallel investigation without charges against the company.

Koninklijke Philips N.V.

In another SEC-only FCPA enforcement action, on May 11, 2023, Dutch medical supplier Koninklijke Philips agreed to resolve books-and-records and internal controls charges arising from the company's use of distributors in China. According to the SEC's order, between 2014 and 2019, Koninklijke Phillips subsidiaries in China provided special price discounts to distributors, which allegedly "created a corruption risk that the increased margins could be used to fund improper payments to employees of government-owned hospitals." The SEC further alleged that these subsidiaries engaged in improper bidding practices, such as influencing hospital officials to tailor specifications to favor the companies' products and preparing false "complementary bids" to provide an inaccurate sense of competition.

To resolve the allegations, and without admitting or denying the SEC's findings, Koninklijke Philips agreed to pay approximately $62.2 million, consisting of a $15 million civil penalty and the balance to disgorgement and prejudgment interest. The company also agreed to self-report to the SEC on the status of its FCPA compliance program for a two-year period. The SEC noted that it had previously charged Koninklijke Philips in 2013 for alleged FCPA misconduct in Poland, as covered in our 2013 Mid-Year FCPA Update. The company announced that DOJ has closed its parallel investigation into the more recent matter without filing any charges.

Gartner, Inc.

On May 26, 2023, Connecticut-headquartered technological research and consulting company Gartner resolved FCPA bribery and accounting charges with the SEC. The SEC's order alleged that, from roughly December 2014 through August 2015, Gartner entered into subcontracts with a South African IT consulting company and subagents that allegedly had close ties to officials in the South Africa Revenue Service. The SEC claimed that Gartner knew or consciously disregarded the risk that all or part of the money it paid to the consulting company would be used to bribe revenue officials to influence the award of sole-source contracts to Gartner, and that the justification for using this consultant was false because neither it nor its subagents qualified for the Broad-Based Black Economic Empowerment legislation that was the purported basis for the consultant's retention. The SEC further alleged that the company maintained false records and deficient controls relating to the retention of consultants.

Without admitting or denying the SEC's findings, Gartner agreed to pay a $1.6 million civil penalty and pay $856,764 in disgorgement plus prejudgment interest. The SEC recognized Gartner's self-disclosure, following press reports in South Africa, as well as the company's cooperation, and did not require any additional, forward-looking compliance undertakings.

U.S.-Based Multinational Company

On August 25, 2023, the SEC announced a settled FCPA resolution with a U.S.-based multinational conglomerate. According to the SEC's order, between approximately 2014 and 2018, employees of the company's Chinese subsidiary allegedly arranged for influential Chinese healthcare officials from various state-owned entities to attend overseas conferences, healthcare facility visits, and other educational events, including to the United States. The SEC suggested that the true purpose of the trips was to encourage the officials to purchase the company's products, though it seemed unable to establish a *quid pro quo* connection between the trips and any business awarded to the entity. Still, the SEC's theory was that employees allegedly submitted one set of travel itineraries emphasizing the educational purposes of the trips for compliance review, while at the same time maintaining secret, alternate itineraries for the government officials that included tourism and entertainment activities unrelated to the company's business operations, thus falsifying corporate books and records. Finally, the SEC alleged that the employees submitted vaguely described payments to travel agencies to obtain reimbursement of otherwise non-reimbursable expenses associated with the trips.

To resolve the matter, and without admitting or denying the SEC's allegations concerning FCPA books-and-records and internal controls charges, the company agreed to pay nearly $4.6 million in disgorgement and prejudgment interest, plus a $2 million civil penalty. The SEC credited the company for its prompt and voluntary self-reporting and cooperation, as well as undertaking

substantial remedial measures. It appears that DOJ's investigation into the matter has been closed.

Clear Channel Outdoor Holdings Inc.

In the year's final SEC-only FCPA enforcement action, on September 28, 2023 Texas-based out-of-home advertising company Clear Channel agreed to resolve charges arising out of alleged corruption in China. According to the SEC's order, from 2012 to 2017, Clear Channel's Chinese subsidiary made improper payments and gifts to Chinese government officials in an effort to obtain advertising display contracts with local Chinese government transport authorities. These payments and other items of value were allegedly provided directly and by inflating third-party vendor contracts to maintain the outdoor advertising displays. The subsidiary also allegedly created a so-called "off-book fund" by creating false invoices used to justify employee cash withdrawals that were then provided to un-diligenced third parties with whom the subsidiary had no contracts in order to facilitate business development activities. Finally, the SEC alleged that these activities occurred at the subsidiary despite multiple internal audits flagging various bribery risks in China, and that the control deficiencies continued throughout 2019.

To resolve the matter, and without admitting or denying the allegations, Clear Channel consented to the filing of FCPA bribery and accounting charges and to pay a total of $26.2 million in penalties, disgorgement, and prejudgment interest. Reportedly in part due to its inability to remediate the issues raised in the SEC order, Clear Channel divested its interest in the Chinese subsidiary in 2020. The SEC credited Clear Channel's cooperation with the SEC and remediation, and did not require any post-resolution reporting. According to the company, DOJ has closed its investigation without filing any charges.

5. LATAM Continues to Dominate FCPA-Plus Individual Prosecutions.

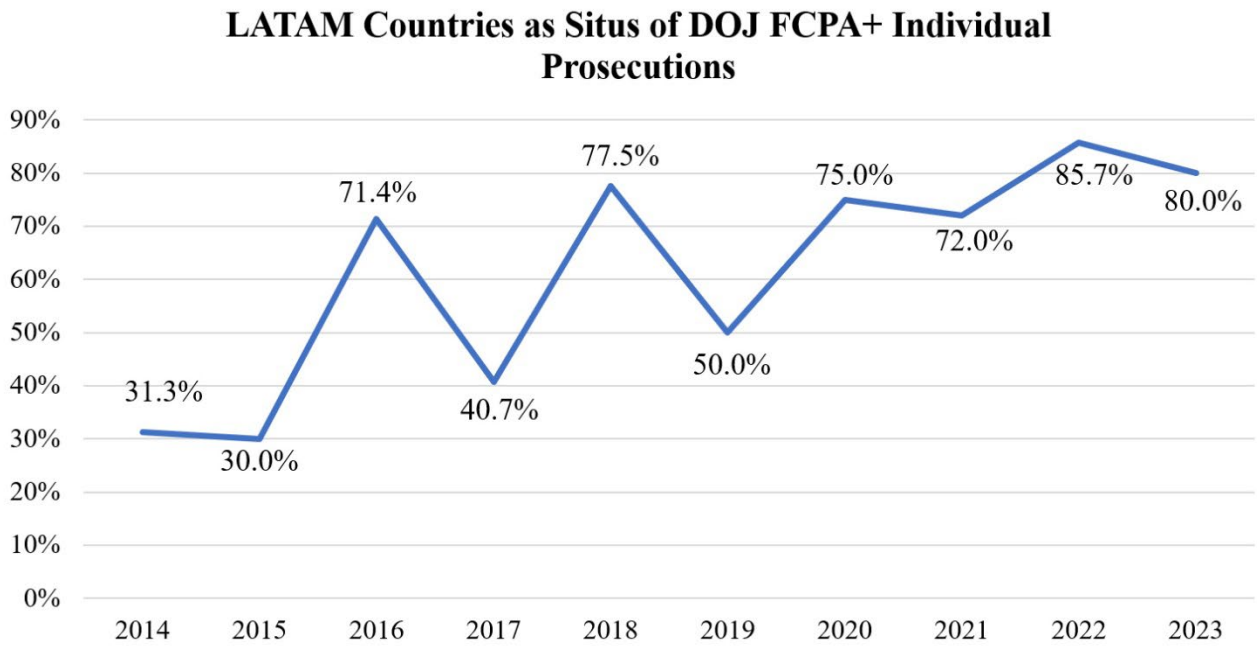
Latin America collectively makes up about 5% of global gross domestic product, but many multiples of that as a percentage of criminal FCPA and related anti-corruption enforcement by DOJ. This is particularly the case in individual prosecutions for which, in 2023, 80% of criminal FCPA and FCPA-related prosecutions arose out of fact patterns involving Latin American countries. And this figure is not aberrant as compared to recent years in anti-corruption enforcement. Over the past 10 years, nearly 65% of criminal FCPA and FCPA-related charges brought by DOJ had a nexus to conduct occurring in Latin American countries.

There are many reasons for this, and we do not count among them that Latin America is particularly corrupt as compared to other parts of the developing world—it is not. One principal reason has to do with the degree of integration between the U.S. economy and those of its neighbors across the Americas. This is true both because of the diaspora of immigrants who have set up businesses in the United States focused on their home countries, as well as a reflection of flight to the stability of the U.S. Dollar from markets with less stable currencies, of which there are several across Latin America. Another principal reason has to do with the relationships that DOJ has established over the past decade with prosecutors across the region, starting in Brazil with the "Operation Car Wash" investigation, but also prominently with Colombian and several Central American enforcers. Finally, there can be no escaping the unique significance of the collapse of the Venezuelan economy and the looting of state-owned

oil company Petróleos de Venezuela, S.A. ("PDVSA"), among other corruption-related fact patterns that have found their way into U.S. court filings.

These factors influence corporate anti-corruption enforcement as well, particularly the second relating to DOJ's cross-border partnerships with Latin American enforcement agencies. But our experience shows that as a whole the above dynamics influence individual prosecutions to a much greater degree. This is because individuals are far more likely than companies to press their cases to indictment and beyond, and when assessing the prospect of trial, a case that involves meetings in Miami and bank accounts in Houston is far more compelling than an Africa or Asian-based fact pattern where the only U.S. touchpoints are correspondent banking account transfers. The greater degree of travel—both directly to the United States and indirectly to extradition-friendly countries—within the Americas also makes it far more likely that individuals within the region will be picked up on a warrant and have their indictment unsealed.

As noted above, 80% (12 of 15) individual FCPA enforcement actions in 2023 arose from Latin America-based fact patterns. The Brazilian (Petrobras) case involving the Oztemel brothers and Innecco is covered above together with the corporate case of Freepoint , and the remainder follow. Consistent with our standard practice, we discuss both actual FCPA charges and FCPA-related charges brought by DOJ's FCPA Unit, most frequently under the money laundering statute as illustrated below.



Maikel Jose Moreno Perez (Venezuela)

The first FCPA-related case of 2023 was made public on January 26, when DOJ announced an indictment on money laundering charges returned against Maikel Jose Moreno Perez, a sitting justice on Venezuela's Supreme Tribunal of Justice and former President of the Court. The indictment, which tracks a criminal complaint filed in 2020, alleges that between 2014 and 2019

Moreno accepted more than $10 million in bribes for taking various actions in his role on the Court, including dismissing criminal charges or arrest warrants, sentencing defendants leniently, and even approving the judicial seizure of an auto plant owned by a U.S. car manufacturer.

Moreno, who also has been designated as a Specially Designated National by the Treasury Department's Office of Foreign Asset Controls, has been declared a fugitive by the U.S. District Court for the Southern District of Florida.

George Walther-Meade & Juan Gonzalez Ruiz (Mexico)

In another FCPA-related case, on February 9, 2023, a grand jury sitting in the Southern District of California returned an indictment charging a former division manager of a U.S. defense contractor, George Walther-Meade, and third-party consultant Juan Gonzalez Ruiz, with wire fraud and money laundering arising out of an embezzlement scheme tied up in an FCPA investigation. According to the indictment, Walther-Meade arranged for his employer to retain Gonzalez's company as a subcontractor in Mexico and caused the defense contractor to pay the subcontractor more than $3 million between 2012 and 2021 for work that was never performed. In return, Gonzalez allegedly kicked back portions of the defense contractor's payments to Walther-Meade by, among other avenues, issuing credit cards to Walther-Meade and his family members that they used to pay for personal expenses. Separate civil litigation between the defense contractor and Walther-Meade (which has since been stayed pending the criminal cases) makes clear that the matter is part of a broader FCPA investigation disclosed by the defense contractor, which also is consistent with the presence of DOJ FCPA Unit prosecutors on the docket sheet.

On June 15, 2023, Ruiz reached a plea agreement and entered a guilty plea to one count each of money laundering and wire fraud. He was sentenced on December 22 to 314 days (time served) and ordered to make $3.2 million in restitution to the defense contractor. Sadly, under the weight of the charges and prospect of a cooperating co-defendant, Walther-Meade reportedly took his own life on November 6, 2023. This was tragically the second FCPA defendant to take their life in 2023, as in a heartbreaking scene Juan Manuel Gonzalez Testino (whose 2019 FCPA-related guilty plea was covered in our 2020 Year-End FCPA Update) was found shot to death together with his three-year-old son in their South Florida apartment in March, weeks before the father's sentencing hearing, in what was reported as a murder-suicide.

Samuel Bankman-Fried (China)

The FCPA and crypto worlds collided for the first time on March 28, 2023, when DOJ unsealed a fifth superseding indictment adding an FCPA bribery conspiracy count to the blockbuster prosecution of disgraced cryptocurrency mogul Samuel Bankman-Fried. The FCPA charge against the FTX.com and Alameda Research founder concerned an alleged bribe of approximately $40 million in cryptocurrency paid to a Chinese government official in November 2021 to unfreeze the trading accounts of Alameda Research, which contained over $1 billion in cryptocurrency and had been frozen in connection with an ongoing investigation by the Chinese government.

Bankman-Fried subsequently filed a motion to dismiss the FCPA charge, among others that were not filed prior to his extradition from the Bahamas in the underlying crypto fraud case, arguing that the "rule of specialty" prohibited the United States from extraditing a defendant on one set of charges only to subsequently indict the defendant on additional charges that were not approved in the extradition process. Of potentially greater interest to FCPA enthusiasts, Bankman-Fried separately moved to dismiss the FCPA count on the ground that the indictment did not sufficiently allege the "obtain or retain business" element of the FCPA in that lobbying a government to unfreeze corporate assets is not sufficiently related to obtaining or retaining business from that government. Finally, Bankman-Fried challenged venue for the FCPA charge in the Southern District of New York. The Honorable Lewis A. Kaplan of the U.S. District Court for the Southern District of New York denied the motion in an omnibus order issued on June 29, 2023, finding in a brief analysis that the minimal requirements required at the indictment stage were met.

DOJ did agree, however, to sever the five new charges, including the FCPA bribery count, to allow more time for discussions with the Bahamian government regarding extradition, resulting in the severance of the new charges and a separate trial date in March 2024. In the meantime, in November 2023 a jury found Bankman-Fried guilty of the original crypto-related market manipulation, wire fraud, and money laundering charges. On December 29, 2023, DOJ filed a letter with the Court advising that it did not intend to proceed to trial on the severed counts, including the FCPA charge. DOJ noted that The Bahamas still had not consented to the new charges, and that the delay required for a second trial would not be in the interests of justice given the interests in finality to the first verdict as well as, it contended, the ability of the Court to consider the additional charges as "relevant conduct" at sentencing for the first set of convictions. Sentencing for the crypto fraud convictions is scheduled for March 2024.

Alvaro Ledo Nass (Venezuela)

On March 29, 2023, the former general counsel of Venezuela's PDVSA, Alvaro Ledo Nass, pleaded guilty to one count of conspiracy to launder bribes linked to various foreign currency exchange schemes involving PDVSA loan contracts that we have been covering regularly since our 2018 Year-End FCPA Update. According to Ledo's factual proffer, between 2012 and 2017 he and a variety of previously-charged individuals exploited Venezuela's fixed foreign currency exchange rate that artificially pegged the value of the bolivar above prevailing rates, selling the rights to exchange Venezuelan bolivars for U.S. dollars at inflated rates in exchange for bribes. Ledo admitted personally to accepting more than $11.5 million in payments associated with corrupt currency schemes valued at more than $1 billion.

On June 12, 2023, the Honorable Kathleen M. Williams of the U.S. District Court for the Southern District of Florida sentenced Ledo to three years in prison, coupled with an order of forfeiture.

Carlo Alloni (Djibouti)

We frequently make the point that FCPA enforcement is greater than what is reported, as many cases are filed and remain under seal for years for a variety of reasons, ranging from ongoing cooperation to extradition efforts. An excellent example of this phenomena is the case of former Ericsson regional manager Carlo Alloni, who pleaded guilty in 2018 to a single count of FCPA

bribery conspiracy, had his case remain under seal until 2021 as he cooperated with the government, and then had the case publicized only with the appearance of an FCPA prosecutor in connection with his June 28, 2023 sentencing.

According to court documents, Alloni, an Italian citizen living in England who previously worked for Ericsson in Africa, was first approached by federal agents in 2017 when he landed at a U.S. airport. Although he initially denied having knowledge of the alleged corruption, he subsequently approached prosecutors with counsel and agreed to cooperate in what would become the Djibouti allegations resolved by the company in 2019. Because of "the substantial nature and significance of [his] cooperation," at the June 28, 2023 sentencing the Honorable George B. Daniels of the U.S. District Court for the Southern District of New York sentenced Alloni to time served on probation pending sentencing, with no further sanction following the hearing.

Amadou Kane Diallo (Senegal)

On September 20, 2023, a grand jury in the Central District of California returned a superseding indictment against California businessman Amadou Kane Diallo, adding an FCPA charge to wire fraud and money laundering charges filed earlier in the year arising from an alleged investment fraud scheme. According to the indictment, from 2015 to 2020 Diallo executed a scheme to defraud investors in two companies that he owned by using a false appearance of wealth to fraudulently solicit investments, then using those investments to further his appearance of wealth rather on the businesses as represented to prior investors. But where this scheme took an FCPA turn is when Diallo allegedly attempted to corruptly obtain a land grant involved in the investment scheme from Senegalese government officials by providing or promising to provide them with gifts. This included allegedly chartering a helicopter to take one Senegalese official to an NBA basketball game while the official was visiting the United States, and then offering to purchase five motor vehicles for a second official during a trip to Senegal to discuss the land grant.

Diallo, who has been detained pretrial, has pleaded not guilty to all charges and is currently facing a March 2024 trial date.

Christian Julian Cazarin Meza (Mexico)

On October 27, 2023, Mexican construction company owner Christian Julian Cazarin Meza pleaded guilty in the U.S. District Court for the Eastern District of New York to one count of conspiracy to violate the FCPA. Cazarin admitted that between 2017 and 2020 he participated in a bribery scheme with former Vitol Group trader Javier Alejandro Aguilar Morales and others to provide more than $600,000 to Gonzalo Guzman Manzanilla and Carlos Espinosa Barba, both officials of the U.S. procurement subsidiary of Mexican state-owned oil company Petróleos Mexicanos ("PEMEX"), in exchange for confidential information that Vitol used to win contracts from the PEMEX subsidiary. We last covered the charges against Cazarin's co-defendants in the PEMEX scheme in our 2022 Mid-Year FCPA Update.

Cazarin is currently awaiting sentencing, which has not yet been scheduled.

Orlando Alfonso Contreras Saab (Venezuela)

On November 2, 2023, Venezuelan businessman Orlando Alfonso Contreras Saab pleaded guilty to a one-count information charging him with conspiracy to violate the FCPA. According to the information, Contreras participated in a scheme to bribe the then-governor of the Venezuelan state of Táchira, Jose Gregorio Vielma Mora, in connection with Comité Local de Abastecimiento y Producción ("CLAP"), a Venezuelan food and medicine distribution program. Between 2016 and 2019, Contreras allegedly took bribe payments from co-conspirator Alvaro Pulido Vargas associated with inflated food contracts received by Pulido's company under CLAP and passed them on to Vielma, after keeping a cut for himself. We previously reported on DOJ's charges against Vielma, Pulido, and others, in our 2021 Year-End FCPA Update.

Contreras is scheduled to be sentenced in February 2024. His co-conspirators have been designated fugitives by the U.S. District Court for the Southern District of Florida and are not before the Court.

Carl A. Zaglin, Francisco Roberto Cosenza Centeno, Aldo N. Marchena (Honduras)

The final FCPA case of 2023 was made public on December 22, when DOJ announced the unsealing of a five-count indictment charging Carl A. Zaglin, owner of a Georgia-based manufacturer of law enforcement uniforms and equipment, with bribing co-defendant Francisco Roberto Cosenza Centeno, the former director of a Honduran governmental entity known as "TASA" that procured goods for the Honduran National Police, through companies owned by Florida resident Aldo N. Marchena. According to the indictment, Zaglin and Marchena conspired to pay more than $166,000 in bribes to Cosenza and other TASA officials to corruptly influence the award of more than $10 million in law enforcement equipment contracts to the Honduran National Police.

Zaglin and Marchena are charged with substantive FCPA and/or FCPA conspiracy offenses and all three defendants are charged with money laundering offenses. According to recent court filings, only Zaglin is currently before the Court, but both Cosenza and Marchena are in custody and undergoing extradition proceedings, from Honduras and Colombia, respectively. In the meantime, trial has been scheduled for November 2024.

2023 FCPA-RELATED ENFORCEMENT LITIGATION

As our readership knows, following the filing of FCPA or FCPA-related charges, criminal and civil enforcement proceedings can take years to wind their way through the courts. The substantial number of enforcement cases from prior years, especially involving contested criminal indictments of individual defendants, has led to an active year in enforcement litigation beyond the cases initiated in 2023 as covered above. A selection of key 2023 FCPA-related enforcement litigation developments follows.

DOJ Drops 2018 Money Laundering Charges Against Acosta y Lara

Although most indicted FCPA cases result in conviction, that is not always the case. Occasionally criminal defendants prevail in convincing a jury to acquit at trial, a judge to

dismiss the charges before, during, or after trial, and sometimes DOJ even seeks to dismiss the case itself. That happened on November 22, 2023 to Uruguayan banker ***Marcello Federico Gutierrez Acosta y Lara***, whose 2018 indictment on PDVSA-related money laundering charges was dismissed with prejudice by the Honorable Kathleen M. Williams of the U.S. District Court for the Southern District of Florida, on DOJ motion, on November 16, 2023. DOJ gave no explanation on the reason for the requested dismissal in its one-sentence motion, but Acosta y Lara's counsel told reporters at *Global Investigations Review* that the "case never should have been brought and the government had a moral responsibility to dismiss it" due to exculpatory evidence.

Fifth Circuit Affirms Dismissal of Casqueiro Murta PDVSA Bribery Charges

In our 2022 Year-End FCPA Update, we covered the Fifth Circuit's February 2023 decision reversing the dismissal of PDVSA-related FCPA and money laundering charges against wealth management advisors ***Daisy Teresa Rafoi Bleuler*** and ***Paulo Jorge Da Costa Casqueiro Murta***. As is the typical practice, on remand the case was sent back to the judge who dismissed the indictments in the first place, which in this case was the Honorable Kenneth M. Hoyt of the U.S. District Court for the Southern District of Texas.

Post-remand proceedings as to Rafoi have been quiet, as she has yet to be extradited and make an appearance before the District Court. But as to Casqueiro Murta, Judge Hoyt once again dismissed the case with prejudice on May 17, 2023, this time finding a violation of the defendant's right to a speedy trial under both the Sixth Amendment and Speedy Trial Act. In a subsequent memorandum and order issued on June 6, 2023, the Court found, among other things, that DOJ engaged in "intentional and protracted delay" in first bringing to the Court's attention, and then failing to disclose details regarding, certain classified national security information that DOJ knew to be irrelevant to Casqueiro Murta in the first place. Judge Hoyt concluded "that the government intentionally used non-discoverable, irrelevant material as a faux pas basis for delaying trial because it was unprepared." DOJ appealed and the Fifth Circuit expedited briefing.

On November 28, 2023, the Fifth Circuit affirmed the dismissal of charges against Casqueiro Murta on Speedy Trial Act grounds, but reversed the Sixth Amendment basis for dismissal as well as Judge Hoyt's determination that the Speedy Trial Act dismissal should be with prejudice. Then, on January 5, 2024, the Fifth Circuit retracted the original opinion and substituted a new opinion for the same holding. In the substituted opinion, the Honorable Jacques L. Wiener, Jr. writing for the Fifth Circuit panel held that the District Court erred in its balancing of factors leading to the determination that the Speedy Trial Act violation weighed in favor of dismissal with prejudice. Chief among the errors found was that the District Court in weighing the dismissal factors improperly elevated the interests of Portuguese citizens in potential charges against Casqueiro Murta in Portugal (which the District Court errantly referred to as actual charges, when in fact there was only an investigation) above the interests of the United States in charges here. The Fifth Circuit likewise found in error the District Court's Sixth Amendment basis for dismissal.

The Fifth Circuit remanded the case back to the District Court, but in an unusual move—premised on "the history of this case and some findings by the district judge not discussed" in the opinion—ordered that the case be reassigned to a different judge on remand. On remand,

Chief Judge Randy Crane assigned the case to himself and the matter is currently set for a March 2024 evidentiary hearing on whether the Speedy Trial Act violation merits dismissal with or without prejudice.

Saab Moran Granted Clemency in Prisoner Swap with Venezuela

As we first covered in our 2019 Year-End FCPA Update, joint Colombian and Venezuelan citizen ***Alex Nain Saab Moran*** was indicted on money laundering offenses in connection with an alleged $350 million construction-related bribery scheme in Venezuela. After he was detained in the Republic of Cape Verde on a U.S. extradition request, Saab Moran filed a motion to enter a special appearance and challenge the indictment from abroad. The motion was denied by the Honorable Robert N. Scola, Jr. of the U.S. District Court for the Southern District of Florida and Saab Moran's appeal was dismissed as moot by the Eleventh Circuit after he was successfully extradited to the United States. On December 23, 2022, Judge Scola denied the motion to dismiss the indictment, as we reported in our 2022 Year-End FCPA Update.

Saab Moran took another interlocutory appeal to the Eleventh Circuit from Judge Scola's denial of the motion to dismiss, which was in the process of being briefed when on December 21, 2023, White House officials announced that Saab Moran had been granted clemency by President Biden. Saab Moran was part of prisoner swap between the governments of the United States and Venezuela, in which he was sent back to Venezuela in exchange for the release of 10 U.S. citizens held in Venezuela plus infamous contractor fugitive Leonard Glenn Francis ("Fat Leonard"), the latter of whom had sought asylum in Venezuela after escaping home detention prior to reporting to prison after being convicted of non-FCPA-related bribery charges in the Southern District of California. Following the inter-governmental deal, Saab Moran's lawyer issued a statement that the swap "allows an innocent Venezuelan diplomat to return home after serving over three and a half years in custody."

Chang Extradited; Motion to Dismiss Denied; Trial Scheduled for July 2024

In our 2019 Year-End FCPA Update, we covered the indictment of former Mozambique Minister of Finance ***Manuel Chang***—along with seven other defendants—on FCPA-related wire fraud, securities fraud, and money laundering charges. In what is known as the "Tuna Bonds" scandal, Chang allegedly signed guarantees on behalf of the Mozambique government falsely representing its financial solvency, which caused foreign banks to issue loans to Mozambique state-owned companies for maritime projects that ultimately failed, in exchange for receiving approximately $18 million in alleged kickbacks. Chang was arrested in South Africa on a U.S. extradition request in December 2018, but extradition proceedings lasted four-and-one-half years—due in large part to a competing extradition request filed by the Government of Mozambique—and Chang was not extradited to the United States until July 2023.

On August 8, 2023, Chang filed a motion to dismiss the indictment on speedy trial grounds. Co-defendant ***Najib Allam***, an executive of the shipbuilding company that allegedly paid the bribes, followed with his own speedy trial motion to dismiss, even though he is still in Lebanon. On December 21, 2023, the motions were denied by the Honorable Nicholas Garaufis of the U.S. District Court for the Eastern District of New York. As to Chang, Judge Garaufis found that the defendant's own actions in resisting extradition were responsible for the majority of the pretrial

delay. As to Allam, Judge Garaufis held that a defendant who stays in a country with no extradition treaty (such as Lebanon) cannot complain of the delay caused by his refusal to leave the country and face prosecution in the United States.

Trial for Chang is currently set to begin on July 29, 2024.

Schulman Motions to Dismiss Denied; Trial Scheduled for March 2024

In our 2020 Year-End FCPA Update, we reported on the FCPA-related bank, mail, and wire fraud and money laundering indictment of Maryland attorney ***Jeremy Wyeth Schulman*** arising from his alleged role in a six-year conspiracy to misappropriate $12.5 million in Somali sovereign assets frozen in U.S. financial institutions. DOJ contends that Schulman forged paperwork purporting to show that he was acting on the authority of the Central Bank of Somalia in repatriating these assets, when in fact there reportedly was no such authorization. Schulman, for his part, contends he was acting on the valid instruction of a client associated with a key member of the transitional Somali government, and notes that roughly three-quarters of the $12.5 million recovered was repatriated to the Central Bank of Somalia. Pretrial litigation has been, to put it mildly, contentious.

On September 28, 2023, the Honorable Paula Xinis of the U.S. District Court for the District of Maryland denied four different motions to dismiss filed by Schulman in a 63-page memorandum opinion. First, Judge Xinis denied the motion to dismiss for pre-indictment delay—even though she found that Schulman established prejudice based on witnesses who became unavailable with the passage of time—because the Court did not believe it appropriate to second-guess DOJ's decision to wait up to six years to build its case before indicting, and found that ultimately DOJ acted diligently. Second, Judge Xinis denied Schulman's motion to dismiss pursuant to the "act of state doctrine," finding that the true question for trial was not whether Schulman actually had authority to repatriate the assets under Somali law, but whether he believed he had authority. Third, the Court denied Schulman's "political question" motion to dismiss for similar reasons. Finally, Judge Xinis denied Schulman's motions to dismiss various counts of the indictment for failure to state a claim, as duplicitous, or barred by the applicable statute of limitations, finding that Schulman at most presented factual questions to be resolved by the jury.

Trial in Schulman's case is presently scheduled to begin on March 4, 2024. In the meantime, pre-trial motion practice continues apace as in early February Schulman filed yet another motion to dismiss the indictment based on allegedly exculpatory evidence withheld by DOJ.

Cognizant's Outside Counsel Not a Government Actor for* Garrity *Purposes; Trial for Coburn & Schwartz Delayed Over Foreign Witness's Availability

When we last checked in on the upcoming trial of former Cognizant Technology Solutions President ***Gordon Coburn*** and Chief Legal Officer ***Steven Schwartz***, in our 2022 Mid-Year FCPA Update, the Honorable Kevin McNulty of the U.S. District Court for the District of New Jersey compelled the company to turn over materials associated with various internal investigation interviews, finding a waiver of privilege from the company disclosing aspects of those interviews to DOJ. On July 20, 2023, Judge McNulty issued another important opinion on an oft-recurring issue in corporate internal investigations, this time denying a "*Garrity*" motion to

suppress the defendants' statements to corporate counsel based on a finding that counsel was not acting at DOJ's behest.

In *Garrity v. New Jersey*, the U.S. Supreme Court held that prosecutors cannot use a compelled interview statement taken by a government employer in a subsequent criminal prosecution. As we covered in our 2019 Year-End FCPA Update in connection with the momentous *Connolly* decision out of the U.S. District Court for the Southern District of New York, *Garrity* has in limited circumstances been extended to private employers "where the actions of [the] private employer in obtaining [the] statements are 'fairly attributable to the government.'"

In this case, Judge McNulty agreed with defendants that the interviews conducted by outside counsel as part of the internal investigation were "compelled" due to the company's policy requiring employees to cooperate in internal investigations or face disciplinary action and the fact that the defendants were specifically directed to attend the interviews in question. But still the Court denied the defendants' *Garrity* motion because of insufficient evidence that the company's internal investigation, and interviews, were directed by DOJ. Even though Judge McNulty observed that Cognizant was motivated by DOJ's then-operative "FCPA Pilot Program," pursuant to which the company did receive a "declination with disgorgement" as reported in our 2019 Year-End FCPA Update, he held that "[g]overnment policies alone do not entail that a company's action in furtherance of such policies amounts to state action."

Based on similar reasoning, the Court also denied defendants' motion to require Cognizant to search its files for potential exculpatory evidence under *Brady v. Maryland*. Because Judge McNulty found that "Cognizant did not act on behalf of or under the control of the Government," he concluded that the company's files were not in the "constructive possession" of DOJ.

The trial for Coburn and Schwartz was set to commence on October 2, 2023, but the week before DOJ notified the Court that an "essential witness" for the government, located in India, had been ordered to turn his passport over to Indian authorities in connection with their own investigation of the same conduct. The issue was resolved, but not in time to hold the trial date, which now has been reset to May 6, 2024. In the midst of the delay, presiding Judge McNulty announced his retirement, and the case has now been transferred for trial to the Honorable Michael E. Farbiarz.

Cherrez Miño Still a Fugitive; But $72 Million Sought in Civil Forfeiture

In our 2021 Year-End FCPA Update, we covered charges against three defendants for an alleged bribery scheme involving the Instituto de Seguridad Social de la Policia Nacional ("ISSPOL"), Ecuador's public police pension fund, whereby investment advisor ***Jorge Cherrez Miño*** paid more than $2.6 million in bribes to ISSPOL officials, including ***John Luzuriaga Aguinaga***, in exchange for the right to manage ISSPOL funds. Luzuriaga pleaded guilty to money laundering charges, was originally sentenced to 58 months, but was then released early after serving only 40 months in November 2023 based on DOJ's Rule 35 motion in light of his post-conviction cooperation. (The other cooperating co-defendant, ***Luis Alvarez Villamar***, has been sentenced to six months for his role in the money laundering scheme.) But Cherrez Miño remains a fugitive outside of the United States.

One disadvantage of fugitive status is that it can prevent one's ability to defend against the civil forfeiture of assets while a fugitive. On September 29, 2023, DOJ filed an *in rem* forfeiture complaint in the U.S. District Court for the Southern District of Florida against $72 million in accounts held by or for the benefit of Cherrez Miño. ISSPOL has since filed a statement of interest and a scheduling conference is scheduled for February 20, 2024.

Fifth Circuit Affirms Sealing of Ahsani Sentencing Documents

We covered the guilty pleas of Unaoil CEO and COO ***Cyrus*** and ***Saman Ahsani***, as well as related cases associated with the sprawling corruption scheme that spanned over 15 years, dozens of companies, and close to 10 countries, in our 2019 Year-End FCPA Update. Although the Ahsani brothers' sentencing hearings were repeatedly delayed after their guilty pleas to account for their continued cooperation with the government, Saman's hearing ultimately took place on January 30, 2023. The Honorable Andrew Hanen of the U.S. District Court for the Southern District of Texas handed Saman a comparably favorable sentence of 12 months and one day, one year of supervised release, and $1.5 million in forfeiture.

The significance of the case, coupled with extensive sealing of proceedings before the district court, garnered the interest of media organizations *The Financial Times*, *Global Investigations Review*, and *The Guardian*, who, represented by The Reporters' Committee for Freedom of the Press, jointly moved to intervene and unseal. The court granted the press outlets intervenor status and unsealed much of record leading up to the sentencing. But the sentencing memoranda and a portion of the sentencing hearing itself (taking place in chambers the morning of the public hearing) were not only sealed, but docketed only as "Sealed Events" such that the intervenors were unable effectively to challenge the court's closure of proceedings. Still, intervenors were able to garner enough information to challenge the sealings, which the district court denied on February 23, 2023.

On appeal, the Honorable Jerry E. Smith wrote for a unanimous panel of the U.S. Court of Appeals for the Fifth Circuit on August 4, 2023. The Court was critical of the district court's failure to create a record capable of scrutiny through more transparent docketing of the full sentencing proceedings, but ultimately affirmed the merits of the ruling to seal. Specifically, Judge Smith agreed that the need to protect the defendants, their families, and the integrity of ongoing investigative activities by the government justified the sealing, even with the passage of time and fact that the defendants' general cooperation was a matter of public knowledge.

Saman Ahsani's case is now complete, but brother Cyrus's sentencing is set for November 2024.

Aguilar Gets FCPA Count Severed; Now Faces Indictments in Two Districts

As we last covered in the 2022 Year-End FCPA Update, former Vitol Group oil trader ***Javier Alejandro Aguilar Morales*** was the subject of a superseding indictment in December 2022, which supplemented 2020 charges relating to alleged bribery in Ecuador with new charges that he allegedly bribed officials of Mexican state-owned oil company PEMEX. (These charges are related to those against Christian Julian Cazarin Meza discussed above.) On March 3 and April 27, 2023, Aguilar twice moved to sever and dismiss the PEMEX-related charges, arguing that

venue for these charges did not lie in the Eastern District of New York, where the original and superseding indictments were returned.

On May 31, 2023, the Honorable Eric N. Vitaliano of the U.S. District Court for the Eastern District of New York dismissed the two FCPA counts (substantive and conspiracy) associated with the PEMEX scheme for lack of venue in that district, but without prejudice such that DOJ was authorized to refile the same charges in an appropriate district. With respect to the money laundering conspiracy count, however, Judge Vitaliano declined to "splice" the conduct and observed that the indictment was sufficient on its face to allege a single scheme to launder funds associated with bribery in Ecuador and Mexico. The Court thus denied Aguilar's motion as to the money laundering conspiracy count without prejudice to refile at trial.

On August 3, 2023, a grand jury sitting in the Southern District of Texas returned a five-count indictment relating to the PEMEX corruption scheme, including FCPA bribery, conspiracy, money laundering and Travel Act counts. In response to the Texas indictment, Aguilar again moved to dismiss the PEMEX-related aspects of the money laundering conspiracy count in the New York case as duplicitous. On September 19, 2023, Judge Vitaliano denied the motion to dismiss, finding again that there was evidence to demonstrate that the money laundering conspiracy charge consisted of a single overarching conspiracy across both countries.

As we write, Aguilar is currently undergoing a lengthy trial in the Eastern District of New York, which began on January 3, 2024. Trial in the Southern District of Texas is currently scheduled to begin on April 15, 2024. We expect there will much to report on regarding this significant trial (or these trials) in our next update.

2023 FCPA-RELATED LEGISLATIVE DEVELOPMENTS

It has been years, if not decades, since there has been a consequential legislative development pertinent to the FCPA. But that changed on December 22, 2023, when as part of the annual omnibus National Defense Authorization Act President Biden signed into law the Foreign Extortion Prevention Act ("FEPA").

FEPA amends the federal domestic bribery statute (18 U.S.C. § 201) to prohibit "any foreign official or person selected to be a foreign official to corruptly demand, seek, receive, accept, or agree to accept, directly or indirectly, anything of value" from a "person" as defined under the FCPA, using the instrumentalities of interstate commerce, in exchange for "being influenced in the performance of any official act," "being induced to do or omit to do any act in violation" of their duties, or "conferring any improper advantage" "in connection with obtaining or retaining business." Foreign officials who violate this provision face criminal penalties of up to 15 years in prison and fines of up to $250,000 and/or three times the monetary equivalent of the thing of value.

Now at first blush this may seem like a significant event, in that it criminalizes the "demand side" of bribery, which as interpreted by the courts the FCPA does not. Indeed, Transparency International U.S. issued a statement upon the passage of FEPA, calling this "the most important foreign bribery law in half a century." But our readers will immediately recognize that years ago DOJ implemented a practice of charging government official bribe recipients in FCPA investigations under the existing money laundering laws, which criminalize engaging in

monetary transactions through the U.S. financial system with the proceeds of various "specified unlawful activities," which include violations of the FCPA and bribery under the laws of foreign countries. We have been covering this development for years, and indeed you cannot have gotten to this point of our update without reading about several examples of such charges in 2023 alone.

The practical enforcement significance of FEPA remains to be seen. Although the existing money laundering statutes are likely to cover many FEPA fact patterns, there are aspects of FEPA that are broader. Most notably, FEPA covers solicitations and demands for bribes by foreign officials and expressly applies extraterritorially, meaning that even a refused bribe could be prosecuted, which is not true under the money laundering statute. The same is true of bribes that are accepted abroad and not then laundered back through the U.S. financial system. But keep in mind that there is a requirement that DOJ show use of the facilities of interstate commerce, which may be a limiting factor in wholly foreign conduct. There are also diplomatic and political sensitivities involved with prosecuting a foreign government officials, and those sensitivities are likely to be enhanced the further DOJ stretches FEPA to its limits.

Because U.S. criminal laws apply only prospectively, and foreign corruption matters typically take years to investigate, it is likely to be some time before we get a sense of the practical import of FEPA. But in the meantime, an interesting aspects of the statute is that it requires DOJ to file annual reports each December "focusing [] on demands by foreign officials for bribes from entities domiciled [] in the United States, "the efforts of foreign governments to prosecute such cases," and U.S. "diplomatic efforts to protect [U.S. entities] from foreign bribery." We will follow these reports and other FEPA developments carefully and report back in the years to come.

2023 FCPA-RELATED POLICY DEVELOPMENTS

The issuance of DOJ's updated Corporate Enforcement Policy on January 17, 2023 was undoubtedly the most consequential FCPA-related policy development of the year. Because of its significance, we covered this already as a "bonus" feature of our 2022 Year-End FCPA Update and refer our readers there for our analysis. But DOJ did not stop its important FCPA-related policy updates in January.

On March 3, 2023, DOJ issued a series of updates to its Evaluation of Corporate Compliance Programs and monitor selection guidance, as well as an entirely new policy encouraging companies to embed compliance principles in their employee compensation and clawback programs. We discuss this trio of updates below, but also refer our readers to our separate client alert on the subject, "DOJ Updates Its Guidance on Corporate Compliance Programs." Also discussed below is an important speech setting forth DOJ policy on FCPA successor liability in voluntary disclosure cases.

Updated DOJ Memo re Evaluation of Corporate Compliance Programs

As discussed in our 2017 Mid-Year FCPA Update, in February 2017 DOJ published the initial version of a guidance document, "Evaluation of Corporate Compliance Programs," setting forth a helpful insider's view of how DOJ evaluates corporate compliance programs. This guidance has been updated periodically over the years, most recently in March 2023. The most

significant changes in this year's revision to DOJ's guidance concern two points, both echoing the September 15, 2022 "Monaco Memorandum": (1) establishing compliance incentives within corporate compensation policies; and (2) corporate regulation of ephemeral messaging applications.

Regarding the first point, the updated evaluation guidance instructs prosecutors to consider in corporate charging decisions whether a company has positively incentivized compliance by designing compensation systems that defer or escrow discretionary compensation and tie it to compliance standards, as well as the company's efforts to recoup compensation previously awarded to individuals who are responsible for corporate wrongdoing. The guidance also encourages companies to establish career advancement opportunities for employees engaged in compliance roles.

Regarding the second point, the updated evaluation guidance instructs prosecutors to consider in corporate charging decisions how a company regulates (and then, importantly, enforces) limitations on the use of third-party messaging platforms for company-related communications. As our readers know well, the use of third-party communications platforms—from WhatsApp to WeChat to many more—is ingrained in modern communication norms, especially in certain geographic regions and generational demographics. The updated guidance does not call for an outright ban on such communications, but does encourage companies to create and then enforce policies governing their use. The greatest challenge our clients typically face, and to the disappointment of many not addressed in this guidance, is the application of myriad privacy laws that vary from jurisdiction to jurisdiction and can render it very difficult to enforce compliance in the "Bring Your Own Device" culture that dominates multinational companies.

Revised DOJ Monitor Selection Process

As discussed in our 2018 Year-End FCPA Update, on October 12, 2018, then-Criminal Division Assistant Attorney General Brian A. Benczkowski issued a memorandum including guidance on the selection of monitors in Criminal Division matters. This memorandum, in the tradition of DOJ guidance documents, became known as the "Benczkowski Memorandum," and was itself an update on the so-called "Morford Memorandum" from a different Assistant Attorney General 10 years prior. The latest iteration, announced in March 2023, is entitled "Revised Memorandum on Selection of Monitors in Criminal Division Matters." As with the corporate compliance program evaluation guidance above, much of this update was foretold in the 2022 Monaco Memorandum.

The updated monitor guidance makes clear that there is no presumption for or against the imposition of a compliance monitor in corporate criminal resolutions. Instead, the memorandum directs prosecutors to consider 10 non-exhaustive factors, which may be summarized by noting that a monitorship is more likely to be recommended where the company's compliance program and controls are deemed to be "untested, ineffective, inadequately resourced, or not fully implemented at the time of a resolution." The monitor memorandum further provides: (1) the qualifications and conflict requirements for the named monitor also apply to others on the monitorship team; (2) monitor selections will be made with an eye toward diversity, equity, and inclusion; and (3) the cooling-off period for monitors is increased from two to three years from the date of the monitorship's termination.

Pilot Program Regarding Compensation Incentives & Clawbacks

The third March 2023 DOJ compliance program update is the most novel of the trio. Although the substantive guidance in this document substantially overlaps with the compliance program evaluation guidance in encouraging companies to consider compliance factors in incentive compensation structures, this memorandum establishes a clawback pilot program for the next three years in Criminal Division matters. Specifically, the program allows companies facing a criminal resolution to reduce their fines dollar-for-dollar by "clawing back" past compensation paid to employees who engaged in the underlying misconduct, as well as the supervisors who failed adequately to supervise them. Further, in a seeming nod to the labor law difficulties that may arise in the pursuit of clawbacks—especially outside of the United States—the policy allows for up to a 25% credit for amounts sought by the company in good faith but not successfully collected.

The pilot program also makes clear that the Criminal Division will require all companies resolving cases to "implement compliance-related compensation criteria in their [employee] compensation and bonus system." True to form, we saw the first instance of this new language embedded in Attachment C (Corporate Compliance Program) to the Grupo Aval subsidiary DPA described above, with a revised section and two new paragraphs describing DOJ's "Compensation Structures and Consequence Management" requirements of creating incentives for compliant behavior and then disciplinary procedures for non-compliance. The new language is enhanced especially on the incentives point, but not entirely new in kind from what was in the "Enforcement and Discipline" section previously. The same requirements then appeared in the resolution documents for the Albemarle, H.W. Wood, Tysers, and Freepoint Commodities matters described above, reflecting that these new requirements are now standard practice in corporate FCPA resolutions.

As covered above, the Albemarle resolution included the first example of a company receiving "clawback credit" under the pilot program. Albemarle received a credit of $763,453 on the resolution amount for withholding bonuses during the course of its internal investigation from employees it deemed culpable (either directly or through supervision) based on its investigation. One can certainly imagine circumstances involving substantial recoveries from senior and highly compensated executives who have clawback language built into their employment agreements, as was recently required of Section 16 officers of U.S. issuers pursuant to a new SEC rule covered in our client alerts "SEC Releases Final Clawback Rules" and "NYSE and Nasdaq Allow More Time for Companies to Adopt Rule 10D-1 Clawback Policies: What to Do Now." But for the run-of-the-mill FCPA matter, in our experience, the misconduct (and even the supervision of the misconduct) is concentrated at lower levels of the organization involving more modestly-compensated individuals whose employment contracts are held by entities subject to protective labor law regimes. Under such circumstances, "the juice may not be worth the squeeze." The Albemarle resolution crediting a fraction of one percent of the settlement amount underscores this point. In any event, we will continue to monitor this program and report on developments.

"Safe Harbor Policy" for Voluntary Disclosures in Mergers & Acquisitions

When Deputy Attorney General Lisa O. Monaco spoke at the annual Compliance & Ethics Institute for the Society of Corporate Compliance and Ethics on October 4, 2023, her prepared

remarks announced a new "Safe Harbor Policy for Voluntary Self-Disclosures Made in Connection with Mergers and Acquisitions." Stating that the "last thing the Department wants to do is discourage companies with effective compliance programs from lawfully acquiring companies with ineffective compliance programs," Monaco announced the new policy to incentivize acquiring companies to disclose misconduct uncovered during the process of mergers and acquisitions. In essence, Monaco stated that DOJ was seeking to codify as a broader policy the concepts set forth in the momentous FCPA Opinion Release 2008-02, covered in our 2008 Mid-Year FCPA Update.

Under the new "Safe Harbor Policy," acquiring companies will have six months from the date of closing to report misconduct and still qualify for voluntary disclosure credit, which applies even to the acquired company, even if the conduct had been discovered pre-acquisition provided it was not public or otherwise known to DOJ. The acquiror will then "have a baseline of one year from the date of closing to fully remediate" misconduct at the acquired company—though that timeline may be extended in the discretion of DOJ under the particular facts and circumstances of the transaction. Finally, DOJ has made clear that the recidivism analysis will apply differently in the context of acquisitions, such that the misconduct of the acquired company will not be attributed to the acquiring company for future recidivism purposes.

There is, predictably, certain caveat language in the "Safe Harbor Policy." The transaction must, for example, be a "bona fide, arms-length M&A transaction[]," and DOJ emphasizes that to gain the benefit of the Policy, "Compliance must have a prominent seat that the deal table" and "perform effective due diligence." We will closely follow the implementation of this Policy in the years ahead, but the message for now is to underscore the critical importance of pre-acquisition anti-corruption due diligence and post-acquisition anti-corruption compliance integration.

2023 FCPA OPINION PROCEDURE RELEASES

By statute, DOJ is obligated to provide a written opinion on the request of an "issuer" or "domestic concern" concerning whether DOJ would prosecute the requestor under the FCPA's anti-bribery provisions for prospective (not hypothetical) conduct that it is considering taking. DOJ publishes these opinions on its FCPA website, which helpfully organizes the releases into 18 subject matter areas, from "Audit Rights" to the "Written Laws Affirmative Defense."

Although only parties who join in the requests may authoritatively rely upon them, these releases provide valuable insights into how DOJ interprets the statute. And although the SEC does not itself issue these releases, it has opted as a matter of policy not to prosecute issuers that obtain clean opinions from DOJ.

Usage of the opinion procedure release process waned notably in the 2010s, not coincidentally following publication of the comprehensive joint DOJ / SEC FCPA Resource Guide covered in our 2012 Year-End FCPA Update. But recently we have started to see a modest trickle again, and 2023 saw the first two-opinion year in a decade, the 64th and 65th in the history of the statute.

FCPA Opinion Procedure Release Regarding Adoption Services (23-01)

On August 14, 2023, DOJ issued FCPA Opinion Procedure Release 23-01. Here the requestor was a U.S.-based adoption service provider organizing travel for foreign officials from a country that required that its officials visit certain families that have adopted children from the country to ensure the success of the adoption. The requestor represented, among other facts, that the officials would be chosen not by it but by the government agency, that the requestor had no non-routine business before the government agency, that travel and recreation costs would be limited and paid directly to the providers rather than paid by providing cash or stipends to the officials, and that the requestor would not host spouses or other family members of the officials.

Based on these representations, DOJ concluded that the proposed expenses "reflect no corrupt intent of the Requestor" and appear to be "reasonable and bona fide expenses" with a legitimate business purpose. Although there are certain limiting circumstances underlying this opinion procedure release—namely, that the travel is required by the foreign country's law and the requestor had no other business before the relevant government agency—DOJ's analysis is nonetheless instructive for companies considering sponsoring travel for foreign officials under other circumstances. Specifically, and consistent with prior opinion procedure releases, excluding spouses and family members, ensuring that costs that are reasonable and consistent with internal policies, and making payments directly to providers remain appropriate best practices.

FCPA Opinion Procedure Release Regarding Logistical Support for Foreign Government Officials (23-02)

On October 25, 2023, DOJ issued FCPA Opinion Procedure Release 23-02. Here the requestor was a company in the business of providing training events and logistical support, which had been awarded a contract with a U.S. government agency to support training events that included foreign government officials. Among other things, the requestor was required to provide stipend payments to the foreign officials for meals and transportation. The requestor represented that they took various steps to mitigate potential anti-corruption risks, including: making the stipend payments through a U.S. government official; calculating the stipends in accordance with U.S. Department of State guidelines in limited amounts of between $8 and $40 per day depending on the location; maintaining accounting records documenting the payments; and further represented that it was not made aware of the identities of the foreign officials at the time it bid for the contract. The requestor also represented that the U.S. agency responsible for this project confirmed that the stipends were authorized by the Foreign Assistance Act of 1961.

In approving the payments, DOJ first reasoned that the facts and circumstances as represented by the requestor "reflect[ed] no corrupt intent" and indeed were authorized by U.S. law. Secondly, DOJ explained that "the payments themselves do not appear to be for the purpose of assisting" the requestor obtaining and retaining business. Although the specific facts of this release are rather bespoke, the release nonetheless offers useful guidance of mitigation measures companies can take to reduce anti-corruption risks associated with subsidizing foreign officials' travel expenses.

2023 FCPA SPEAKER'S CORNER

Once again, U.S. government anti-corruption enforcement personnel were active on the speaking circuit in 2023, trumpeting their priorities and setting expectations for the companies that will appear before the agencies. A selection of relevant speeches of note include the following.

DOJ Deputy Attorney General Lisa O. Monaco

At the same Society of Corporate Compliance and Ethics event at which she announced the "Mergers & Acquisitions Safe Harbor" policy described above, on October 4, 2023, Deputy Attorney General Monaco proclaimed that across its various recent policy and enforcement developments, DOJ is working to create an "enormous gulf between outcomes for companies that do the right thing – that step up and own up – and companies that do the opposite."

DOJ Criminal Division, Acting Assistant Attorney General Nicole M. Argentieri

On November 29, 2023, during the same keynote address at the annual ACI Conference on the FCPA at which she made the comments on applying forfeiture against non-issuers as described above, Argentieri emphasized DOJ's focus on bringing "high impact" cases. Then turning to the updated Corporate Enforcement Policy, Argentieri made clear that companies start with zero credit and have to work their way up toward the maximum of 50%, and also encouraged companies not to forget that this credit is based on only on cooperation, but also remediation. As to what sets companies apart within the range, Argentieri underscored that often it "is the speed of a company's action." Finally, Argentieri promoted DOJ's formation of the International Corporate Anti-Bribery Initiative ("ICAB"), pursuant to which the Department will assign three experienced prosecutors to focus on building new and improving existing bilateral and multilateral enforcement partnerships around the globe to develop new case referrals.

DOJ Criminal Division, Fraud Section Chief Glenn Leon

During a fireside chat at the *Compliance Week National Conference* on May 16, 2023, DOJ Fraud Section Chief Glenn Leon sent a sigh of relief throughout the audience by acknowledging that the recent Evaluation of Corporate Compliance Programs guidance does not require companies to outright ban the use of ephemeral messaging applications by employees. Himself a former Chief Ethics & Compliance Officer of a major U.S. multinational, Leon acknowledged the complexity of the situation—including due to applicable data privacy regulations—and encouraged the audience members to work in good faith to design policies with care and the company's specific risk profile in mind, and then apply them and adjust if needed.

2023 FCPA-RELATED PRIVATE CIVIL LITIGATION

As we have been reporting for years, although the FCPA does not provide for a private right of action, civil litigants employ various causes of action in connection with losses allegedly associated with FCPA-related conduct, often through shareholder litigation. A selection of matters with material developments in 2023 follows.

Shareholder Lawsuits / Class Actions

- ***Ericsson*** – On May 25, 2023, the Honorable William Kuntz of the U.S. District Court for the Eastern District of New York granted Ericsson's motion to dismiss a putative shareholder class action suit filed against Ericsson and three top executives. The suit alleged that Ericsson's public filings misrepresented growth in the company's compliance program, as well as outstanding litigation risks, in view of the alleged misconduct in Iraq that led, in part, to the revocation of Ericsson's 2019 DPA and guilty plea in March 2023 as described above. But in dismissing the lawsuit, Judge Kuntz found that the company's public statements were either immaterial as a matter of law or not false when they were made, and further that the company's statements regarding DPA compliance included "ubiquitous warnings to investors regarding the possibility of future compliance failures and investigations." Plaintiffs have noted an appeal to the U.S. Court of Appeals for the Second Circuit.

Select Civil Fraud / RICO Actions

- ***PDVSA v. Lukoil*** – On March 13, 2023, the U.S. Court of Appeals for the Eleventh Circuit affirmed the dismissal of a civil fraud lawsuit filed on behalf of PDVSA against Lukoil and other international oil companies and traders. PDVSA claimed that the defendants engaged in corrupt schemes with PDVSA employees to obtain insider information about PDVSA to the detriment of the Venezuelan state-owned oil company. But the Honorable Darrin P. Gayles of the U.S. District Court for the Southern District of Florida dismissed the lawsuit under the political question doctrine. Writing for the Eleventh Circuit, the Honorable William Pryor agreed, holding that the political question of who has the right to represent the Venezuelan government, in light of U.S. policy not to recognize the regime of President Nicolas Maduro, presents a nonjusticiable political question about which the federal courts may not inquire. On October 30, 2023, the U.S. Supreme Court declined to take up PDVSA's petition for certiorari.

- ***Petrobras America v. Samsung Heavy Industries*** – We last checked in on a civil RICO and common law fraud lawsuit filed by Petrobras America against Samsung Heavy Industries in our 2021 Year-End FCPA Update, where the U.S. Court of Appeals for the Fifth Circuit revived the case after finding that Samsung Heavy Industries' statute-of-limitations defense used to dismiss the case presented a question of fact. Back before the district court, the Petrobras affiliate continued to allege that Samsung Heavy Industries bribed Petrobras officials to secure a drilling services contract. On August 11, 2023, the Honorable Lee H. Rosenthal of the U.S. District Court for the Southern District of Texas issued an opinion granting cross-motions for summary judgment filed by both sides, dismissing each party's claims against the other. Although the alleged corruption scheme resulted in a $200 million arbitral judgment against Samsung Heavy Industries and criminal convictions of the Petrobras employees who allegedly took the bribes, Judge Rosenthal ruled that Petrobras's harm was too attenuated from the scheme to support a RICO claim under U.S. law. The court also rejected Samsung Heavy Industries' counterclaim, which argued that Petrobras America should pay a portion of the arbitration award. Petrobras has once again appealed to the U.S. Court of Appeals for the Fifth Circuit.

2023 INTERNATIONAL ANTI-CORRUPTION DEVELOPMENTS

World Bank

As we frequently report in these updates, multilateral development banks ("MDBs"), most notably the World Bank, continue to be quite active in global anti-corruption enforcement as part of their wider mandate to investigate and take appropriate action vis-à-vis "sanctionable practices," including investigating alleged improprieties associated with the procurement processes of Bank-funded projects and implementing debarments through internal proceedings. Notably, the umbrella of sanctionable practices enforced by MDBs extends beyond corrupt or fraudulent practices to "coercive," "collusive," and "obstructive" practices, as those terms are defined in Bank Private Sector Anti-Corruption Guidelines.

Under the banner of this mandate, MDBs have increasingly scrutinized corporate compliance programs, as evidenced by the March 2023 release of "MDB General Principles for Business Integrity Programmes." Much like the DOJ and SEC *FCPA Resource Guide*, DOJ's "Evaluation of Corporate Compliance Programs" memorandum, and other guidance on agency expectations for compliance programs, this joint guidance from several participating MDBs reflects the current MDB expectations for entities seeking to work on MDB-funded contracts. Many of the controls principles covered in this guidance will be familiar to experienced practitioners, including regular risk assessments; the role of senior management in instilling a culture of compliance; robust due diligence regarding employees, business partners, and government interactions; close monitoring of gifts, hospitality and travel expenses, and charitable or political contributions; the maintenance of accurate books and records; and the establishment of sound reporting, investigation, remediation, and training procedures.

On the enforcement side, in 2023 the World Bank announced seven debarments resulting from agreements to settle allegations of "corrupt practices" in violation of the Bank's Procurement Guidelines. These cases illustrate a range of anti-corruption priorities, which range from addressing run-of-the-mill procurement fraud and bribery to incentivizing investigation cooperation and compliance with more complex disclosure requirements:

- Bidding Process Fraud: In March 2023, the World Bank announced a 24-month debarment of Kenyan engineering and construction company ***Burhani Engineers Ltd.*** According to the settlement, the company made misrepresentations about its experience during the selection process for contracts related to a project in Uganda. Similarly, in October 2023, the Bank debarred Vietnamese construction firm ***HTC Construction and Advanced Technology Joint Stock Company*** for 41 months for allegedly inflating the value of its past awards and misrepresenting its finances during the bidding process for multiple sustainable development and sanitation contracts in Vietnam. Lastly, in December 2023, the World Bank debarred Botswana-based civil engineering company ***Multi-Tech Consult (PTY) Ltd.*** and its Managing Director ***Peter Lambileki*** for 42 months for allegedly misrepresenting the company's prior experience in three bids for Bank projects.

- Invoicing Fraud: In March 2023, the World Bank announced a 15-month debarment of ***PCS Limited***, a power and communication company based in Vanuatu, for alleged fraudulent practices in connection with a project in the South Pacific nation. The Bank

alleged that PCS claimed reimbursement for non-reimbursed items and "knowingly misled" the Project Implementation Unit to obtain a financial benefit. A subsequent 22-month debarment in November 2023 of Bangladeshi engineering consulting company ***BETS Consulting Services Limited*** also involved invoicing a Bank project for expenses not incurred, but with a more direct corruption allegation as the Bank alleged BETS directed its lead consultant to bribe officials in return for their influence on contract decisions.

- Disclosure Requirements: In April 2023, the World Bank announced a 24-month debarment of Turkish national ***Selçuk Yorgancioğlu*** in connection with alleged fraudulent practices in an International Finance Corporation investment project in Turkey. The Bank alleged that Yorgancioğlu failed to sufficiently disclose the financial condition of one of the investee companies involved in the project. Six months later, in October 2023, the World Bank debarred Honduran engineering consulting firm ***Consultores en Ingeniería S.A. de C.V.*** for 18 months due to failure to disclose an actual conflict of interest.

- Cooperation Requirements: The World Bank emphasized in announcing the HTC debarment described above the company's lack of cooperation with Bank investigators and its consistent refusal to submit to examinations by the Bank in accordance with its contractual inspection and audit rights.

The World Bank also publishes uncontested sanctions determinations entered by the Chief Suspension and Debarment Officer. Uncontested determinations take place when the party against whom allegations are made does not engage with the World Bank sanctions process to resolve or contest the Bank's allegations. The following examples of uncontested sanctions determinations involve similar characteristics to debarments entered by the Bank, but resulted in more significant periods of debarment:

- In April 2023, the World Bank entered a debarment of nearly nine years (six years from an earlier debarment imposed in 2021 plus an addition of nearly three years) against ***Getinsa Ingeniería Vietnam Co. Ltd.***, a Vietnamese company. The Bank also entered into a nearly three-year debarment of ***Tran Thi Hoan***, a Vietnamese national. The Bank alleged that Getinsa Vietnam and Hoan engaged in "collusive or corrupt practices" in relation to a development project in Vietnam by coordinating with two other companies to manipulate the preparation of technical specifications for contracts and by negotiating a commission from one of the other companies in exchange for helping it win contracts. The Bank also found the company liable for obstructive practices during the Bank's subsequent efforts to audit the company's records.

- In October 2023, the World Bank entered a 43-month debarment of ***M/S Gul Construction Co.***, a Pakistani construction company. The Bank alleged that the company bribed project officials and misrepresented a commitment not to pay commissions, its experience, and its financials by submitting falsified documents.

The contrast in consequences between companies that engage with the World Bank to enter into negotiated resolutions, on the one hand, and uncontested sanctions determinations, on the other, illustrate that companies electing to cooperate with the World Bank Integrity Vice

Presidency and enter into settlement agreements—which typically include provisions regarding future cooperation and voluntary remedial actions, such as implementing compliance program enhancements—are more likely to receive reduced debarment periods and other benefits relative to those companies that decline to engage with the Bank's sanctions process.

As we noted most recently in our 2022 Year-End FCPA Update, the consequences of sanctions imposed by the World Bank (or another MDB) can often be compounded by a cross-debarment—a tool of inter-MDB cooperation that allows one MDB to recognize and enforce sanctions imposed by another MDB. Indeed, several of the longest World Bank debarment penalties assessed in 2023 were the result of another MDB's sanctions proceedings. Yet, the Bank recognized 32% fewer cross-debarments in FY 2023 (49 cross-debarments) than FY 2022 (72 cross-debarments). Similarly, the number of World Bank debarments eligible for recognition by other MDBs declined 43% between FY 2022 (30 cross-debarments) and FY 2023 (17 cross-debarments).

United Kingdom

SFO Charges Three in Sierra Leone Mining Bribery Scheme

On June 16, 2023, the UK Serious Fraud Office ("SFO") announced the filing of UK Bribery Act ("UKBA") charges against ***Graeme Hossie*** and ***Rachel Rhodes***, respectively the former CEO and CFO of collapsed mining company London Mining Plc, as well as ***Ariel Armon***, a third-party agent utilized by the company. The charges relate to two alleged schemes to bribe public officials in Sierra Leone, the first of which involved bribes allegedly paid to public officials in Sierra Leone between 2009 and 2012 to help secure a license for London Mining to operate an iron ore mine. The SFO also alleges Hossie and Rhodes retained Armon as their third-party "fixer" in connection with a second bribery scheme between 2010 and 2014 to obtain an additional environmental license for the mine, more land for the project, and access to local roads.

On October 6, 2023, all three individuals pleaded not guilty to the charges. The next hearing in the case is scheduled for June 30, 2024, and the trial is scheduled for January 2025.

Charges Announced Regarding Gemstone Bribery Solicitation in Madagascar

On August 14, 2023, the UK National Crime Agency ("NCA") announced the filing of UKBA charges against ***Romy Andrianarisoa*** and ***Philippe Tabuteau***, respectively the Chief of Staff to the President of Madagascar and her associate. The NCA, in cooperation with the UK Crown Prosecution Service ("CPS"), alleges that the two attempted to secure a bribe from a UK-based gemstone mining and marketing company, in exchange for mining licenses to operate in Madagascar. The NCA acknowledged the unnamed company's prompt reporting of the bribe solicitation and cooperation with the ongoing investigation.

In a hearing in September 2023, Andrianarisoa pleaded not guilty to the charges, and Tabuteau did not enter a plea, but later pleaded guilty. Andrianarisoa's trial began in February 2024 and is underway as of this publication.

NCA Charges Three in Nigerian Oil Bribery Scheme

On August 22, 2023, the NCA announced UKBA charges against ***Diezani Alison-Madueke***, Nigeria's former Minister for Petroleum Resources and former president of the Organization of the Petroleum Exporting Countries. Then, on October 2, 2023, charges were added against her brother ***Doyé Agama*** and Nigerian oil executive ***Olatimbo Ayinde***. The charges arise out of an alleged scheme in which Alison-Madueke purportedly steered oil and gas contracts valued in the billions of dollars in exchange for benefits that ranged from the use of a number of properties in London, £100,000 in cash, private jet flights, jewellery, and designer goods. Agama allegedly accepted bribes to influence his sister's conduct in her former role, and Ayinde allegedly bribed Alison-Madueke with luxury goods in an attempt to secure job opportunities for her husband.

All defendants have pleaded not guilty and trial has been adjourned to November 2025.

Indonesia to Challenge UK Settlement with Airbus

On September 25, 2023, the Republic of Indonesia announced that its planning to sue the UK to annul the UKBA settlement the SFO reached with ***Airbus SE*** in 2020. As reported in our 2020 Mid-Year FCPA Update, Airbus reached a multi-billion-dollar coordinated resolution with authorities in France, the United Kingdom, and the United States regarding alleged improper payments to government officials in more than a dozen countries, including Indonesia, as well as export controls-related charges in the United States. The allegations included kickbacks purportedly paid to executives at Indonesia's state-owned airline, Garuda, to secure contracts.

In an interview, Indonesia's Minister of Law and Human Rights said his country seeks to force a renegotiation to give Indonesia a share of the €991 million (~ $1.1 billion) portion of the global settlement paid to the SFO in recognition of Indonesia's provision of "crucial evidence" to support the investigation. However, as of this writing, it does not appear a formal claim has yet been filed.

Entain plc Reaches Deferred Prosecution Agreement for Failure to Prevent Bribery

On December 5, 2023, the CPS reached a £615 million (~ $787 million) resolution with sports betting and gambling company Entain to resolve an investigation by HM Revenue and Customs into failure to prevent bribery at a former Turkish subsidiary of the company between 2011 and 2017 in violation of UKBA Section 7. Entain will pay a financial penalty of £465 million, £120 million in disgorgement of profits, and a further £10 million towards investigation costs. The company will also make a £20 million donation to various charities.

Entain received a 50% discount in the penalty due to its significant cooperation and remediation, but still the deferred prosecution agreement is the second-largest corporate criminal settlement ever reached in the UK, second only to the 2020 Airbus agreement mentioned above. It is also the first deferred prosecution agreement ever reached with the CPS. In presiding over the settlement, the judge noted that a DPA was warranted in light of Entain's significant and ongoing cooperation with the SFO investigation and the fact that Entain had welcomed a "wholesale change of senior management and approach" along with acknowledgement by the company of the need to "overhaul its culture and practices." The judge also cited the potential loss of thousands of jobs, as well as losses to shareholders, as a reason the deferred prosecution agreement was in the interests of justice.

Notable Forfeiture Actions

In addition to the above prosecutions, the SFO also seized several properties and other valuable assets in corruption-related proceedings in 2023, including:

- On March 17, 2023, Westminster Magistrates' Court approved the SFO's seizure of almost $7.7 million from a UK bank account belonging to ***Mario Ildeu de Miranda***, a former Petrobras employee, based on a finding that the funds were likely the proceeds of crime. Miranda was previously convicted in Brazil on 37 counts of money laundering for using a fake consultancy business to launder bribes to Petrobras officials on behalf of companies seeking to secure lucrative oil contracts with Petrobras, including Brazilian conglomerate Odebrecht. On April 13, 2023, Miranda filed an appeal at Southwark Crown Court against the judgment.

- On July 14, 2023, the High Court approved the SFO's seizure of a property worth approximately £200,000 (~ $260,000), plus associated rental profits, allegedly linked to ***Guang Jiang***, an agent whom the SFO contends facilitated the corrupt acts of Sarclad Ltd. leading to the company's deferred prosecution agreement reported in our 2019 Year-End FCPA Update. Jiang reportedly fled to China in 2014 in alleged breach of his release conditions after being charged by UK prosecutors, but the SFO continues to pursue his assets in his absence.

- On August 8, 2023, the High Court issued a preliminary order that paves the way for the SFO to seize multiple properties valued at approximately £34 million (~ $43 million) that belonged to ***Gulnara Karimova***, the embattled daughter of the former president of Uzbekistan who herself is serving a prison sentence in Uzbekistan and has been indicted separately by U.S. prosecutors as reported in our 2020 Mid-Year and 2019 Year-End FCPA updates. The Court's order focused on the fact that the British Virgin Islands companies that held title to the properties had been dissolved, which under UK law vests property with the Crown, but the underlying context of the proceedings arises from long-running efforts to identify and seize the proceeds of Karimova's alleged corrupt dealings.

Economic Crime and Corporate Transparency Act

Although not solely relevant to anti-corruption enforcement, we note that on October 26, 2023, the Economic Crime and Corporate Transparency Act ("ECCTA") received Royal Assent and passed into law. Among several notable provisions is the creation of a new offense called "failure to prevent fraud" under Section 199 of the statute, which will allow large organizations to be held criminally liable if a member of staff commits fraud from which they intend the organization to benefit, following a structure akin to Section 7 of the UK Bribery Act's "failure to prevent bribery" offense. At present, this provision applies to eight types of fraud, including false representations, false accounting, false statements by company directors, and tax fraud, or aiding, abetting, counseling or procuring the commission of covered offenses.

The new offense will apply to large organizations satisfying two of three of the following criteria: (1) annual turnover of more than £36 million; (2) total assets of more than £18 million; or (3) an average of more than 250 employees. The statute, like the UKBA, allows covered

organization to defend against charges with a showing that they had "reasonable procedures" in place at the time of the fraud to prevent fraud, or that it was not reasonable in the circumstances to expect such procedures to be in place. On the other hand, amendments to the "identification doctrine," a common law test for attributing actions of a natural person to an organization, seek to reduce the ability of large corporations to rely on the "directing mind and will" doctrine, under which corporations can only be held liable for the actions of an individual who was the "directing mind and will" of the corporation, and allow a company to be held culpable if one of its "senior managers" commits the offense while acting within the actual or apparent scope of their authority. A "senior manager" is defined as an individual who plays a significant role in either (1) the making of decisions about how the whole or a substantial part of a covered organization's activities will be managed or organized; or (2) the actual managing or organizing of all or a substantial part of the covered organization's activities.

The amendments to the "identification doctrine," which came into force on December 26, 2023, applies to all organisations, regardless of size, and could result in a significant increase in corporate prosecutions in the UK. Initially, this amendment will only apply to selected "relevant offenses," which includes offenses under Section 1 of the UKBA (bribing another person). The ECCTA also extends the SFO's power to compel the production of information before the launch of a formal investigation, previously limited to investigations involving potential bribery, to the types of fraud covered by the new Section 199.

Europe

European Union

On May 3, 2023, the European Commission released a proposal for a new directive on combating corruption at the European Union level, which endeavors to harmonize corruption offenses, sanctions, related prevention, and enforcement across EU member states. The proposal includes so-called "minimum rules"—in other words, rules that, if adopted by the European Parliament and Council, member states would be required to implement into national law within 18 months, though member states may choose to adopt stricter anti-corruption rules than those set forth in the proposed directive. Areas of harmonization covered by this proposed framework include the definitions of and penalties for active and passive bribery in both the public and private sectors, the circumstances pursuant to which an organization may be held liable for the acts of its officers, and mitigating circumstances that prosecutors would be required to consider, such as the company's internal controls framework and cooperation. For more detailed analysis of this important proposal, please see our separate client alert, "EU Commission Proposes Harmonized Framework to Combat Corruption."

In another update that is not specific to anti-corruption enforcement, but given its multi-lateral enforcement nature may certainly influence it in the future, we draw attention to an important judgment of the European Court of Justice rendered on September 14, 2023. In the case of ***Volkswagen Group Italia SpA*** and ***Volkswagen AG***, the Court held in a preliminary ruling that the fundamental right of *ne bis in idem* (roughly equivalent to the common law doctrine of double jeopardy) precludes the Italian Competition and Markets Authority from imposing a fine on Volkswagen AG for conduct relating to the diesel emissions scandal in view of a €1 billion fine previously imposed by the Public Prosecutor's Office of Braunschweig in Germany. The Court held that the fine, although classified as an administrative penalty under national law,

constituted a criminal penalty for the purposes of *ne bis in idem* as it had a punitive purpose as well as a high degree of severity. Furthermore, the Court set out that duplicative proceedings or penalties concerning the same facts are permissible only if: (i) such duplication does not represent an excessive burden for the person concerned, (ii) there are clear and precise rules making it possible to predict which acts or omissions are liable to be subject to a duplication, and (iii) the multiple proceedings in question have been conducted in a sufficiently coordinated manner and within a proximate timeframe. We expect that the third requirement in particular will encourage member-state authorities to coordinate enforcement proceedings even more closely going forward to avoid running afoul of this new precedent.

Austria

On September 1, 2023, the Corruption Criminal Law Amendment Act 2023 came into force in Austria. The law was passed in response to the so-called "Ibiza affair," which was triggered by a video that showed Austria's then-Vice Chancellor ***Heinz-Christian Strache*** seeming to offer to influence future state contracts in exchange for financial support ahead of the 2017 parliamentary elections and ultimately led to Strache's resignation. The Act introduces the new criminal offense of "mandate buying," which criminalizes the provision of remuneration to representatives of a political party in exchange for influencing the placement of a candidate on that party's slate of candidates, and also expands the scope of criminal liability to persons who aspire to become public officials, as well as incumbents, provided the candidates actually become a public official. Finally, the Act increases the maximum penalties for individuals to up to 15 years imprisonment and for companies to a fine of up to €5.4 million, and sentences of greater than six months' imprisonment also result in the temporary loss of eligibility to hold national or European public office.

Belgium

As reported in our 2022 Year-End FCPA Update, former Vice President of the European Parliament ***Eva Kaili*** was arrested by Belgian authorities on December 9, 2022, and charged with corruption and money laundering offenses, as well as participation in a criminal organization, for allegedly accepting corrupt payments in exchange for favorable treatment of a "gulf country" before the European Parliament. Further arrests in the expanding investigation have since included Kaili's life partner ***Francesco Giorgi***, former member of the European Parliament ***Pier Antonio Panzeri***, and two other members of the European Parliament, ***Marc Tarabella*** and ***Andrea Cozzolino***. The charges center around allegations that the nation states of Qatar and Morocco corruptly sought to influence votes and other official proceedings before the European Parliament, a charge that representatives of both countries have denied. Investigators have seized more than €1.5 million in cash across a series of raids. All three current members of the European Parliament have had their committee positions stripped away, but as of this writing remain sitting members of the legislative body, though Kaili's lawyer announced in February 2024 that she would not seek reelection.

In response to the so-called "Qatargate" scandal, on September 13, 2023 the European Parliament approved a series of reforms of the Parliament's internal rules aimed at promoting greater integrity, transparency, and accountability among Members of the European Parliament. Among other things, the new rules reinforce a prohibition on engaging in activities that would constitute lobbying, require members to declare if their input to legislative initiatives is

based on suggestions received from external actors, and introduce harsher penalties for breaches of the code of conduct.

France

On March 14, 2023, the Parquet National Financier ("PNF") and the French Anti-Corruption Agency ("AFA") published a guide on best practices in conducting internal investigations into corruption allegations. The guide, which finalizes a draft version circulated for public comment in March 2022, carries no legal force, but nonetheless is a useful reference source for those handling matters before the PNF. It discusses the conditions, structure, and manner in which anti-corruption investigations should be initiated and conducted. Specific recommendations include that companies should draft and adopt an internal investigation protocol as part of their policies and procedures, assemble investigation teams that are free from conflicts of interest and then hire separate counsel to handle the criminal defense (a recommendation that is contrary to local bar guidance and for which the guide provides no explanation), adhere to EU data protection legislation as interpreted by French data protection law, and draft a comprehensive investigation report after concluding the investigation.

On June 28, 2023, a French court approved a corruption settlement between the PNF and two subsidiaries of UK oil and gas company ***TechnipFMC plc***. The subsidiaries will collectively pay nearly €209 million (~ $229 million) pursuant to a judicial public interest agreement ("CJIP") to resolve allegations that between 2008 and 2012 the companies paid bribes to government officials in Equatorial Guinea and Ghana. The agreements also resolve certain legacy allegations concerning the former parent company in Angola. TechnipFMC and its predecessor companies previously entered into separate resolutions with the DOJ and Brazilian authorities in June 2019 related to activities in Brazil and Iraq (discussed in our 2019 Year-End FCPA Update) and a 2010 resolution with U.S. authorities arising from its involvement in the corruption scheme in Bonny Island, Nigeria (discussed in our 2010 Mid-Year FCPA Update).

Furthermore, in a 2022 development only reported publicly in August 2023 (with thanks to our friends at *Global Investigations Review*), we have learned that in April 2022, PNF secured the conviction on money laundering, tax evasion, and misuse of corporate assets charges of ***François Polge de Combret***, the French banker who allegedly served as the intermediary to the senior Guinean official used by ***Rio Tinto*** as reflected in its SEC settlement discussed above. Polge de Combret reportedly received a suspended prison sentence and was ordered to pay €1 million in confiscation after pleading guilty. The PNF reportedly could not charge him with bribing a public official because French law did not contain such an offense when the consulting fee was paid.

Germany

On May 12, 2023, Germany passed the Whistleblower Protection Act to implement the Whistleblower Directive 2019/1937 of the European Union. Although the law was passed later than the stipulated deadline of December 17, 2021, Germany (like many other EU member states) went beyond the minimum scope set forth in the directive by extending protected whistleblowing to cover any conduct punishable under the German penal code, administrative offenses concerning employees, and any other actions which, though not illegal, undermine the purpose of the legal provisions. The Act sets forth three different channels for reporting

potential violations: internal reporting within an organization, external reporting to an appropriate government agency, or public disclosure. Although, as mandated by the directive, the German law does not stipulate a clear priority amongst the three reporting channels, the law explicitly encourages employees to make use of internal reporting channels first, and directs companies with 50 or more employees in Germany to establish internal reporting mechanisms for whistleblowers and assign functions to review and address reports. Finally, the law prohibits retaliation against whistleblowers acting in good faith, allows for damage claims by those claiming they experienced retaliation for reports, and even establishes a rebuttable presumption that adverse actions taken after a report are retaliatory in nature. For additional details regarding this law, please consult our separate client alert, "German Whistleblower Protection Act Brings New Obligations for Companies."

The Netherlands

On February 16, 2023, the Dutch Public Prosecution Service ("OM") asked a court to levy fines of €15,000 and €50,000 against two unidentified employees of Dutch medical company ***DRC International B.V.*** for allegedly attempting to bribe a former World Bank consultant in order to obtain information about government contracts. Prosecutors further sought a fine of €225,000 against DRC. In a decision published in March 2023, the judge ordered much-reduced fines of €750 for each of the two employees and €4,000 for DRC. The court ruled that the OM failed to specify whether the consultant who received the bribe acted in a position of a civil servant or as a non-civil servant employee of an international organization, and consequently dismissed the bribery charges. The defendants were convicted of possessing false contracts, but acquitted of creating the false contracts due to insufficient evidence.

The DRC allegations concern World Bank consultant ***Wassim Tappuni***, who, as reported in our 2017 Year-End FCPA Update, was sentenced to six years in prison after being found guilty of receiving €2 million worth of gifts in exchange for his assistance with contracts with medical equipment suppliers. In 2016, two other unnamed DRC employees settled with the OM for fines of €5,000 and €20,000, and in 2020, the OM entered into settlement agreements with two other Dutch medical companies — ***Simed International*** and ***Dutchmed International***—as well as with several of their employees for suspected involvement in the scheme. DRC, Simed, and Dutchmed also received debarments from the World Bank in 2014, 2015, and 2017, respectively.

On February 17, 2023, the OM confirmed a separate settlement with the Dutch member of the ***PwC*** global network, pursuant to which the auditor agreed to pay €150,000 to resolve allegations of misstated audits of ***Econosto Mideast***, which itself entered into a 2021 resolution of foreign bribery in the Middle East and Asia.

Norway

In April 2023, the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime ("Økokrim") indicted the longtime former President of the International Biathlon Union, ***Anders Besseberg***, on charges of aggravated corruption. Økokrim issued a statement on April 17, 2023, saying that there was sufficient evidence to prove that from 2009 to 2018 Besseberg accepted bribes that included watches, hunting trips and trophies, prostitutes, and a leased BMW. According to a separate External Review Commission report issued in

November 2018 in response to the allegations, the alleged bribes were in return for favorable decisions toward Russia in the anti-doping context.

Poland

In September 2023, media reported that Polish consulate employees may have issued hundreds of thousands of temporary work visas to migrants from Asia and Africa since 2021 in return for bribes of several thousand dollars each. After the European Commission asked the Polish government to comment on the allegations, Poland's Prosecutor General admitted that an investigation by the Anti-Corruption Agency in Poland into this matter had been ongoing since July 2022, but that only one deputy foreign minister had been dismissed and seven people taken into custody for questioning. The European Commission did not consider the answer to be sufficient and asked Poland for further clarification, but the status of the inquiry is unclear in the wake of Poland's seismic parliamentary election resulting in a change of political power shortly thereafter. (In January 2024, the Anti-Corruption Agency arrested the former deputy head of the Ministry of Foreign Affairs for his alleged role in the scheme, and we will follow-up on these developments in our next update.)

Portugal

On November 7, 2023, Portugal's Prime Minister ***Antonio Costa*** resigned from his position after the Public Prosecutor's Office announced it was investigating Costa and several members of his cabinet. In connection with the inquiry, prosecutors detained Costa's chief of staff, ***Vitor Escaria***, and four other persons and also searched private residences and two governmental agencies. This investigation concerns allegations of bribery and corruption in connection with lithium exploration concessions, a green hydrogen project, and a major data center investment. While the authorities found tens of thousands of euros in envelopes in Escaria's office, news outlets later reported that the only evidence linking Costa to the allegations—the transcript of a wiretapped telephone conversation—had reportedly been misinterpreted by prosecutors confusing the name of Prime Minister Antonio Costa with that of Economy Minister Antonio Costa Silva.

Switzerland

On March 28, 2023, the Swiss Court of Appeals in Geneva upheld a corruption verdict against Israeli mining magnate ***Beny Steinmetz*** and two other defendants for bribing foreign public officials in Guinea in order to obtain exploration permits for Guinea's vast iron ore deposits. As discussed in our 2021 Year-End FCPA Update, the 2021 verdict found that Steinmetz and the other defendants paid bribes to acquire mining permits for the world's richest untapped deposits of iron ore in Guinea's southeastern Simandou mountain range, and then forged documents to cover it up. Although the bribery convictions of Steinmetz and his associates were upheld, the Court of Appeals overturned their forgery convictions. The court also upheld the CHF 50 million (~ $56.5 million) fine against Steinmetz, but reduced his five-year prison sentence to three years—of which only 18 months must be served given the passage of time. The sentences against the other two defendants were fully suspended.

On April 25, 2023, the Office of the Attorney General of Switzerland ("OAG") announced the indictment of two unnamed executives of Saudi oil company ***PetroSaudi*** for conduct arising from the now-infamous 1MDB scandal. The charges, covering alleged conduct from 2009 to 2015, include counts of commercial fraud, aggravated criminal mismanagement, and aggravated money laundering. The two executives allegedly colluded with two senior managers from 1MDB as well as ***Jho Low***, a confidant to the Malaysian Prime Minister and informal consultant to 1MDB, to have 1MDB pay $1 billion for purported PetroSaudi assets in Turkmenistan that did not actually exist, after which $700 million were allegedly transferred to an account that was beneficially owned by Low, who in turn diverted $85 million to the two defendants.

On April 27, 2023, OAG announced that it had ordered security ink company ***SICPA SA*** to pay CHF 81 million (~ $90.6 million) in connection with alleged acts of corruption in Brazil, Colombia, and Venezuela. A former sales manager at SICPA was also found guilty of bribing high-ranking Colombian and Venezuelan officials between 2009 and 2011 and was sentenced to a conditional prison term of 170 days. Proceedings were discontinued without charges against SICPA's CEO and main shareholder, though the OAG ordered this individual to bear a portion of the costs of the proceedings.

On September 28, 2023, the OAG filed an indictment against ***Gulnara Karimova***, daughter of Uzbekistan's former president and a defendant in numerous other jurisdictions as reported in our 2020 Mid-Year and 2019 Year-End FCPA updates. The instant Swiss charges accuse Karimova of participating in a criminal organization known as "The Office," from which she allegedly engaged in money laundering, acceptance of bribes as foreign public official, and forgery of documents between 2001 and 2013. Foreign companies allegedly paid bribes to "The Office" in exchange for access to the Uzbek telecommunications market. Swiss authorities have seized assets totalling CHF 780 million (~ $857 million) and seek the forfeiture of additional assets valued at CHF 440 million (~ $497 million).

On December 6, 2023, the OAG announced that it had filed charges against the commodities trader ***Trafigura AG*** with the Federal Criminal Court in Belinzona for allegedly failing to take reasonable measures to prevent its employees from paying bribes. Prosecutors allege that between April 2009 and October 2011 Trafigura employees paid approximately $5 million in bribes to the former CEO of a subsidiary of the Angolan state oil company in exchange for securing ship chartering and oil bunkering contracts worth $142.7 million. OAG also charged Trafigura's former Chief Operating Officer ***Mike Wainwright***, the Angolan public official, and a former Trafigura intermediary for their involvement in the alleged bribe scheme. Trafigura has stated that it will defend itself at court and present evidence regarding the strength of its internal control system.

Russia & Former CIS

Kazakhstan

In May 2023, the Anti-Corruption Agency of the Republic of Kazakhstan ("ANTIKOR") announced that it had partnered with other anti-corruption services in Central Asia to create a regional platform to coordinate priorities and accelerate the mutual exchange of information and training, technical assistance, and knowledge management. The fruits of this partnership

appeared to be reflected in ANTIKOR's November 2023 announcement that over the preceding 10 months it had recovered KZT 857 billion (~ $1.8 billion) in cash and assets derived from corruption schemes. ANTIKOR also reported that 1,500 corruption crimes were registered during the same period, involving over 1,100 individuals, including former Minister of Justice ***Marat Beketaev***, who was detained in October 2023 for alleged abuse of power in steering state contracts to a company with which he was affiliated and overseeing payouts for unnecessary services.

In another high-profile case, Kazakhstan's former Prime Minister and former Head of the National Security Committee, ***Karim Masimov***, was convicted of high treason, attempting to seize power by force, and abuse of office and power for his alleged role in the January 2022 Zhanaozen mass protests that left at least 238 people dead. In April 2023, Masimov was sentenced to 18 years in prison for allegedly helping to orchestrate protests over a fuel price hike, which rapidly escalated to broader civil unrest against corruption and widespread injustice under the rule of former President Nursultan Nazarbaev. On the same charges, the court also convicted Masimov's deputies, ***Anuar Sadyqulov*** and ***Daulet Erghozhin***, and sentenced them to 16 years and 15 years in prison, respectively. In November 2023, the government announced additional charges against Masimov for allegedly laundering money and taking a bribe.

Russia

The Russian government has made a string of arrests and prosecutions of public officials this year on allegations of corruption, including:

- ***Valery Serov***, Mayor of the city of Pechora, was arrested in September 2023 and charged with allegedly accepting a bribe. According to investigators, Serov and his former First Deputy ***Andrey Kanishchev*** helped an entrepreneur obtain municipal construction contracts in return for RUB 4 million (~ $43,000); and

- ***Andrey Boldorev***, Head of Investment and Strategic Development at Federal State Unitary Enterprise "Rosmorport," was also arrested in September 2023 for allegedly accepting bribes. According to the Investigation Department for Transport of the Investigative Committee of the Russian Federation, Boldorev accepted bribes in the form of wages for fictitious employment at a mining company.

On the legislative front, in July, the State Duma Committee on Security and Anti-Corruption introduced a bill to increase liability for petty public official bribery and petty commercial bribery involving less than RUB 10,000 (~ $108). The bill would double the maximum penalty from one to two years of imprisonment, and it would further allow for a one-year sentence enhancement if certain criteria are met, such as the additional presence of extortion or a prior criminal history.

Ukraine

Although defending against and repelling Russia's invasion remains the primary focus of lawmakers and law enforcement agencies alike, the Ukrainian government nonetheless has continued to take steps aimed at rooting out corruption on a national level. One significant

motivation behind these efforts is moving the country closer to European Union membership, as the preconditions to reaching that objective include meeting certain anti-corruption benchmarks.

To that end, Ukrainian President Volodymyr Zelenskyy's administration dismissed several high-ranking officials amid a wave of corruption scandals in January 2023. Following that flurry, President Zelenskyy appointed a new director for the country's National Anti-Corruption Bureau—Semen Kryvonos—to address international corruption concerns. Corruption related charges brought since have included:

- President of the Ukrainian Supreme Court ***Vsevolod Kniaziev*** was arrested in May 2023 for allegedly accepting a bribe worth approximately UAH 99.2 million (~ $2.7 million);

- Former judge of the Dnipro District Court in Kyiv ***Mykola Chaus*** was convicted and sentenced to 10 years in prison by the High Anti-Corruption Court in June 2023 for taking bribes in exchange for making favorable court decisions; and

- Former Deputy Head of the Presidential Administration ***Kyrylo Tymoshenko*** had an administrative case opened against him in August 2023 for allegedly accepting gifts and engaging in other misuses of his public office, although these charges were quickly dismissed by a court in September 2023.

On the legislative front, the Ukrainian government has also made significant headway on President Zelenskyy's anti-corruption agenda, including approving a draft law on the ratification of the country's agreement with the OECD and a draft law that brings Ukrainian anti-money laundering legislation up to the standards set forth by the Financial Action Task Force in September 2023. Finally, in December 2023, Ukraine passed the four remaining legislation requirements necessary for the European Commission to make a final recommendation that the European Council begin accession negotiations, three of which relate to anti-corruption priorities.

The Americas

Brazil

On May 5, 2023, the Brazilian subsidiary of Swiss medical device company ***Medartis AG*** signed a leniency agreement with the municipality of São Paulo's Office of the Comptroller General ("CGM"), pursuant to which it agreed to pay 10 million reais (~ $2 million) to resolve charges under Brazil's Clean Company Act. This is believed to be the first corporate settlement with a local government body under the 2013 statute. The São Paulo CGM alleged that between 2011 and 2017 Medartis employees provided "undue advantages" to doctors of state-run hospitals to improperly influence them to purchase the company's medical products. The CGM confirmed that Medartis self-reported the conduct, actively cooperated with the investigation, and agreed to make further enhancements to its compliance program. This first-of-its-kind resolution is indicative of the broadening range of agencies responsible for anti-corruption investigations and enforcement in jurisdictions around the world.

On July 21, 2023, the Office of the Comptroller General of Brazil ("CGU") announced that it had settled a corruption case against the Brazilian subsidiary of German chemicals distribution company ***Helm AG***. The CGU alleged that between 2015 and 2017 the company made four payments to Brazilian officials totaling about 28,000 reais (~ $5,750) to buy confidential import and export data from Brazil's federal revenue services. The subsidiary agreed to pay 696,700 reais (~ $143,000), corresponding to 0.1% of Helm do Brasil's revenue the year prior to the investigation. The settlement took the form of a summary judgment, which under Brazilian law requires companies to admit their wrongdoing. In announcing the enforcement action, the CGU said this is just one of more than 10 companies (though the first international company) to have been penalized so far in the alleged scheme to buy confidential import and export data.

On September 6, 2023, Judge Dias Toffoli of the Brazilian Federal Supreme Court ruled that evidence stemming from ***Odebrecht S.A.***'s leniency agreement, part of its record-breaking 2016 anti-corruption resolution covered in our 2016 Year-End FCPA Update, is inadmissible in other proceedings. The decision came as part of a 2020 lawsuit filed by Brazilian President Luiz Inácio Lula da Silva to obtain access to materials from the investigation into leaked messages between the lead prosecutor and judge overseeing the prolific Operation Car Wash investigation. Writing for the Court, Judge José Antonio Dias Toffoli expressed concerns that public officials had "subverted evidence, acted with bias … and outside their sphere of competence," and that prosecutors did not comply with chain of custody rules with respect to evidence collected as part of the leniency agreement. Brazil's National Association of Public Prosecutors appealed the decision to a broader panel of the Federal Supreme Court, which in February 2024 suspended the BRL 8.5 billion (~ $1.7 billion) fine imposed on Odebrecht. This decision generates substantial uncertainty regarding the consequences for the dozens of other corporate penalties and convictions based on evidence collected as part of Odebrecht's leniency agreement, which we will continue to cover in our future updates.

Canada

Most recently in our 2022 Year-End FCPA Update we reported on the Canadian Corruption of Foreign Public Officials Act ("CFPOA") prosecution of ***Ultra Electronics Forensic Technology Inc.***, along with four former executives—***Robert Walsh***, ***René Bélanger***, ***Philip Heaney***, and ***Michael McLean***—on bribery and fraud charges associated with the alleged use of local agents in the Philippines to bribe foreign public officials in an effort to influence and expedite the award of a contract to supply a ballistic identification system to the national police force. On May 17, 2023, the Public Prosecution Service of Canada announced that the Superior Court of Quebec had approved a four-year remediation agreement with the Ultra Electronics subsidiary, pursuant to which the company agreed to pay a penalty of CAD 6.6 million (~ $4.9 million) plus a CAD 659,000 (~ $484,700) victim "surcharge" and the disgorgement of CAD 3.3 million (~ $2.4 million). The agreement also requires the company to implement an anti-bribery and anti-corruption compliance program "under the supervision of an external auditor."

In another consequential CFPOA case, on January 16, 2023, the Ontario Supreme Court of Justice acquitted ***Damodar Arapakota***, the former CEO of Toronto-based electronics company Imex Systems, finding him not guilty of charges associated with the sponsorship of a $40,000 trip from New York to Orlando for a Botswanan government official and his family. Justice Rita-Jean Maxwell reasoned that the prosecution failed to show a "material economic advantage" to Imex and thus found the required *quid pro quo* lacking. Although accepting that the payment of

travel expenses for the Botswanan official and his family constituted an advantage for the official, the Court found that the fact that this benefit was conferred while Imex was in the process of attempting to secure a contract from the agency the official worked for did not, without more, meet the necessary *mens rea* required by the CPFOA. On March 7, 2023, Arapakota successfully defended against the Crown Prosecution Service's appeal, securing the first acquittal ever rendered in a case prosecuted under CPFOA.

Colombia

On July 30, 2023, Colombian authorities arrested ***Nicolas Petro***, the eldest son of incumbent Colombian President Gustavo Petro, on charges of money laundering and illicit enrichment relating to his father's 2022 presidential campaign. Prosecutors allege that the younger Petro received money or properties valued at approximately $400,000 from, among others, persons convicted and extradited to the United States on drug trafficking charges, in exchange for participation in his father's peace plans. The younger Petro, a legislator in Colombia's Atlantico province, resigned from his seat following his arrest, but despite pleading not guilty has signaled a willingness to cooperate. His trial has been set for the end of April. Colombian authorities also brought charges against Nicolas Petro's ex-wife, ***Daysuris Vasquez***, for her role in the alleged scheme. In December 2023, the Commission of Accusations of Colombia's House of Representative announced that it was opening an investigation against President ***Gustavo Petro*** arising out of the same investigation.

Ecuador

On February 22, 2023, the Attorney General of Ecuador announced that her office would bring corruption charges against 37 defendants, including former President ***Lenín Moreno*** and former Chinese Ambassador to Ecuador ***Cai Runguo***, in connection with an alleged bribery scheme related to the construction of the $2.5 billion Coca Codo Sinclair hydroelectric dam. The charges relate to an alleged scheme in which Chinese state-owned company ***Sinohydro*** purportedly paid $76 million in bribes to Ecuadorian public officials between 2009 and 2018, which Ecuador began investigating in 2019 after a leak of documents regarding the scheme, known as the "Ina Papers," were published online. The Attorney General explained that "[t]hose tens of millions of USD in bribes would have been delivered by Sinohydro and channeled through third parties, concealing the payments using a false image of consulting and representation services and paid through gifts, checks[,] and transfers." In addition to Moreno and Runguo, other parties to be charged include four of Sinohydro's former "legal representatives" and four ex-directors at ***Comercial Recorsa***, a local infrastructure company.

Separately, on May 15, 2023, the Office of the Attorney General announced that it had arrested ***Xavier Vera***, the country's former minister of energy and mines, as part of a corruption investigation. Vera resigned his post in October 2022 amid an investigation into accusations that he had helped to arrange jobs at state oil company Petroecuador in exchange for bribes.

Middle East & Africa

South Africa

In September 2023, prosecutors from South Africa's National Prosecuting Authority ("NPA") blocked a request to obtain a copy of its corporate corruption settlement with ***ABB Ltd.*** As we covered in the 2022 Year-End FCPA Update, in December 2022, ABB entered into a resolution with DOJ and the SEC as well as authorities in South Africa and Switzerland to resolve allegations of bribery in South Africa. Following this resolution, *Global Investigations Review* and *Corruption Watch* requested access to the resolution documents pursuant to South Africa's transparency laws. The NPA refused the request, citing ABB's withheld consent for the disclosure and the resolution's inclusion of evidence relating to ongoing criminal proceedings.

On November 21, 2023, the Middleburg Specialised Commercial Crimes Court stuck the criminal corruption case against former acting Eskom CEO ***Matshela Koko*** and his co-defendants. Koko was alleged to have received bribes as part of a corruption scheme involving ABB. The Court determined there had been an "unreasonable delay" in the investigation and dismissed the case, finding that the defendants' rights to a timely trial had been violated. This loss on what the NPA had listed as one of its "seminal" state-capture cases follows acquittals in another recent corruption case and an unsuccessful extradition in 2022 discussed immediately below. Nevertheless, the NPA prosecutors stated that they were confident that the case could be brought in the future or "re-enrolled, citing unanticipated complexities as the reason for the delay.

United Arab Emirates

In February 2023, Abu Dhabi's government-owned ***International Petroleum Investment Company*** and a subsidiary agreed to pay $1.8 billion to the government of Malaysia to settle a lawsuit and related arbitration proceedings filed in the UK concerning their involvement with the massive 1MDB fraud scheme. The settlement resolved Malaysia's contention that an earlier, smaller settlement negotiated in 2017 with former Malaysian Prime Minister ***Najib Razak***—who has since been convicted and sentenced to 12 years in prison on 1MDB-related corruption allegations as discussed below—was procured by fraud.

In April 2023, a court in Dubai informed South Africa of its denial of the latter's request to extradite ***Atul Gupta*** and ***Rajesh Gupta***, who were arrested in the UAE in June 2022, for charges of political corruption in connection to bribes allegedly paid to former South African President ***Jacob Zuma***. According to the response from the UAE to South Africa, the Dubai court ruled that the UAE also had jurisdiction to prosecute the alleged crimes because the Guptas were alleged to have engaged in money laundering activity in both the UAE and South Africa. However, it is unclear whether the UAE intends to prosecute the Guptas, who were released after the court's decision and whose present whereabouts are unknown. The UAE has publicly claimed that the court denied the requests because they did not contain copies of current arrest warrants, as required under the extradition treaty between the UAE and South Africa. The South African authorities have strongly criticized the Dubai court's ruling, which they claim did not comply with the countries' bilateral extradition treaty and has significantly hampered, if not eliminated, the country's ability to bring two of its most notorious corruption suspects to justice.

Asia

China

In January 2023, the Central Commission for Discipline Inspection ("CCDI") of the Chinese Communist Party held a plenary session during which President Xi Jinping reiterated the Party's "zero tolerance" policy against corruption and the need to address "both the symptoms and the root causes" of corruption. Subsequently, in March 2023, the CCDI launched another campaign to investigate dishonest and disloyal officials within its ranks. As just one example of related enforcement, in April 2023 former Supreme Court Judge ***Meng Xiang*** was sentenced to 12 years in prison and fined RMB 2 million (~ $290,000) by the Zhengzhou City People's Intermediate Court for accepting bribes totaling RMB 22.7 million (~ $3.3 million) between 2003 and 2020. More recently, in November 2023, former vice-chairman of the Guizhou Provincial Committee of the Chinese People's Political Consultative Conference, ***Li Zaiyong***, was removed from public office after allegedly accepting banquets and travel arrangements, which enforcement authorities determined could compromise his impartiality when performing his official duties. Further, Li was also found to have solicited bribes from others and improperly used his authority to influence the selection and appointment of Party and government cadres.

The financial sector remains a focus of China's anti-corruption efforts. In February 2023, the Supreme People's Procuratorate charged ***Tian Huiyu***, former President of the China Merchants Bank, with accepting bribe payments and engaging in insider trading. A year later in February 2024, the Intermediate People's Court of Changde issued a suspended death sentence to Tian, which may be commuted to a life imprisonment if he does not commit any serious crimes during the next two years. Other investigations have been announced for senior officials of other Chinese banks, such as ***Wang Bin***, the former chairman of China Life Insurance, who also received a suspended death sentence, by the Intermediate People's Court of Jinan for receiving RMB 325 million (~ $44.6 million) in bribes between 1997 and 2021.

We also continue to see anti-corruption efforts and enforcement in China's healthcare sector. In May 2023, 14 Central Government ministries jointly issued the *2023 Key Tasks on Safeguarding the Integrity of Medical Procurement and Medical Services*, which updated existing guidance originally issued in 2022 (as discussed in our 2022 Mid-Year FCPA Update). The updated guidance directs local governments to combat all forms of bribery and kickbacks in the healthcare sector, such as bribes disguised as donations or academic conference fees. This guidance echoes the themes found in recent anti-corruption enforcement actions in the healthcare sector, including the February 2023 prosecution of ***Tong Wei***, the former Party Secretary of Nanxian People's Hospital in Hunan Province, for allegedly favoring certain pharmaceutical companies and distributors in public procurement decisions in exchange for RMB 9.665 million (~ $1.359 million) in bribes. On July 21, 2023, the National Health Commission, together with nine other government agencies, jointly held a conference to launch a one-year campaign targeting corruption issues in the healthcare industry. One week later, the CCDI issued a statement of support, stating that the campaign will be a comprehensive and systematic approach that covers "all areas and all chains."

Hong Kong

As reported in our 2022 Year-End FCPA Update, the Independent Commission Against Corruption ("ICAC") commenced several enforcement actions connected to the construction of a runway at Hong Kong International Airport. In February 2023, the ICAC charged eight persons for accepting, offering, and "handling" bribes totaling HKD 4.3 million (~ $550,000) from 2017 to 2022. The defendants include ***Yin Kek-Kiong*** and ***Ricky Lee***, respectively the former General Manager and former Principal Manager of the Airport Authority Hong Kong, who allegedly received corrupt payments from contractors ***Goldwave Steel Structure Engineering Limited***, ***Carol Engineering Limited***, and ***Joint Field Engineering Limited***. Lee's wife, ***Diana Kok-tan Chan***, is also charged with laundering criminal proceeds totaling HKD 6 million (~ $766,000), including the alleged bribes described above. The other defendants worked for suppliers and sub-contractors of the airport project.

In September 2023, the ICAC charged 23 individuals for allegedly offering and accepting bribes totaling more than HKD 6.5 million (~ $832,000) in relation to building renovation contracts. According to the ICAC, several middlemen conspired with project contractors to offer bribes to members of a building owners' committee in exchange for renovation and project management contracts in the building.

India

India's National Financial Reporting Authority ("NFRA") has reiterated that statutory auditors of Indian companies are required to report instances of fraud and suspected fraud to the Government of India even if the fraud has already been reported to the government by the Company or another entity. The NFRA circular clarifies an existing requirement that statutory auditors of Indian companies must report any instance of fraud, which involves or is expected to involve an amount of INR 10,000,000 (~ $120,000) or more, to the Indian Government. Consistent with judicial precedents, the NFRA circular also notes that a statutory auditor cannot be absolved of its duty to report such fraud by resigning from its role as the statutory auditor.

Indonesia

As reported in our 2022 Year-End FCPA Update, the Corruption Eradication Commission ("KPK") detained former Supreme Court judge ***Sudrajad Dimyati*** for allegedly accepting IDR 800 million (~ $53,000) in bribes in exchange for a favorable ruling for a lending cooperative. On May 30, 2023, an Indonesian court found Dimyati guilty and sentenced him to eight years imprisonment, in addition to a fine of IDR 1 billion (~ $66,693). Other corruption cases involving high-ranking government officials include a 15-year sentence issued by the Jakarta Corruption Crime Court against ***Johnny G. Plate***, the Communications and Information Technology Minister, for corruption related to a telecommunications project, and ***Lukas Enembe***, the former Governor of Papua, who was indicted for accepting bribes in relation to infrastructure projects. Enembe was convicted and received an eight-year sentence, but passed away shortly thereafter.

Japan

As reported in our 2022 Year-End FCPA Update, the Tokyo District Public Prosecutors Office indicted a number of individuals in connection with the 2020 Olympic Games, including Olympic and Paralympic Organizing Committee Executive Board Member ***Haruyuki Takahashi***, on charges that Takahashi accepted bribes in exchange for awarding sponsorship rights. Takahashi pleaded not guilty in December 2023. In related cases, ***Shinichi Ueno***, former President of marketing and creative content company ADK Holdings Inc.; ***Taiji Sekiguchi***, the former President of a stuffed-toy maker Sun Arrow Inc.; his father and also former Sun Arrow executive ***Yoshihiro Sekiguchi***; and ***Toshiyuki Yoshihara***, an executive at the Japanese publishing house ***Kadokawa***, were all convicted and sentenced for providing Takahashi with bribes.

On September 7, 2023, Tokyo prosecutors arrested former parliamentary vice foreign minister and Liberal Democratic Party lawmaker ***Masatoshi Akimoto*** on suspicion of accepting bribes totaling JPY 61 million (~ $410,000) from a wind power company. Akimoto allegedly received the funds in exchange for requesting the government to review assessment standards when awarding contracts for offshore wind power projects, which was in favor of the offshore wind power company as it was vying for offshore wind power projects in Aomori Prefecture and other areas. Amidst the allegations, Akimoto departed from the ruling Liberal Democratic Party and stepped down from his role as parliamentary vice foreign minister.

Malaysia

As noted above and reported in our 2020 Year-End and 2022 Mid-Year FCPA updates, former Malaysian Prime Minister ***Najib Razak*** was sentenced to 12 years imprisonment in 2020 in connection with the 1MDB corruption scheme, which was upheld by Malaysia's highest court in 2022. On March 3, 2023, Razak was separately acquitted of charges related to tampering with an audit report to cover up misconduct. On March 31, 2023, the court dismissed Najib's bid to review his corruption-related convictions, effectively ending his avenues for appeal. However, in February 2024, Malaysia's pardons board reduced Razak's sentence to 6 years.

On February 1, 2023, Malaysia's Anti-Corruption Commission ("MACC") confirmed that it had frozen two bank accounts held by the Parti Pribumi Bersatu Malaysia ("***Bersatu***") political party. In April 2023, the MACC confirmed that the accounts that were previously frozen had been seized. These actions were taken in connection into a probe into whether Bersatu misappropriated public funds that had been earmarked to battle the COVID-19 pandemic. In connection with the same investigation, the MACC arrested former Prime Minister ***Muhyiddin Yassin***, the leader of Bersatu, on March 9, 2023, and charged him with corruption and money laundering. Yassin has claimed that the prosecution was politically motivated and an attempt to discredit Bersatu ahead of elections in July 2023. On August 15, 2023, the Malaysian high court overturned the charges for abuse of power, but Yassin still faces three charges of money laundering.

On July 12, 2023, the MACC announced the arrest of former 1MDB General Counsel ***Jasmine Loo Ai Swan*** on further charges arising from the 1MDB scandal. Loo has been described as a close confidant of ***Jho Low***, the fugitive businessman and alleged mastermind of the scam, leading some to speculate that Malaysian authorities are getting closer in their hunt for Low.

Singapore

On August 16, 2023, Singapore's Corrupt Practices Investigations Bureau ("CPIB") charged ***Balakrishnan A/L Govindasamy***, a former commercial executive of oil rig construction company Sembcorp Marine, with 14 counts of corruption under the country's Prevention of Corruption Act. Govindasamy allegedly received (or sought to receive) cash bribes totaling at least S$202,877 (~ $150,000) from nine contractors between 2015 and 2021. According to the CPIB, the contractors paid the bribes in exchange for contracts with a Sembcorp Marine subsidiary. The Singapore investigation commenced in March 2023, following an investigation by Brazil's CGM, and is reportedly an extension of Brazil's long-running "Operation Car Wash" anti-corruption investigation.

South Korea

On December 27, 2022, President Suk-Yeol Yoon granted a presidential pardon to former President Myung-Bak Lee. As reported in our 2018 Year-End FCPA Update, the Seoul Central District Court originally convicted Lee of bribery and embezzlement in 2018. In 2020, the Supreme Court upheld a 17-year prison sentence and a KRW 13 billion (~ $10 million) fine for Lee. The subsequent pardon in December 2022 voided 14.5 years of Lee's prison term and his unpaid fine of KRW 8.2 billion (~ $6 million). President Yoon also issued pardons to over 1,300 former civil servants, politicians, and public officials convicted of corruption, bribery, and other similar crimes. Those receiving pardons include senior staff members of former President Geun-Hye Park's administration. The Yoon administration described the pardons as an effort to foster "national unity."

Australia

On August 2, 2023, the High Court of Australia ruled that a 2020 penalty imposed upon an Australian engineering company for alleged corruption in the Philippines and Vietnam must be recalculated. The Court upheld the prosecution's appeal of the penalty, finding that "the value of the benefit" received for the alleged corrupt payments—which presents one measure of setting the maximum penalty—means the absolute value of the contracts received rather than the profits on those contracts. The High Court said that the value of the benefit that a company obtains from bribes should amount to "no more and no less than the sum of the money in fact received" because the law offers "no hint" that the value should be calculated "by some specific process of valuation." This decision runs counter to sentencing practices in numerous other countries, including the United States.

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