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Introduction

"I have very set and consistent principles, but I am flexible on tactics"

— Madeleine Albright

We are pleased to bring you our Fall 2022 FCPA & Anti-Bribery Alert. This past year saw a number of key developments in FCPA enforcement. There were high-profile corporate settlements, including a global resolution between commodities trader Glencore and authorities in the U.S., UK, and Brazil that required the company to pay more than $1.1 billion in fines and penalties, and resolutions with repeat offenders Oracle Corporation and Tenaris S.A., as well as a number of individual prosecutions and settlements. The U.S. Department of Justice also made notable policy changes. In particular, in September 2022 Deputy Attorney General Lisa Monaco issued the so-called "Monaco Memo," which announced extensive updates and revisions to the DOJ's corporate enforcement policies, including enhanced requirements for receiving cooperation credit and new guidance on how executive compensation should be addressed in compliance programs. The DOJ also adopted a new policy requiring that chief compliance officers submit written certifications along with mandatory compliance reports as part of certain corporate resolutions, and began implementing this new requirement in the Glencore resolution and its deferred prosecution agreement with Brazilian airline GOL Linhas Aéreas Inteligentes. Companies will need to pay careful attention to these and other developments and would be wise to heed the advice of former Secretary of State Albright by being flexible in the manner in which they address corruption and related risks in their operations, but unflinching in their commitment to ethical practices.

The Alert discusses these and other developments in detail, and once again includes a deep dive into FCPA enforcement, as well as anti-bribery enforcement and developments in France, Brazil, Mexico, the UK and China, and by multilateral development banks.

The Alert is divided into five chapters. Chapter 1 is devoted to analysis of critical enforcement and policy highlights and trends, and lessons from recent settlements and prosecutions. Chapter 2 is dedicated to the FCPA and provides a description of FCPA-related charges and settlements in 2021 and the first 10 months of 2022. Chapter 3 provides an anti-corruption enforcement update for France. Chapter 4 includes updates for selected countries: Brazil, China, Mexico and the UK. Chapter 5 provides an update on the corruption-related enforcement activities of multilateral development banks.

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1 Highlights, Trends & Lessons

Recent Highlights

The past year has seen several noteworthy developments in the area of anti-corruption enforcement. Below are Hughes Hubbard's highlights from the past twelve months.

Glencore Agrees to Pay over $1.1 Billion to Settle FCPA and Commodity Price Manipulation Charges

In one of the most high-profile corporate FCPA resolutions in the past couple of years, on May 24, 2022, the DOJ announced that Swiss-based commodities trader Glencore had entered into a coordinated global resolution with authorities in the U.S., UK, and Brazil to resolve allegations of bribery and commodities fraud. As part of this resolution, Glencore International A.G. pleaded guilty to one count of conspiracy to violate the anti-bribery provisions of the FCPA, and Glencore's U.S. subsidiary pleaded guilty to conspiracy to engage in a commodity price manipulation scheme. The U.S. subsidiary also resolved civil commodities violations with the Commodity Futures Trading Commission. Under the global settlement, Glencore and its subsidiaries have agreed to pay more than $1.1 billion in fines and forfeiture to authorities in these three jurisdictions. This includes approximately $444 million in connection with the Foreign Corrupt Practices Act resolution and just over $242 million in connection with the criminal commodities price manipulation resolution. The global settlement did not resolve ongoing investigations in Switzerland and the Netherlands; thus Glencore may face additional fines in the future.

In connection with its FCPA resolution, Glencore admitted to paying tens of millions of dollars to public officials in Brazil, Cameroon, the Democratic Republic of Congo, Equatorial Guinea, Ivory Coast, Nigeria and Venezuela to obtain crude oil and refined petroleum contracts at favorable prices, obtain priority payment from state-owned entities, avoid government audits, and influence legal actions. In connection with its commodities fraud resolution, Glencore's U.S. subsidiary admitted to manipulating fuel oil prices at two commercial shipping ports in the U.S. in violation of the Commodity Exchange Act and related regulations. In both the FCPA and commodities fraud resolutions in the U.S., Glencore is required to retain independent compliance monitors for three-year terms. Glencore is the second commodities trader to settle FCPA allegations in recent years. In 2020, Vitol agreed to pay over $135 million to resolve allegations that it engaged in bribery in Brazil, Ecuador and Mexico.•

Monaco Memo: DOJ Announces Updates to Corporate Enforcement Policies

On September 15, 2022, Deputy Attorney General Lisa Monaco issued a memorandum titled "Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group." The so-called "Monaco Memo" announced a number of updates and revisions to the DOJ's policies and practices regarding corporate criminal enforcement, building on a number of updates announced by Deputy AG Monaco in October 2021. The updates touch on individual accountability, corporate accountability, and compliance monitorships, among other things. Some of the changes represent entirely new policies for the DOJ, such as expectations for how companies should address executive compensation in their corporate compliance programs. For other policy areas, such as crediting corporations for voluntarily disclosing misconduct, the Monaco Memo focuses on ensuring that all divisions within the DOJ have adopted consistent approaches. In a speech before the NYU Program on Corporate Compliance and Enforcement the same day the Monaco Memo was published, Deputy AG Monaco discussed some of the key updates. It should come as no surprise that the Deputy AG began her remarks by stressing that the DOJ's top priority remains individual accountability for corporate crime. She noted two changes that are focused on ensuring individuals are held accountable. First, corporations will be further incentivized to provide timely information regarding individual accountability. Any undue or intentional delay in producing documents or evidence regarding individual accountability will result in the reduction or denial of cooperation credit for the offending corporation. Second, the Deputy AG highlighted that prosecutors must either initiate individual charges or set out a plan for completing investigations into individuals prior to or at the time of any related corporate resolutions. The Deputy AG also discussed guidance in the Monaco Memo regarding how the DOJ will evaluate a corporation's history of misconduct, the continued focus on encouraging voluntary self-disclosure, clarifications regarding the use of independent monitors, and new guidance on how executive compensation should be evaluated as part of compliance efforts. In Chapter 2 of the Alert we provide more detail into these and other polices changes in the Monaco Memo.•

Oracle Corporation Pays $22.9 Million to Resolve FCPA Allegations

On September 27, 2022, Oracle Corporation, a multinational software provider headquartered in Texas, agreed to a cease-and-desist order with the U.S. Securities and Exchange Commission to resolve allegations that Oracle violated the anti-bribery, books and records, and internal controls provisions of the FCPA in connection with conduct in Turkey, India and the United Arab Emirates. Without admitting or denying the SEC's allegations, Oracle agreed to pay $7.9 million in disgorgement and pre-judgment interest and a civil penalty of $15 million. According to the SEC, Oracle's subsidiaries provided excessive discounts to distributors and resellers, and reimbursed distributors and resellers for fictitious marketing expenses, all to create slush funds that were then used to pay cash bribes to foreign officials and provide travel and hospitality to officials and their family members that violated Oracle Corporation's policies and had no legitimate business justification. Although Oracle had controls in place that required approvals for larger than normal discounts and reimbursements for marketing expenses, employees were not required to submit documentation supporting their claimed justifications for these expenses, and the controls failed to prevent the improper use of these marketing tools. Oracle previously settled similar allegations with the SEC in 2012, paying a civil penalty of $2 million to resolve allegations related to an Indian subsidiary's use of distributors to create and misuse slush funds.

DOJ Announces New Policy Requiring CCOs to Certify Compliance with Settlement Obligations

The DOJ announced in early 2022 that it will begin mandating in certain corporate criminal resolutions that the chief executive officer and chief compliance officer of a settling company provide a written certification along with any mandatory compliance reports affirming that their company's compliance program is reasonably designed to detect and prevent violations of relevant laws, and that the company has otherwise met the compliance obligations imposed under the terms of its settlement agreement. The first corporate resolution implementing this new requirement was the DOJ's May 2022 settlement with commodities trader Glencore. Under the terms of its DPA, Glencore agreed that thirty days

prior to the expiration of the plea agreement's three-year term, the company's chief executive officer and head of compliance will execute a certification stating that based on their "review and understanding" of Glencore's compliance program, (i) the compliance program meets the requirements set forth in the settlement agreement, and (ii) the compliance program is reasonably designed to detect and prevent violations of the FCPA and other applicable anti-corruption laws throughout the company's operations. The certification will also specifically state that it constitutes a material statement and representation by the CEO and CFO, and the company, to the executive branch for purposes of 18 U.S.C.§ 1001, which criminalizes false statements, and that it constitutes a record, document or tangible object for purposes of 18 U.S.C.§ 1519, which criminalizes obstruction of justice in Federal investigations. The DOJ's subsequent DPA with GOL Linhas Aéreas Inteligentes, S.A. included nearly identical certification requirements. Although the DOJ has touted these certifications as empowering compliance personnel, there is significant concern that the certifications will expose CCOs to personal criminal liability for corporate malfeasance. There is no guidance on what degree of review CCOs should undertake before signing the certifications, and the term "reasonably designed to detect and prevent" FCPA violations is also clearly open to interpretation.•

FinCEN Issues New Rule for Beneficial Ownership Reporting

On September 29, 2022, the U.S. Department of the Treasury's Financial Crimes Enforcement Network issued a final rule (the "Rule") establishing a beneficial ownership information ("BOI") reporting requirement for certain legal entities created or registered to do business in the United States. The Rule will require most such entities to report BOI (i.e., information about persons who ultimately own or control the entity) to FinCEN. The Rule is intended to help prevent and combat money laundering, terrorist financing, corruption, tax fraud, and other illicit activity, while minimizing the burden on entities doing business in the United States. The Rule is effective January 1, 2024. Under the Rule, two distinct types of reporting companies must file reports with FinCEN: domestic reporting companies and foreign reporting companies. A domestic reporting company includes a corporation, limited liability company or any other entity created by the filing of a document with a secretary of state or any similar office under the law of a state or Indian tribe. A foreign reporting company is a corporation, LLC, or other entity formed under the law of a foreign country that is registered to do business in any state or tribal jurisdiction by the filing of a document with a secretary of state or any similar office. The Rule includes exemptions for 23 types of entities, including SEC issuers, banks and credit unions, and tax-exempt entities.•

Tenaris S.A. Pays $78 Million to Resolve SEC Investigation

On June 2, 2022, the SEC announced that it had reached a resolution with Luxembourg-based steel pipe manufacturer and supplier Tenaris after finding that Tenaris, through its Brazilian subsidiary, Confab Industrial S.A., engaged in a scheme to obtain and retain business from Brazilian state-owned entity Petróleo Brasileiro S.A. in violation of the anti-bribery, books and records, and internal accounting controls provisions of the FCPA. The SEC entered a cease-and-desist order and, without admitting or denying the SEC's findings, Tenaris agreed to pay approximately $78 million in disgorgement and civil penalties as well as committed to undertake various prescribed remediations for a two-year period. According to the SEC's order, from 2008 to 2013, agents of Confab paid approximately $10.4 million in bribes to an unnamed Brazilian official to obtain and retain business contracts worth about $1 billion from Petrobras. The bribes were funneled through companies affiliated with Tenaris' controlling shareholder, San Faustin, S.A. Tenaris has previously been the subject of FCPA scrutiny. In 2011, Tenaris consented to the SEC's first Deferred Prosecution Agreement ("DPA") for alleged bribes paid to a state-owned entity in Uzbekistan. Tenaris was also subject to a Non-Prosecution Agreement ("NPA") with the DOJ for the same conduct.•

Former Goldman Sachs Banker Roger Ng Convicted of FCPA Offenses

On April 8, 2022, former Goldman Sachs banker Ng Chong Hwa, better known as Roger Ng, was convicted of conspiracy to violate the anti-bribery and internal controls provisions of the FCPA and conspiracy to engage in money laundering, in connection with his role in the 1MDB bribery and embezzlement scandal. Ng's conviction is the latest in a series of criminal and civil resolutions related to the 1MDB scandal, which involved the theft of more than $2.7 billion. In 2018, former Goldman Sachs Participating Managing Director, and Ng's former boss, Tim Leissner, pleaded guilty to conspiracy to violate the anti-bribery and internal controls provisions of the FCPA and conspiracy to commit money laundering. Leissner cooperated with the government in Ng's trial. Ng, Leissner, Goldman, and others arranged for more than a billion dollars in bribes to officials in Malaysia and Abu Dhabi in order to win lucrative work assisting 1MDB with various bond offerings. The money from the bond offerings was embezzled by the scheme's alleged mastermind, Low Take

Jho "Jho Low," as well as former Malaysian prime minister Najib Razak and others, and also used to fund the bribe payments and pay kickbacks to the conspirators. At the close of the government's case, Ng filed a Rule 29 motion to dismiss on the grounds that, among other things, the government's interpretation of internal controls is overly broad. In essence, Ng argued that the transactions at issue did not involve Goldman's assets and that application of the internal controls provisions in this context was inappropriate. The court disagreed, finding both that Goldman's assets were implicated since it purchased the bonds as part of the services it provided, and that the internal controls provisions are broader than Ng claimed, covering the entire system designed to ensure that the "business is adequately controlled."•

New Decree Regulating the Brazilian Clean Companies Act Enters into Force

On July 18, 2022, Decree No. 11,129/2022 entered into force to regulate the application of the Clean Companies Act. The updates reflect the experience gained by the Brazilian Federal Government in the application of the CCA since it came into force in 2014, and incorporated guidelines previously issued by the Comptroller General of the Union (CGU) in internal ordinances and manuals. Among other changes, the new Decree (i) improved and detailed the preliminary investigation procedure and the sanctioning administrative procedure (under which companies are sanctioned for breaches of the CCA); (ii) altered the percentage and language of aggravating and mitigating factors for calculating monetary fines for breaches of the CCA; and (iii) increased the incentives for companies to implement a compliance program (mitigating credit against monetary fines raised from 4% to 5% when companies have an adequate compliance program in place). The new decree also updated some of the parameters for the evaluation of compliance programs under the CCA to determine whether credit is warranted. These changes provide companies operating in Brazil with an updated view of what Brazilian authorities will consider to be an adequate compliance program. Among other notable revisions, the commitment of top management will now specifically be evaluated, including whether top management has devoted adequate resources to the compliance program, periodic communication initiatives in connection with the compliance program will be assessed (in addition to training), and mechanisms in place to conduct due diligence on politically exposed persons and sponsorships and donations will be expected. Finally, the decree provides for the CGU's direct and indirect monitoring of compliance programs in the context of leniency agreements. Although compliance monitors have been used in Brazil previously, this formal change could potentially open the door for more regular use of the mechanism.•

Prosecutors Dismiss Charges in Haitian Bribery Case

In June 2022, the DOJ moved to dismiss charges against Joseph Baptiste (founder/president of a Maryland-based nonprofit focused on Haiti) and Roger Boncy (Chairman and CEO of a U.S. company called Haiti Invest LLC) with prejudice, ending a more than eight-year ordeal that began with an undercover sting operation in 2015. In 2019, Baptiste and Boncy were found guilty of various charges stemming from a foreign bribery sting operation in which Baptiste and Boncy allegedly solicited bribes from undercover FBI agents posed as potential investors with a proposed project to develop a port in Haiti. In March 2020, a U.S. district court judge granted Baptiste and Boncy a new trial based on a claim of ineffective assistance of counsel. The retrial was scheduled for July 2022, but prosecutors dismissed the case after the FBI discovered exculpatory evidence on an FBI server. The genesis of the decision dates back to a December 2015 phone call between an undercover FBI agent posing as an investor and Boncy. At the original trial, Boncy insisted that he had made exculpatory statements during that call, but the FBI inadvertently failed to preserve the recording. Following repeated and aggressive discovery requests from Boncy and Baptiste in advance of the new trial, the FBI found text messages that described the contents of the phone call, including a statement by Boncy during the call that the funds would not be used to pay bribes.•

French CJIPs

France's efforts to strengthen and refine its corruption laws and enforcement efforts have been a focus of this Alert for several years. The past 12 months have seen these efforts pay concrete dividends. Between December 2021 and June 2022, the French authorities entered into three settlements with companies to resolve allegations of influence peddling and bribery of foreign public officials. On December 15, 2021, French luxury goods conglomerate LVMH Moët Hennessy Louis Vuitton ("LVMH") entered into a CJIP with the French public prosecutor (Procureur de la République) to resolve allegations of influence peddling in connection with its use of a consultant who formerly served as France's Central Director of Domestic Intelligence (Directeur Central du Renseignement Intérieur). Under the terms of the CJIP, LVMH agreed to pay a public interest fine of €10 million. On June 9, 2022, the Doris Group SA ("Doris Group"), a French company specialized in the engineering of offshore oil and gas rigs, entered into a CJIP with the French Financial Public Prosecutor

(the "PNF") to resolve allegations of corruption of foreign public officials. Under the terms of the CJIP, Doris Group agreed to pay a public interest fine of €3,463,491 and to enter into a three-year monitorship by the AFA.
On June 20, 2022, Idemia France, which is part of the Idemia Group specializing in the development, production and sales of products and services in the security technology sector, entered into a CJIP with the PNF to resolve allegations of corruption of a foreign public official in Bangladesh by one of its subsidiaries, formerly known as Oberthur Technologies SA ("Oberthur"). Under the terms of the CJIP, Idemia France agreed to pay a public interest fine of €7,957,822. The PNF did not impose a monitorship, likely because Oberthur had previously entered into a negotiated settlement with the World Bank in late 2017 concerning the same acts. Under the terms of this agreement, the World Bank excluded all ex-Oberthur entities from participating in calls for tenders initiated by the World Bank, and nominated an independent expert to assist Oberthur in implementing a compliance program during a period of 30 months. In May 2020, the World Bank's Integrity Compliance Officer determined that the quality of the company's compliance program warranted the lifting of the disqualification sanction against the ex-Oberthur entities of the Idemia Group.•

DOJ Hires Compliance and Data Analytics Counsel

On September 8, 2022, the DOJ announced that it had hired the former global compliance chief of Anheuser-Busch InBev S.A., Matt Galvin, to join the Fraud Section's Corporate Enforcement, Compliance, and Policy Unit (CECP) in the role of Counsel, Compliance and Data Analytics. Galvin takes over a role, albeit with a slightly revised title, that has been vacant since Hui Chen resigned from her position as the DOJ's Compliance Counsel in June 2017. Within the Fraud Section, the CECP is responsible for evaluating corporate compliance programs during investigations and managing post-settlement compliance obligations. In his new role, Galvin will advise prosecutors as they assess the compliance efforts of companies under investigation to determine whether they are entitled to mitigating credit for either having in place an effective compliance program at the time of the alleged misconduct, or for undertaking appropriate improvements in light of the identified misconduct, and whether or not any proposed settlement should include the imposition of an independent compliance

monitor or other compliance requirements. Galvin will also assist in evaluating post-settlement compliance reports, helping to determine whether companies' compliance improvements meet the Department's standards. While at AB InBev, Galvin was best known for leading the development of the multinational brewing company's "BrewRight" platform, which uses machine learning to analyze corporate data from throughout the company's operations to identify and address high-risk activities. Given his background and the revised title at DOJ, it is clear that Galvin's efforts at the CECP will focus on how companies are using big data to improve their compliance controls. The DOJ already made clear in its June 2020 Evaluation of Corporate Compliance Programs guidance that it expects companies to incorporate effective data analytics practices into their compliance efforts. Galvin's hiring is further evidence of the Department's belief in the ability of technology to help address compliance risks, and a wake-up call to any companies that have been slow to begin investing in these systems.•

Trends & Lessons

Trends

Business Development by Another Name: Gifts and Hospitality Continue to Feature in FCPA Resolutions • Corruption risks associated with the provision of gifts and hospitality have long been recognized, and corporate resolutions in 2021 and 2022 again bore this out. One-third of corporate resolutions in 2022, and half of the settlements in 2021, involved the provision of gifts and hospitality for corrupt purposes. For example, the SEC alleged that Oracle Corporation's employees created slush funds that were used to provide gifts and hospitality for foreign officials, including in instances where officials' spouses and children attended trips and where travel provided for officials plainly had no legitimate business purpose. Likewise, the SEC alleged that KT Corporation used slush funds to provide numerous gifts and entertainment to foreign officials as a way to exert improper influence over them.

Fool Me Twice • Two of the six corporate FCPA settlements in 2022 involved repeat offenders. Tenaris S.A., which paid $78 million this year to resolve FCPA allegations with the SEC related to conduct in Brazil, previously settled with the DOJ and SEC in 2011, paying just under $9 million to resolve allegations related to misconduct in Uzbekistan. Likewise, this past year Oracle Corporation paid $23 million to resolve the SEC's allegations related to misconduct in India, Turkey and the United Arab Emirates. Oracle previously settled allegations related to similar misconduct in India, paying a total of $2 million in 2012. Tenaris and Oracle are far from the first FCPA corporate recidivists. Prior repeat offenders include Credit Suisse, which resolved allegations in 2018 and again in 2021, Novartis, which resolved allegations in 2016 and again in 2020, and Eni, which resolved allegations in 2010 and 2020, among others. The DOJ's policy announcements in recent years emphasize that recidivism will be a factor in charging decisions, further demonstrating the need for fulsome and lasting remediation.

Nowhere to Run • The DOJ and SEC continue to rely upon and provide assistance to a growing number of non-U.S. enforcement agencies in complex bribery investigations. In 2021 and 2022, the DOJ credited authorities from the following countries, among others, for assistance in its FCPA prosecutions: Australia, Austria, Belgium, Bermuda, Brazil, British Virgin Islands, Canada, Cayman Islands, Cyprus, Ecuador, France, Germany, Hong Kong, India, Indonesia, Ireland, Isle of Man, Italy, Latvia, Luxembourg, Malaysia, Malta, Mexico, the Netherlands, Norway, Panama, Portugal, Singapore, South Africa, South Korea, Spain, Switzerland, Taiwan, Thailand, and the United Kingdom.

Nowhere to Hide • In addition to cooperation with foreign agencies, the DOJ and SEC credited a wide variety of domestic agencies and divisions for their assistance in various of their investigations in the past few years: (i) FBI, (ii) IRS Criminal Investigation, (iii) ICE Homeland Security Investigations, (iv) U.S. Postal Inspection

Services, (v) the Federal Reserve Bank of New York, (vi) Department of Energy Office of Inspector General, (vii) FDIC Office of Inspector General, and (viii) the CFTC. It is clear that U.S. prosecutors have vast and growing resources available to investigate foreign bribery allegations.

The Return of the Monitorship? • None of the four corporate FCPA resolutions in 2021 included the imposition of an independent compliance monitor. This continued a three-year trend in which corporate compliance monitors all but disappeared from FCPA-related resolutions. We noted in last year's Alert, however, that in an October 2021 speech, Deputy AG Monaco specifically rescinded any prior policy or unofficial DOJ position suggesting that monitorships were disfavored. In the first 10 months of 2022, two out of the three DOJ corporate FCPA settlements included the imposition of independent compliance monitors. Moreover, the Monaco Memo likewise indicated that the DOJ will impose compliance monitors any time circumstances warrant. The Monaco Memo sets out 10 factors that prosecutors should consider when determining if a monitor is appropriate, including whether the corporation has already implemented an effective compliance program, whether the conduct involved the exploitation of an inadequate compliance program, and whether the underlying conduct was long-lasting or pervasive. This could potentially represent a significant change, as the analysis previously focused primarily (and perhaps solely) on whether the company had implemented an adequate compliance program.

Where Is the Next Enforcement Wave? • Both 2021 and 2022 were historically slow in terms of corporate FCPA resolutions. There were four corporate resolutions in 2021 and six in 2022, compared to 12 in 2019 and 15 in 2018. Various initiatives and statements from both DOJ and SEC, however, suggest that this lull is likely to be short-lived. Last year, the DOJ indicated that the FBI had in place a new team dedicated to the DOJ's Criminal Division, Fraud Section, and that other task forces and resources had been put in place to address corporate crime. The Monaco Memo issued this past year likewise reiterates that corporate criminal enforcement remains a core priority for the DOJ and that the DOJ is intent on holding corporate wrongdoers accountable. This prioritization of corporate criminal enforcement and the enhanced resources being devoted to such enforcement, combined with the historically cyclical nature of FCPA corporate resolutions, may signal an impending uptick in corporate FCPA resolutions.

Cash Is (Still) King • While wire transfers to offshore accounts and (increasingly) cryptocurrency receive much of the attention as potential means for effectuating bribe payments, recent enforcement actions demonstrate that the days of bribes paid with suitcases filled with cash are far from over. In its resolution with KT Corporation, for example, the SEC described how KT Corporation executives approved inflated bonuses to personnel, who then returned the extra amounts in cash that was stored in a safe in the company's offices. This cash was then used to provide improper gifts to foreign officials. When this scheme was uncovered, KT Corporation personnel created a new scheme using gift cards that were likewise converted to cash and that was then used for illegal campaign donations. Similarly, in its settlement with Glencore, the DOJ described how the company maintained "cash desks" in London and Switzerland for a number of years that

were used to make corrupt payments. A Glencore agent in West Africa also made a payment of over $1 million in cash to a Nigerian official to help secure a crude oil contract.

No Good Deed: Donations and Sponsorships Continue to be a Source of Corruption Risk • Although discussed less than payments to third parties or gifts and hospitality, payments ostensibly made for donations or sponsorships remain a key corruption risk area. In its settlement with KT Corporation, for example, the SEC alleged that the company made donations to charitable organizations, including a foundation for the promotion of Korean culture, and two foundations for the promotion of sports, at the behest of high-level government officials. The SEC noted that two of these foundations were only established after KT Corporation agreed to make the donations, and that the company failed to conduct due diligence of any of these donations to ensure that they were being used for legitimate purposes.

When It Comes to Cooperating on Individual Misconduct: Timing is Key • In its resolutions with Stericycle Inc. and GOL Linhas Aéreas Inteligentes S.A., the DOJ made clear that both companies received full cooperation credit because, among other things, they provided all known relevant information about the individuals involved in misconduct. Similarly, in its letter announcing its decision not to prosecute Jardine Lloyd Thompson Group Holdings Ltd. ("JLT Group"), the DOJ pointed to, among other things, JLT Group's proactive cooperation in the DOJ's investigation of individuals involved and its agreement to continue to cooperate in any further investigations and prosecutions arising from the matter. The Monaco Memo makes clear that going forward, corporations will only receive full cooperation credit if they produce all relevant, non-privileged facts and evidence about individual misconduct in a timely manner. If prosecutors believe that there has been any undue or intentional delay in the production of relevant information or documents, a company will receive only reduced cooperation credit, or possibly no credit at all.

Lessons

Maintain an Empowered and Adequately Resourced Compliance Function • The DOJ's Evaluation of Corporate Compliance Programs guidance made clear that a compliance function must have an appropriate degree of authority and independence, and adequate resources, in order to be effective. The need for such empowered compliance functions is further highlighted by the DOJ's recently announced policy of requiring in certain criminal resolutions that chief compliance officers provide written certifications that companies have met any compliance obligations imposed through the resolutions. The DOJ's stated intent in adopting this new requirement is to ensure compliance functions receive the resources and stature necessary to be effective, and that heads of compliance are granted access to boards of directors. The importance of maintaining empowered and well-resourced compliance functions is also continually borne out in corporate settlements. In Goldman Sachs' resolution with the DOJ and SEC in 2021, for example, DOJ and SEC highlighted instances where compliance personnel expressed frustration with their inability to prevent certain bankers from continuing to work with an individual identified as presenting compliance risks.

Incorporate Data Analytics into Compliance • The DOJ's Evaluation of Corporate Compliance Programs guidance, published in June 2020, highlighted the growing importance of data analytics in compliance. The guidance made clear, for example, that compliance and control functions should have access to relevant sources of data to allow for timely and effective monitoring of activities, and that compliance should have "continuous access" to operational data for purposes of assessing compliance risks. It also indicated that compliance functions should be capable of collecting, tracking, analyzing, and using information obtained from mechanisms put in place to allow employees to report known or suspected misconduct, and should otherwise be able to collect and analyze compliance data to test controls. Further demonstrating the DOJ's focus on the use of data analytics in compliance, in September 2022 the DOJ announced that it had hired the former global compliance chief of Anheuser-Busch into the Fraud Section's Corporate Enforcement, Compliance, and Policy Unit, as compliance and data analytics counsel. The value of data analytics in compliance, and, by contrast, the harm in not having an effective means of analyzing compliance data, can also be seen from recent enforcement actions. In its 2022 settlement with Oracle, for example, the SEC noted that Oracle failed to obtain documentation supporting the justifications offered by employees for providing larger than normal discounts to distributors, and also pointed out that information contradicting the offered justifications was freely available in the public sphere. Having access to real-time information on discounts being offered throughout a company's global operations can, together with an empowered compliance function, ensure that such practices are more closely scrutinized and any abuse quickly uncovered.

Conduct Thorough M&A Due Diligence and Implement Risk-Based Compliance Programs • Pre-acquisition, or at least post-acquisition, anti-corruption due diligence is now a regular part of most corporate acquisitions. The pressure to ensure that such due diligence is effective in identifying potential misconduct is as high as ever. The DOJ's FCPA Corporate Enforcement Policy makes clear that acquiring entities may be able to avoid prosecution for FCPA offenses committed by the acquired entity if they uncover the misconduct through timely due diligence or post-acquisition audits, and voluntarily report the misconduct to the DOJ. It is likewise equally critical that, following an acquisition, the acquiring company timely implement a risk-based compliance program at the acquired entity (another requirement for obtaining a declination), and that compliance improvements following an acquisition are adequately tailored to the entity's new risk profile and effectively implemented. The DOJ and SEC indicate in the Second Edition of the FCPA Resource Guide that acquiring companies should, among other things, train new employees, reevaluate third parties under their own standards, and conduct compliance audits as necessary. WPP's 2021 settlement with the SEC is instructive of the dangers of not following through with risk-based compliance improvements following an acquisition, particularly for companies whose growth strategies involve frequent acquisitions. WPP acquired numerous local advertising agencies in high-risk markets but failed to incorporate these entities into a compliance system that could account for the increased risks posed by its rapidly growing operations in high-risk markets. As a result, a number of these entities engaged in misconduct that the company's controls failed to identify and prevent.

Ensure Strong "Internal Accounting Controls" are in Place • Year after year, the DOJ and SEC rely on the FCPA's accounting and internal controls provisions against issuers, even (and perhaps especially) when the actual bribe is difficult to prove. Both the DOJ and SEC have taken a very broad view of the term "internal accounting controls" as used in the context of the FCPA's internal controls provisions. The internal accounting controls provisions require issuers to devise and maintain a system of internal accounting controls sufficient to provide certain assurances regarding accounting for assets, enabling the preparation of financial statements, and ensuring appropriate management authorization of transactions and assets. Judge Margo Brodie of the U.S. District Court for the Eastern District of New York ("EDNY") added support to this broad reading in her opinion denying Roger Ng's Rule 29 motion for a judgment of acquittal. Judge Brodie ruled that, while "internal accounting controls" could be interpreted literally to apply only to controls covering accounting entries, this reading would not be consistent with the intent of the statute or the requirement regarding controls to ensure management authorization of transactions. It is clear that an issuer should take steps to ensure that it has strong internal controls, regardless of whether those controls could properly be considered "accounting controls."

Beware of Privilege Waiver in Cooperation with Authorities • For the past several years, the international legal community has been grappling with how and whether the attorney-client privilege applies to investigations and how that privilege might be affected when a company begins cooperating with government investigators. Recent discovery disputes arising in the prosecution of former Cognizant Technology Solutions ("Cognizant") President Gordon Coburn and Chief Legal Officer Steven Schwartz have resulted in decisions that the privilege waiver resulting from such cooperation could be broader than intended by the company. As part of Cognizant's cooperation with the DOJ into potential FCPA violations, it provided DOJ investigators with "detailed accounts" of employee interviews conducted by Cognizant's outside counsel. In part based on these efforts, the DOJ ultimately declined to prosecute Cognizant. However, during the prosecution of Coburn and Schwartz, the defendants sought all records related to those interviews, including notes, memoranda, summaries, or records of discussion of the interviews. Judge Kevin McNulty of the U.S. District Court for the District of New Jersey ruled that by sharing detailed accounts of the interviews, Cognizant had waived attorney-client privilege and work product protection as to these records. For these purposes, it did not matter than Cognizant shared the information with the DOJ only orally rather than in writing. In addition, Judge McNulty ruled that the waiver also applied to any documents and communications that formed the basis of any presentations made by Cognizant or its counsel to the DOJ as part of its cooperation.

Conduct Appropriate Due Diligence and Monitoring of Business Partners • Risk-based due diligence of third parties is a foundational component of an effective corporate compliance program. The DOJ's Evaluation of Corporate Compliance Programs specifically recognizes the corruption risks that accompany the use of third parties, and directs prosecutors to evaluate whether companies have in place risk-based controls for engaging and monitoring third parties. The importance of effective risk-based due diligence has also

been noted by the international community. OECD guidance on internal controls, ethics, and compliance programs counsels towards the adoption of a risk-based approach to due diligence. The World Bank Integrity Compliance Guidelines and African Development Bank Integrity Compliance Guidelines likewise require that companies have in place a process for risk-based due diligence on all third parties. The importance of due diligence on third parties also continues to be demonstrated in FCPA enforcement actions. Every corporate FCPA resolution in 2021 and 2022 (to date) involved third-party agents or other intermediaries. In almost every one of those cases, the DOJ or SEC criticized the company for failing to conduct appropriate due diligence on their third-party agents or intermediaries, or for ignoring red flags that suggested that there was a high probability that the payments to such entities would be passed on to government officials. In its settlement with Deutsche Bank, for example, the DOJ criticized the bank for failing to conduct due diligence on high-risk third parties and ignoring indicia of corruption. Most critically, a company's due diligence and third-party monitoring procedures should include the following:

- Identify Beneficial Owners. Shell companies and other similar entities can easily be used to conceal the identities and locations of their beneficial owners, and thus the true source or destination of funds. Due diligence procedures must seek to learn the identities of all beneficial owners and actual control persons of shell companies, holding companies, and trusts that maintain an ownership interest in an agent or third party.

- Examine Carefully the Qualifications of Agents, Distributors, and Other Third Parties. Companies must understand the background and qualifications of agents and intermediaries. A third party's lack of qualifications is a critical red flag suggesting that the third-party is being retained for improper purposes.

- Ensure that Compensation Is Commensurate with Services. Companies must also ensure that proposed compensation is commensurate with the envisioned services. Even absent other risk factors, excessive compensation can be a significant red flag, particularly in high-risk jurisdictions.

- Examine the Tasks to Be Performed by Third Parties and Confirm Such Tasks Are Necessary and Are Performed. Companies must examine the specific tasks that a third-party will perform, and the justification for retaining the third-party to perform those tasks. During the course of the relationship, companies must also confirm that such tasks are actually performed by obtaining adequate proof of services.

Carefully Monitor Donations and Sponsorships • It is critical that companies carefully evaluate proposed charitable donations and sponsorships to ensure that they are not being undertaken for improper purposes and that the recipients are legitimate charitable organizations or other appropriate beneficiaries. The SEC's

recent settlement with KT Corporation highlights how a failure to perform a thorough review of both the justification for the charitable donation and the proposed beneficiary can result in liability. KT Corporation failed to conduct any type of review to determine the genesis for donations to a number of charitable foundations, which in fact were made at the behest of high-ranking foreign officials in the executive branch in South Korea. As the SEC pointed out, even a cursory review of these foundations would have identified significant red flags.

Effectively Respond to Red Flags • It is critical that companies establish a compliance system that can identify and elevate potential red flags. However, enforcement actions continue to demonstrate that such efforts are virtually meaningless if a company does not respond appropriately to these warning signs. In its 2020 settlement with Goldman Sachs, the DOJ noted that Goldman's compliance and audit functions were aware of significant compliance concerns regarding Goldman's relationship with Malaysian businessman Jho Low. Despite these concerns, when compliance personnel learned that Low was potentially involved in high-value bond offerings for 1MDB, Goldman failed to sufficiently investigate Low's potential role, instead relying on unverified denials from Goldman bankers. Likewise, in its 2021 settlement with Deutsche Bank, the DOJ noted critically that a high-level risk assessment committee tasked with approving business development agents was made aware of a number of red flags related to a proposed agent in the Middle East, including ties to public officials, a lack of qualifications, and the indirect involvement of a relative of a public official in the engagement. The committee, which included an employee from the legal and compliance function, nevertheless approved the relationship without taking further action to address these identified risks. In its 2022 settlement with Oracle Corporation, the SEC likewise noted that despite discounts to distributors and resellers already being subject to controls, these controls did not require employees to submit documentation supporting their claimed justification for the discounts. The SEC concluded that the controls also failed to prevent fictitious marketing expense reimbursements being used to create slush funds for the payment of bribes to foreign officials. Each of these companies might have avoided significant financial penalties and reputational damage had it responded appropriately to these early warning signs.

Undertake Swift and Thorough Remediation after Uncovering Misconduct • It is essential that companies undertake swift and thorough remediation after uncovering evidence of misconduct. In its 2022 cease-and-desist order against KT Corporation, the SEC noted that despite learning in 2013 that senior executives had engaged in rampant corruption, KT Corporation failed to improve its compliance and financial controls. This failure allowed KT Corporation's personnel to devise new schemes to commit bribery that led to KT Corporation's $6.3 million FCPA settlement in 2022.

Use Executive Compensation to Promote Ethical Conduct.• Compliance guidance has long made clear that companies should have in place effective mechanisms to punish employees who engage in misconduct and reward those employees who actively promote a culture of integrity and compliance. The Monaco Memo now goes one step further, instructing prosecutors to specifically evaluate whether companies appropriately

structure employee compensation so that personnel will face *financial* consequences for engaging in unethical conduct and can also be affirmatively rewarded for engaging in compliant behavior. This new guidance makes clear that companies should have in place mechanisms to claw back compensation or otherwise financially penalize executives and other personnel who either engage in or facilitate improper conduct. Companies should also provide financial incentives for ethical personnel, including for example by including compliance metrics and benchmarks into compensation calculations and performance reviews.

Balance Data Protection Regulations with Compliance Needs • Data protection regulations in the European Union and elsewhere include a number of protections and requirements that impact internal investigations and certain compliance activities. Companies must be careful to adhere to these requirements and should have in place appropriate policies and mechanisms to ensure that they are in compliance with all data protection requirements. The Monaco Memo, and prior guidance from the DOJ, make clear, however, that companies seeking credit for cooperating with DOJ investigations will need to work diligently to find any available legal means of disclosing and producing relevant data to the Department. Likewise, the Monaco Memo makes clear that companies that seek to use data privacy and similar laws to shield themselves from U.S. law enforcement are unlikely to receive cooperation credit.

Chapter

2 FCPA

FCPA Elements and Penalties

The FCPA has two fundamental components: (1) the Anti-Bribery Provisions in Section 30A of the Securities Exchange Act of 1934 ("Exchange Act")[1] and in Title 15, United States Code,[2] and (2) the Books and Records and Internal Accounting Control Provisions in Sections 13(b)(2)(A)[3] and 13(b)(2)(B)[4] of the Exchange Act, respectively (collectively, the "Accounting Provisions"). The DOJ has exclusive jurisdiction to prosecute criminal violations of the FCPA, while the DOJ and the SEC share jurisdiction over civil enforcement actions.

Anti-Bribery Provisions

The FCPA's Anti-Bribery Provisions prohibit: (i) an act in furtherance of (ii) a payment, offer or promise of, (iii) anything of value, (iv) to a foreign official,[5] or any other person while knowing that such person will provide all or part of the thing of value to a foreign official, (v) with corrupt intent, (vi) for the purpose of either (a) influencing an official act or decision, (b) inducing a person to do or omit an act in violation of his official duty, (c) inducing a foreign official to use his influence with a foreign government to affect or influence any government decision or action, or (d) securing an improper advantage, (vii) to assist in obtaining or retaining business.[6]

The term "foreign official" is broadly defined to mean any officer or employee of a foreign government, agency or instrumentality thereof, or of a public international organization, or any person acting in an official capacity on behalf of such government, department, agency, or instrumentality, or public international organization.[7] The term foreign official has been construed by federal prosecutors to include employees, even relatively low-level employees, of state-owned institutions.

Under the FCPA, "a person's state of mind is 'knowing' with respect to conduct, a circumstance, or result" if he or she has actual knowledge of the conduct, circumstance, or result or "a firm belief that such circumstance exists or that such result is substantially certain to occur."[8] In addition, knowledge of a circumstance can be found when there is a "high probability" of the existence of such circumstance.[9] According to the legislative history,

> [T]he Conferees agreed that "simple negligence" or "mere foolishness" should not be the basis for liability. However, the Conferees also agreed that the so called "head-in-the-sand"

1 Codified at 15 U.S.C.§§ 78dd-1(a).
2 15 U.S.C.§§ 78dd-2(a), 78dd-3(a).
3 Codified at 15 U.S.C.§ 78m(b)(2)(A).
4 Codified at 15 U.S.C.§ 78m(b)(2)(B).
5 The FCPA further prohibits payments to foreign political parties and officials thereof.
6 *See* 15 U.S.C.§§ 78dd-1(a).
7 15 U.S.C.§§ 78dd-1(f)(1).
8 *Id.*
9 *See* 15 U.S.C.§ 78dd-1(f)(2)(B).

> problem—variously described in the pertinent authorities as "conscious disregard," "willful blindness" or "deliberate ignorance"—should be covered so that management officials could not take refuge from the Act's prohibitions by their unwarranted obliviousness to any action (or inaction), language or other "signaling [*sic*] device" that should reasonably alert them of the "high probability" of an FCPA violation.[10]

Since the 1977 enactment of the FCPA, the Anti-Bribery Provisions have applied to U.S. and foreign issuers of securities that registered their securities with or reported to the SEC and to domestic concerns, such as U.S. citizens and companies organized under U.S. law or with a principal place of business in the United States, if the U.S. mails or a means or instrumentalities of U.S. interstate commerce (such as an interstate wire transfer) were used in furtherance of the anti-bribery violation.[11] In 1998, amendments to the Anti-Bribery Provisions generally extended U.S. jurisdiction to cover acts outside of U.S. territory in furtherance of an anti-bribery violation by U.S. issuers and domestic concerns, and acts inside U.S. territory in furtherance of an anti-bribery violation by other persons, such as foreign non-issuers and foreign nationals, who were not previously subject to the FCPA.[12] Such extended jurisdiction is not dependent upon the use of U.S. mails or means or instrumentalities of U.S. interstate commerce.[13]

The FCPA also applies to officers, directors, employees, or agents of any organization subject to the FCPA and to stockholders acting on behalf of any such organization.[14]

The Exception and Defenses to Alleged Anti-Bribery Violations

Under the FCPA, facilitating payments "to expedite or to secure the performance of a routine governmental action" are excepted from the Anti-Bribery Provisions.[15] This is a narrow exception, only applying to non-discretionary acts such as obtaining official documents or securing utility service, and not applying to any decision to award or continue business with a particular party.[16] Also, its practical effect is limited because many other jurisdictions and international conventions do not permit facilitation payments.

There are two affirmative defenses to an FCPA charge. Under the "written law" defense, it is an affirmative defense to an FCPA prosecution if the payment, gift, offer, or promise of anything of value that is at issue was lawful under the written laws and regulations of the recipient's country.[17] It is also an affirmative defense if the payment, gift, offer, or promise of anything of value was a reasonable, *bona fide* expenditure directly

10 H.R. Rep.No. 100-576, at 920 (1987) (Conf. Rep.), *reprinted* in 1988 U.S.C.C.A.N. 1547, 1953.
11 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).
12 15 U.S.C. §§ 78dd-1(g), 78dd-2(i), 78dd-3(a).
13 *Id.*
14 15 U.S.C.§§ 78dd-1(a), (g), 78dd-2(a), (i), 78dd-3(a).
15 15 U.S.C.§§ 78dd-1(b), 78dd-2(b), 78dd-3(b).
16 15 U.S.C.§§ 78dd-1(f)(3)(B), 78dd-2(h)(4)(B), 78dd-3(f)(4)(B).
17 15 U.S.C.§§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1).

related either to the promotion, demonstration, or explanation of products or services, or to the execution or performance of a contract with a foreign government or agency.[18] Both defenses, however, are narrow in practice and, because they are affirmative defenses, it would be the defendant's burden to prove their applicability in the face of an FCPA prosecution.

Accounting Provisions

The FCPA's Accounting Provisions apply to issuers who have securities registered with the SEC or who file reports with the SEC.[19] The Books and Records Provisions compel such issuers to make and keep books, records, and accounts which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.[20] The Internal Accounting Controls Provisions require such issuers to devise and maintain a system of internal accounting controls regarding accounting for assets, enabling the preparation of financial statements, and providing reasonable assurances that management authorizes transactions and controls access to assets.[21] As used in the Accounting Provisions, "reasonable detail" and "reasonable assurances" mean a level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.[22]

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18 15 U.S.C.§§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2).

19 15 U.S.C.§ 78m(b)(2). The Accounting Provisions were passed as part of the original 1977 FCPA legislation out of concern over companies improperly recording payments on their books and records and failing to fully account for illicit "slush" funds, from which improper payments could be made. These provisions, however, have broader application than simply within the context of the FCPA. For purposes of this Alert, when violations of these provisions are alleged in the context of improper payments to foreign officials or similar conduct, they are referred to as violations of the FCPA's Accounting Provisions. When violations occur in situations not involving improper payments (*see, e.g.*, the Willbros Group settlement discussed *infra*), they are described as the Exchange Act's books and records and/or internal controls provisions.

20 15 U.S.C.§ 78m(b)(2)(A).

21 15 U.S.C.§ 78m(b)(2)(B).

22 15 U.S.C.§ 78m(b)(7).

Penalties

The FCPA imposes both criminal and civil penalties. Willful violations of the Anti-Bribery Provisions carry maximum criminal fines of $2 million for organizations and $250,000 for individuals, per violation.[23] Under U.S. criminal law, alternative fines of up to twice the pecuniary gain from the offense apply instead, if the alternative fine exceeds the maximum fine under the FCPA.[24] Individuals also face up to five years' imprisonment for willful violations of the Anti-Bribery violations.[25] Anti-bribery violations also carry civil penalties of up to $16,000 for organizations or individuals, per violation.[26] These fines may not be paid by a person's employer or principal.[27]

Willful violations of the Accounting Provisions carry maximum criminal fines of $25 million for organizations and $5 million for individuals, or, if greater, the alternative fine of twice the pecuniary gain.[28] Individuals face up to 20 years' imprisonment for willful violations of the Accounting Provisions.[29] Civil penalties for violations of the Accounting Provisions include disgorgement of any ill-gotten gains and penalties up to $775,000 for organizations and $160,000 for individuals, per violation, in actions brought by the SEC.[30]

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23 15 U.S.C.§§ 78ff(c), 78dd-2(g), 78dd-3(e); 18 U.S.C.§ 3571(b)(3), (e) (fine provision that supersedes FCPA-specific fine provisions).

24 18 U.S.C.§ 3571(d), (e) (fine provision that supersedes FCPA-specific fine provisions).

25 15 U.S.C.§§ 78ff(c)(2)(A), 78dd-2(g)(2)(A), 78dd-3(e)(2)(A).

26 15 U.S.C.§§ 78ff(c), 78dd-2(g), 78dd-3(e); *see* DOJ & SEC, A RESOURCE GUIDE TO THE FOREIGN CORRUPT PRACTICES ACT (2012) (indicating that the maximum civil penalty for an anti-bribery provision violation is $16,000, but citing the SEC's announcement of the adjustment for issuers subject to SEC enforcement without citing a parallel DOJ announcement for domestic concerns and other persons).

27 15 U.S.C. §§ 78ff(c)(3), 78dd-2(g)(3), 78dd-3(e)(3).

28 15 U.S.C.§ 78ff(a); 18 U.S.C.§ 3571(d), (e).

29 15 U.S.C.§ 78ff(a).

30 15 U.S.C.§ 78u(d)(3), (5); *see* 17 C.F.R. § 201. 1005, Table V (2013) (adjusting the amounts for inflation).

Policy Updates

On September 15, 2022, Deputy Attorney General Lisa Monaco ("Deputy AG Monaco") announced new guidance and policies regulating the approach of the DOJ to corporate criminal enforcement. The policies evolved from the Corporate Crime Advisory Group ("CCAG"), which consisted of DOJ personnel tasked with reviewing and proposing changes to strengthen the DOJ's prosecution of corporate crime. The policy revisions announced in Deputy AG Monaco's Memorandum (the "Monaco Memo") provide guidance in five key areas.

Individual Accountability

The Monaco Memo states that the DOJ's "first priority" in dealing with corporate criminal matters "is to hold accountable the individuals who commit and profit from corporate crime." In furtherance of this goal, the new policies provide incentives for companies to disclose and report individual wrongdoers.

First, the Monaco Memo states that any company seeking cooperation credit will be required to timely provide the government with all relevant non-privileged information and evidence about individuals involved in or responsible for the misconduct at issue—not just those whose involvement was "substantial." The new policy instructs prosecutors to assess companies' compliance with this directive, and should prosecutors determine that a company engages in "undue or intentional delay in the production of information or documents—particularly with respect to documents that impact the government's ability to assess individual culpability," the DOJ will reduce or eliminate cooperation credit.

Second, prosecutors are directed to complete investigations and seek criminal charges against individuals, where warranted, prior to or simultaneously with any resolution with the corporation. The Monaco Memo indicates that if prosecutors seek to resolve a corporate case prior to completing an investigation of an individual, any corporate resolution authorization memorandum must also include a memorandum and investigation plan for concluding investigations into all potentially culpable individuals.

The Monaco Memo also includes guidance for commencing a prosecution of individuals responsible for cross-border corporate crime. The Monaco Memo notes that at times the DOJ conducts criminal investigations in parallel with another jurisdiction for the same or related conduct, and this may be grounds to forgo prosecution in the United States. Under the new policy, the DOJ will require prosecutors to make a determination as to whether there is a significant likelihood that the individual will be subject to effective prosecution in the other jurisdiction, by considering: "(1) the strength of the other jurisdiction's interest in the prosecution; (2) the other jurisdiction's ability and willingness to prosecute effectively; and (3) the probable sentence and/or other consequences if the individual is convicted in the other jurisdiction."

History of Misconduct

The Monaco Memo also includes refined guidance on how the DOJ will evaluate a company's past misconduct. First, the Monaco Memo instructs that not all prior misconduct will be considered equally, and that prosecutors are to focus in particular on recent criminal resolutions in the United States, and to prior misconduct involving the same personnel or management. More historic misconduct (*i.e.*, criminal resolutions entered into more than 10 years before the conduct under investigation and civil or regulatory resolutions finalized more than five years before the conduct under investigation) will be accorded less weight.

Second, the Monaco Memo instructs prosecutors to consider the specific facts and circumstances underlying a corporation's prior resolution, including any factual admissions by the corporation. Prosecutors are to consider the seriousness and pervasiveness of the past misconduct, whether that conduct was similar in nature to the conduct under investigation, and whether the corporation was under probation, supervision, monitorship, or other obligations imposed by a prior resolution.

Third, the Monaco Memo instructs prosecutors to be mindful when comparing corporate track records to ensure that the comparison is appropriate. For example, the history of regulatory compliance for companies operating in a highly regulated industry should be compared to that of similarly situated companies in the industry, not to ones with less regulatory oversight.

Finally, the Monaco Memo instructs prosecutors to give less weight to prior resolutions that involved entities in the corporate group that do not have common management or share compliance resources with the entity under investigation, or that involved conduct that is not a criminal violation under U.S. federal law. Prosecutors are also instructed to give less weight to prior misconduct committed by an acquired entity as long as the acquired entity has been integrated into an effective, well-designed compliance program, the acquiring corporation addressed the root cause of the prior misconduct, and full and timely remediation of the past misconduct occurred before the conduct under investigation.

Voluntary Self-Disclosure

The Monaco Memo expands and clarifies DOJ policies on voluntary self-disclosure. To encourage voluntary self-disclosure, the Monaco Memo confirmed that the DOJ will not seek a guilty plea by a company that has: (1) voluntarily self-disclosed misconduct, (2) fully and timely cooperated with the investigation, and (3) appropriately remediated the criminal conduct. Furthermore, the DOJ will not impose an independent compliance monitor for a company where that company voluntarily self-disclosed the relevant conduct and demonstrated that it had implemented and tested an effective compliance program at the time of resolution.

The Monaco Memo directed each DOJ unit or division that prosecutes corporate crime to review its policies on corporate voluntary self-disclosure, and where such policy is lacking, to draft a formal written policy to incentivize voluntary self-disclosure. Deputy AG Monaco noted that voluntary self-disclosure programs such as the Corporate Enforcement Policy and policies adopted by the Antitrust Division and the National Security Division have already been successful. The Monaco Memo provides that all drafted policies must set out a clear expectation of what constitutes voluntary self-disclosure—for example, expectations regarding the timing of the disclosure and the need for it to be accompanied by the timely preservation, collection, and production of relevant documents—and must identify the benefits to a company if it meets the expectations under that component's policy.

Compliance Program Evaluation

The Monaco Memo also announced changes in the way the DOJ will evaluate a company's compliance program. In addition to reinforcing the existing guidance for evaluating compliance programs, the Monaco Memo directs prosecutors to consider (i) whether a company's compensation structure promotes compliance, and (ii) the company's policies and procedures on the use of personal devices and third-party messaging platforms.

Compensation Structure

The Monaco Memo instructs prosecutors to consider whether the company's compensation structure penalizes employees involved in criminal conduct and incentivizes compliance. Prosecutors should consider whether the company's compensation system incorporates financial punishments, such as clawback provisions, that enable the company to impose penalties against current or former employees, executives, or directors whose actions or omissions contributed to the misconduct. Prosecutors should also evaluate whether the company compensation system incentivizes compliance, such as including compliance metrics and benchmarks in the compensation calculation, and whether the company's performance reviews of employees are aimed at "compliance-promoting behavior."

The Monaco Memo also instructs prosecutors to consider whether the company uses or has used nondisclosure agreements or other compensation or financial agreements to "inhibit the public disclosure of criminal misconduct by the corporation or its employees."

Deputy AG Monaco noted that by the end of 2022, the DOJ's Criminal Division will develop further guidance on how to reward corporations that employ clawback provisions or similar arrangements, noting that this will help shift the burden of corporate financial penalties away from shareholders, who frequently play no role in the misconduct, to those who are more directly responsible.

Use of Personal Devices and Third-Party Platforms

In addition to the expectation that corporations will have compensation systems that deter criminal conduct and incentivize compliance, prosecutors evaluating compliance programs are directed to assess whether companies have effective policies and procedures governing the use of personal devices, such as smartphones, tablets, and laptops, and third-party messaging platforms, including encrypted and ephemeral messaging applications, to ensure that business-related electronic documents, communications, and data are preserved and can be collected by the company and provided to the DOJ in an investigation.

Independent Compliance Monitors

Acknowledging the need for "more transparency to reduce suspicion and confusion about monitors," Deputy AG Monaco announced several factors that prosecutors should consider in identifying, selecting, and overseeing monitors. Prosecutors are to consider, on a case-by-case basis, a list of 10 non-exhaustive factors when evaluating whether a monitor is appropriate and will benefit the company, namely whether: (i) the corporation voluntarily self-disclosed the underlying conduct in a manner that satisfies DOJ's self-disclosure policy, (ii) the corporation has implemented an effective compliance program and sufficient internal controls to detect and prevent similar misconduct in the future, (iii) the corporation had adequately tested its compliance program and internal controls to demonstrate that it will detect and prevent similar misconduct in the future, (iv) the underlying criminal conduct was long-lasting or pervasive across the business organization or was approved, facilitated, or ignored by senior management, executives, or directors (including by means of a corporate culture that tolerated risky behavior or misconduct, or did not encourage open discussion and reporting of possible risks and concerns), (v) the underlying criminal conduct involved the exploitation of an inadequate compliance program or system of internal controls, (vi) the conduct involved active participation of compliance personnel or the failure of compliance personnel to appropriately escalate or respond to red flags, (vii) the corporation adequately investigated or took remedial measures to address the underlying criminal conduct, including the termination of the business relationship, or disciplining or terminating responsible individuals, such as those with management, supervisory or oversight responsibilities, (viii) the corporation risk profile has substantially changed, evidencing that the misconduct is minimal or nonexistent, (ix) the corporation faces any unique risks or compliance challenges, including with respect to the particular region or business sector in which the corporation operates, and (x) the extent to which the corporation is subject to oversight from industry regulators or a monitor imposed by another domestic or foreign enforcement authority or regulator.

The Monaco Memo indicates that prosecutors will ensure that monitorships are tailored to the misconduct. Where the DOJ imposes a monitor, it will also "monitor the monitor," which requires prosecutors to closely supervise the work and progress of the monitor.

FCPA Settlements and Enforcement Actions: Corporate Resolutions[31]

2022[32]

Glencore International A.G.

Introduction

On May 24, 2022, the DOJ announced that Glencore International A.G. ("Glencore"), a multinational commodity trading and mining company based in Baar, Switzerland and listed on the London and Johannesburg stock exchanges, pleaded guilty in the Southern District of New York ("SDNY") to one count of conspiracy to violate the FCPA's anti-bribery provisions. On the same day, and as part of a separate resolution, the DOJ also announced that Glencore Ltd., a U.S. subsidiary of Glencore, pleaded guilty in the District of Connecticut to one count of conspiracy to engage in a commodity price manipulation scheme.

KEY FACTS

U.S. AGENCIES: DOJ/CFTC

COUNTRIES INVOLVED: Nigeria, Cameroon, Ivory Coast, Equatorial Guinea, Democratic Republic of the Congo (DRC), Brazil, Venezuela

MEANS OF CORRUPTION: Falsified invoices, use of third parties, sham consulting agreements, use of coded language, use of cash and cash desks, use of personal email addresses

The guilty pleas in the two separate criminal cases are part of a coordinated resolution with criminal and civil authorities in the U.S., UK and Brazil, where Glencore and certain Glencore entities faced parallel market manipulation investigations by the CFTC, bribery investigations by Brazil's Ministerio Publico Federal ("MPF"), and bribery charges brought by the SFO. Under the global settlement, Glencore and its subsidiaries have agreed to pay over $1.1 billion in fines and forfeitures to the relevant law enforcement authorities. The coordinated resolution, however, did not include other investigations that Glencore is currently facing in Switzerland and the Netherlands for alleged failure to have organizational measures in place to prevent corruption in the Democratic Republic of the Congo ("DRC"). Cameroon's anti-corruption agency also announced a bribery investigation into Glencore mining operations in the country.

31 Hughes Hubbard represents or has represented multiple companies that have been the subject of the enforcement actions or other activities summarized in this Alert. All details and information provided in this Alert in connection with such enforcement actions, however, are based solely on the government's charging documents or other publicly available documents. Additionally, all descriptions of allegations underlying the settlements (or other matters such as ongoing criminal cases) discussed in this Alert are not intended to endorse or confirm those allegations, particularly to the extent that they relate to other, non-settling entities or individuals.

32 Cases and settlements have been organized alphabetically within each year.

In addition to the global penalty, the DOJ imposed Independent Compliance Monitors for terms of three years in each of the FCPA and commodity fraud criminal dispositions.

Conduct

According to admissions and court documents filed in the SDNY, as early as 2007 through about 2018, Glencore, acting through certain of its employees and agents (including UK-based Glencore subsidiaries), conspired to pay over $100 million and other things of value to various intermediaries in order to influence and bribe foreign officials from state-owned or state-controlled entities in Brazil, Cameroon, Democratic Republic of the Congo ("DRC"), Equatorial Guinea, Ivory Coast, Nigeria, and Venezuela. According to the DOJ, Glencore's bribery scheme was approved by its top executives and used as a means of securing oil contracts, avoiding government audits, and dodging lawsuits.

Conduct in West Africa

Glencore and its UK-based subsidiaries engaged two companies, West Africa Intermediary Company and Nigeria Intermediary Company, and paid these companies approximately $79.6 million to pursue business opportunities and other improper advantages with state-owned and state-controlled entities in Nigeria, Cameroon, Ivory Coast, and Equatorial Guinea. The court documents referenced three unnamed Glencore executives, including senior executives, and employees, and named one former oil trader, Anthony Stimler, who facilitated and approved bribes in West Africa.

Nigeria

Glencore and West Africa Intermediary Company employees used coded language including "newspapers," "journals," "pages," and "filings" to conceal and discuss the bribe payments to NNPC and its subsidiary, Pipelines and Product Marketing Co. ("PPMC"), in order to obtain crude oil contracts and falsely undervalue a cargo of fuel oil to benefit Glencore. For instance, on November 17, 2008, a Glencore trader described a $90,000 payment by Glencore UK-based subsidiaries to the West Africa Intermediary Company as the "amount they needed to cover [PPMC] in newspapers reading materials" and the recipient agreed that the "the newspapers will be delivered" in person. In another case, in February 2012, Anthony Stimler and a West Africa Intermediary Company agent communicated that, it was "very urgent re our filings have to have a meeting Monday." Following this conversation, a Glencore executive approved a payment of $1,050,981 to the owner of West Africa Intermediary Company, with the knowledge that part of this amount would be used to pay bribes to Nigerian officials in exchange for the award of a crude oil contract to Glencore. Other forms of bribery to Nigerian officials included a $300,000 "advance" payment towards the reelection campaign of a senior Nigerian official in exchange for a contract to buy crude oil cargoes from Nigeria.

Cameroon, Ivory Coast, and Equatorial Guinea

In Cameroon, Ivory Coast, and Equatorial Guinea, for over a 10-year period, Glencore paid over $27 million to West Africa Intermediary Company to make corrupt payments in transactions associated with state-owned entities and state-controlled oil companies to obtain and retain business, including to receive crude oil cargoes from these companies. Some of the bribes were paid in cash from a "Cash Desk" that Glencore maintained in both its London and Baar, Switzerland offices. As a result of its bribery scheme, Glencore obtained more than $92 million in profits.

Conduct in the DRC

In the DRC, Glencore admitted that, from at least 2010 to about 2013, it conspired to and corruptly offered and paid approximately $27.5 million to third parties, intending that part of the payments be used to pay bribes to limit liabilities related to government audits and a private litigation. Glencore paid a tax consultant, who created fraudulent invoices and billed Glencore for professional services to conceal bribe or "gratuity" payments to a DRC official in exchange for a reduction in projected audit fines from approximately $700,000 to approximately $180,000. Overall, Glencore obtained over $43 million in benefits related to its mining operations from the corrupt payments to DRC government officials.

In addition, Glencore Mining Company 2, a Glencore subsidiary, approved a fake invoice from the DRC agent for $500,000, part of which was used to pay bribes to a DRC official and the presiding judge in a $16 million contract dispute involving the company. The contract dispute was decided in Glencore Mining Company 2's favor.

Conduct in Brazil

In Brazil, Glencore paid approximately $147,202 to its Brazilian consultant in 2011, knowing that part of this amount would be used to pay bribes to Petróleo Brasileiro S.A.("Petrobras") officials in exchange for oil contracts. A Glencore employee used a personal email address to discuss with the Brazilian consultant how to conceal the bribe payment. Ultimately, Glencore Mexico and the Brazilian consultant executed a sham service agreement to disguise the so-called "delta" as a $0.50 per barrel commission payment to the consultant.

Conduct in Venezuela

In Venezuela, from around 2011 to 2014, Glencore paid approximately $1,286,057 to Venezuela Intermediary Company with the intent that part of the payments be used to pay bribes to officials from Petróleos de Venezuela, S.A.("PDVSA"), a Venezuelan state-owned oil and natural gas company. Glencore concealed the bribes as percentage fees to obtain priority repayment to recover late payment interest owed PDVSA: the percentage fees paid to Venezuela Intermediary Company and other intermediaries were based on the amount of money obtained from PDVSA. In total, Glencore recovered over $11 million in payments from PDVSA through the intermediary.

Commodity Price Market Manipulation

In the related commodity price manipulation case, Glencore Ltd. pleaded guilty to conspiring to manipulate fuel oil prices at two commercial shipping ports in the U.S., the Port of Los Angeles and the Port of Houston. According to the CFTC order, Glencore International AG, Glencore Ltd., and Chemoil Corporation (collectively, "Glencore") violated the Commodity Exchange Act ("CEA") and the CFTC's regulations prohibiting price manipulation and fraud. From around 2007 to at least 2018, Glencore engaged in a scheme to manipulate U.S. price-assessment benchmarks relating to physical fuel oil products and derivatives such as futures and swaps. Glencore also defrauded other market participants through corruption and misappropriation of material nonpublic information, in order to benefit Glencore's trading positions and increase profits. Glencore's trading profits increased by over $320 million due to its misconduct.

Glencore traders, including former Glencore Ltd. senior fuel oil trader Emilio Jose Heredia Collado, conspired to manipulate benchmark price assessments published by S&P Global Platts ("Platts") for fuel oil products, in particular intermediate fuel oil 380 CST at the Los Angeles Port and RMG 380 fuel oil at the Houston Port, by submitting bids and offers during the trading windows to artificially inflate or deflate benchmark prices solely to manipulate prices up or down to benefit existing Glencore contracts to buy or sell fuel oil.

Additionally, Glencore made corrupt payments to employees and agents of certain state-owned entities in Brazil, Cameroon, Nigeria, Venezuela, and Mexico, to improperly obtain and use material nonpublic information to benefit Glencore's business and trades, and to obtain preferential treatment and access to trades with those entities. Glencore traders obtained information that was explicitly marked "confidential" and took steps to ensure that the SOEs would not learn that they had confidential information. To conceal the corrupt payments, Glencore relied on cash payments and on falsified third-party invoices for euphemistic costs or services such as "advance payment," "marketing services," or "commission." Glencore traders and intermediaries also used coded language, such as "filings," "newspapers," or "chocolates" when referring to the corrupt payments. The CFTC stated that the corrupt conduct was widespread within Glencore's oil business, and supervisors were aware of and at times directly involved in the corruption.

Resolutions and Proceedings to Date

Resolution Against Glencore

FCPA Case

Under the plea agreement, Glencore agreed to an aggregate penalty of $700,706,965 to resolve the DOJ's bribery investigations. Glencore will pay $428,521,173 in criminal penalties, reflecting a 15 percent discount off the bottom of the United States Sentencing Guidelines for Glencore's partial cooperation and remediation.

In addition, Glencore will pay $272,185,792 in criminal forfeiture and disgorgement. The DOJ aggregate penalty of $700,706,965 includes credits to other authorities as follows:

- Up to $136,236,140 credit for payments to the SFO (if resolution occurs within six months)
- Up to $29,694,819 credit for possible payments to authorities in Switzerland (if resolution is made within 12 months)
- $90,728,597 credit for disgorgement to the CFTC

The DOJ did not credit the $39,598,367 penalty levied by the MPF. Glencore will pay the DOJ approximately $444 million.

The DOJ noted that Glencore did not receive voluntary disclosure credit because the company "did not at all times demonstrate a commitment to full cooperation." The DOJ did not give Glencore full remediation credit because the DOJ noted that the company "did not timely and appropriately remediate with respect to disciplining certain employees involved in the misconduct." The DOJ did credit some of Glencore's remedial measures, such as terminating and separating employees involved in the conduct; establishing a centralized compliance function, and hiring a Head of Compliance; enhancing its third-party business partners, due diligence procedures, payment controls, post-engagement monitoring, and risk-based trainings for employees, directors, and business partners; and cooperating with the parallel investigations with other domestic and foreign authorities.

Restitution Claim

On October 12, 2022, Ian and Lauretheé Hagen (the "Hagens"), the 90 percent owners of Crusader Health RDC SARL (formerly, Crusader Health RDC SPRL) ("Crusader Health"), the "medical services company" referenced in Glencore's plea agreement, petitioned the court in the SDNY in the underlying Glencore FCPA enforcement action, to file a $50 million restitution claim against Glencore under the Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C. § 3663A, and the Crime Victims' Rights Act, 18 U.S.C. § 3771. The Hagens asked the court to find that they were the victims of bribes paid by the Glencore unit and its executives in the DRC to secure a favorable ruling in a $16 million breach of contract lawsuit that Crusader Health filed against Glencore's DRC subsidiary, as described by the DOJ prosecutors in the May 24 settlement. The federal judge granted the motion.

On November 8, 2022, Glencore filed its response to the Hagens' restitution request and asked the court to award a $12 million restitution payment ($10.86 million with $1.14 million in prejudgment interest if any) instead of the $50 million that the Hagens requested. Glencore argued that Crusader Health sought an

award that goes "far beyond" than what is authorized under the MVRA. According to Glencore, "the losses alleged by the Hagens include speculative harms that extend far beyond the offense of conviction and a prejudgment interest rate, well in excess of the rate typically applied federal court." In support of its proposed $12 million restitution payment, Glencore also argued that "[a]lthough Crusader [Health] is arguably entitled to considerably less—or indeed nothing—in restitution," it submitted that Crusader Health should be awarded the $10.86 million in damages that the DRC court had ordered in 2019, plus prejudgment interest. (*After the DRC court dismissed Crusader Health's $16 million lawsuit against Glencore's DRC subsidiary (which Glencore admitted to have used bribe payments to have dismissed), in 2018, Crusader Health filed a new $20 million lawsuit against the Glencore subsidiary. In 2019, the DRC court issued a $10.86 million ruling in Crusader Health's favor*). Glencore further argued that although in the May 24 plea agreement it admitted to paying bribes to avoid paying $16 million to satisfy the Hagens' breach of contract claim, the MVRA distinguishes "loss to the victim and ill-gotten gains to the defendant." As such, Glencore argued that its admission as to the amount of the ill-gotten gains it accrued from the bribe payments does not establish the harm to Crusader Health, as required under the MVRA.

Glencore's sentencing for the FCPA case with the DOJ is scheduled for November 21, 2022.

Commodity Fraud Case

In a separate plea agreement with the DOJ in which Glencore Ltd. pleaded guilty to one count of conspiracy to engage in commodity price manipulation, Glencore agreed to pay an aggregate penalty of $485,638,885, which is a combined criminal fine of $341,221,682 and criminal forfeiture of $144,417,203 in proceeds. Of this amount, the DOJ credited $242,819,443 against the resolution with the CFTC.

In a parallel civil enforcement action for violations of the CEA and CFTC regulations, the CFTC ordered Glencore to pay an aggregate penalty of $1,186,345,850, including a civil monetary penalty of $865,630,784 and a disgorgement of $320,715,066, the highest of any CFTC settlement, for manipulative and deceptive conduct in the United States and the global oil market. Of this amount, $852,797,810 will be offset against the DOJ and SFO payments. Glencore will pay approximately $333.5 million to the CFTC.

In addition to the monetary penalty and forfeiture, the plea agreement requires that Glencore retain two independent compliance monitors: (1) Glencore International AG, or alternatively, Glencore UK Ltd must retain an independent compliance monitor for a period of three years to assess and monitor the company's compliance with the agreement and evaluate the effectiveness of its compliance program and internal controls, and (2) the DOJ and the CFTC require Glencore Ltd. to retain an independent compliance monitor for a period of three years for the commodity price manipulation scheme. Significantly, the plea agreement also requires both Glencore Group's CEO and Chief Compliance Officer certify under penalty of perjury as well as a criminal obstruction of justice statute at the end of the term of the monitorship that Glencore has

complied with the requirements for remediation and has a compliance program that incorporates all the elements required by the plea agreement. The plea agreement also requires the CEO and Chief Financial Officer to certify that the company is compliant with its disclosure obligations under the agreement.

Restitution Claim

On September 23, 2022, at its sentencing before the federal district court in Connecticut, Glencore informed the court that the company had entered into a confidential settlement agreement with Mexican state-owned oil company Petróleos Mexicanos ("Pemex") to resolve Pemex's separate restitution claims.

Charges Against Individuals

In July 2021, Anthony Stimler, a former senior trader in charge of Glencore's West Africa desk for the crude oil business, pleaded guilty to one count of conspiracy to violate the FCPA and one count of conspiracy to commit money laundering.

On March 25, 2021, former trader Emilio Jose Heredia Collado pleaded guilty to one count of conspiracy to engage in commodities price manipulation in connection with his trading activity related to the Platts Los Angeles 280 SCST Bunker Fuel price.

Related Cases

Several investment and pension funds in the UK filed 'class-action styled' lawsuits against Glencore that are linked to Glencore's admitted bribery and market manipulation schemes. These cases are currently pending in London.

GOL Linhas Aéreas Inteligentes, S.A.

On September 15, 2022, the DOJ and the SEC announced that GOL Linhas Aéreas Inteligentes S.A.("GOL"), Brazil's second-largest airline, settled charges to resolve parallel bribery investigations by criminal and civil authorities in the U.S. and Brazil, related to a scheme to bribe Brazilian government officials to secure favorable legislation that benefitted GOL.

KEY FACTS

U.S. AGENCIES: DOJ and SEC

COUNTRIES INVOLVED: Brazil

MEANS OF CORRUPTION: Third-party intermediaries, sham contracts, false invoices, false books and records

In a settled administrative proceeding initiated on September 15, 2022, the SEC charged GOL with violating the FCPA's anti-bribery, books and records, and internal controls provisions. On September 16, 2022, GOL entered into a three-year deferred prosecution agreement ("DPA") with DOJ in connection with charges that GOL conspired to violate the anti-bribery and the books and records provisions of the FCPA. Under the terms of the DPA,

GOL admitted to the misconduct and agreed to pay a reduced criminal penalty of $17 million. In a separate resolution with the SEC, GOL agreed to pay a reduced fine of $24.5 million in disgorgement and prejudgment interest. The DOJ and SEC reduced the settlement amount due to GOL's inability to pay the full fines.

Conduct

According to the DPA and SEC order, between 2012 and 2013, a member of GOL's Board of Directors "knowingly and willingly" conspired to pay approximately $3.8 million in bribes through an intermediary to Brazilian government officials in exchange for the passage of two pieces of legislation by the National Congress and the Legislative Chamber of the Federal District of Brasilia. These laws included certain payroll tax and fuel oil reductions that financially benefited GOL and other Brazilian airlines.

In 2011, the Brazilian government initiated an economic stimulus program that included tax cuts to boost domestic employment. The program included reduction in payroll taxes for qualifying companies in labor-intensive industries. In 2012, the GOL director approached a Brazilian official and committed to pay approximately $4.5 million in bribes to the official and a Brazilian political party to include the air and transport industries in the payroll tax program, which would result in a significant reduction of payroll taxes that GOL and the GOL director's road transportation company would be required to pay. The GOL director used an intermediary to facilitate the bulk of the bribe payments, and in exchange for services, the intermediary kept one-third of the bribes as a fee.

Subsequently, in 2012, the Brazilian legislature expanded the new law, and the Brazilian President signed the amended legislation to include the air transport industry, including GOL. GOL corruptly obtained tax savings of approximately $39.7 million from the amended legislation.

In 2013, the intermediary and the GOL director discussed lowering the aviation fuel tax in the Federal District of Brasilia. To achieve this, the GOL director agreed to pay bribes to a Brazilian official and a Brazilian political party to ensure that the legislature passed legislation lowering the fuel tax in Brasilia. The GOL director and the Brazilian official agreed that a portion of the bribes would be paid through a fake consulting services agreement between GOL and a consulting company controlled by a close associate of the Brazilian official.

In April 2013, the government of Brasilia enacted a law that lowered the Brasilia's aviation fuel tax rate from 25% to 12%. GOL received a tax savings of approximately $12.24 million from the fuel tax legislation.

To facilitate the bribe payments, the intermediary and the GOL director discussed the bribes in person, by text messages, and by phone, including the amount and timing of the payment. The intermediary and Brazilian government officials discussed bribe payments in person, by phone and "via an ephemeral U.S.-based messaging program that transmitted the messages using servers located in the United States."

According to the DPA, GOL funded and concealed the bribe payments in three ways. First, in October 2012, GOL made payments to companies owned and controlled by the Brazilian official for advertising services on the Brazilian official's companies' websites. The GOL director falsely represented to an executive of GOL that the advertisement would be a "fruitful investment" and, to take full advantage, GOL needed to make payments quickly. An employee then sent a proposal to the GOL marketing department with a payment amount that was not open for negotiation. Although the marketing department considered the amount high, between October 2012 and November 2013, GOL paid approximately $1.14 million to the Brazilian official's companies.

Second, GOL entered into contracts with companies owned and controlled by an intermediary for the purpose of funding and concealing multiple bribe payments to various Brazilian government officials. For example, in one instance GOL entered into an agreement with an intermediary company under which the intermediary would serve as an external advisor to obtain capital investment for GOL. The GOL director requested payments be made to the intermediary company without a contract. In another case, the GOL director backdated an unsigned sham consulting agreement with the intermediary company. The intermediary subsequently invoiced a GOL subsidiary for $151,433 for consulting work rendered to GOL that was never performed. The GOL director also paid $350,000 to Brazilian government officials from a shell company in the Bahamas that the director owned and controlled, through the United States, to the intermediary company's Swiss bank account.

Finally, the GOL paid bribes through a consulting company controlled by a Brazilian official. In 2013, the consulting company sent a sham work proposal for analysis of aviation legislation to a legal executive at GOL, copying the GOL director. The GOL director expressed GOL's interest to learn about the project, and agreed to make payments to the consulting company knowing that the true purpose was to make bribe payments to the Brazilian official in exchange for his assistance with the aviation fuel tax legislation in Brasilia. Between June and August 2013, GOL paid $552,400 to the Brazilian official's consulting company, advance payments without a contract in place with the consulting company.

According to the DOJ and SEC, GOL maintained books, records, and accounts that falsely listed these corrupt payments as legitimate business expenses and characterized these expenses as for advertising as well as other services which were never provided. The SEC also pointed to the outsized role that the GOL director played in GOL's internal controls, noting that GOL's procurement process relied primarily on the GOL director for authorization and verification.

Resolution

GOL entered into a three-year DPA with the DOJ and settled a cease and desist proceeding with the SEC. Under the DPA, GOL initially agreed to pay a criminal penalty of $87 million, which represented a 25% reduction off the bottom of the applicable U.S. Sentencing Guidelines. The DOJ, however, agreed to reduce

that amount to $17 million based on GOL's inability to pay the full $87 million. The DOJ also agreed to credit $1.7 million in recognition of GOL's agreement to pay approximately $3.4 million in fines to resolve charges with Brazilian authorities in relation to investigations by the Controladoria-Geral de União (CGU) and the Advocacia-Geral de União (Attorney General's Office).

The DOJ did not impose a monitor on GOL, but the agency required that GOL's Chief Executive Officer and Chief Compliance Officer certify at the end of the DPA term that its "compliance program is reasonably designed to detect and prevent violations of the [FCPA] and other applicable anti-corruption laws throughout the [c]ompany's operations."

In the related administrative proceedings, the SEC ordered GOL to pay $70 million in disgorgement and prejudgment interest. However, the SEC simultaneously lowered the amount to $24.5 million based on GOL's inability to pay. The SEC also agreed to credit up to $1.7 million that the company paid to the Brazilian authorities. The SEC did not impose a civil penalty on GOL because of the criminal penalty already assessed by the DOJ.

Both the DOJ and SEC stated that they gave GOL full credit for cooperating with their investigation and affirmatively accepting responsibility for its criminal conduct, including timely sharing information from its internal investigation, translating key documents, identifying information previously unknown to the DOJ, and making its management and employees available to the agencies. In addition, the DOJ recognized GOL's immediate implementation of remedial measures, which included conducting a comprehensive risk assessment, re-evaluating and redesigning its anti-corruption compliance program, creating a new risk and compliance department with a new chief compliance officer, and terminating its relationship with third parties involved in the misconduct. The DOJ did not give GOL voluntary disclosure credit because the company did not voluntarily and timely self-disclose the misconduct.

Jardine Lloyd Thompson Group Holdings Ltd.

On March 18, 2022, the DOJ issued a declination letter to Jardine Lloyd Thompson Group Holding Ltd., formerly Jardine Lloyd Thompson Group plc ("JLT"), pursuant to the DOJ's FCPA Corporate Enforcement Policy. In the declination letter, the DOJ stated that it would not prosecute JLT for violations of the anti-bribery provisions of the FCPA, "despite bribery committed by an employee and agents of the [c]ompany and its subsidiaries." JLT agreed to disgorge approximately $29 million in profit it made as a result of the bribes, and the DOJ agreed to credit up to 100 percent of the disgorgement amount against any fines that JLT pays to the SFO related to the conduct.

KEY FACTS

U.S. AGENCIES: DOJ

COUNTRIES INVOLVED: Ecuador

MEANS OF CORRUPTION: Third-party intermediary

JLT is a multinational insurance company headquartered in London, England and was acquired by Marsh & McLennan Companies, Inc. ("Marsh & McLennan") in April 2019. As the successor in interest, Marsh & McLennan agreed to the facts and conditions stipulated in the letter, including to paying the disgorgement amount and continuing to cooperate with the DOJ.

Conduct

According to the declination letter, between 2014 and 2016, JLT's employee and agents paid approximately $10.8 million to a third-party intermediary based in Florida, knowing that approximately $3.157 million would be paid in bribes to Ecuadorian government officials to obtain and retain contracts with Seguros Sucre S.A., the Ecuadorian state-owned and controlled surety company. The declination letter states that approximately $1.2 million of the bribe payments were laundered through bank accounts in the United States.

Resolution

The DOJ applied the Corporate Enforcement Policy factors and declined to prosecute JLT based on: (1) JLT's "voluntarily self-disclosure" of the bribery conduct, (2) JLT's "full and proactive cooperation" with the investigation, including that JLT provided "all known relevant facts about the misconduct, including information about the individuals involved in the conduct," (3) the nature and seriousness of the offense, (4) JLT's timely and full remediation, including by separating from the executive and third-party intermediary involved in the misconduct and enhancing its anti-corruption training and compliance program, and (5) the fact that JLT agreed to disgorge the full amount of its ill-gotten gains.

As part of JLT's declination with the DOJ, JLT agreed to disgorge approximately $29 million in profit it made as a result of the bribes. The DOJ indicated, however, that it would credit up to 100% of the disgorgement amount against any fines that will be paid to the SFO within one year, "pursuant to the [c]ompany's separate resolution with the SFO that addresses the same underlying conduct." If, however, JLT does not pay the SFO any part of the disgorgement amount within one year, the declination letter requires JLT to pay the full remaining amount to the U.S. Treasury.

KT Corporation

On February 17, 2022, the SEC announced that it had reached a resolution with South Korea's largest telecommunications operator, KT Corporation ("KT"). The SEC entered a cease-and-desist order, finding that KT violated the books and records and internal accounting provisions of the FCPA by engaging in improper payment schemes in South Korea and Vietnam. Without admitting or denying the SEC's findings, KT agreed to pay a $6.3 million fine. KT's ADR shares are registered with the SEC under Section 12(b) of the Exchange Act and traded on the New York Stock Exchange, making the company an "issuer" within the meaning of the FCPA.

KEY FACTS

U.S. AGENCIES: SEC

COUNTRIES INVOLVED: South Korea, Vietnam

MEANS OF CORRUPTION: Slush funds, use of personal bank accounts, use of cash stockpiles, use of gift cards, political contributions, donations, sponsorships, third-party intermediaries, falsified books and records

Conduct

The SEC found that, from at least 2009 through 2017, high-level executives at KT maintained off-the-books slush funds, which were used to provide gifts, entertainment, and illegal political contributions to members of the Korean National Assembly. These Assembly members, who served on committees relevant to KT's operations, were positioned to influence KT's business. From 2009 through 2013, high-ranking KT executives amassed approximately $1 million in off-the-books funds through inflated bonuses to officers and executives at KT, which were then cashed out and either transferred to the personal bank account of a KT executive officer or stored as cash in a safe within KT's office building in Seoul, South Korea. KT officers and executives could then access these funds to make gifts and contributions to South Korean politicians who might be able to influence KT's business.

In October 2013, news of the inflated bonus scheme broke in South Korea. One of the principal KT executives responsible for maintaining the bonus-based slush fund scheme resigned and faced criminal charges in April 2014. However, rather than investigating the past misconduct and creating internal accounting controls sufficient to prevent misconduct, KT executives instead devised a new scheme to generate and disguise off-the-books slush funds. From 2014 to 2017, KT purchased gift cards from a third-party vendor and booked the payments as "research and analysis" or "entertainment" expenditures. Pursuant to the scheme, a vendor would meet a mid-level KT manager in a van parked outside of KT's Seoul offices and deliver a manila envelope full of cash, corresponding to the amount that KT spent on gift cards minus the vendor's commission. KT managers would first store the cash in a locked cabinet onsite, before transferring the funds to the political contribution accounts of members of the Korean National Assembly. This scheme allowed KT officers and

executives to evade Korea's domestic political contribution laws (which prohibit corporations from making donations to lawmakers) and to improperly distribute over $1.3 million to Korean politicians between 2014 and 2017.

Separate from the payments through political contribution accounts, KT paid over $1.6 million to different organizations at the behest of high-level government officials. From 2015 to 2016, KT made payments to three different foundations that were linked to associates of senior Korean politicians. Despite the fact that these three payments were solicited by public officials (two by the presidential residence and office and one by a member of Korea's National Assembly), KT inaccurately booked these payments as charitable donations or sponsorships without any efforts to determine the legitimacy of the requests or of the foundations themselves. Additionally, during this time, and at the behest of an official linked to the presidential office, KT hired two advertising executives with close connections to South Korea's President and made payments totaling $454,009 in salaries to these individuals. KT, also at the behest of Korean government officials, hired an advertising agency closely associated to the President and paid this firm $5.88 million in fees. KT failed to conduct due diligence on either the advertising executives or the advertising agency.

In its order, the SEC also presented findings regarding KT's misconduct in Vietnam. KT officials engaged third parties to pay bribes to Vietnamese government officials to obtain two different government contracts: one for the construction of a solar cell power system in the Quang Binh province, and another for the provision of hardware, software, and training for vocational colleges overseen by Vietnam's Ministry of Labor, Invalids and Social Affairs. For the solar cell contract, KT used a construction company to pay a bribe of $95,031 to a provincial Vietnamese official. KT later settled with the construction company when it sought reimbursement for the payment and booked the bribe as a fee for "support/consulting." Additionally, a KT employee used a KT company credit card to process four cash-back transactions at a Hanoi restaurant, the cash proceeds of which (totaling approximately $3,000) were paid to Ministry of Finance officials to "speed up" the financing process of KT's solar cell project. Separately, in relation to the vocational college contracts, KT subcontracted a local agent (who eventually became a partner in KT's bidding consortium) at the behest of a high-ranking official within Vietnam's General Department of Vocational Training. The local agent was tasked with diverting a large portion of its agent fee to this government official in 2015, for a total bribe payment of $550,000 out of the agent fee. KT also arranged for a separate subcontractor to become KT's partner in its vocational college project consortium in 2015. This newly minted consortium partner was designated to manage the relationship with—and payments to—the local agent, in an effort to distance the local agent from KT and to conceal the local agent from KT's internal controls relating to agents. Under this arrangement, the subcontractor-turned-partner booked a $735,000 payment to the local agent as a fee for "site survey for installation." Similarly, in 2017, KT paid $775,000 to its partner for undocumented consulting services, which was later found to have covered payments made by the partner to the local agent for bribes distributed to the high-ranking official from the General Department of Vocational Training.

Resolution

KT agreed to pay a disgorgement of $2,263,821, prejudgment interest of $536,457, and a civil money penalty of $3,500,000, for a total of $6,300,278. Under the terms of the SEC's order, KT will be subject to a two-year remediation and reporting period, whereby KT is bound to self-report the results of its compliance reviews to the SEC on a semi-annual basis. KT is also subject to disclosure requirements, in the event that KT uncovers evidence of additional misconduct. In reaching this resolution, the SEC credited KT's cooperation, which included providing translations and summaries of relevant documents, providing certain facts developed in its own internal investigation, and making current and former employees available for interviews. Additionally, the SEC credited KT's remedial efforts, including terminating employees responsible for the alleged misconduct, introducing enhanced internal accounting controls, strengthening its ethics and compliance organization, enhancing its code of conduct and expenditure policies, and increasing training of employees on anti-bribery issues.

Oracle Corporation

On September 27, 2022, the SEC announced that Oracle Corporation ("Oracle"), a Texas-based multinational information technology company, settled charges that it had violated provisions of the FCPA when its subsidiaries in Turkey, the UAE, and India created and used slush funds to bribe foreign officials in exchange for business in violation of Oracle's policies and procedures. Oracle did not admit or deny the SEC's findings, but has agreed to pay $23 million in penalty and disgorgement stemming from the alleged violations of the anti-bribery, books and records, and internal accounting controls provisions of the FCPA. This is the second time Oracle settled charges with the SEC for violating the FCPA. In 2012, Oracle agreed to pay a $2 million penalty to settle allegations that it had violated the books and records and internal controls provisions of the FCPA by failing to prevent Oracle India Private Limited ("Oracle India") from keeping unauthorized side funds at distributors from 2005 to 2007.

KEY FACTS

U.S. AGENCIES: SEC

COUNTRIES INVOLVED: India, Turkey, United Arab Emirates

MEANS OF CORRUPTION: Slush funds, discount schemes, sham marketing reimbursement payments, use of third parties/entities

Conduct

The SEC alleges that between 2014 and 2019, employees at Oracle India, Oracle Bilgisayer Sistemleri Limited Sirketi ("Oracle Turkey"), and Oracle Systems Limited ("Oracle UAE") "used discount schemes and sham marketing reimbursement payments to finance slush funds held at Oracle's channel partners in those

markets." The slush funds were then used both to "(i) bribe foreign officials, and/or to (ii) provide other benefits such as paying for foreign officials to attend technology conferences around the world in violation of Oracle's internal policies."

According to the SEC's order, Oracle used both direct and indirect sales methods. Oracle is alleged to have created improper slush funds by using its indirect sales model, which conducted transactions with various value-added distributors ("VADs") and value-added resellers ("VARs'). The SEC states that Oracle's policies required employees to request a discount from a product's list price, which was to be approved for only a "legitimate business reason." Oracle had a three-tier system for approving discount requests above a designated amount. Discounts at the highest tier required a subsidiary employee to obtain approval from Oracle's headquarters in the U.S. However, while the policy required that discount requests be supported by accurate information, it did not require employees to provide documentary support even for discounts at the highest level. The SEC states that this allowed Oracle subsidiary employees to implement "a scheme whereby larger discounts than required for legitimate business reasons were used…to create slush funds with complicit VADs or VARs…[with] [t]he channel partners profit[ing] from the scheme by keeping a portion of the excess deal margin." The SEC alleges that Oracle subsidiary employees in Turkey and UAE requested sham marketing reimbursements to VADs and VARs "as a way to increase the amount of money available in the slush funds held at certain channel partners…[with] direct supervisors of these sales employees [approving] the fraudulent requests."

Turkey

The SEC alleges that between 2009 and 2019, Oracle Turkey employees "routinely used the slush funds to pay for the travel and accommodation expenses of end-user customers, including foreign officials, to attend annual technology conferences in Turkey and the United States, including Oracle's own annual technology conference." According to the SEC, "Oracle Turkey sales employees referred to the accounts as 'havuz,' which means 'pool,' or 'kumbara,' which means 'moneybox,' and used the accounts for purposes that were prohibited under Oracle's internal policies."

In one instance, in 2017, an Oracle Turkey sales representative used a Turkey VAR to create a slush fund to pay officials of Turkey's Social Security Institute ("SSI") in connection with a database infrastructure order. Oracle headquarters personnel in the United States approved "a significant discount" for the deal without supporting documents, generating a margin of approximately $1.1 million. However, only a portion of that amount was used to purchase legitimate products, such as software licenses. The SEC's order states that the "Turkey VAR kept a nominal amount for itself," and as instructed by the Oracle Turkey sales representative, "passed the majority of the funds to other entities, including an entity controlled by an intermediary." The intermediary was used to pay cash bribes, totaling at least $185,605, to SSI officials.

In another case, in May 2018, the same Oracle Turkey sales representative "sought to improperly influence" officials with Turkey's Ministry of Interior (MOI) "to win a lucrative contract" with the MOI, related to the creation of the country's 112 emergency call system (the "112 Project"). Oracle had previously provided services on the project. The Oracle Turkey sales representative, with the knowledge of the then-country leader, brought four MOI officials on a week-long trip to California to purportedly attend a meeting at Oracle's headquarters with a senior Oracle executive, likely paid for with funds from a VAD account. The SEC alleges that the meeting at Oracle's headquarters lasted approximately fifteen to twenty minutes, and for the rest of the week, the Turkey sales representative entertained the MOI officials in Los Angeles and Napa Valley and took them to a theme park. In order to fund the MOI officials' leisure trip, the Turkey sales representative told Oracle U.S. that he needed an excessive, non-standard discount for the project because of the ministry's "budgetary restraints" and "stiff competition from other original equipment manufacturers." According to the SEC, "[i]n reality, the MOI did not conduct a competitive bidding process for this contract," and "[i]nstead required any bidders that responded to the tender offer to include Oracle products in their bid." On May 31, 2018, Oracle received a large follow-on order related to the 112 Project.

The same Turkey sales representative involved in the 112 Project also directed cash bribes to officials at SSI to finalize a 2016 deal with the SSI by falsely claiming that he needed a significant discount due to intense competition from other original equipment manufacturers, which Oracle U.S. approved without supporting documentation.

UAE

From at least 2014 to 2019, Oracle UAE sales employees used excessive discounts and marketing reimbursement payments to create slush funds, which they referred to as "wallets," at VARs. According to the SEC, "Oracle UAE sales employees directed the VARs how to spend the funds, and used the wallets to pay for the travel and accommodation expenses of end customers, including foreign officials, to attend Oracle's annual technology conference in violation of Oracle's internal policies."

In 2018 and 2019, an Oracle UAE sales representative for a UAE state-owned entity ("SOE") paid approximately $130,000 in bribes to the SOE's Chief Technology Officer for six contracts over the same period. Two complicit VARs were used to fund the first three bribes, which were funded through an excessive discount and paid through another entity that was not an Oracle approved VAR for public sector transactions. The only purpose for the entity was to make the bribe payments. For the final three deals, the UAE Entity was the actual entity that contracted with the UAE SOE, despite the fact that Oracle's deal documents represented that an Oracle-approved partner was used as the VAR for the deal.

India

In January 2019, Oracle India sales employees used an excessive discount scheme in connection with a transaction with an Indian SOE transportation company, majority-owned by the Indian Ministry of Railways. As part of the scheme, the sales employees requested a 70% discount on the software part of the deal, claiming that Oracle India was facing intense competition from other original equipment manufacturers. The Indian SOE's procurement website, however, said it had mandated the use of Oracle products for the project. According to the SEC, "one of the sales employees involved in the transaction maintained a spreadsheet that indicated $67,000 was the 'buffer' available to potentially make payments to a specific Indian SOE official." Due to the size of the discount, Oracle required an employee based in France to approve the request, which was approved without documentary support. A total of approximately $330,000 was funneled to an entity with a reputation for paying (Indian) officials and another $62,000 was paid to an entity controlled by the sales employees responsible for the transaction.

Resolution

Under the terms of the settlement, Oracle agreed to pay disgorgement of $7,114,376.44 plus prejudgment interest of $791,040.20 and a civil money penalty of $15,000,000. The SEC noted Oracle's cooperation, including sharing information and voluntarily providing translation of key documents during the course of the investigation. The SEC also noted the remediation measures that Oracle took, which included terminating senior regional managers and other employees, distributors, and resellers involved in the misconduct, strengthening its compliance and control function by hiring new employees, and limiting financial incentives and business courtesies available to third parties.

Stericycle, Inc.

Introduction

On April 20, 2022, the DOJ announced that it had entered into a three-year deferred prosecution agreement ("DPA") with Stericycle, Inc. ("Stericycle") to resolve a two-count criminal information filed in the Southern District of Florida. The information charged Stericycle with conspiracy to violate anti-bribery and accounting provisions of the FCPA by making bribe payments to Brazilian, Mexican, and Argentinian officials between 2011 and 2016.

KEY FACTS

U.S. AGENCIES: DOJ/SEC

COUNTRIES INVOLVED: Brazil, Mexico, Argentina

MEANS OF CORRUPTION: Use of cash, falsified invoices, use of coded language, use of third parties

On the same day, the SEC announced that Stericycle consented to a cease-and-desist order for violations of the anti-bribery, books and records, and internal accounting control provisions of the FCPA. The violations

resulted from Stericycle's payment of bribes to foreign officials in Brazil, Mexico, and Argentina, its failure to reflect accurately the improper payments in its books and records, and its failure to have sufficient internal accounting controls in place to detect and prevent the misconduct.

The conduct at issue in the DOJ and SEC resolutions took place between 2011 and 2016. Stericycle, a Delaware corporation headquartered in Illinois, operated an international waste management network, including the processing of medical, industrial, and maritime waste and document destruction. During the relevant period, Stericycle conducted business in Brazil, Mexico, and Argentina through wholly owned subsidiaries ("Stericycle Brazil," "Stericycle Mexico," and "Stericycle Argentina"). These subsidiaries were directed and controlled by Stericycle's Latin America division ("Stericycle LATAM"), whose leadership and staff were based in Miami, Florida.

According to the DPA, Stericycle, through its employees and agents at Stericycle LATAM and wholly owned subsidiaries Stericycle Brazil, Stericycle Mexico, and Stericycle Argentina, conspired and agreed to pay approximately $10.5 million to officials in Brazil, Mexico, and Argentina to obtain and retain business and other advantages. The DOJ estimates that Stericycle earned $21.5 million in profits from the scheme.

Conduct

Between 2011 and 2016, Stericycle paid bribes to government officials in Brazil, Mexico, and Argentina. To carry out this scheme, executives at Stericycle LATAM directed employees at Stericycle Brazil, Stericycle Mexico, and Stericycle Argentina to make bribe payments, typically in cash and calculated as a percentage of underlying contract payments, to government officials in their respective countries. Throughout the scheme, Stericycle employees and agents took steps to track and conceal these bribe payments, leading to the production of false and misleading accounting documents.

Brazil

Employees of Stericycle Brazil made bribe payments to Brazilian government officials in return for receiving payment priority on certain amounts owed under contracts made with government agencies. The payments were often made through third-party intermediaries and were typically a percentage of the invoice amount owed or a fixed amount. Stericycle Brazil employees concealed the payments by paying third-party vendors to generate falsified invoices for debt collection services that were never provided. At the direction of Stericycle Brazil executives, employees recorded in spreadsheets the bribe payments, the bribed client, the region, the method used in the calculation of the bribe, revenue generated, and the employee responsible for retrieving the cash and delivering the bribe. These spreadsheets were circulated to Stericycle LATAM executives for their review. Stericycle earned approximately $13.4 million through this scheme to corruptly obtain and retain business with the Brazilian government.

Mexico

In Mexico, Stericycle paid bribes to Mexican officials employed by at least fifteen state-owned entities. These payments were made to obtain or retain business, to obtain payment priority for payments owed under contracts, or to avoid fines. The payments, referred to internally under coded language as "little pieces of chocolates" or "IP payments," were often made in cash and were calculated as a percentage of the government customer's invoice value, a percentage of the amount of waste collected, or a fixed amount. To conceal the payments, employees of Stericycle Mexico, with the approval of Stericycle LATAM executives, obtained false invoices from 45 local vendors with false descriptions of services that were never rendered. As in Brazil, Stericycle employees tracked the payments using spreadsheets, which were reviewed by Stericycle LATAM executives. Stericycle earned an estimated $3.7 million in profits from corruptly obtained and retained contracts with the Mexican government.

Argentina

Stericycle executives in Argentina operated a similar scheme to their Brazilian and Mexican counterparts. Between 2011 and 2016, Stericycle employees paid bribes to government officials in Argentina to obtain and retain business and to obtain priority release of payments under contracts with government-owned entities. To carry out the scheme, Stericycle Argentina employees would calculate and approve the amount of the bribe, which would often be a percentage of the underlying contract payment. Once approved, Stericycle Argentina sales employees would obtain cash from Stericycle Argentina's Buenos Aires office and deliver the requisite amount to the foreign official. To conceal these payments, Stericycle Argentina employees referred to them as "IP Commissions" or "alfa" and "alfajores"—a popular type of cookie in Argentina. A Stericycle Argentina executive maintained records tracking the payments. Stericycle is estimated to have made $4.4 million in profits from corruptly obtained and retained contracts with the Argentinian Government.

Resolution and Proceedings to Date

In the DOJ and SEC resolutions, Stericycle agreed to pay $80.7 million in penalties and disgorgement. Specifically, pursuant to the DPA, Stericycle agreed to pay a criminal penalty of $52.5 million, which represents a 25% reduction off the bottom of the applicable Sentencing Guidelines fine range. Stericycle received full credit for cooperation with the DOJ and for engaging in extensive remedial measures such as conducting its own internal investigation, appointing new executive leadership and board members, and divesting its subsidiaries in Argentina and Mexico, among other actions. However, because it failed to voluntarily and timely disclose the misconduct, Stericycle did not receive credit for voluntary and timely disclosure.

Under the DPA, Stericycle must pay $35 million immediately. However, the DOJ agreed to credit the remaining $17.5 million for fines Stericycle had agreed to pay as part of parallel resolutions with Brazilian authorities. As of April 20, 2022, Stericycle had reached resolutions with the Controladoria-Geral da União and the

Advocacia-Geral de União authorities in Brazil, under which it agreed to pay a total of $9.3 million in fines for its misconduct. In addition, the DOJ agreed to credit the remaining $8.2 million should Stericycle reach a resolution with a third Brazilian authority.

With respect to the SEC's cease-and-desist order, Stericycle agreed to pay approximately $28.2 million in disgorgement and prejudgment interest to the U.S. Treasury. The SEC did not impose a civil penalty in addition to the criminal penalty imposed under the DPA, and agreed to credit up to $4.2 million in disgorgement for any disgorgement amount paid as part of resolutions with Brazilian authorities.

Finally, due to Stericycle's failure to fully implement or test its enhanced compliance program, the DPA imposed an independent compliance monitorship for a term of two years, with an additional year of compliance and self-reporting obligations. Stericycle also agreed to cooperate with the DOJ in any ongoing or future criminal investigations related to the misconduct.

Tenaris, S.A.

On June 2, 2022, the SEC announced that it had reached a resolution with Tenaris S.A.("Tenaris"), a Luxembourg-based steel pipe manufacturer and supplier, to resolve charges that agents and employees of Tenaris' Brazilian subsidiary bribed a Brazilian government official to obtain and retain business from Brazil's state-owned oil company, Petróleo Brasileiro S.A.("Petrobras"). In an internal administrative order, the SEC found that, through conduct of its Brazilian subsidiary, Confab Industrial S.A.("Confab"), Tenaris violated the anti-bribery, books and records, and internal accounting controls provisions of the FCPA. Tenaris is a foreign private issuer with American Depository Shares ("ADSs") listed on the New York Stock Exchange.

KEY FACTS

U.S. AGENCIES: SEC

COUNTRIES INVOLVED: Brazil

MEANS OF CORRUPTION: Falsified books and records, inadequate internal accounting controls, third-party intermediary

According to the SEC's order, from 2008 to 2013, agents of Confab paid approximately $10.4 million in bribes to an unnamed Brazilian governmental official to obtain and retain business contracts worth about $1 billion from Petrobras. The bribes were funneled through several companies and bank accounts, located in both the U.S. and foreign jurisdictions, affiliated with Tenaris' controlling shareholder, San Faustin, S.A.("San Faustin"). Tenaris settled with the SEC without admitting or denying the SEC's findings, and agreed to pay approximately $78 million in disgorgement and civil penalties. Additionally, Tenaris agreed to report to the SEC for two years regarding the status of various remediations and compliance measures.

Tenaris previously settled FCPA-related enforcement actions with the DOJ and SEC for misconduct in Uzbekistan. In 2011, Tenaris entered into a Deferred Prosecution Agreement ("DPA") with the SEC (the SEC's first-ever use of a DPA to facilitate and reward cooperation in SEC investigations) and a Non-Prosecution Agreement ("NPA") with the DOJ for alleged bribes to obtain government contracts from a state-owned entity in Uzbekistan. In the settlement with the SEC, Tenaris agreed to pay approximately $5.4 million in disgorgement of profits and interest, and in the settlement with the DOJ Tenaris agreed to pay a $3.5 million penalty.

Conduct

According to the SEC order, in 2008, an agent of Confab "entered into an understanding" with a high-ranking manager in Petrobras' supply procurement and tender process department, under which the Brazilian government official "would use his authority to influence Petrobras to forgo an international tender process for certain contract pipes and tubes," thereby favoring Confab to continue to be "the only domestic supplier" and allowing direct negotiation with Tenaris' Brazilian subsidiary. The rigged bidding process effectively eliminated all international competitors that could have competed with Confab to sell pipes and tubes to Petrobras. In addition, Confab received a steady stream of business from Petrobras, allowing the company to maintain its production unit in Brazil and giving the company a further advantage over potential international competitors who faced expensive shipping costs. In return, the Brazilian government official received 0.5% of Confab's revenue obtained from those contracts.

To conceal the bribes, the Brazilian government official (through an unnamed associate) formed a shell company in Uruguay and opened a bank account in the company's name there, which Confab then used to deposit the payments. The bribe payments to the Uruguayan shell company were made through various bank accounts and offshore holding companies, all of which were affiliated with Tenaris, its management, and its controlling stakeholder San Faustin. The bribe payments were initially sourced from a bank account in the name of an offshore company controlled by San Faustin. Thereafter, the money was funneled through various San Faustin-related holding companies and bank accounts in both U.S. and foreign jurisdictions. The SEC states, "each of these companies and accounts were controlled by employees of entities within Techint Group [the holding/parent company] who had roles or close associated ties with Tenaris and/or its management." The unnamed associate also communicated with agents of Confab about the bribes, including the timing of payments to be deposited into the bank account.

The bribery payments were also concealed by "fake contracts" between the Uruguayan shell company and a Panamanian company for "purported past and future consultancy and advisory services" that the Uruguayan company performed for the group of companies to which the Panamanian company belongs.

In total, between 2008 and 2013, Confab paid about $10.4 million in bribes to the Brazilian government official to obtain and maintain more than $1 billion in contracts with Petrobras. The Brazilian government official used the funds for various purposes, including to purchase artwork and real estate.

Although the various transactions by which the bribe payments were made were inaccurately reflected in Confab's books and records, Tenaris consolidated Confab's books and records into Tenaris' for the purpose of SEC filings. Thus, the SEC determined that, as the parent-issuer and controlling shareholder, Tenaris was liable for the conduct of Confab.

Resolution

In the settled administrative proceeding, the SEC ordered Tenaris to cease and desist violating the anti-bribery, books and records, and internal accounting controls provisions of the FCPA. Tenaris also agreed to pay disgorgement of $42,842,497, prejudgment interest of $10,257,841, and a civil money penalty of $25,000,000, for a total penalty of $78,100,338.

The SEC credited Tenaris' cooperation and remedial efforts, which included: i) providing translated copies of documents and witness testimony; ii) encouraging third parties outside the scope of the SEC's subpoena power to cooperate; iii) terminating its commercial agents in Brazil and reducing its use of commercial agents globally; and iv) implementing a Code of Conduct, Code of Ethics for Senior Financial Officers, a Business Conduct Policy and related procedures, and anti-bribery and compliance training.

Tenaris also agreed that for a period of two years, the company will report to the SEC its remediation and compliance measures, including i) conducting an initial review and written report within 180 days, describing its remediation efforts, proposals for compliance programs, and parameters of the subsequent reviews; and ii) conducting and submitting at least two follow-up reviews and reports, and a final report due no later than 540 days after the submission of the initial report, to further assess whether its policies are reasonably designed to detect and prevent violations of the FCPA and other applicable anti-corruption laws. At the end of its reporting obligations, Tenaris must also submit a certification of compliance.

The DOJ also conducted a separate investigation into the conduct noted above. In a press release announcing the SEC resolution, Tenaris stated that the DOJ informed Tenaris that it had "closed its parallel inquiry" into the matter.

2021

Amec Foster Wheeler Energy Limited

On June 25, 2021, the DOJ, Amec Foster Wheeler Energy Limited ("AFWEL"), and John Wood Group plc, AFWEL's parent company, entered into a three-year deferred prosecution agreement ("DPA") to resolve a single-count criminal information filed in the EDNY charging AFWEL with conspiracy to violate the anti-bribery provisions of the FCPA. The information concerned AFWEL's efforts between 2011 and 2014 to obtain an oil and gas engineering and design contract in Brazil by using intermediaries to pay bribes, which it recorded as valid commission payments, to officials at Brazil's state-owned oil company, Petróleo Brasileiro S.A., ("Petrobras").

KEY FACTS

U.S. AGENCIES: DOJ/SEC

COUNTRIES INVOLVED: Brazil

MEANS OF CORRUPTION: Bribery of public officials, undisclosed agent, false invoices

On the same day, AFWEL entered into a coordinated resolution with the SEC, consenting to a cease-and-desist order finding that it violated the anti-bribery, books and records, and internal accounting controls provisions of the FCPA, in connection with its conduct in Brazil. In related foreign proceedings, which the DOJ and SEC considered in calculating AFWEL's penalties, AFWEL entered into a DPA with the United Kingdom's Serious Fraud Office related to a broader range of corrupt activities, which took place from 1996 to 2014 in Brazil, India, Malaysia, Nigeria, and Saudi Arabia, and reached settlements with the Brazilian Controladoria-Geral de União ("CGU"), Ministério Público Federal ("MPF"), and Advogado-Geral de União ("AGU").

The conduct at issue in the DOJ and SEC resolutions took place from 2011 to 2014; during that time, Foster Wheeler Energy Limited, the entity responsible for the conduct, was a UK subsidiary of Foster Wheeler AG, a Swiss-based company providing engineering, project, and technical services to the industrial and energy markets in over 30 countries. During this period Foster Wheeler AG was an "issuer" within the meaning of the FCPA, as its shares were registered with the SEC pursuant to Section 12(b) of the Exchange Act and were traded on the NASDAQ Exchange. In November 2014, Foster Wheeler AG and its subsidiaries were acquired by the UK-based AMEC plc, and the company was renamed Amec Foster Wheeler plc; Amec Foster Wheeler plc continued to be an issuer, as its shares were registered with the SEC and traded on the New York Stock Exchange. In 2017, the company was subsequently acquired by John Wood Group plc (which is not an issuer within the meaning of the FCPA) and was renamed Amec Foster Wheeler Energy Limited.

Conduct

Between 2011 and 2014, AFWEL, then Foster Wheeler Energy, knowingly and willfully conspired and agreed to corruptly offer and pay bribes to decision-makers at Petrobras in order to obtain a $190 million engineering and design contract for a gas-to-chemicals complex called the Complexo Gás-Químico UFN-IV ("UFN-IV"). As part of its efforts to secure this contract, AFWEL engaged an Italian agent, who was affiliated with a Monaco-based intermediary company and a Brazilian intermediary company.

In September 2011, the Italian agent and an executive of the Brazilian intermediary met in New York to discuss working as sales agents for AFWEL. Following that meeting, a different executive of the Brazilian intermediary sent the Italian agent copies of internal and confidential Petrobras documents regarding the planned UFN-IV project. The Italian agent shared these documents with the manager of a high-end men's clothing store in New York, which was frequented by a high-level AFWEL executive. The clothing store manager later arranged a meeting between the Italian agent and the AFWEL executive in Switzerland. The Italian agent told the AFWEL executive that the agent had "privileged relations" with Petrobras officials who had authority over the UFN-IV project.

During the period in which AFWEL was preparing its bid for the UFN-IV project, the Italian agent encouraged the Monaco intermediary to enter into an agreement with AFWEL as a "front" for the agent and the Brazilian intermediary, based on the belief that the Monaco intermediary could pass AFWEL's due diligence process. AFWEL eventually engaged the Italian agent through an "interim" agency agreement before it had completed due diligence on the agent. AFWEL executives also prevented the Italian agents, and the Brazilian intermediaries' due diligence materials from disclosing the relationship between the two. After the Italian agent failed AFWEL's due diligence process based on the results of a third-party due diligence review, AFWEL executives planned to engage the Brazilian intermediary, with the understanding that the Italian agent would work behind the scenes as an "unofficial" agent.

The Italian agent and the Brazilian intermediary obtained and provided confidential documents, inside information, and secret assistance from Petrobras officials for the benefit of AFWEL. After AFWEL was awarded the UFN-IV contract by Petrobras, it executed an agency agreement with the Brazilian intermediary, providing for a two percent commission, despite an AFWEL executive informing an AFWEL in-house lawyer that he believed the Italian agent may have promised to pay bribes to Petrobras officials. In 2013 and 2014, the Brazilian intermediary submitted four quarterly reports to Foster Wheeler Energy along with invoices for payment, none of which documented any meaningful work by the intermediary, but all of which were paid anyway.

In total, AFWEL paid approximately $1.1 million to the Brazilian intermediary; these payments were credited to the intermediary's account in Brazil and were made through a correspondent account in New York. Twenty percent of these funds were made available to pay bribes, with the remaining funds divided between the

Italian agent and the Brazilian intermediary. At least $89,000 was deposited to the Italian agent's bank account in Switzerland through a Brazilian money launderer. AFWEL earned at least $12.9 million in profits from its work on the UFN-IV project.

Resolution

Under the terms of its DPA with the DOJ, AFWEL agreed to pay a criminal penalty of $18,375,000, which represented a 25% reduction off the bottom of the sentencing guidelines range, and to self-report on the status of the company's anti-corruption compliance for the duration of the DPA. The DOJ agreed to credit up to $10,718,750 of the fine against payments that AFWEL made to authorities in the UK and Brazil in coordinated resolutions.

In agreeing to a DPA with AFWEL, the DOJ took into consideration AFWEL and John Wood plc's remediation and cooperation. This included: (i) full credit for cooperation with the DOJ's investigation, including making factual presentations, voluntarily facilitating Company employee interviews, and timely producing documents located domestically or abroad; (ii) providing the DOJ with all relevant facts known to them; and (iii) engaging in remedial measures, including the implementation of enhanced anti-corruption policies and training. Notably, AFWEL did not receive voluntary disclosure credit because the DOJ determined it did not voluntarily and timely self-disclose relevant conduct.

In connection with the SEC resolution, AFWEL agreed to pay disgorgement of $17,656,302 and prejudgment interest of $5,107,985, for a total of $22,764,287. The SEC agreed to credit up to $12,636,975 in disgorgement paid to authorities in the UK and Brazil. As with the DOJ, in entering its resolution, the SEC considered AFWEL and its parent company's remediation and cooperation.

Credit Suisse Group AG

On October 19, 2021, Credit Suisse Group AG ("Credit Suisse"), a Swiss-based international bank, and its UK subsidiary, Credit Suisse Securities (Europe) Limited (CSSEL), resolved criminal charges with the DOJ related to a scheme to defraud investors in the financing of state-backed projects to develop Mozambique's coastline and tuna fishing industry. Credit Suisse entered into a three-year deferred prosecution agreement resolving a criminal information filed in the U.S. District Court for the EDNY, charging the company with one count of conspiracy to commit wire fraud, and CSSEL pleaded guilty to one count of conspiracy to commit wire fraud. On the same day, Credit Suisse reached a coordinated resolution with the SEC to resolve charges that the company violated anti-fraud provisions of U.S. securities law, as well as the internal accounting controls and books and records provisions of the FCPA.

Credit Suisse also entered into parallel resolutions with the UK's Financial Conduct Authority (FCA) and Switzerland's Financial Market Supervisory Authority (FINMA), related to the same conduct. In total, the bank agreed to pay penalties, fines, and disgorgement totaling approximately $475 million, and pay restitution to victims of the scheme in an amount to be determined by the U.S. federal court. In its resolution with the UK FCA, Credit Suisse also agreed to forgive $200 million in debt owed to the bank by Mozambique.

Credit Suisse has over 47,000 employees worldwide and more than $1.6 trillion in assets under management. Its shares are listed on the New York Stock Exchange, making the bank an "issuer" for the purposes of the FCPA. This action marks the second FCPA-related resolution that Credit Suisse has reached with U.S. authorities; in 2018, Credit Suisse agreed to pay the SEC approximately $30 million in disgorgement and interest and its Hong Kong subsidiary paid a criminal penalty of over $47 million as redress for the bank's scheme to win business from Chinese state-owned entities by hiring friends and family members of Chinese government officials.

Conduct

Starting in late 2011, Mozambique government officials reached an agreement with Privinvest, an Abu Dhabi-based holding company with experience in the shipbuilding industry, to serve as the contractor for a project to develop, surveil, and exploit Mozambique's coastline. Privinvest agreed to pay bribes totaling at least $50 million to government officials throughout the Mozambiquan government and military in order to receive this contract.

In early 2012, Privinvest approached Credit Suisse regarding obtaining financing for the project. After meeting with Privinvest and government representatives, Credit Suisse proposed a financing structure where loan proceeds would be paid directly to Privinvest, with the government of Mozambique guaranteeing the loan. Credit Suisse then undertook an enhanced due diligence process, which resulted in a number of significant negative findings regarding Privinvest, including reports that Privinvest's senior executive was "an expert in kickbacks, bribery and corruption," "alleged to be heavily involved in corrupt practices," and a "dangerous man." Despite these findings, Credit Suisse moved forward with the loan, with one CSSEL Managing Director arranging to receive a personal $5.5 million kickback from Privinvest. Ultimately, in March 2013, Credit Suisse arranged a $372 million syndicated loan that was paid to Privinvest, with the government of Mozambique acting as a guarantor.

Several months after this loan, Credit Suisse agreed to raise another $500 million in financing for Empresa Mocambicana de Atum, S.A. (EMATUM), a Mozambiquan state-owned company that was established to create a state-owned tuna fishing company, with a second investment bank raising a further $350 million. These loans were financed through the sale of loan participation notes (LPNs), which were fixed-income securities

that Credit Suisse marketed and sold on the international bond market, including to investors in the U.S. When it marketed and sold these LPNs, Credit Suisse, through the CSSEL executives involved in the project, knew that a portion of the funds would be used to pay bribes and kickbacks, in violation of the terms of the offering circular.

In connection with the tuna fishing project, EMATUN hired Privinvest as its sole contractor to supply tuna fishing boats, an operations center, and relevant training. Credit Suisse employees worked with Privinvest and EMATUM officials to "maximize" the size of the loan, which allowed for more money to be used to pay bribes and kickbacks. Once again, Credit Suisse agreed to provide the loan proceeds directly to Privinvest, which again agreed to pay kickbacks to CSSEL executives; in fact, two CSSEL executives left the bank during 2013 and began working for a Privinvest subsidiary. Following the sale of the LPNs, in September 2013 Credit Suisse provided $500 million to a Privinvest subsidiary; the other investment bank provided an additional $350 million the following month. Privinvest used these funds to secretly pay millions in bribes and "fees" to Mozambiquan government officials and current and former CSSEL executives.

Although the LPN offering circular included projections that EMATUM would generate annual fishing revenues exceeding $200 million by the end of 2016, the company ultimately generated minimal revenue and conducted very little fishing operations. By mid-2015, Credit Suisse was aware that EMATUM was generating little revenue and would likely not be able to meet the LPNs' repayment schedule. The bank began to work with EMATUM and the Mozambique government on a transaction, referred to as the EMATUM Exchange, to exchange the EMATUM LPNs for government-issued bonds with a longer repayment schedule. As part of this process, Credit Suisse conducted a review of the use of the EMATUM loan proceeds, including engaging two independent experts to conduct valuations of the boats and other items that Privinvest sold to EMATUM using the loan proceeds. By early 2016, Credit Suisse knew that there were significant disparities between the loan amounts disbursed to Privinvest and the value of the boats and accompanying infrastructure and training that Privinvest provided to EMATUM; ultimately, the experts concluded that the value of the boats sold to EMATUM was between $265 and $394 million less than the value of the EMATUM loan proceeds provided to Privinvest.

After learning of this dramatic disparity, Credit Suisse employees expressed concern that the bank's Bribery and Anti-Corruption Compliance (BACC) Committee would shut down the proposed EMATUM Exchange transaction, or that the bank must have a duty to disclose this information to LPN investors. However, Credit Suisse employees also raised concerns that, if another financial firm managed the EMATUM Exchange, they could identify the same shortfalls in the use of the loan proceeds that Credit Suisse had identified, causing reputational damage to Credit Suisse. Ultimately, at a March 2016 meeting regarding reputational risk, a Credit Suisse compliance executive determined that, while the $250 million shortfall in the use of the EMATUM loan revenue was "difficult to understand," it did not pose a reasonable suspicion of financial crime that would trigger the bank's reporting obligations.

Credit Suisse's Compliance Department raised no objection to the EMATUM Exchange, and the bank's top management approved the transaction. The investor documents provided to holders of the EMATUM LPNs did not disclose any of the information that Credit Suisse had obtained regarding the hundreds of millions of dollars in shortfalls in the use of the loan proceeds. By April 2016, the EMATUM Exchange settled, converting the LPN notes into Mozambiquan government bonds. Later that same month, aspects of Credit Suisse's fraudulent conduct were revealed, causing the price of these bonds to drop. From May 2016 through March 2017, Mozambique and its relevant state-owned entities defaulted on their loans, causing losses to investors.

Resolution

Credit Suisse agreed to pay a U.S. criminal penalty totaling $247,520,000; of this amount, the bank will pay approximately $175.6 million to the U.S. Treasury in connection with the criminal resolution, with the remainder of the penalty being credited to amounts paid by Credit Suisse to the SEC and the UK FCA. In addition, the bank agreed to pay full restitution for the losses suffered by victims of the scheme in an amount determined by the court. This penalty reflects a 15% reduction from the bottom of the applicable sentencing guidelines range. Credit Suisse received partial credit based on its cooperation with the DOJ's investigation, engaging in remedial measures, and implementing a compliance program and internal controls; however, the bank did not receive full cooperation credit, based on its significant delays in providing certain evidence to U.S. authorities. Credit Suisse also did not receive credit for voluntarily disclosure of the matter.

Credit Suisse also agreed to pay the SEC a total of nearly $100 million, consisting of a civil money penalty of $65 million, disgorgement of approximately $26.2 million, and approximately $7.8 million in prejudgment interest.

On the same day, Russian bank VTB's London subsidiary agreed to pay the SEC approximately $6 million to resolve its role in misleading investors in connection with the 2016 bond exchange.

In its settlement with the UK FCA, Credit Suisse agreed to pay a penalty of £147,190,200 (or approximately $200 million). This penalty was discounted to reflect both Credit Suisse's cooperation with UK authorities and the bank's agreement to forgive $200 million in debt owed by Mozambique.

Finally, under the terms of its settlement agreement with Switzerland's FINMA, Credit Suisse agreed to the appointment of an independent third-party to oversee the implementation and effectiveness of the bank's compliance program. FINMA also imposed restrictions on Credit Suisse's loans to countries that are deemed high-risk and financially weak that will exist through 2022.

Deutsche Bank Aktiengesellschaft

On January 8, 2021, the DOJ announced that Deutsche Bank Aktiengesellschaft ("Deutsche Bank") entered into a three-year deferred prosecution agreement to resolve a two-count criminal information filed in the EDNY, which charged Deutsche Bank with one count of conspiracy to violate the books and records and internal controls provisions of the FCPA, and one count of conspiracy to commit wire fraud. The wire fraud allegations were related to a commodities fraud charge based on a separate set of facts than the FCPA charge. The same day, as part of a coordinated resolution, the SEC also announced a resolution with Deutsche Bank, involving charges that the bank violated the FCPA's books and records and internal controls provisions.

Deutsche Bank is a financial services corporation headquartered in Frankfurt, Germany. Operating in over 70 countries worldwide, Deutsche Bank has approximately 100,000 employees. Its shares were traded on the New York Stock Exchange and it is regulated by the SEC pursuant to the Securities Exchange Act.

This is the second FCPA resolution for the German bank; in 2019, the SEC announced that Deutsche Bank would pay approximately $16.2 million to settle charges based on FCPA violations in Russia and the Asia-Pacific region, which were unrelated to the January 2021 resolutions.

Conduct

Conduct Underlying the DPA

Deutsche Bank admitted that between 2009 and 2016, Deutsche Bank, acting through its employees and agents, including high-level regional executives and managing directors, willfully and knowingly conspired to maintain false books, records, and accounts to conceal corrupt payments made to third-party intermediaries, in order to obtain and retain lucrative business for the bank. Deutsche Bank referred to these intermediaries as "business development consultants" or "BDCs." The DOJ identified corrupt or otherwise improper payments made to BDCs in Abu Dhabi, Saudi Arabia, and Italy. These payments were inaccurately recorded in Deutsche Bank's books and records and were not subject to sufficient internal controls; in certain instances, Deutsche Bank made payments to BDCs that were unsupported by evidence or invoices showing any actual services provided. At other times, the company's employees helped create or created false justifications for the payments to BDCs.

In Saudi Arabia, Deutsche Bank entered a BDC contract with a company that was beneficially owned by the wife of an individual responsible for making investment decisions for the family office of a Saudi official. Payments to this BDC were recorded as "referral fees," and bank officials recorded that the BDC was the source of business from the family office, when in fact the family office business was a pre-existing client, and bank officials were aware that these corrupt payments were made to retain the family office's business. Deutsche Bank officials assisted the Saudi BDC in establishing a company in the British Virgin Islands, and

opened an account for the BVI company with Deutsche Bank, into which it deposited the corrupt payments. In total Deutsche Bank made payments totaling more than $1 million into this account, and provided other benefits to the manager of the Saudi family office, including a loan of approximately €635,000 to purchase a house in France. Deutsche Bank also contracted and conspired with a BDC from Abu Dhabi who was a relative of a high-ranking government official, in order to obtain and retain lucrative business from an investment vehicle indirectly owned by the government of Abu Dhabi. Deutsche Bank officials were aware that the Abu Dhabi BDC was acting as a proxy for the government official, and that paying bribes to the BDC was a requirement for the bank to obtain business from the state-owned investment vehicle. Engagement of the Abu Dhabi BDC was reviewed and approved by Deutsche Bank's Global Markets Risk Assessment Committee ("GMRAC")—which included high-ranking bank employees from multiple subsidiaries and divisions, as well as a high-ranking employee within the bank's regional Legal and Compliance function—despite information showing indicia of corruption. Deutsche Bank did not perform due diligence on the Abu Dhabi BDC before entering into the BDC contract with him and beginning to make payments under that contract. In total, the bank paid the Abu Dhabi BDC nearly $3.5 million, despite receiving no invoices and minimal evidence of services provided.

Deutsche Bank also engaged an Italian tax judge as a BDC, despite knowledge by bank employees that he was a judge. The bank made payments to this judge that were outside the terms of his BDC contracts, continued making payments even during periods in which his contract had lapsed, and found ways to pay the judge additional amounts that were falsely recorded in the bank's books and records as compensation for "reports" submitted by the judge.

Conduct Underlying the SEC Order

In addition to the misconduct related to the Saudi Arabian, Abu Dhabi, and Italian BDCs that were described in the DPA, the SEC alleged that Deutsche Bank improperly engaged a Chinese consultant as a BDC in connection with the establishment of a clean energy investment fund with a Chinese government entity. Deutsche Bank officials were aware that the Chinese consultant was a "senior advisor" to the regional Chinese government—with which the bank was seeking to establish the investment fund—and was a close personal friend of a Chinese government official whose approval was required to establish the investment fund; that same Chinese government official required that Deutsche Bank "work through" the Chinese consultant.

Despite this, Deutsche Bank engaged the Chinese Consultant as a BDC without performing due diligence. From April 2011 to May 2013, Deutsche Bank paid this individual at least $1.6 million. This included payments for services purportedly provided before he was engaged, and reimbursement for gifts and entertainment provided to government officials that was not pre-approved by Deutsche Bank Compliance, as required by the bank's policies. In addition, the Chinese consultant was given an equity interest in the investment fund that required little or no capital investment, without the bank's Legal and Compliance departments being made aware of his relationship with the local Chinese government. Ultimately, however, the investment fund was dissolved, having failed to raise capital.

Conduct Underlying the Commodities Fraud Charge

In addition to the FCPA violations charged, the DPA also resolved charges related to a scheme by Deutsche Bank precious metals traders to defraud other traders on the Commodity Exchange Inc. and New York Mercantile Exchange Inc. commodities exchanges. Traders on Deutsche Bank's precious metals desk in New York, Singapore, and London placed orders to buy and sell precious metals futures contracts, intending to cancel such orders prior to execution in an attempt to profit by deceiving other market participants by injecting false and misleading information concerning supply and demand.

Resolution

As part of the DOJ and SEC resolutions, Deutsche Bank agreed to pay more than $130 million in financial penalties, approximately $122.9 million of which related to FCPA violations. Specifically, Deutsche Bank agreed to pay a criminal penalty of $79,561,206 in relation to the FCPA scheme. The bank received full cooperation credit but did not receive credit for self-reporting. The DOJ acknowledged Deutsche Bank's efforts to enhance and commitment to continue to enhance its anti-bribery and anti-corruption program and internal controls, and determined that a compliance monitor was not necessary based on the current state of the bank's compliance program and agreement to provide three annual reports regarding its compliance controls, policies, and procedures.

In addition to the criminal penalty, the SEC required Deutsche Bank to pay $43,329,622, constituting $35,145,619 in disgorgement of profits and $8,184,003 in prejudgment interest. The SEC did not impose an additional civil penalty.

In relation to the commodities fraud scheme that was also resolved through the DPA, Deutsche Bank agreed to pay $7,530,218, including disgorgement of $681,480, victim compensation payments of $1,223,738, and a criminal penalty of $5,625,000, which was fully credited against Deutsche Bank's payment of a $30 million civil monetary penalty assessed by the CFTC in connection with the commodities conduct.

WPP PLC

On September 24, 2021, the SEC announced that it had reached a resolution with London- and New York-headquartered WPP plc ("WPP"), a communications holding company with operations in more than 100 countries, and entered a cease-and-desist order, finding that WPP violated the anti-bribery, books and records, and internal accounting provisions of the FCPA, including through schemes by subsidiaries in India, China, Brazil, and Peru. WPP, considered the world's largest advertising agency, agreed to pay more than $19 million and to cease and desist from violating the FCPA, without admitting or denying the SEC's findings. WPP's ADR shares are registered with the SEC under Section 12(b) of the Exchange Act and traded on the New York Stock Exchange, making the company an "issuer" within the meaning of the FCPA.

Conduct

The SEC found that WPP's FCPA violations were an outgrowth of an aggressive international growth strategy the company pursued until 2018. WPP purchased controlling stakes in a number of smaller advertising agencies, including agencies located in high-risk markets, and integrated them into one of its "Networks"—which were responsible for servicing clients and overseeing operations within a certain territory. While the newly acquired agencies' financial statements were consolidated within WPP's financials, and WPP centralized the finance, reporting, control, treasury, tax, mergers and acquisitions, investor relations, legal affairs, and internal audit functions, the newly acquired agencies often retained significant control over their operations. Frequently, the former founder or head of the acquired agency—from whom WPP had purchased a majority stake in the agency—would stay on as the Chief Executive Officer of that agency, with wide autonomy and with a portion of the agency's purchase price deferred until the agency met future financial performance goals.

Although WPP mandated that acquired agencies follow WPP's global policies and internal accounting control requirements, the SEC found that in practice it did little to exercise effective control over these agencies, including agencies operating in high-risk markets. WPP had no compliance department throughout the relevant time period—the SEC Order referenced conduct from 2013 through 2019—and its legal and internal audit functions and Network management lacked meaningful coordination. As a result, Network management was given responsibility for remediating deficiencies identified by the legal and internal audit teams, but no entity provided sufficient oversight to ensure that the newly acquired agencies actually implemented WPP's internal accounting controls and compliance policies. Further, WPP failed to respond appropriately to red flags, including anonymous complaints, identifying corruption or other failures within WPP's agencies.

In India, WPP acquired a majority interest in a Hyderabad-based agency in 2011, making that agency a subsidiary (the "India Subsidiary") of one of WPP's Networks, with the agency's co-founder as its CEO. Much of the India Subsidiary's revenue was generated through advertising and public relations campaigns by two Indian state governments. From 2015 through 2017, WPP received seven anonymous complaints that provided specific information about multiple bribery schemes directed by the India Subsidiary's CEO, through which the India Subsidiary paid bribes to Indian government officials and kickbacks to its CEO.

The SEC found that the first scheme involved the India Subsidiary utilizing a third-party vendor to purchase advertising space in newspapers in order to run advertisements for its Indian state government clients. While the India Subsidiary negotiated a lower rate for these advertising purchases, it paid a higher rate to the third-party vendor, and directed the vendor to use the excess funds to pay bribes to Indian government officials and kickbacks to the India Subsidiary's CEO. In the second scheme, the India Subsidiary concocted an entirely false advertising campaign (which never actually ran), but directed a different third-party vendor to provide invoices indicating that it actually provided services for this false campaign. An Indian state government paid the India

Subsidiary over $1.5 million in fees related to this nonexistent campaign, most of which the India Subsidiary then paid on to the third-party vendor, based on its false invoices. The third-party vendor then paid more than $1 million to a separate intermediary, which was responsible for paying bribes to Indian government officials, and paid the rest of the funds back to the India Subsidiary and its CEO.

Despite receiving multiple specific complaints describing both bribery schemes, WPP failed to promptly take sufficient action to uncover and remediate the misconduct. After receiving a complaint describing the first scheme in 2015, WPP engaged a local accounting firm to review the allegations; however, this firm relied on information provided by the India Subsidiary's CEO and CFO, did not contact third parties, and ultimately produced a report which contained no conclusions regarding the bribery allegations. Despite receiving further complaints in 2016, WPP did not take action to address the allegations that the CEO was involved in bribery schemes. Only after additional complaints in 2017 named the specific Indian government official who allegedly received the bribes did WPP direct its legal team to conduct an investigation, which uncovered the extent of both schemes and resulted in the termination of the India Subsidiary CEO and CFO.

In China, WPP acquired a majority interest in a Shanghai-based agency which became a subsidiary of a WPP Network (the "China Subsidiary"), with the agency's co-founder remaining as CEO. The SEC found that, in 2017, an internal audit identified that the China Subsidiary was violating WPP's internal accounting controls, including by employing tax-avoidance schemes. In 2018, a China Subsidiary employee informed a member of the WPP Network regional management that the China Subsidiary was facing potential criminal charges as part of an ongoing tax audit, but that tax officials had recommended that the subsidiary engage a specific third-party vendor. Shortly after this, the China Subsidiary CEO informed other members of WPP's finance function and the WPP Network CFO that he was "comb[ing] through… [his] personal social connections," to attempt to resolve the tax audit. WPP did not take any action to address these red flags. In November 2018, the China Subsidiary paid approximately $107,000 to a third-party vendor identified by a Chinese tax official, supported by falsified documentation, after which the tax official closed the tax investigation without major findings. This allowed the China Subsidiary to avoid paying more than $3.25 million owed to Chinese tax authorities.

In Brazil, the SEC found that a public relations agency, in which WPP acquired a majority interest in 2016 (the "Brazilian Subsidiary"), made payments to third-party "advisors" who assisted the agency in obtaining government contracts. These payments violated WPP policy, which prohibited its agencies from making payments to third parties to obtain government contracts without WPP approval. Additionally, the SEC found that these payments were made in circumstances in which there was a "high probability" that some of the fees paid would be passed on to government officials with the authority to award the contracts. The Brazilian Subsidiary falsified its books and records to disguise these payments as legitimate expenses.

In Peru, WPP acquired a Lima-based creative services agency (the "Peru Subsidiary"), appointing its founder as the CEO. The SEC found that, in 2013, the Peru Subsidiary and the CEO acted as a conduit for bribes paid by a construction company, which were used to pay for the political campaigns of the mayor of Lima. The Peru Subsidiary CEO assisted the construction company in disguising the source of funds by routing them through WPP subsidiaries in Colombia and Chile, obscuring any record that the construction company was the source of the funds paid to the mayor's campaign. WPP did not uncover this scheme until a Peruvian criminal proceeding identified it in 2019.

Resolution

WPP agreed to pay disgorgement of $10,114,242.86, prejudgment interest of $1,110,234.68, and a civil penalty of $8 million, for a total of $19,224,659.54. In reaching this resolution, the SEC credited WPP's cooperation, which including sharing facts developed through its own investigations and forensic accounting reviews, translating documents, and making current and former employees available for interviews. Additionally, the SEC credited the company's remediation efforts, which included terminating or separating from senior executives and others involved in or with supervisory responsibility over the misconduct, enhancing its compliance, internal investigations, risk and controls, and internal audit functions, taking further action to enhance its compliance program, including creating Network risk committees, performing annual compliance risk assessments, performing reviews of agencies in high-risk countries, enhancing the procedures for the engagement of third parties, and providing additional compliance training for employees.

FCPA Settlements and Enforcement Actions: Individual Prosecutions

2022

Cognizant Prosecutions

On February 1, 2022, Judge Kevin McNulty of the federal District Court for New Jersey ruled that documents that Cognizant Technology Solutions Corporation ("Cognizant") produced to the DOJ from its internal investigations into potential violations of the FCPA constituted a "significant" waiver of privilege. On April 27, 2022, in a clarifying order that was unsealed on May 4, 2022, Judge McNulty upheld his original ruling and ordered Cognizant to produce documents, including interview memoranda and attorney notes, in their full and unredacted form, because the company had waived privilege as to those documents once it had disclosed the information to the DOJ.

The ruling stemmed from the trial of Gordon Coburn, Cognizant's former President, and Steven Schwartz, its former Executive Vice President, Chief Legal and Corporate Affairs Officer, who were indicted in February 2019 for violating and conspiring to violate the FCPA's anti-bribery and accounting provisions.

Background

On February 15, 2019, the SEC announced that it had settled with Cognizant for alleged violations of the anti-bribery, books and records, and internal controls provisions of the FCPA. The SEC found that between 2014 and 2016 Cognizant, acting through Gordon Coburn and Steven Schwartz and other employees, authorized contractors to pay approximately $3.6 million in bribes to government officials in India to obtain required planning permits and operating licenses in connection with the development of an office park in Tamil Nadu, India. Without admitting or denying the SEC findings, Cognizant agreed to pay disgorgement and prejudgment interest of approximately $19 million and a penalty of $6 million to settle the charges.

Prior to the SEC's announcement, on February 13, 2019, the DOJ formally declined to prosecute Cognizant under the FCPA Corporate Enforcement Policy. In its declination letter, the DOJ pointed to a number of factors for its decision, including Cognizant's voluntary self-disclosure, full cooperation, lack of prior criminal history, and full remediation, the adequacy of remedies such as civil or regulatory enforcement actions, including the company's resolution with the SEC and agreement to pay a civil penalty of $6 million

and disgorgement, Cognizant's agreement to disgorge the full amount of its cost savings from the bribery, and the fact that, as a result of the company's timely voluntary disclosure, the DOJ was able to conduct an independent investigation and identify individuals with culpability for the corporation's conduct.

In relation to the SEC and DOJ resolutions, on February 14, 2019, the DOJ secured a twelve-count indictment against Gordon Coburn and Steven Schwartz in the United States District Court for the District of New Jersey. The DOJ charged Coburn and Schwartz with conspiracy to violate, as well as direct violations of, the anti-bribery, books and records, and internal controls provisions of the FCPA in connection with Cognizant's business in India. The SEC also filed a related civil case on February 15, 2019, against Coburn and Schwartz. According to the indictment, between 2014 and 2016, Coburn, Schwartz, and others authorized contractors to bribe senior government officials in connection with the construction of a corporate campus for Cognizant in Chennai, India.

The Cognizant Attorney-Client Privilege and Waiver Ruling

In October 2020, Coburn and Schwartz served subpoenas on Cognizant and its construction partner, Larsen & Toubro Construction Company, to obtain documents from the company's investigation. The interrelated motions revolving around the subpoenas led to Judge McNulty's February 1 ruling. The defendants argued that Cognizant "effected a subject matter waiver of broad categories of documents, namely, any communications regarding conduct alleged in the indictment and any materials related to Cognizant's internal investigation, by disclosing a summary of its investigation's findings to the DOJ." Cognizant maintained that it did not waive attorney-client privilege over the entire internal investigation as it "was simply cooperating with DOJ or disclosing portions of investigative documents."

Judge McNulty agreed with the defendants that Cognizant effectuated a subject matter waiver of its attorney-client privilege as to the documents provided to the government. Judge McNulty ruled that Cognizant had made a "significant" waiver in its disclosures to the government consisting of "detailed accounts of 42 interviews of 19 Cognizant employees," including Coburn and Schwartz. The judge reasoned that "[b]y disclosing this information to the Government while under threat of prosecution, Cognizant handed these materials to a potential adversary and destroyed any confidentiality they may have had, undermining the purpose of both attorney-client and work-product privileges." The judge further held that that in turning over internal investigation materials to the government, Cognizant had effectuated a subject-matter waiver of privilege "as to communications that 'concern the same subject matter' and 'ought in fairness be considered together' with the actual disclosures to DOJ." Accordingly, Judge McNulty found that: first, Cognizant had waived its privilege to "all memoranda, notes, summaries or other records of interviews to the extent summaries of the interviews had been provided to the government"; second, Cognizant had waived its

privilege to "underlying documents or communications" whose content had been directly conveyed through the summaries; and third, Cognizant had waived its privilege as to "any documents and communications that were reviewed and formed any part of the basis of any presentation, oral or written to DOJ."

The judge also made several other rulings in the case. Specifically, on the questions of privilege pertaining to Cognizant's draft press releases, retention and collection policies, communications with its accountants, and the company's internal investigation, the judge found that drafts of press releases and public disclosures and communications with public relations firms were not privileged, reasoning that such drafts and communications were neither "created for the predominant purpose of legal advice," nor "to prepare for litigation." The judge determined that documents relating to legal advice concerning the formulation of Cognizant's document collection and retention policies are facially privileged. The judge concluded that Cognizant maintained its privilege with respect to its communications with its accounting firm concerning the internal investigation and related updates to DOJ and SEC because they were "closely related to the provision of legal advice." The judge also concluded that Cognizant's internal investigation "by its nature [ ] consists of attorneys' fact gathering for the purpose of rendering legal advice."

Cognizant sought "clarification" of the judge's ruling, arguing that the ruling had "authorized it to extensively redact interview memoranda made during its investigation and to withhold notes used by its attorneys in preparation for its disclosures to the government." In the April 2022 order, Judge McNulty reiterated his original finding that Cognizant had waived its privileges as to those documents. He explained that Cognizant cannot "redact the documents based on this or that sentence or paragraph being privileged or nonprivileged, viewed in isolation." He stated that "[t]he basis for the Court's decision was not that such items could not have been privileged as an original matter, but rather that the disclosure to the government waived any privilege as to documents actually disclosed and certain related documents pertaining to the same subject matter." In the clarifying order Judge McNulty ordered Cognizant to produce to the defendants in unredacted form "all memoranda, notes, summaries, or other records" of interviews concerning the same subject matter "to the extent that summaries of interviews were conveyed to the government" and over "documents and communications that were reviewed and formed any part of the basis of any presentation to the government," within 14 days, noting that both the unredacted interview memoranda and attorney notes fall within the production.

Judge McNulty also observed that Cognizant was being investigated for allegations of bribery, and signed a declination agreement with the DOJ to avoid prosecution. The declination letter, he noted, cited Cognizant's voluntary disclosure, its thorough investigation, and its "full and proactive cooperation" to continue to provide the government with "any information" to avoid liability. As such, Judge McNulty noted that "[i]t is not surprising that Cognizant waived its privilege; by doing so, it dodged a bullet."

Hoskins

On August 12, 2022, the U.S. Court of Appeals for the Second Circuit affirmed the acquittal of Lawrence Hoskins, a British national and former senior vice president of Alstom S.A. ("Alstom"), finding that the United States District Court for the District of Connecticut properly determined that no agency or employee relationship existed between Hoskins and Alstom's Connecticut-based U.S. subsidiary, Alstom Power Inc. ("API"). This is the second time that the Second Circuit has concluded that Hoskins' alleged acts in a foreign country were outside the scope of the FCPA's extraterritorial jurisdiction.

Hoskins' case dates back to July 2013, when the DOJ charged him with conspiracy to violate the anti-bribery provisions of the FCPA, violating the anti-bribery provisions of the FCPA, conspiracy to commit money laundering, and violating the money laundering provisions of the FCPA, for his alleged role in a scheme to bribe Indonesian officials to secure business for Alstom. Specifically, the DOJ alleged that between 2002 and 2004, Hoskins participated in API's hiring of two consultants to bribe officials of the Indonesian state electricity company, Perusahaan Listrik Negara, to secure a $118 million contract relating to the Tarahan coal-fired steam power plant project for Alstom.

Hoskins was employed by an Alstom UK subsidiary, but was assigned to another Alstom subsidiary based in France, Alstom Resources Management. The DOJ alleged that Hoskins, who worked in Paris for API's UK subsidiary, was responsible for approving the selection of the consultants and authorizing payments to them.

Hoskins did not squarely fit into any of the three categories of persons over whom FCPA jurisdiction applies, as 1) he was not a "domestic concern," 2) he was not employed by a domestic concern, and 3) he did not enter the United States while allegedly working on the scheme. Nonetheless, the DOJ claimed that Hoskins was liable as a co-conspirator or accomplice to the FCPA violations of API, a U.S. company.

In June 2015, Hoskins filed a motion to dismiss the conspiracy or accomplice charge, which the District Court granted in August 2015. The District Court denied the DOJ's subsequent motion to reconsider the ruling, and the government appealed. On August 24, 2018, in *United States v. Hoskins* (*Hoskins I*), 902 F. 3d 69, 76 (2d Cir. 2018), the Second Circuit affirmed the District Court's decision and rejected the government's theory that Hoskins could be subject to FCPA conspiracy or accomplice liability. The court held that "a person could not be guilty as an accomplice or a co-conspirator for an FCPA crime that he or she is incapable of committing as a principal." The Second Circuit, however, left open the possibility that Hoskins could be held liable as an "agent." The court held that if the government could show Hoskins was acting as an agent, he could be prosecuted under the FCPA. The DOJ refiled the case under the agency theory of liability, arguing that Hoskins' work for API "rendered him an 'an agent' of 'a domestic concern'—a category of persons squarely within the FCPA's terms."

Hoskins went on trial on October 28, 2019. On November 8, 2019, a jury convicted him of eleven counts, seven of which were FCPA violations, and four of which were money laundering charges, and acquitted him on one count of money laundering. Hoskins filed a motion for acquittal or a new trial and argued that he was not an agent within the meaning of the FCPA. The District Court granted Hoskin's motion. The government again appealed to the Second Circuit.

In *United States v. Hoskins*, No. 20-842, _ F. 4th _, 2022 WL 3330357 (2d Cir. Aug. 12, 2022) (*Hoskins II*), the Second Circuit affirmed Hoskins' acquittal. The court explained that the crux of the appeal was "whether there was an agency relationship between Hoskins and API." Applying the "common law meaning of agency," the Second Circuit explained that the "three elements necessary to an agency relationship are (1) a manifestation by the principal that the agent will act for him; (2) acceptance by the agent of the undertaking; and (3) an understanding between the parties that the principal will be in control of the undertaking." The Second Circuit stated that Hoskins' actions occurred "at the behest" of API and "subject to the decision-making" of other executives of API, and there was no evidence that API executives actually controlled Hoskins' actions. The court noted that the lack of control over Hoskins' actions is fundamental to the question of whether Hoskins was an agent. The court noted that, because Hoskins did not appear to have any authority to negotiate contract terms and appeared to serve as little more than a messenger for API, API lacked control over Hoskins. The court concluded that there was insufficient evidence from which a jury could find the agency or employee relationship between Hoskins and API required to establish criminal liability under § 78dd-2.

Following the Second Circuit ruling, under its appellate options, the DOJ could seek either an *en-banc* review of the Hoskin's panel decision by the Second Circuit or seek *certiorari* in the U.S. Supreme Court. The DOJ, however, did not file for an *en-banc* rehearing nor did it seek *certiorari* by the November 14, deadline, ending the DOJ's long-running FCPA case against Hoskins.

Vitol Prosecutions

Lionel Hanst

On March 16, 2022, the DOJ filed a single count information in the EDNY, charging Lionel Hanst, a citizen of the Netherlands and Curaçao, with one count of conspiracy to commit money laundering. According to the court documents, between November 2014 and September 2020, Hanst engaged in an international money laundering scheme in which he and others facilitated, concealed, and disguised bribe payments made by and on behalf of Vitol, Inc. ("Vitol") to foreign officials in Ecuador, Mexico, and Venezuela, to obtain and retain business with the state-owned oil and gas companies in those countries.

Conduct

In 2014, Hanst and a Vitol Trader agreed that Hanst would purportedly work from Curaçao overseeing the other brokers in the region on behalf of Vitol and a Vitol Group affiliate. In this role, Hanst would make payments on behalf of Vitol, ostensibly to brokers that he managed in Curaçao. In return, Hanst would keep 5% of the money he received. In connection with making payments on behalf of Vitol, Hanst created two shell companies and opened corresponding bank accounts in Curaçao. To conceal and disguise the bribes, the Vitol Trader communicated with Hanst via personal, non-Vitol email addresses. Hanst then entered into sham brokerage and commodity swap agreements with a Vitol Group affiliate under the name of one of the shell companies. At the direction of the Vitol Trader, Hanst signed and sent the Vitol agreements to a Vitol Group affiliate using a Swiss fax number provided by the Vitol Trader, even though he knew he would not perform any of the services described in the agreements. To further conceal the bribes, Hanst submitted to Vitol for approval sham invoices with information the Vitol Trader provided to justify payments.

Hanst and the Vitol Trader agreed to execute sham consulting services agreements between Hanst's shell companies and intermediaries in Mexico, Ecuador, and Venezuela, knowing that the services detailed in the sham agreements would not be performed. Subsequently, the Vitol Trader provided bank routing instructions and sham invoices purportedly issued by the third parties to Hanst, who then initiated transfers of funds to shell companies controlled by these third parties. The intermediaries used the funds to make bribe and other fraudulent payments to foreign officials in those countries.

Pursuant to the sham agreements and invoices, Vitol paid approximately $21 million from bank accounts in the UK to Hanst shell companies in Curaçao, a portion of which was transferred through the United States. Hanst, at the direction of the Vitol Trader, wired approximately $19.9 million to dozens of bank accounts in the United States, Mexico, and elsewhere. Some of the bank accounts were held directly in the names of foreign officials and other shell companies controlled by the intermediaries, who then used the bribe payments to pay foreign officials in exchange for Vitol obtaining and retaining business from Citgo Petroleum Corporation ("Citgo") a state-owned and controlled oil company in Venezuela, Pemex Procurement International, Inc. ("PPI"), a stated-owned and controlled oil company in Mexico, and Empresa Publica de Hidrocarburos del Ecuador ("Petroecuardo"), a state-owned and controlled oil company in Ecuador.

Gonzalo Guzman Manzanilla and Carlos Espinosa Barba

In May 2021, the DOJ charged two Mexican officials, Gonzalo Guzman Manzanilla ("Guzman") and Carlos Espinosa Barba ("Espinosa"), procurement general managers at PPI, with one count of conspiracy to commit money laundering. The defendants, both Mexican citizens, resided in Houston, Texas. The DOJ determined that the defendants were "foreign officials" under the FCPA because PPI and its parent, Petróleos Mexicanos ("PEMEX"), are owned and controlled by the Mexican government.

Conduct

According to the DOJ, beginning in August 2017, a Vitol Trader paid bribes to Guzman and Espinosa in order to obtain an improper business advantage and obtain and retain business with PPI. Guzman, Espinosa, and the Vitol Trader met with a third PPI official in Houston, Texas, at which time they agreed that Vitol would pay bribes of approximately $600,000 to Guzman, Espinosa, and the third PPI official, to obtain confidential information that would help Vitol win a "valuable contract to supply ethane to PPI." In June 2018, Vitol was awarded the contract.

To promote and conceal the bribes, the defendants were paid through offshore bank accounts held by shell companies controlled by unnamed intermediaries. The Vitol Trader and the intermediaries also created fake invoices and sham consulting agreements to conceal the proceeds of the bribery scheme. Espinosa received approximately $255,895 and Guzman received approximately $371,466 in bribe payments through bank accounts controlled by close relatives.

The DOJ charges followed a 2020 DPA between Vitol and the DOJ in which Vitol agreed to pay a combined criminal penalty of $135 million to resolve allegations that the company engaged in conspiracies to violate the anti-bribery provisions of the FCPA through schemes to bribe officials in Brazil, Ecuador, and Mexico. The DPA was part of a coordinated resolution with the Commodity Futures Trading Commission in a related matter, and an investigation by the Brazilian Ministerio Publico Federal of to the company's bribery scheme in Brazil.

PDVSA Prosecutions

In 2022, the DOJ announced indictments and arrests of several individuals in the Southern District of Florida, for allegedly participating in various corrupt schemes involving Venezuela's state-owned and state-controlled energy company, Petróleos de Venezuela S. A ("PDVSA"). The DOJ charged: (i) Ralph Steinmann and Luis Fernando Vuteff, alleging conspiracy to commit money laundering and direct money laundering violations; (ii) Jhonnatan Teodoro Marin Sanguino, alleging conspiracy to commit money laundering; (iii) Daniel D'Andrea Golindano and Luis Javier Sanchez Rangel, alleging money laundering; and (iii) Rixon Rafael Moreno Oropeza, alleging conspiracy to commit money laundering as well as direct money laundering violations. Additionally, in a related case in 2018, the DOJ charged Carmelo Urdaneta Aqui with conspiracy to commit money laundering and foreign travel in aid of racketeering. In June 2022, a federal judge sentenced Urdaneta. All the DOJ charges relate to various bribery schemes to obtain or retain business from PDVSA.

These cases continue the DOJ's recent trend of pursuing charges against individuals, including non-U.S. citizens, and holding individual violators accountable on FCPA and related charges. These cases also highlight the DOJ's continued focus on bribery schemes involving PDVSA and its subsidiaries and joint ventures, and the frequent use of money laundering charges in these prosecutions.

Ralph Steinmann and Luis Fernando Vuteff

On July 12, 2022, the DOJ charged two financial asset managers, Ralph Steinmann ("Steinmann"), a Swiss national, and Luis Fernando Vuteff ("Vuteff"), an Argentinian national, with conspiracy to commit money laundering and direct money laundering violations for their alleged participation in a $1.2 billion money laundering scheme involving Venezuelan officials. According to the court documents, the defendants were charged with one criminal count each for allegedly conspiring with others to launder the proceeds of a corrupt foreign currency exchange scheme involving bribery of Venezuelan officials, worth more than $200 million, through the U.S. by way of U.S. and European bank accounts and real estate investments. The defendants also opened accounts for or on behalf of at least two Venezuelan public officials to receive their bribe payments related to the scheme. The defendants join the ranks of at least eight others charged in July 2018 in the alleged currency-exchange scheme dubbed "Operation Money Flight."

According to the criminal complaint, in or around December 2014 and lasting until at least August 2018, Steinmann, Vuteff, and others allegedly discussed and agreed to create sophisticated financial mechanisms and relationships required to launder more than $200 million from the scheme, which took advantage of Venezuela's fixed currency exchange rate against the U.S. dollar. The complaint stated that the scheme that Steinmann and Vuteff operated involved roughly $600 million in illegal proceeds from PDVSA, obtained through bribery and corruption, and included "coordinating the movement of funds with an individual who worked as a confidential source," to launder a portion of the money. As part of the scheme, funds were allegedly wired from a financial institution in Malta to a trust account in the Bahamas of which the confidential source was the ultimate beneficiary.

According to the court documents, through a series of shell companies in Venezuela and elsewhere, the conspirators bought bolívars (Venezuela local currency) on the open market for a small amount of foreign currency, lent the bolívars to PDVSA, and then got repaid in foreign currency at the Venezuelan government's fixed exchange rate, which placed an artificially high value on bolívars, yielding a significant profit. In one example, the transaction was disguised as a "financing" arrangement whereby the conspirators loaned 7.2 billion bolívars to PDVSA, which would have been worth roughly €35 million in the non-government run exchange market, but received $600 million when the loans were paid back at the fixed exchange rate.

Steinmann and Vuteff allegedly kept a spreadsheet to track the distribution of the bribery proceeds and participated in wire transfers from Europe to Florida designed to mask the transfer of the bribery proceeds. The defendants concealed the nature, source, and location of the bribery proceeds through money transfers from Europe to South Florida and then laundered the proceeds through the purchase of assets, including a condo in South Florida. The DOJ said that Steinmann and Vuteff also employed the services of an unnamed UK broker-dealer firm to help launder funds through a fraud scheme targeting UK treasury bonds.

Jhonnatan Teodoro Marin Sanguino

On April 21, 2022, the DOJ charged Jhonnatan Teodoro Marin Sanguino ("Marin") with conspiracy to commit money laundering in concert with a larger PDVSA scheme to obtain contracts and other business advantages from PDVSA subsidiaries though corruption and bribery. According to the court documents, Marin served as the mayor of the city of Guanta, Venezuela from around 2008 to at least 2017. From 2013 to 2017, Marin and others, including a co-conspirator contractor for the PDVSA subsidiaries, conspired to pay bribes of approximately $3.8 million to Marin in exchange for using his official position as the mayor of Guanta to influence officials at the PDVSA subsidiaries to award contracts to the co-conspirator contractor's companies. As a result of this scheme, the procurement director of a PDVSA subsidiary helped award tens of millions of dollars in contracts to the co-conspirator contractor companies.

Specifically, the DOJ alleged that Marin and his co-conspirators paid bribes to at least two Venezuelan officials to influence PDVSA subsidiaries to award contracts. Marin used his official status as mayor to influence and direct the head procurement director of Petrocedeño, S.A., a joint venture between PDVSA and two European oil companies, to award a three-year contract (2015-2017) valued at tens of millions of dollars to the contractor companies. In another instance, Marin personally attended a meeting with senior officials at the PDVSA subsidiaries, at which the participants agreed to assign procurement contracts to certain contractors with ties to officials at the PDVSA subsidiaries and/or the Venezuelan government or military.

To promote and conceal the bribes, Marin directed the co-conspirator contractor to transfer proceeds from the schemes to accounts controlled and maintained by Marin, his family, and others. Marin used the bribe payments to purchase properties in South Florida and chartered private jets for personal use. Marin also caused the contractor to wire more than $1 million from the contractor's bank account in Panama to a bank account of Marin's company in Florida for the benefit of the Venezuelan officials involved in the scheme.

On June 23, 2022, Marin pled guilty, and on August 4, the court preliminarily ordered Marin to forfeit $3.8 million in property. In October 2022, Marin was sentenced to 27 months in prison.

Daniel D'Andrea Golindano and Luis Javier Sanchez Rangel

On March 8, 2022, the DOJ announced the indictment of Daniel D'Andrea Golindano ("D'Andrea") and Luis Javier Sanchez Rangel ("Sanchez"), two former senior Venezuelan prosecutors, alleging a conspiracy to commit money laundering and direct money laundering violations for accepting over $1.2 billion in bribes in exchange for not pursuing criminal charges against a contractor and others in Venezuela. Each defendant has been charged with one count of conspiracy to commit money laundering and two counts of money laundering.

According to the indictment, in 2017, D'Andrea and Sanchez, in their official roles as prosecutors within the Venezuelan Attorney General's Office, were investigating an unnamed Venezuelan contractor for allegations of corruption related to $150 million in contracts from PDVSA subsidiaries. The defendants discussed and agreed to accept more than $1 million in bribes in exchange for not pursuing criminal charges against the contractor and others. To conceal the bribe payments, D'Andrea caused an unnamed co-conspirator to create false invoices seeking payment from the contractor purportedly for medical equipment. The contractor then made payment of over $1 million to an account in Florida for the benefit of D'Andrea and Sanchez. As a result of the payment, the Venezuelan Attorney General's Office did not seek criminal charges against the contractor and others. The DOJ press release states that both defendants are currently in Venezuela and remain at large.

Rixon Rafael Moreno Oropeza

On August 24, 2022, the DOJ filed a six-count indictment against Rixon Rafael Moreno Oropeza ("Moreno") alleging a conspiracy to commit money laundering as well as direct money laundering violations.

According to the court documents, from 2015 through May 2019, Moreno allegedly conspired with others to obtain multimillion dollar contracts from Petropiar S.A.("Petropiar"), a Venezuelan oilfield joint venture between PDVSA (70%) and Chevron (30%), through a bribery scheme. In 2015, Moreno agreed with a co-conspirator to pay approximately $1 million in bribes to senior officials in the Venezuelan government to install another Venezuelan official as a high-ranking procurement official at Petropiar. Subsequently, in 2015 through 2016, Moreno paid bribes to the procurement official in exchange for improper business advantage, including causing Petropiar to approve a $2.7 million contract to Moreno's company, a contract whose price had been allegedly inflated to 100 times the actual cost.

In addition, in 2015, Moreno and Naman Wakil, a Syrian citizen and U.S. permanent resident (separately charged in 2021 with another bribery and money laundering scheme involving PDVSA), allegedly paid bribes to Petropiar officials to award a $11.2 million contract for the supply of pipes to Petropiar. The pipes were acquired for $1.3 million, leaving an inflated amount of nine times the price of the contract. To conceal the bribes and disguise the beneficiaries of the contract, Moreno and the co-conspirator transferred the proceeds of the contract, initially received in South Florida, to Panama and subsequently returned them to South Florida.

According to the complaint, Moreno sent millions of dollars in bribes to Petropiar officials from accounts he controlled in Florida. Moreno also instructed a co-conspirator to send false invoices to Moreno to conceal the "true nature of the financial transactions and bribe payments."

Moreno received over $30 million in payments on contracts from Petropiar to his companies' accounts in South Florida, and used the proceeds for his own personal benefit, including to purchase real estate, a private jet, and luxury vehicles in South Florida.

This case is ongoing.

Roger Ng

On April 8, 2022, a federal jury in the EDNY convicted Ng Chong Hwa, also known as Roger Ng, a citizen of Malaysia and former Managing Director of the Goldman Sachs Group, Inc. ("Goldman Sachs"), of three counts of conspiracy to violate the bribery provisions of the FCPA for his role in conspiring to launder billions of dollars embezzled from Malaysia's state-owned investment and development fund, 1Malaysia Development Berhad ("1MDB") by paying bribes to various Malaysian and Abu Dhabi officials. Ng was convicted of: i) conspiracy to violate the anti-bribery provisions of the FCPA, ii) conspiracy to violate the FCPA by circumventing Goldman's internal accounting controls, and iii) money laundering conspiracy to violate the bribery provisions of the FCPA.

In November 2018, the DOJ charged Ng and Low Take Jho, aka "Jho Low", a wealthy Malaysian national, with conspiracy to violate the anti-bribery and internal controls provisions of the FCPA as well as conspiracy to commit money laundering by means of a multi-billion-dollar scheme to launder money through 1MDB by paying bribes to various Malaysian and Abu Dhabi officials, and, in Ng's case, conspiring to circumvent Goldman Sachs' internal accounting controls. Low, who is purported to be the mastermind behind the scheme, is alleged to have embezzled $1.42 billion from 1MDB, fled Malaysia after the charges were brought, and remains a fugitive. However, Ng was arrested in Malaysia, where he still faces additional criminal charges. On May 6, 2019, after Malaysian authorities reached an agreement to transfer Ng to the U.S. to face trial, Ng appeared in the EDNY and pleaded not guilty to all charges.

Ng's trial was the first time that charges relating to the 1MDB scheme have gone to a jury. His conviction is the latest in a series of civil and criminal resolutions against the major players involved in the scheme.

Conduct

According to the court documents, between 2009 and 2014, during which time 1MDB was raising money to fund its projects, Low, Ng, Tim Leissner, and others conspired to misappropriate and fraudulently divert funds from 1MDB, including funds 1MDB raised in 2012 and 2013 through three bond transactions that it executed with Goldman Sachs. As part of the scheme, Low, Ng, Leissner, and others allegedly conspired to bribe government officials in Malaysia, including at 1MDB, and Abu Dhabi to obtain and retain contracts for Goldman Sachs, including the 2012 and 2013 bond deals.

They also allegedly conspired to launder the proceeds of their criminal conduct through the U.S. financial system by purchasing, among other things, luxury residential real estate in New York City and elsewhere, artwork from a New York-based auction house, jewelry, and a yacht, as well as by financing major Hollywood films, including *The Wolf of Wall Street*.

In early 2012, 1MDB engaged Goldman Sachs as the underwriter of the first of a series of bond offerings, known internally as "Project Magnolia." Low, Leissner, Ng and the co-conspirators agreed that, with the assistance of Goldman Sachs, 1MDB would issue $1.75 billion in bonds guaranteed by the International Petroleum Investment Company ("IPIC"), an investment fund owned by the government of Abu Dhabi. Goldman Sachs and individuals agreed to pay bribes to various officials in Malaysia and Abu Dhabi. Low and other co-conspirators allegedly agreed to pay bribes and kickbacks to 1MDB for their assistance in executing Project Magnolia, including by obtaining the necessary approvals.

After Project Magnolia closed on May 21, 2012, more than $500 million of the bond proceeds were allegedly misappropriated and diverted from 1MDB through numerous wire transfers to bank accounts in the name of shell companies beneficially owned and controlled by Low, Leissner, Ng, and other co-conspirators, including a high-level official at the Abu Dhabi entity that guaranteed the Project Magnolia bonds and a close relative of a Malaysian official.

Low, Ng, Leissner, and their co-conspirators also conspired to obtain and retain additional 1MDB business, including the bond transactions known as "Project Maximus" and "Project Catalyze," which transactions generated substantial fees and revenue for Goldman Sachs.

After Project Maximus was closed, approximately $790 million of the bond proceeds was allegedly transferred through a series of shell company accounts beneficially owned and controlled by Low, Leissner, and others, including officials in Malaysia and Abu Dhabi, in exchange for their assistance in obtaining and retaining business for Goldman Sachs.

Similarly, after the Project Catalyze offering raised $3 billion and after the deal was closed, transfers of the proceeds ensued. According to the court documents, $1.2 billion of the funds traceable to Project Catalyze were transferred to bank accounts in the name of entities beneficially owned and controlled by Low, Leissner, and others, including 1MDB officials, and more than $4 million of the funds were transferred to a bank account beneficially owned by a relative of Ng. Low allegedly spent approximately $137 million of the Project Catalyze proceeds to purchase works of art at an auction house in New York City.

After the last bond offering, Goldman Sachs continued to do business with 1MDB, and Low and Leissner continued to pay bribes to 1MDB officials in order to secure business for Goldman Sachs for a proposed initial public offering of 1MDB's energy assets. One such bribe included a payment of $4.1 million to a jeweler to help pay for gold jewelry for the wife of a Malaysian official.

Prosecutors allege that, as a result of its role, Goldman Sachs received approximately $600 million in fees and revenue. Ng received more than $35 million in kickbacks for his role in the scheme to steal and launder billions of dollars from 1MDB.

Ng's Rule 29 Motion on the Internal Accounting Controls Provision of the FCPA

At the end of the government's case and prior to his conviction, Ng filed a motion pursuant to Rule 29 of the Federal Rules of Criminal Procedure to dismiss the second count of conspiracy to circumvent internal accounting controls in violation of the FCPA, 15 U.S.C. § 78m(b)(2)(B). Ng argued that the "Government has read the word 'accounting' out of the 'internal accounting controls' provision, and contends that if this word is to be given any effect, it is clear that internal 'accounting' controls are 'a limited and defined set of controls' that are 'only one aspect of a company's total control system' and that are to be distinguished from legal, risk-management, compliance, and other controls."

The judge denied Ng's motion. The judge stated that "internal accounting controls" is not intended to apply to only literal accounting, but also to oversight procedures, such as compliance controls. The court observed that "[t]he statute defines an adequate system of internal accounting controls by reference to the objective of such a system, and the plain language of the statute indicates that such systems are intended not only to provide reasonable assurances of accurate internal accounting for purposes of external financial reporting [ ] but also to provide reasonable assurances that the company is adequately controlled." In this case, the government argued that Ng "knowingly and willfully" conspired to circumvent Goldman's internal accounting controls for business contracts, by obtaining authorization of the bond deals and withholding material information from Goldman Sachs internal committees authorizing the 1MDB bond deals.

Odebrecht-Related Prosecutions

On March 24, 2022, the DOJ filed a six-count indictment in the Southern District of Florida against Carlos Ramon Polit Faggioni ("Polit"), the former Comptroller General of Ecuador, alleging a conspiracy to commit money laundering as well as direct money laundering violations and transacting in criminally derived property.

Conduct

The indictment alleges that between 2010 and 2016, Polit solicited and received over $10 million in bribes from Odebrecht, S.A. ("Odebrecht"), a Brazilian construction conglomerate, in exchange for using his official position as comptroller general to prevent the Comptroller's office from imposing large fines against Odebrecht relating to certain of Odebrecht's construction projects in Ecuador. In 2015, Polit also allegedly received bribes from an Ecuadorian businessman in exchange for helping the businessman and his company obtain contracts from Ecuador's state-owned insurance company, Seguros Sucre S.A.

The indictment further alleges that, between 2010 and 2017, Polit directed an unnamed co-conspirator to make proceeds of the bribery scheme "disappear," which the co-conspirator did by using Florida companies registered in the names of certain of the co-conspirator's associates, often without their knowledge. These companies then used the proceeds from Polit's bribery scheme to purchase and renovate real estate in South Florida and elsewhere, as well as to purchase other businesses, including restaurants and a dry cleaner.

In another instance, Polit directed the co-conspirator to request that Odebrecht make bribe payments through wire transfer, instead of cash, through intermediaries' bank accounts in Panama to the co-conspirator's bank account in South Florida and then to other bank accounts of Florida companies for the purchase of assets. To further conceal the bribe, the co-conspirator issued fake invoices to cover the payments as "technical advice."

Polit's indictment is the latest development of a years-long investigation by the DOJ into conduct by Odebrecht, involving the payment of approximately $800 million in bribes to government officials in twelve countries, including Ecuador. In December 2016, Odebrecht pleaded guilty to conspiracy to violate the anti-bribery provisions of the FCPA in connection with the scheme. Under the plea agreement with the DOJ, Odebrecht agreed to retain an independent compliance monitor for three years, take extensive compliance and remedial measures, and pay a criminal fine of $2.6 billion to resolve charges with authorities in the United States, Brazil and Switzerland. Due to Odebrecht's inability to pay, the DOJ reduced the fine that Odebrecht must pay to the U.S. to $93 million. In January 2020, the DOJ and Odebrecht jointly agreed to extend the term of the monitorship and other terms of the plea agreement for an additional nine months. Prosecutors at the time said Odebrecht had failed to adopt recommendations made by its monitor and failed to implement an adequate anti-bribery compliance program. On November 18, 2020, Odebrecht announced the conclusion of its monitorship, after the company's monitor certified that Odebrecht's compliance program was reasonably "designed and implemented to prevent and detect potential violations [of] anti-corruption laws."

Merlo Hidalgo

On July 19, 2022, the DOJ announced an indictment in the Southern District of Florida against Esteban Eduardo Merlo Hidalgo ("Merlo"), an Ecuadorian and U.S. citizen, and Christian Patricio Pintado Garcia ("Pintado") and Luis Lenin Maldonado Matute ("Maldonado"), two Ecuadorian citizens residing in Costa Rica. The indictment charged the three men with conspiracies to violate the anti-bribery provisions of the FCPA and to commit money laundering as well as direct violations of the anti-bribery provisions of the FCPA. According to the indictment, Merlo, Pintado, and Maldonado paid bribes to officials of Ecuador's state-owned insurance companies, Seguros Sucre S.A. ("Seguros Sucre") and Seguros Rocafuerte S.A. ("Seguros Rocafuerte"), to obtain and retain business for themselves, intermediary companies, and reinsurance clients. The intermediary companies also allegedly used portions of the brokerage commission obtained from Seguros Sucre and Seguros Rocafuerte to pay the bribes. The indictment also alleges that Merlo, Pintado, and Maldonado laundered funds related to the bribery scheme for their personal benefit.

According to the court documents, from around 2013 to 2018, Merlo, Pintado, and Maldonado paid bribes, directly and indirectly, to officials at Seguros Sucre and Seguros Rocafuerte, including the chairman of both companies, Juan Ribas Domenech ("Ribas"), in order to secure their assistance in awarding business to two intermediary companies, owned and controlled by Merlo, and reinsurance brokers based in the United Kingdom. Merlo's intermediary companies, which acted as intermediaries for the reinsurance brokers, were registered in Panama and Ecuador and operated in Miami, Florida.

The indictment alleges that the reinsurance brokers engaged Pintado and Maldonado through Merlo's intermediary companies, to assist them in obtaining reinsurance business from Seguros Sucre and Seguros Rocafuerte. The intermediary companies were compensated with a portion of the brokerage commission that resulted from the business they obtained from the insurance companies.

According to the indictment, the three defendants paid bribes to Ribas and other officials at Seguros Sucre and Seguros Rocafuerte in exchange for giving business to the reinsurance brokers through Merlo's intermediary companies. The bribes were made through bank accounts controlled by the defendants in the U.S., Switzerland, Panama, and elsewhere. To conceal the "true nature of the bribe payments," the defendants directed payments to shell companies created for the benefit of the Ecuadorian officials at Seguros Sucre and Seguros Rocafuerte. Merlo also concealed bribe payments by using false contracts that described services that were never provided.

The indictment further alleges that the defendants concealed the corrupt nature of their business by using coded language such as referring to the Ecuadorian officials as "local people" and business as "more production." In one instance, on January 2, 2014, Pintado wrote to the reinsurance broker that he "[o]nly want to mention and remember the commitment [they] have to comply with local people who have given [them] the opportunity to get these public business (local acquisition cost)." Pintado then reminds the broker of the agreed commission percentage breakdown, a 50-50 split between Ecuador and London. He adds that if "they fail to meet the commitments of the local people they could lose the account and not have new business opportunities." On January 14, 2014, Maldonado emailed the reinsurance broker and advised that a portion of the commission would be paid to "local people involved commercial[ly] and politically in obtaining achievement of this business," noting that "[m]ore explicit I can't be." Merlo also communicated to Maldonado via WhatsApp about giving the reinsurance broker "more production" and advising Maldonado to tell Ribas to give the reinsurance broker more business.

The DOJ press release states that while Merlo made his initial court appearance in the U.S. District Court for the Southern District of Florida and was released on a $1.5 million bond, Pintado and Maldonado remain at large.

The case is ongoing.

2022

Afework Bereket

Introduction

On September 8, 2021, the DOJ announced that a federal indictment was unsealed charging Afework Bereket ("Bereket"), a former employee of Telefonaktiebolaget LM Ericsson's ("Ericsson") Egyptian subsidiary, Ericsson Egypt Ltd. ("Ericsson Egypt"), for his role in a scheme to pay approximately $2.1 million in bribes to high-level government officials in the Republic of Djibouti. The purpose of these bribes was to obtain and retain business from a state-owned telecommunications company. The two-count indictment, which was initially filed on June 3, 2020, in the District Court for the SDNY, charged Bereket with one count of conspiracy to violate the FCPA and one count of conspiracy to commit money laundering.

The conduct at issue in the indictment took place from 2010 through January 31, 2014. During that time, Bereket served as the account manager for the Horn of Africa, a region that includes Djibouti. In addition to Bereket, the indictment alleges that Ericsson, Ericsson Egypt, and Ericsson's wholly owned subsidiary and largest operating entity, Ericsson AB, as well as other employees and agents of Ericsson, participated in the scheme to bribe officials in Djibouti.

No additional action has been taken in this case since the indictment was unsealed.

Conduct

Ericsson is a multinational telecommunications equipment and services company, headquartered in Stockholm, Sweden. On June 3, 2020, a grand jury issued a two-count indictment, filed in the District Court for the SDNY, against Afework Bereket, a former employee of Ericsson Egypt. The indictment alleged that from 2010 until January 31, 2014, Bereket participated in a scheme to bribe government officials in Djibouti in order to obtain and retain business from a wholly state-owned telecommunications company. The indictment charged Bereket with one count of conspiracy to violate the FCPA and one count of conspiracy to commit money laundering.

From approximately November 2010 through July 2013, Bereket served as account manager for Ericsson's Horn of Africa region. According to the indictment, from 2010 through January 31, 2014, Bereket participated in a scheme to pay $2.1 million in bribes to two government officials in Djibouti's executive branch and one high-level executive at Djibouti's state-owned telecommunications company to obtain a contract valued at approximately €20.3 million.

To conceal the bribe payments, Bereket and his co-conspirators caused Ericsson AB's branch in Ethiopia to enter into a sham contract with a consulting company in Djibouti owned by the spouse of one of the Djibouti government officials who received bribe payments. Bereket and his co-conspirators then generated and approved false invoices for consulting services that were never performed. To pay these invoices, money was wired from an Ericsson AB bank account in Dubai to a bank account in New York, NY, and then into the consulting company's bank account in Djibouti, from which it was passed on to the foreign officials. Bereket and his co-conspirators also completed a draft due diligence report, which failed to reveal the spousal relationship between the owner of the consulting company and the Djibouti government official.

Resolution and/or Proceedings to Date

If convicted on both counts, Bereket faces a maximum penalty of 25 years in prison. In addition, in the indictment, the Grand Jury would have the court order Bereket to forfeit any and all property, real and personal, derived from or traceable to the offenses.

The indictment of Bereket follows a December 6, 2019, settlement between Ericsson and the DOJ, under which Ericsson entered into a deferred prosecution agreement ("DPA") with the DOJ in connection with charges that Ericsson conspired to violate the anti-bribery, books and records, and internal controls provisions of the FCPA. As part of this settlement, Ericsson Egypt also pleaded guilty to a single charge that it conspired to violate the anti-bribery provisions of the FCPA. Under the DPA, Ericsson agreed to enter into a three-year monitorship and to pay a criminal penalty of approximately $520.6 million, which included $9.5 million to be paid on behalf of Ericsson Egypt.

Bolivian Ministry of Defense Cases

On May 26, 2021, the DOJ announced that it had arrested and charged two Bolivian nationals, including the former Minister of Government of Bolivia, and three U.S. citizens for involvement in an alleged bribery and money laundering scheme related to efforts by a U.S. company to improperly obtain procurement contracts from the Bolivian Ministry of Defense. The DOJ alleges that the three U.S. citizens, Bryan Berkman ("Bryan"), his father, Luis Berkman ("Luis"), and Philip Lichtenfeld ("Lichtenfeld"), conspired to pay bribes to Bolivian government officials, including the two Bolivian nationals charged in this case, Arturo Carlos Murillo Prijic ("Murillo") and Sergio Rodrigo Mendez Mendizabal ("Mendez"), in exchange for the Bolivian officials using their influence to ensure that government contracts were awarded to Bravo Tactical Solutions LLC ("Bravo"), a Florida company owned by Bryan. Each of the five individuals was initially charged with, and pleaded not guilty to, one count of conspiracy to commit money laundering.

On September 28, 2021, the three charged U.S. citizens, Bryan, Luis, and Lichtenfeld, appeared in U.S. District Court for the Southern District of Florida to enter changed pleas; Bryan and Lichtenfeld each pleaded guilty to one count of conspiracy to violate the FCPA, while Luis pleaded guilty to one count of conspiracy to commit money laundering. On September 29, 2021, Mendez pleaded guilty to one count of conspiracy to commit money laundering. On June 9, 2022, Bryan was sentenced to 28 months in prison, Luis was sentenced to 38 months in prison, Lichtenfeld was sentenced to 26 months in prison, and Mendez was sentenced 42 months in prison.

Murillo initially continued to deny wrongdoing after the guilty pleas of the others. However, on October 20, 2022, Murillo pleaded guilty to conspiracy to launder bribes he received from the U.S. company. His sentencing is pending.

Conduct

Bravo is a Florida company that sold tactical equipment to law enforcement and military agencies, including to the Bolivian Ministry of Defense ("MOD"). The DOJ alleges that, in November 2019, Mendez, at that time the chief of staff of the Bolivian Ministry of Government, sent Bryan an email seeking quotes for tear gas and other non-lethal weaponry and tactical equipment for the Bolivian MOD. Bryan responded by sending Mendez a message over the WhatsApp messaging app, in which he asked Mendez to write an official letter stating that one of Bravo's competitors was banned from selling tear gas to the Bolivian government. Mendez agreed and did so. One month later, in December 2019, Bravo was awarded a contract worth $5,649,137 to supply tear gas and other non-lethal equipment to the Bolivian MOD.

Bravo purchased the tear gas and other equipment to fulfill the contract from a Brazilian supplier. The following month, in January 2020, the Bolivian MOD attempted to wire the $5,649,137 from the Central Bank of Bolivia to Bravo's U.S bank account. However, the bank questioned the wire and ultimately declined to accept it, returning the funds to the Central Bank of Bolivia.

Following this rejection of the wire transfer, Luis and Lichtenfeld became involved and reached out to Murillo, who, from November 2019 through November 2020, served as the Minister of Government of Bolivia, in which role he was responsible for the country's public policy, for assistance in completing the wire transfer to Bravo. The three coordinated through messages sent via WhatsApp, and Murillo agreed to help complete the wire transfer. In March 2020, the Central Bank of Bolivia successfully wired $3,976,902 to an account belonging to Bravo at a different U.S. bank. After the transfer was accepted, the Central Bank of Bolivia wired an additional $1,754,584 to the same account the following month.

In the weeks between these two wire transfers, Bryan, Luis, and Lichtenfeld coordinated the payment of a $582,000 bribe to Mendez, part of which was to be for Murillo's benefit. Lichtenfeld arranged for the funds to be withdrawn in cash from one of Bravo's bank accounts. Lichtenfeld then brought the cash to the home of one of his relatives in Cochabamba, Bolivia, where Mendez collected the money. Additionally, Lichtenfeld also coordinated another payment of $20,000 to an unnamed co-conspirator, who was an official in the Bolivian MOD. The DOJ alleges that these payments were made to influence the Bolivian officials to use their official capacities to obtain and retain business for Bryan's company in violation of the FCPA.

CLAP Prosecutions

On October 21, 2021, the DOJ unsealed an October 7, 2021 indictment filed in the Southern District of Florida, charging five individuals—Alvaro Pulido Vargas, Emmanuel Enrique Rubio Gonzalez, Carlos Rolando Lizcano Manrique, Jose Gregorio Vielma-Mora, and Ana Guillermo Luis—with conspiracy to commit money laundering as well as direct money laundering violations for their alleged roles in laundering the proceeds of a bribery scheme to obtain and retain inflated contracts through the Comité Local de Abastecimiento y Producción ("CLAP"), a Venezuelan state-owned and state-controlled food and medicine distribution program. Each defendant was charged with one count of conspiracy to commit money laundering and four counts of money laundering.

According to the indictment, from July 2015 through at least 2020, the five Colombian and Venezuelan nationals allegedly obtained contracts with Venezuelan state-owned and -controlled entities, Comercializadora de Bienes Y Servicios Del Estado Tachira ("COBISERTA"), Corporación Venezolana de Comercio Exterior ("CORPOVEX"), Fondo de Desarollo Nacional ("FONDEN"), and Banco de Desarrollo Económico y Social de Venezuela ("BANDES") to import and distribute boxes of food and medicine to the

people of Venezuela through CLAP. The defendants and their co-conspirators "knowingly inflated the cost of the contracts" and conspired to pay bribes to Venezuelan officials, including Jose Gregorio Vielma-Mora ("Vielma-Mora"), then-governor of the state of Tachira, to grant and retain these contracts.

The indictment alleges that sometime in early to mid-2016, Vielma-Mora met with Carlos Rolando Lizcano Manrique ("Lizcano") and two co-conspirators to discuss the procurement and distribution of food to the people of Venezuela through the CLAP program. Thereafter, in mid-to-late-2016, Vielma-Mora, Lizcano, and the two co-conspirators met with two Venezuelan government officials to obtain their support and approval for awarding food contracts to companies controlled by Alvaro Pulido Vargas ("Pulido") and one of the co-conspirators. In October 2016, COBISERTA awarded a food contract to Pulido and the co-conspirator company to distribute approximately 10 million boxes of food under the CLAP program worth approximately $340 million, although Vielma-Mora knew that the cost for producing and importing the food was far less than the agreed $34 per box. In February 2017, Pulido and his co-conspirator also obtained a second food contract valued at approximately $369.9 million.

Vielma-Mora and his co-conspirator caused COBISERTA to purchase the food boxes at an inflated price, so that they could use the inflated proceeds to pay bribes to the participants in the scheme. Vielma-Mora and his co-conspirators discussed how Vielma-Mora would receive the bribe money, and decided that one of the co-conspirators would serve as an intermediary to receive the bribe money on Vielma-Mora's behalf.

Subsequently, Ana Guillermo Luis ("Guillermo"), who worked for Pulido, worked with one of the co-conspirators to create a "web of dozens" of shell companies and associated bank accounts in various countries to receive and move money obtained from the bribery scheme.

In addition to the food contracts, in February and May 2017, Pulido's company obtained two contracts to import and distribute medicine in Venezuela from CORPOVEX, valued at approximately $70,889,234 and $74,990,942, respectively, through bribes to Venezuelan government officials.

The defendants and their co-conspirators laundered the proceeds of the scheme through banks in Antigua, the UAE, the United States, and elsewhere. In all, the defendants and their co-conspirators allegedly received approximately $1.6 billion from the Venezuelan government through the inflated contracts and transferred approximately $180 million through or to the United States.

Pulido was sanctioned by the U.S. Department of the Treasury in 2019 and indicted the same year in connection with a different alleged money-laundering scheme in Venezuela. At the time of publication, all five defendants remain at large.

The case is ongoing.

Ecuadorian Police Pension Fund Cases

On March 2, 2021, the DOJ announced criminal charges against Ecuadorian nationals Jorge Cherrez Miño ("Cherrez") and John Robert Luzuriaga Aguinaga ("Luzuriaga") for their alleged roles in a bribery and money laundering scheme involving Ecuador's public police pension fund (ISSPOL). Complaints filed in the Southern District of Florida on February 10, 2021 and February 19, 2021 charged Cherrez and Luzuriaga each with one count of conspiracy to commit money laundering.

ISSPOL was the Ecuadorian public institution responsible for managing the financial contributions of Ecuadorian police officers towards their social security. ISSPOL was an instrumentality of the Ecuadorian government, and its employees were foreign officials for the purposes of the FCPA.

The criminal complaints allege that Cherrez, who at the time served as a manager, president and director of several U.S. investment fund companies, paid over $2.6 million in bribes to government officials working for ISSPOL between 2014 and 2020 in exchange for being hired by ISSPOL to invest its funds. The DOJ alleges that Luzuriaga, who was employed as ISSPOL's Risk Director and was a member of its Investment Committee, received approximately $1.4 million from Cherrez in exchange for directing investment business to the U.S. investment fund companies that Cherrez controlled. The DOJ alleges that one of Cherrez's companies was hired by ISSPOL to perform certain swap transactions, but that Cherrez's companies received approximately $65 million in additional profits from these transactions at ISSPOL's expense. Further, one of Cherrez's companies entered into a bond repurchase transaction, in which it committed to repurchase certain bonds from ISSPOL, but had failed to fulfill its repurchase obligations for $111 million of these obligations as of August 2020.

The Bribery Scheme

According to the criminal complaints, in order to conceal and disguise his bribe payments, Cherrez caused the payments to be laundered through bank accounts in the U.S. for the benefit of ISSPOL officials, in violation of U.S. money laundering laws. Cherrez's payments to Luzuriaga and other ISSPOL officials allegedly violated the FCPA as well as Ecuadorian law against bribery of a public official.

Cherrez directed payments to Luzuriaga in three distinct ways: (i) approximately $419,226 was paid through checks made out to Luzuriaga; (ii) approximately $663,000 was paid through checks made out to Luzuriaga's relatives for his benefit; and (iii) Cherrez transferred funds to a U.S. bank account held by one of Cherrez's U.S. investment fund companies, which provided Luzuriaga with a debit card in his own name that Luzuriaga used to withdraw approximately $313,840 and to make personal purchases.

Luzuriaga was arrested on February 26, 2021, and arraigned on September 2, 2021, in the Southern District of Florida. An arrest warrant has been issued for Cherrez, who remains at large and is believed to be living in Mexico.

On May 19, 2021, Luis Alvarez Villamar ("Alvarez"), the former Operations Manager of Depósito Centralizado de Valores de Ecuador ("Decevale"), an Ecuadorian centralized depository that acted as a clearinghouse and custodian for ISSPOL investments, was charged with one count of conspiracy to launder money for his role in the ISSPOL bribery scheme. Alvarez entered into a plea agreement, admitting that he received more than $3.1 million from U.S. bank accounts controlled by Cherrez, as well as an apartment in Miami, and that he was aware that these funds were derived from the business Cherrez corruptly obtained from ISSPOL. In exchange for these bribes, Alvarez entered into agreements that allowed the ISSPOL securities that were managed by Cherrez to be deposited directly with one of Cherrez's companies, rather than with a conflict-free custodian; this made Cherrez both the investment advisor and the custodian of ISSPOL's assets, allowing him to invest and use ISSPOL's assets without oversight.

Alvarez pleaded guilty to the single charged count on July 7, 2021. His sentencing is pending.

Gunvor Group—Raymond Kohut

On April 6, 2021, Raymond Kohut ("Kohut"), a former employee and agent of Gunvor Group, a Swiss-headquartered and Cyprus-registered commodity trader, pleaded guilty to one count of conspiracy to commit money laundering for his role in a scheme to bribe Ecuadorian government officials to obtain or retain business from Empresa Publica de Hidrocarburos del Ecuador ("Petroecuador"), the country's state-owned oil company. Kohut agreed to forfeit $2.2 million. His sentencing remains pending.

The Bribery Scheme

Based on the criminal information filed in this case, beginning in around 2012, Kohut entered into a scheme involving at least two other Gunvor Group employees (Gunvor Group is not named in the documents in this case but is instead referred to as "Trading Company"), and two individuals who served as Gunvor Group's agents and who were citizens of Ecuador, Spain, and the United States. The agents paid bribes to Ecuadorian government officials, including Petroecuador officials. In exchange for these bribes, the officials directed Petroecuador to enter into favorable agreements with two state-owned oil and gas companies located in Asia (the "Asian SOEs"), under which the Asian SOEs provided loans to Petroecuador that were secured by oil to be delivered by Petroecuador over a period of years. Gunvor Group then entered into agreements with the Asian SOEs to market and sell the oil delivered by Petroecuador pursuant to these agreements. In total, Petroecuador has received at least $ 5.4 billion in oil-backed loans from the Asian SOEs from 2009 to the present.

Gunvor Group's agents entered into agreements with Gunvor's Singaporean subsidiary through which they received a commission based on the number of barrels of Ecuadorian oil that were delivered through Gunvor's agreements with the Asian SOEs. Kohut was involved in reviewing and approving the invoices submitted by these agents, and for directing payment to be made by Gunvor Group to the agents' bank accounts, including payments made through correspondent accounts in New York. In total, Gunvor made payments totaling more than $70 million to the agents' bank accounts in Switzerland, the Cayman Islands, and Panama; at least $22 million of these funds was used to pay bribes to Ecuadorian government officials.

As part of the scheme, Kohut met with the agents, with at least one Ecuadorian government official, and with at least one other Gunvor Group employee in Florida. He corresponded with the agents and with other Gunvor employees using their personal email accounts, rather than their company email, and used code names to refer to individuals involved in the scheme. Beginning around 2015, Kohut requested, and the agents agreed, that they pay him kickbacks from the amounts that Gunvor Group paid to the agents. From March 2015 to February 2017, Kohut received at least $2.4 million in kickbacks.

In late 2019 and early 2020, Gunvor Group compliance personnel asked to meet with the agents to discuss the company's business in Ecuador. Kohut had multiple conversations with the agents in which they discussed how to conceal the scheme from the compliance personnel, and in which Kohut acknowledged that senior executives at Gunvor Group were aware of the payments to Ecuadorian government officials. Some of these conversations, including phone and in-person conversations, were recorded, though it is not clear from the materials filed in this case by whom they were recorded.

Gunvor Group

In November 2020, Gunvor Group announced that it had taken action to end the company's use of agents, consultants, and intermediaries "for business origination and development purposes," and would be "further assessing its use of other consultants, including risk analysts and technical operational service providers, whose services entail greater transparency and a different, lower risk profile." The company stated that it was in the process of winding down its remaining consultant contracts, and that the company would "ensur[e] that we are enforcing our zero-tolerance Compliance policies." In 2019, Gunvor Group reached an agreement with the Office of the Attorney General of Switzerland to pay approximately $94 million in fines, disgorgement, and interest to resolve allegations that the company failed to prevent its employees from paying bribes to public officials in the Republic of Congo and Ivory Coast to secure oil contracts.

Al Nasr Prosecutions

The DOJ has undertaken two separate enforcement actions against former executives at Pennsylvania-based Corsa Coal Corporation ("Corsa") concerning alleged bribery of government officials at state-owned and state-controlled Egyptian manufacturing company Al Nasr Company for Coke and Chemicals ("Al Nasr"). The DOJ alleges that executives at Corsa paid bribes through a sales intermediary to Al Nasr officials in Egypt in order to obtain approximately $143 million in coal contracts. These bribes allegedly included kickbacks to a former Corsa executive. On November 3, 2021, the DOJ filed a single-count information in the Western District of Pennsylvania against former Corsa executive Frederick Cushmore Jr., alleging a conspiracy to violate the antibribery provisions of the FCPA. Cushmore pled guilty on November 17, 2021, and is scheduled to be sentenced on February 23, 2023. In a related proceeding, on March 29, 2022, the DOJ filed a seven-count indictment in the Western District of Pennsylvania against Charles Hunter Hobson, another former Corsa executive, alleging a conspiracy to violate the antibribery provisions of the FCPA, direct violations of the antibribery provisions of the FCPA, money laundering, and a conspiracy to commit wire fraud. Hobson was arrested on March 31, 2022, and the case is ongoing.

Conduct

Corsa, headquartered in Pennsylvania, is a U.S. coal mining company focused on the production and sales of metallurgical coal to both domestic and international customers. Corsa operates mines in Pennsylvania and Maryland, with primary export markets in Egypt and Turkey. Al Nasr is an Egyptian subsidiary of Metallurgical Industries Holding Company, which is wholly owned and operated by the Egyptian government. Al Nasr manufactures metallurgical coke, coal tar, carbon black oil, and other products derived from coal.

The DOJ charges that between 2016 and October 2020, two former Corsa executives, Hobson and Cushmore, engaged in a bribery and money laundering scheme that involved payments to Al Nasr officials paid via a sales intermediary. Hobson held various positions in international sales at Corsa (including Vice-President of Appalachian Business) and was responsible for establishing Corsa's relationship with Al Nasr in late 2016. In 2018, Hobson spun off a subsidiary of Corsa and left the company, at which point Cushmore succeeded Hobson as Corsa's primary point of contact with Al Nasr and with the sales intermediary. The DOJ considered Corsa, Hobson, and Cushmore to be "domestic concerns" as defined in the FCPA.

According to the Hobson indictment, both Hobson and Cushmore contracted with an Egyptian corporation controlled by an Egyptian national on Corsa's behalf to serve as Corsa's sales agent in Egypt, and to act as an intermediary between Corsa and Al Nasr. Hobson first established Corsa's relationship with Al Nasr in late 2016 by engaging the Egyptian intermediary to negotiate and to secure Al Nasr's business for Corsa. Corsa paid sales commissions to the Egyptian intermediary based on each metric ton of coal sold to Al Nasr.

From 2016 through 2020, Hobson and Cushmore caused Corsa to make a total of $4.8 million in commission payments to the Egyptian sales intermediary, a portion of which was earmarked to be passed on to foreign officials at Al Nasr as bribes. Those payments were made from a bank account in the U.S. to the Egyptian sales intermediary's bank account in the UAE. The Egyptian intermediary would then pay Al Nasr officials directly. In exchange for the bribe payments, officials at Al Nasr were able to secure business for Corsa in the form of approximately $143 million in coal contracts delivered across approximately thirteen shipments of coal. Al Nasr officials also shared inside, non-public information with Hobson and Cushmore regarding Corsa's competitors' bids to sell coal to Al Nasr.

In addition, the Egyptian sales intermediary took part of the commission payments to make kickback payments to a bank account in the UAE controlled by Hobson. Hobson received a total of $167,000 in a series of kickback payments from the Egyptian intermediary taken out of the sales commissions paid to him by Corsa.

Hobson, Cushmore, the Egyptian sales intermediary, and Al Nasr officials communicated through encrypted messaging service WhatsApp and personal email accounts regarding the payment scheme and Corsa's bids. These messages included discussions of the amounts paid to officials at Al Nasr out of the Egyptian intermediary's sales commissions, as well as the kickback scheme.

Resolution

Corsa itself has notably avoided prosecution thus far relating to Hobson and Cushmore's bribery scheme. The company disclosed in its 2020 financial statements that, when it learned that the Egyptian sales intermediary had been charged in an overseas jurisdiction, it constituted a special committee of its Board of Directors. The Board then engaged outside legal counsel to conduct an independent investigation as to whether any other Corsa employees or any Corsa subsidiaries were aware of, or involved in, the alleged conduct, and whether any such knowledge or involvement may have given rise to a violation of anti-corruption laws by the company or its subsidiaries. As a result of this investigation, Corsa reported that it has taken "corrective action" and shared the results of the internal investigation with the DOJ. Corsa terminated its relationships with both Cushmore and Hobson before the end of 2020 and is cooperating with authorities.

On November 3, 2021, the DOJ filed a single count information in the Western District of Pennsylvania against Cushmore alleging a conspiracy to violate the antibribery provisions of the FCPA. Cushmore pled guilty on November 17, 2021, and is scheduled to be sentenced on February 23, 2023.

On March 29, 2022, the DOJ filed a seven-count indictment in the Western District of Pennsylvania against Hobson. Hobson was arrested on March 31, 2022, and is charged with one count of conspiracy to violate the FCPA, two counts of violating the FCPA, one count of conspiracy to launder money, two counts of money laundering, and one count of conspiracy to commit wire fraud. Hobson faces up to 95 years in prison for the seven charges.

The factual basis filing following Cushmore's guilty plea also makes note of another Corsa executive, who supervised both Cushmore and Hobson. This executive has not yet been named or charged.

Odebrecht—Individual Prosecutions (*United States v. Weinzierl and Waldstein*)

On May 25, 2021, Peter Weinzierl, the former CEO of Meinl Bank (later renamed Anglo Austrian AAB Bank), was arrested in the UK pursuant to an arrest request from the United States, on previously sealed charges related to his role in laundering funds that were used by Odebrecht to pay bribes to government officials around the world. The same day, the DOJ unsealed an indictment, returned by a grand jury in September 2020, charging Weinzierl and Alexander Waldstein, another former Meinl Bank officer, with one count of conspiracy to commit money laundering and two counts of international promotional money laundering; Weinzierl is also charged with one count of engaging in a transaction in criminally derived property.

The indictment alleges that, in their roles with Meinl Bank and as directors of the affiliated Antiguan-based Meinl Bank (Antigua) Ltd., Weinzierl and Waldstein worked with Odebrecht and others to launder money so as to defraud Brazil's tax authority of tens of millions of dollars in revenue, and to create off-books slush funds that were later used by Odebrecht to pay bribes.

In December 2016, Odebrecht S.A., a Brazil-based construction and engineering conglomerate with global operations, pleaded guilty in the U.S. District Court for the EDNY to one count of conspiracy to violate the FCPA's anti-bribery provisions. In related proceedings, Odebrecht also entered into settlements with the Ministerio Publico Federal in Brazil and the Office of the Attorney General in Switzerland. Odebrecht admitted to paying approximately $788 million in bribes over the course of 15 years to public officials in 12 countries.

To conceal these bribe payments, Odebrecht created a department within the company called the Division of Structured Operations (DSO), which has also been referred to as the "Department of Bribery." The DSO oversaw Odebrecht's "shadow" budget that was dedicated to bribery. In order to fund its illegal payments, Odebrecht generated money that was never disclosed in its financials by, for example, charging subsidiaries overhead fees, omitting its service provider charges from project budgets, and failing to declare commissions for company asset purchases.

The DSO then funneled these unrecorded funds to offshore entities—also not disclosed on the company's balance sheets—that were set up by the DSO and managed by proxy executives. Offshore banks also played a central role in Odebrecht's payment scheme. Odebrecht preferred to use small banks located in countries with strong banking privacy laws, such as the Antigua Overseas Bank. These offshore banks provided accounts both for Odebrecht's offshore entities and for recipients of Odebrecht's bribes.

As officers and directors of offshore banks used by Odebrecht, Weinzierl and Waldstein were critical to Odebrecht's bribery scheme. The indictment alleges that, beginning in 2006 or 2007, Weinzierl and Waldstein,

along with other conspirators, assisted Odebrecht in establishing "Shell Company Accounts" that were purportedly owned by companies with no affiliation to Odebrecht but were, in fact, controlled by Odebrecht. Weinzierl and Waldstein opened Shell Company Accounts at Meinl Bank and intentionally falsely prepared the relevant corporate formation documents and account opening documents to conceal Odebrecht's affiliation with these accounts.

Odebrecht subsidiaries then transferred funds into these Shell Company Accounts. Beginning in 2010, Weinzierl and Waldstein, along with other conspirators, devised a system of back-to-back transactions in which an Odebrecht subsidiary would send millions of dollars to an account at Meinl Bank, pursuant to a sham agreement, and shortly thereafter send those funds (minus fees charged by Meinl Bank) to a Shell Company

Accounts were also held elsewhere, pursuant to a second sham agreement. Meinl Bank entered into fake agreements with Odebrecht subsidiaries, purporting to provide financial services to justify the funds that would be transferred, and recorded as expenses, by Odebrecht to Meinl Bank; Meinl Bank did not actually provide the services represented in the agreements. The purpose of the back-to-back transactions was to create the illusion of arm's-length transactions, when in fact funds were simply being moved by Odebrecht into slush funds that were not recorded in the company's books and records. From May 2010 through October 2014, Odebrecht moved more than $170 million through Meinl Bank using sham back-to-back transactions. Meinl Bank generally received fees of 4.5% of the amounts transferred.

By executing sham transactions and fraudulent contracts for services that were never performed, Weinzierl and Waldstein also assisted Odebrecht in increasing the on-the-books expenses of its foreign subsidiaries, allowing the company to reduce its declared profits and thus fraudulently evade paying income taxes owed to the Brazilian government.

Additionally, the indictment alleges that, in 2010, Weinzierl and Waldstein agreed to sell 51% of Meinl Bank (Antigua), which was then fully owned by Meinl Bank, to a group including DSO employees and agents, for the purpose of allowing the Antiguan bank to be used to make unrecorded payments on behalf of Odebrecht to third parties, including government officials. After the sale, Meinl Bank retained a 49% ownership stake, and Weinzierl and Waldstein served as Meinl Bank's representatives on Meinl Bank (Antigua)'s board of directors.

Further, the indictment alleges that, from December 2010 through May 2016, Weinzierl, Waldstein, and the other directors of Meinl Bank (Antigua) approved the transfer of tens of millions of dollars of funds, which included slush funds generated by Odebrecht's sham back-to-back transactions, to a brokerage account in the United States. These funds were then used to purchase U.S. Treasury securities and corporate stocks and bonds on U.S. exchanges.

Weinzierl is currently in the UK and has challenged his extradition to the United States, while Waldstein remains at large.

PDVSA Individual Prosecutions

On January 27, 2021, Daniel Comoretto Gomez ("Comoretto"), a former manager of Petróleos de Venezuela SA ("PDVSA") appeared in U.S. District Court for the EDNY and pleaded guilty to one count of conspiracy to commit money laundering. Based on the criminal information filed by the DOJ, Comoretto, then a PDVSA manager involved in the trading of asphalt, agreed to accept bribes from Sargeant Marine Inc., a U.S.-based asphalt supplier, and from a Puerto Rican-headquartered asphalt company, in exchange for assisting those companies in obtaining contracts to purchase asphalt from PDVSA. Sargeant Marine, Inc. pleaded guilty in 2020 to conspiracy to violate the FCPA in connection with schemes to pay bribes in Brazil, Venezuela, and Ecuador, and agreed to pay a criminal fine of $16.6 million.

Beginning in 2011, Comoretto and Hector Nunez Troyano ("Troyano"), another PDVSA employee who pleaded guilty in 2019 to conspiracy to commit money laundering in connection with the same scheme, traveled to Puerto Rico to meet with executives of the Puerto Rican asphalt company, and Comoretto agreed to accept bribes in exchange for assisting the company in winning term contracts to purchase asphalt. In 2012, Comoretto and Troyano reached a similar agreement with Sargeant Marine. The bribes were paid through an agent, to whom Sargeant Marine and the Puerto Rican asphalt company paid $0.45 for each barrel of asphalt purchased from PDVSA. The agent then paid a portion of these funds as bribes to Comoretto and Troyano, through a Panamanian bank account held by Troyano. Troyano then wired a portion of these funds to Comoretto's bank account in the United States.

This charge against Comoretto is another in the string of enforcement actions brought against admitted and alleged participants in bribery schemes involving PDVSA and its subsidiaries and joint ventures. Many of the individuals charged were involved in bribery schemes related to U.S.-based suppliers to PDVSA; here Comoretto was charged for his involvement in Sargeant Marine's bribery scheme.

In addition to Comoretto's guilty plea, other individuals who were previously charged in connection with bribery schemes related to PDVSA or its subsidiaries or joint ventures also pleaded guilty during 2021:

- On March 22, 2021, Jose Luis de Jongh-Atencio ("De Jongh-Atencio"), a former official at Citgo Petroleum Corporation, a Houston-based subsidiary of PDVSA, entered into a plea agreement and pleaded guilty to one count of conspiracy to commit money laundering. He agreed to forfeit over $3 million that had been seized from his bank accounts and 15 properties that had been purchased with proceeds of the corrupt scheme. De Jongh-Atencio's sentencing has been rescheduled several times. At the time of publication, sentencing was scheduled for December 15, 2022.

- On April 19, 2021, Carlos Enrique Urbano Fermin ("Fermin"), a Venezuelan national who owned or controlled several PDVSA suppliers, pleaded guilty to one count of conspiracy to commit money laundering in connection with a conspiracy to bribe Venezuelan government officials, including a high-ranking prosecutor, to prevent Fermin's companies from being prosecuted for corrupt activities in connection with their dealings with PDVSA subsidiaries. In May 2022, Fermin was sentenced to five years' probation and 120 days of intermittent confinement.

Carmelo Antonio Urdaneta Aqui

On July 14, 2021, Carmelo Antonio Urdaneta Aqui ("Urdaneta"), a former legal counsel to the Venezuelan Ministry of Oil and Mining, pled guilty to one count of conspiracy to commit money laundering related to a fraud scheme to steal $1.2 billion from PDVSA. Urdaneta, who worked at the oil ministry from 1997 to 2015, is one of eight individuals charged in July 2018 as a result of the investigation. Urdaneta admitted to creating the legal mechanism for the money laundering scheme by forming a contract to provide PDVSA with a loan in Venezuelan bolívars at the open market rate and then get repaid in euros and U.S. dollars at the Venezuelan government's official exchange rate.

In June 2022, a federal judge sentenced Urdaneta to 52 months in prison for his alleged role in the scheme and ordered him to forfeit over $40 million worth of assets, including a luxury apartment and a bank account in Switzerland. The judge also ordered Urdaneta to serve three years' supervised release and pay $35,000 in fines.

Naman Wakil

On August 3, 2021, Naman Wakil, a Syrian-born U.S. permanent resident with a Venezuela passport, was arrested in Miami on charges related to alleged schemes to bribe Venezuelan government officials in order to obtain contracts from Venezuela's state-owned oil company, Petróleos de Venezuela S.A. (PDVSA), and a state-owned food company responsible for purchasing food for the country, Corporación de Abastecimiento y Servicios Agrícola (CASA).

The indictment alleges that, along with several Venezuelan co-conspirators including a relative of a high-ranking CASA official, Wakil sought to enrich himself by bribing Venezuelan officials in order to obtain and retain dollar contracts with Venezuelan state-owned entities. It alleges that, in 2010, Wakil reached an agreement with a high-ranking CASA official to pay bribes in exchange for contracts being awarded and payments made to companies that he controlled. In 2010, Wakil transferred approximately $750,000 in bribe payments to this official; in exchange, a company he controlled received approximately $30 million in revenue through contracts it was awarded by CASA.

In 2012, Wakil reached a separate agreement with another high-ranking CASA official. Wakil and a co-conspirator established bank accounts in Switzerland for the CASA official and for his relatives and, from 2012 to 2014, transferred approximately $11 million to a Swiss bank account for the benefit of the CASA official. Wakil provided invoices to the Swiss bank that held his personal account that falsely stated that the payments to the CASA official were for services, including logistical services and customs paperwork. In fact, however, the payments were bribes, in return for which Wakil's companies received approximately $225 million in revenue from contracts awarded to them by CASA. Of this revenue, Wakil transferred at least $50 million to his own personal bank account in Switzerland; at least $20 million of these funds were transferred on to personal accounts in Wakil's name in the United States, which he used to purchase, among other things, ten apartment units in South Florida, a $3.5 million plane, and a $1.5 million yacht.

The DOJ also alleges that, from 2014 through 2017, Wakil caused bribes to be paid to high-ranking government officials at Petromiranda and Petropiar, joint ventures that are controlled by PDVSA. In addition to cash bribes, the indictment alleges that Wakil transferred the ownership to a $300,000 condominium in Miami to a corporate entity controlled by a relative of a high-ranking official at Petropiar. In exchange for these bribes, the DOJ alleges that Wakil's companies received inflated contracts from the PDVSA joint ventures worth more than $30 million.

In the years before his indictment, Wakil had been publicly tied to corrupt activities in Venezuela. A 2016 audit report prepared by Venezuela's National Assembly identified approximately $5.9 million in payments made in 2012 and 2013 by Wakil to relatives of Venezuelan General Carlos Osorio Zambrano, who then headed CASA.

Media reports alleged that Wakil made these payments to secure a contract to supply beef—a contract that he fulfilled by purchasing 40,000 tons of Brazilian beef at a discount due to its age, turning a $76 million profit on the transaction.

Wakil was also named in documents from the Panamanian law firm Mossack Fonseca, which were published as part of the "Panama Papers" leak. Documents that were released as part of this leak show that a U.S. banker referred Wakil, who is described as having a net worth of $400 million, to Mossack Fonseca for assistance in reducing his U.S. tax liability and protecting his assets from creditors.

Wakil is charged with counts of conspiracy to violate the FCPA, violating the FCPA, conspiracy to commit money laundering, international promotional money laundering, and three counts of engaging in transactions involving criminally derived property. If convicted, he faces a maximum penalty of 80 years in prison.

In April 2022, Wakil filed several motions related to the charges against him, including a motion to dismiss the case for failure to state an offense, a motion to dismiss certain charges because they are duplicitous or time-barred, and a motion to suppress certain evidence. At the time of publication, the court had not yet ruled on these motions.

Chadian Diplomats: *United States v. Tyab, Et Al.*

On May 20, 2021, the DOJ unsealed charges against four individuals, including the Republic of Chad's former Ambassador to the United States and another Chadian diplomat, concerning a bribery scheme through which a Canadian startup energy company attempted to secure oil rights in Chad. The indictment in this case was returned by the grand jury in February 2019, and Naeem Tyab, a Canadian citizen and the founding shareholder of Griffiths Energy International (subsequently renamed Caracal Energy), was arrested that same month and pleaded guilty on April 30, 2019, to one count of conspiracy to violate the FCPA. Tyab agreed to forfeit criminal proceeds of approximately $27 million; his sentencing has not yet been scheduled. The three other defendants remain at large.

From 2004 to 2012, Mahamoud Adam Bechir ("Bechir") was the Republic of Chad's Ambassador to the United States and Canada and was based at Chad's embassy in Washington, D.C. Youssouf Hamid Takane ("Takane") was Chad's Deputy Chief of Mission for the United States and Canada from 2007 to 2012, and was also based in Washington, D.C., during this time. Nouracham Bechir Niam ("Niam"), Bechir's wife, was also indicted for her role in the scheme. All four defendants were charged with conspiracy to commit money laundering. In addition, Tyab and Niam were each charged with conspiracy to violate the FCPA, and Bechir, Takane, and Niam were charged with money laundering.

The Bribery Scheme

According to the indictment, the scheme began in 2008 when Tyab contacted Bechir and Takane about using their influence in the government of Chad to help Griffiths Energy secure oil rights in Chad. On August 30, 2009, Griffiths Energy entered into a sham consulting contract with a company controlled by Bechir, Ambassade du Tchad LLC, pursuant to which Griffiths Energy would pay the company $2 million if it was awarded certain oil rights in the Republic of Chad. This agreement was terminated before any monies were paid, on advice of Griffiths Energy's outside counsel, who advised the company that the Ambassador was a government official and that the company could not directly or indirectly provide or offer him any benefits.

Notwithstanding this advice, on September 15, 2009, Griffiths Energy entered into a virtually identical contract with Chad Oil Consultants, LLC, a company owned by Niam. Several weeks later, on October 1, 2009, Tyab also signed a resolution awarding shares in Griffiths Energy to Niam, a relative of Takane, and another Chadian individual (shares which the indictment alleges allowed Niam to make a profit of approximately $30 million in connection with Glencore's acquisition of Griffiths Energy in 2014). In January 2011, following the expiration of the September 2009 agreement, Griffiths Energy signed another contract with Chad Oil Consultants

containing similar terms. All of these actions were taken for the purpose of inducing Bechir and Takane to misuse their official positions in order to assist Griffiths Energy in obtaining oil rights in Chad.

In early 2011, the government of Chad awarded oil rights to a wholly owned subsidiary of Griffiths Energy, and entered into a production sharing agreement with that subsidiary. Shortly thereafter, in February 2011, Tyab caused Griffiths Energy to wire the agreed-on $2 million to a D.C. bank account held by Chad Oil Consultants, using account information provided by Takane.

In January 2013, Griffiths Energy entered into a resolution with the Royal Canadian Mounted Police related to this conduct, pursuant to which it agreed to pay a CAD $10.35 million fine, the then-largest fine collected under Canada's Corruption of Foreign Public Officials Act, after self-reporting the matter to the Canadian Public Prosecution Service as well as to the DOJ. As part of the Canadian settlement, Griffiths Energy also agreed to plead guilty to one count of bribery and to make improvements to its anti-corruption compliance program.

Chapter

3 France: Anti-Corruption Enforcement Update

France Anti-Bribery Update

In 2016, France instituted sweeping changes to its anti-corruption legal framework to require that certain companies develop and maintain corporate compliance programs designed to prevent and detect corrupt practices. The following section provides an overview of the key aspects of France's anti-corruption framework and discusses recent examples of enforcement efforts from French authorities.

Sapin II

Since the inception of Act No. 2016-1691, entitled "Transparency, the Fight against Corruption and the Modernization of the Economy" (named after then-Minister of Finance, Michel Sapin, hereinafter "Sapin II") in 2016, France has continued to strengthen its anti-corruption legal framework, including through the issuance of guidance by relevant French administrative bodies and greater focus on enforcement efforts.

The changes implemented by Sapin II have expanded France's legal framework for identifying, investigating and prosecuting corruption-related offenses, including: (i) criminalizing influence peddling of foreign officials; (ii) extending French jurisdiction over certain corruption-related offenses; (iii) introducing a settlement mechanism instrument whereby companies may negotiate corporate resolutions (similar to the U.S. and UK.'s deferred prosecution agreements); (iv) creating a dedicated administrative body, the *Agence française anti-corruption* (the French Anti-Corruption Agency, or "AFA"); (v) requiring companies of a certain size to adopt and implement anti-corruption compliance programs; (vi) introducing the possibility of a monitorship by the AFA; (vii) providing additional protections for whistleblowers; and (viii) imposing an obligation to disclose certain affiliations with lobbyists. A selection of these developments, and their implementation, are discussed in further detail below.

Less than five years after the enactment of Sapin II, two Parliamentarians have been tasked to assess the implementation of this law and provide recommendations to further strengthen France's anti-corruption framework. The key takeaways from the report addressing those topics which has been issued on July 7, 2021 (the "Parliamentarian Report") are included in the corresponding relevant sections below. In addition, a draft bill, aimed at implementing select recommendations provided in the Parliamentarian Report, has been issued but was not included in the agenda of the Parliamentary debates prior to the French presidential elections in May 2022 due to conflicting priorities, and since the new legislature convened in September 2022, the subject has not been yet considered for Parliamentary debates.

Criminalization of Influence Peddling

French law penalizes *trafic d'influence* (influence peddling), *i.e.*, a public official's, or person vested with a public service mandate's, offer or solicitation of an improper advantage in order to use his or her apparent or actual influence to obtain undue favors or treatment. This applies to French public officials, officials of public international organizations (such as the United Nations), and, as is the case since Sapin II, foreign government officials. Persons found guilty of influence peddling face penalties of up to five years' imprisonment and a maximum criminal fine of €500,000 or double the proceeds of the offense (whichever is the greater). Criminal fines against companies can be multiplied by up to five times those against natural persons (which would amount to penalties of up to €2.5 million).

French Jurisdiction Over Corruption Offenses

French criminal law, as amended by Sapin II, treats public corruption (*i.e.*, corruption involving public officials) and influence peddling offenses differently than other criminal offenses in France, in that the territorial scope and personal jurisdiction requirements are enlarged. First, public corruption and influence peddling offenses having a foreign component are not subject to the typical "dual criminality" requirement, under which the conduct must be criminalized under both the laws of France and the country where the conduct occurred. Rather, acts of public corruption and influence peddling can be prosecuted in France regardless of whether they constitute a criminal offense in the country in which the conduct took place. Second, French criminal laws on public corruption and influence peddling apply to any defendant who conducts part or all of its business in France. Consequently, under Sapin II, public corruption and influence peddling laws apply to all instances where the defendant is a French national, ordinarily resides in France, or conducts part or all of its business in France.

Another result of Sapin II is that prosecutors no longer have the exclusive right to initiate a prosecution or action against a company for alleged bribery of a foreign public official. Now, potential victims of the offense may also trigger prosecution by filing a complaint with an investigative magistrate. This expansion of the right to initiate action is already being tested in practice, with certain civil society organizations (such as Anticor, Transparency International France, and Sherpa) bringing civil claims (under a theory that they are victims, given their public missions of fighting against corruption) for alleged corrupt activities by French companies.

The Convention judiciaire d'intérêt public—The "French DPA"

Background

Inspired by deferred prosecution agreement settlement mechanisms available in the U.S. and the UK, Sapin II created the *Convention judiciaire d'intérêt public* (the "judicial settlement of public interest" or "CJIP"). While debate remains as to whether this type of settlement mechanism best serves the interests of justice in

corruption-related offenses, the CJIP appears to allow French companies (and prosecutors) faster and more efficient resolutions to settling offenses. Since the CJIP's implementation in the French legal framework in 2016, twelve companies have agreed to pay the fine provided for in a CJIP rather than risk being tried in court.

The outcomes of these 12 CJIPs, combined with (i) a circular issued by the Ministry of Justice on January 31, 2018 ("the 2018 Circular"), (ii) the guidelines issued jointly on June 29, 2019 by the *Parquet National Financier* (the French financial prosecutor, or "PNF") and the AFA ("the PNF/AFA Guidelines"), and (iii) a circular issued by the Ministry of Justice on June 2, 2020 ("the 2020 Circular"), provide some insight on the main considerations for how to conclude a CJIP.

Scope

Offenses eligible for a CJIP. CJIPs were initially only available in cases that could be characterized as offences of corruption, influence peddling, and/or laundering of the proceeds of tax fraud and related offences. However, since the enactment of the Anti-Fraud Act on October 23, 2018, CJIPs are also available in cases of tax fraud, and in late December 2020, with the passage of Act No. 2020 1672 on December 24, 2020, related to the European Public Prosecutor, Environmental Justice, and Specialized Criminal Justice (the "European Public-Prosecutor Act"), the mechanism became available for use in addressing certain environmental crimes.

Persons eligible for a CJIP. The CJIP provides corporations (even those below the financial and personnel thresholds established by Sapin II) with the possibility to settle certain criminal cases outside of the courtroom. Importantly, this alternative negotiated resolution mechanism is available only for legal entities and not for individuals. Hence, the potential benefits of the CJIP do not extend to the companies' representatives and employees, who remain subject to prosecution. However, the PNF publicly stated that the plea agreement procedure (*comparution sur reconnaissance préalable de culpabilité* or "CRPC") could be available for individuals who agree to the alleged facts and admit guilt.

The Parliamentarian Report suggested opening the CJIP to individuals in corruption cases. To support this recommendation, the report refers to the Bolloré case (described below) where the CJIP concluded with the companies was validated but the CRPCs negotiated with the individuals were rejected by the court. The Parliamentarian Report noted that such asymmetry does not necessarily allow for a global and consistent resolution of the case, and might dissuade officers to enter into negotiation with the prosecutor.

Content

Pursuant to the French Code of Criminal Procedure, a CJIP must include one or more of the following obligations: (i) the payment of a public interest fine that is to be proportionate to the profit obtained from the breach, without exceeding 30% of the entity's average annual turnover over the last three years; (ii) the implementation of a compliance program under the supervision of the AFA for a maximum of three years; and (iii) where the victim is identified, the amount and the manner in which the harm suffered as a result of the

violation will be compensated, with payment having to be made within a year of the CJIP (cf. article 41-1-2 of the French Code of Criminal Procedure).

Advantages of CJIPS

No admission of guilt. A CJIP effectively ends the prosecution against the legal entity without requiring conviction, admission of guilt, or, as recently enacted under the European Public Prosecutor Act, the recognition of the facts and legal characterization of such facts leading to the CJIP. As such, it does not entail debarment of the legal entity from national public procurement and makes it possible to continue to respond to calls for tenders related to international public contracts. It also avoids situations where the legal entity is prohibited from conducting certain corporate activities, such as making a public offering, issuing financial securities in negotiations on a regulated market, or closing one or more of its establishments.

Reduced length of proceedings. The CJIP also reduces the frequently very lengthy duration of proceedings, which can destabilize an organization's image, business activities, and governance.

Foreseeability of costs. The CJIP provides the possibility to predict with greater certainty the fines and related costs that must be paid by the legal entity. Indeed, pursuant to Sapin II, the payment of the public interest fine under a CJIP must not exceed 30% of the entity's average annual turnover over the last three years.

Reduced costs. While the 2018 Circular underlines that the settlement fine is to be higher than the amount that could be ordered in court—on the theory that a higher financial penalty is offset by the absence of a conviction and corresponding criminal record—the experience to date shows that, in one instance, proposed penalties in the context of a CJIP negotiation were significantly lower than the fine eventually imposed by a court. Indeed, the CJIP offer to UBS to resolve a tax fraud case was reportedly rejected in March 2017 by the bank, which considered the proposed fine, €1.1 billion, to be excessive. In February 2019, UBS was sentenced after trial to pay a record fine of €3.7 billion (plus €800 million as damages), eventually reduced to €1.8 billion on appeal. Given the relatively limited experience offered so far, companies may be more incentivized (from a financial and risk-management perspective) to enter into the CJIP process rather than risk such severe penalties after trial.

Risks Associated with CJIPS

Lack of legal certainty. Article 41-1-2 of the French Code of Criminal Procedure provides that "*if the president of the court does not validate the proposal of an agreement or if the legal entity avails itself of its right of retraction, the National Financial Prosecutor may not submit to the investigating judge or to the trial court declarations made or documents passed on by the legal entity in the course of the procedure described in this Article*." However, it appears from the parliamentary debates that this was added to the law with the view to guarantee the confidentiality of the information disclosed by the legal entity, where the legal entity does not comply with the terms of the CJIP. Yet, the ambiguity surrounding the term "procedure" is also

addressed by the PNF/AFA Guidelines. In particular, the PNF/AFA Guidelines state that the "procedure" (and the confidentiality obligations it carries) will not be initiated before the CJIP proposal has been formalized by the PNF. As such, the PNF/AFA Guidelines take the view that it does not limit the prosecutors' ability to make use of the documents and information passed on by the company or its counsel at the criminal investigation stage (which is prior to formalization of a proposal for a CJIP). This position appears to conflict with the objective of inducing companies to voluntarily reveal to the prosecutor facts of corruption and/or influence peddling or to otherwise cooperate with an investigation by providing documents and information prior to the formalization of a CJIP proposal.

Questions regarding legal privilege. The PNF/AFA Guidelines take a more skeptical view of the applicability and importance of protections afforded by legal privilege (*secret professionnel*) and indicate that the level of the company's cooperation may be adversely affected by the refusal to transmit documents protected by the legal privilege. Companies therefore must balance the need and desire to communicate in a fulsome manner with their legitimate interest in maintaining legal privilege as well as their right against self-incrimination. In addition, companies that do consider waiving legal privilege protections must consider the effect of such a waiver in other jurisdictions.

Process of Obtaining and Entering Into a CJIP

CJIP Proposition. The CJIP is to be offered at the initiative of the prosecutor or the investigative judge, depending on the current stage of the prosecution. The prosecutor may propose a settlement agreement for an implicated company as long as the company has not been formally charged ("*[t]ant que l'action publique n'a pas été mise en mouvement*") with the offence eligible for that type of resolution. Alternatively, when the case has been brought to the investigative magistrate (*juge d' instruction*)—which means that the public prosecution has commenced—the magistrate can decide to transmit the case to the prosecutor with the view to offer a CJIP to the indicted company (*mise en examen*).

In practice, however, the implicated company may also suggest entering into a CJIP negotiation. Indeed, in most of the court validation orders issued to date, the judge has noted that the CJIP resulted from the company's "clear and unequivocal" request to enter into negotiations with the prosecutor. This practice was endorsed by the PNF/AFA Guidelines, which state that a company wishing to suggest settlement negotiations does not have to formalize this in writing as, at this stage, the objective is only for the prosecutor to assess whether a negotiation can be considered.

Validation. Once the negotiations take place and an agreement has been reached, the CJIP must be subject to judicial scrutiny, with the prosecutor proposing the draft settlement to the court. A public hearing is held, following which the judge decides whether or not to approve the settlement. This entails an assessment of whether the procedural requirements have been met, the substantive conditions, the amount of the fine, and the proportionality of the terms in light of the benefits derived from the violations. The decision cannot be

appealed. If the court approves the settlement, the company has ten days to withdraw its acceptance. The approval order contains no finding of guilt and has neither the nature nor the effect of a conviction. The CJIP settlement, the approval order, and the amount of the fine are to be published on the websites of the Ministry of Justice and Ministry of Budget.

If the court does not approve the settlement, or if the company withdraws its acceptance/does not satisfy the terms of the agreement, the prosecutor then moves forward with the prosecution. If the court does not approve the settlement or the company withdraws its acceptance, then the prosecutor cannot make use of statements made or documents provided by the company in the course of settlement discussions before an investigative magistrate or at trial. In contrast, the law does not guarantee confidentiality in the situation where a prosecution resumes because the company failed to comply with CJIP requirements.

Criteria Likely to be Considered for CJIP Offer

The decision to enter into CJIP negotiations ultimately rests with the prosecutor, who, according to the guidance provided to date, shall decide on the basis of whether the company: (i) voluntarily reported the facts at issue; (ii) cooperated in the context of the investigation; and (iii) already entered into such an agreement in the past (which would likely bar a new CJIP).

Importantly, these three elements are not strict requirements, and do not necessarily prevent prosecutors from entering into CJIP negotiations if they believe that the circumstances warrant one.

Below are some additional points on the above-mentioned criteria.

- **Existence and timing of voluntary disclosure**. The PNF/AFA Guidelines specify that any self-reporting must be made within a reasonable time after the top executives of the company become aware of the offenses. Prosecutors endeavor to verify the impact of such timing on the progress and outcome of the investigations (in particular with a view towards the preservation of evidence and collusion risks).

- **Prior convictions**. While the 2018 Circular invites prosecutors to consider only the legal entity's prior record, the PNF/AFA Guidelines and the 2020 Circular take into account any sanctions that might have been imposed by a French or foreign court against not only the legal entity but also one of its affiliates or even one of its top executives. This also applies when the legal entity has previously been granted a CJIP or a settlement agreement has been entered into with a foreign authority for corruption-related offenses. This clarification seems to go against a cardinal principle of French law whereby punishment attaches only to the specific juridical person that committed the offense.

- **Cooperation**. Guidelines and current practice to date emphasize the need to cooperate with the investigation. In this respect, prosecutors expect companies seeking a CJIP to have actively taken part in revealing the truth by means of an internal investigation or in-depth audit of the offenses and the malfunctioning of the compliance system. The cooperation of the company in the criminal investigation is presented as a prerequisite for entering into a CJIP by the PNF, and the PNF/AFA Guidelines indicate that the quality of this cooperation will be a decisive factor for prosecutors in deciding whether to abandon the prosecution proceedings and enter into a CJIP. Furthermore, the PNF/AFA Guidelines specify that the internal investigation should result in a report presented to prosecutors describing the offenses. The emphasis on cooperation, and the potential expectation by prosecutors of the disclosure of investigative reports, can result in some difficult assessments of risk when it comes to asserting good faith legal protections, such as those afforded by legal privilege/*secret professionnel*.

The PNF/AFA Guidelines and the 2020 Circular indicate that the internal investigations carried out by the company must also help in establishing liability of individuals. To that end, both the *Conseil de l'Ordre* of the Paris Bar and the French National Bar Council have issued publications on internal investigations, given the growing importance of this exercise in the overall anti-corruption enforcement landscape. The Vademecum first issued by the *Conseil de l'Ordre* in September 2016 was modified on December 10, 2019, and annexed to the *Règlement Intérieur National* to provide further ethical guidelines that attorneys conducting internal investigations should follow to ensure that they remain compliant with their ethical obligations when performing such activities. In June 2020, the French National Bar Council released a detailed guide of considerations to have in mind when conducting internal investigations in light of, among other things, confidentiality, legal privilege, and data privacy concerns that can arise in the context of such internal investigations.

Criteria Likely to be Considered in the Calculation of the Public Interest Fine

As the French Code of Criminal Procedure offers no further details on how to calculate the public interest fine other than (i) taking into account the benefits derived from the breaches found and (ii) defining a cap of 30% of the average turnover over the last three years, the 2018 Circular, the PNF/AFA Guidelines, and the CJIPs previously concluded have made it possible to understand in broad terms the methodology applied for calculating the public interest fine. In particular, it appears to be composed of (i) the amount of the ill-gotten gains and, where applicable, (ii) an additional penalty aimed at sanctioning more severely the most serious cases. In this respect, the objectives sought by the prosecutors to (i) include the entire amount of the ill-gotten gains and (ii) adjust the amount of the fine to the seriousness of the misconduct through the additional

penalty are not consistent with the legal cap of 30%. Indeed, the higher the amount of the illicit profit, the more likely the offense will be viewed as serious, and the less room there is to apply an additional penalty.

Restitution of ill-gotten gains. The French Code of Criminal Procedure's provisions indicating that the public interest fine is to be established in proportion to the ill-gotten gains suggest: (i) the amount of the improper advantage is the only reference value to take into account; and (ii) only a portion of such advantage will be included within the public interest fine component. Nonetheless, the precedents to date show that this is not necessarily the case. Indeed, in most of the CJIPs that were concluded as of the time of this Alert (except for that involving Kaefer Wanner and LVMH, see *infra*), the unlawful profits were completely included in the amount of the public interest fine. Such practice has also been endorsed by the PNF in the PNF/AFA Guidelines.

To calculate the amount of the improper advantage, the 2018 Circular and the PNF/AFA Guidelines recommend considering both direct and indirect profits gained from the corruption scheme. According to the PNF/AFA Guidelines, the improper advantage will be calculated on the basis of the turnover generated by the corrupt scheme, after deduction of expenses directly attributable to the project. This deduction may only be made from revenue directly related to the corrupt scheme under consideration.

Determination of additional penalty. Depending on the circumstances, the prosecutor is invited to apply aggravating or mitigating factors. Aggravating factors may include (i) the gravity of the corruption scheme, which can result from its public nature and/or its duration, (ii) previous conviction/sanction of the legal entity, (iii) use of resources of the legal entity to conceal corruption-related offenses, (iv) the fact that the legal entity is subject to Sapin II, and (v) the repeated or systemic nature of the corruption-related offenses. According to the Ministry of Justice, the aggravating multiplier must be equal to at least two, in order for the corrupt conduct to cost the company more than what it benefitted from the scheme. The experience from the CJIPs concluded to date, however, shows that such logic is not applied in practice.

The guidelines also invite the prosecutor to consider mitigating factors where they consider (i) that the facts at issue are particularly old, or (ii) if the company (a) self-reported them, (b) cooperated during the proceedings, (c) took remedial measures, and/or (d) implemented preventive measures. While the guidelines and the criteria laid out in the 2018 Circular appear to be consistent in terms of considering aggravating or mitigating factors, there are two points of divergence that should be highlighted. First, the PNF/AFA Guidelines provide that a company's prior convictions may be considered as an aggravating factor, whereas they are only a criterion for assessing the opportunity of settling a CJIP under the terms of the 2018 Circular. In addition, the 2018 Circular states that the implementation of a compliance program should be taken into account by reducing the cost relating to the implementation of a compliance program, rather than by reducing the amount of the fine, which differs from the approach specified in PNF/AFA Guidelines.

Scope

Under Sapin II, certain companies are required to implement a compliance program in order to prevent and detect acts of corruption. The compliance program requirement applies to: (i) companies established under French law with at least 500 employees and with a turnover of over €100 million; and (ii) companies established under French law that are part of a group with a total of at least 500 employees, where the parent company is headquartered in France, and the group has a consolidated turnover above €100 million. These obligations also apply to state-owned companies and to the subsidiaries of entities subject to Sapin II.

If a company/legal entity meets these criteria, the requirement to implement an adequate compliance program also applies to its president, chief executives (*directeurs généraux*), managing directors (*gérants*) and, under certain circumstances, members of the management board. The French legislature intentionally placed responsibility on natural persons to ensure that anti-corruption compliance programs would be implemented throughout French companies subject to Sapin II.

It should be noted that the Parliamentarian Report suggested removing the condition requiring the parent company's head office to be located in France in order to avoid unequal treatment between smaller companies belonging to large French groups (which are covered) and smaller companies belonging to foreign groups (which are not currently covered). If accepted, the recommendation would expand the scope of the law to have it cover small and mid-sized subsidiaries of foreign groups.

Compliance Program Requirements

Companies and legal entities falling under the scope of Sapin II are required to implement anti-corruption compliance programs that include the following eight elements:

- A code of conduct defining and illustrating the prohibited conduct likely to constitute an act of corruption or influence peddling that is annexed to the company's internal regulations (*règlement interieur*) ("Code of Conduct");
- A regularly updated assessment of the potential risks of exposure to external corruption ("Risk Mapping" or *Cartographie des risques*);
- Internal whistleblowing procedures designed to report violations of the Code of Conduct;
- Third-party due diligence and risk-assessment procedures for clients, lead suppliers and intermediaries;

- Internal or external financial controls ensuring that the company's books and records are not used to conceal acts of corruption or influence peddling;
- Training programs and initiatives for executives and employees potentially exposed to corruption risks;
- Disciplinary procedures in the event of corruption, influence peddling and related misconduct by employees; and
- Internal mechanisms to evaluate and monitor the effectiveness of the compliance program.

France's Anti-Corruption Agency: The AFA

As noted above, Sapin II created the AFA, the authority primarily responsible for assisting companies and entities in preventing and detecting acts of corruption and influence peddling in both the public and private sectors. The AFA has policy-making authority and enforcement powers limited to administrative sanctions, although it may refer cases to the prosecutor for criminal action if the AFA uncovers possible criminal activity while performing its mission. Its head is appointed by the President of France for a non-renewable six-year term, and reports to both the Ministers in charge of Justice and the Budget (Ministre *de la Justice* and *Ministre du Budget*). The first and current head of the AFA is Charles Duchaine, a former prosecutor, who was appointed in March 2017. The AFA is composed of two sections: (i) the Advisory Division, which helps private and public actors to prevent and detect corruption, by elaborating on recommendations and providing support to public and economic actors; and (ii) the Control Division, which controls the quality and the efficiency of the procedures implemented pursuant to Sapin II and the execution of requirements flowing from prosecutions or CJIP settlements.

The Parliamentarian Report recommends modifying the AFA's scope of work in order to have it focus on administrative coordination and transfer its advisory and control missions to the *Haute Autorité pour la Transparence de la Vie Publique* (High Authority of Transparency in Public Life or "HATVP"), but this recommendation has not yet resulted in any draft bills.

Advisory Mission

On October 2, 2018, the AFA released its *Charte d'appui aux entreprises* ("Business Support Charter"), which establishes the framework for the relationship between companies and the AFA's Advisory Division for the purposes of its mission to help organizations prevent and detect corruption and influence peddling. Since the needs of companies may differ according to their size, sector of activity, economic model, and the sophistication of their compliance system, the AFA has set forth three categories of support.

The first category of support is referred to as generic support, which is intended for all companies concerned with detecting and preventing corruption, regardless of the company's size or sector. Generic support consists of the AFA developing, updating and disseminating the French anti-corruption framework, on the basis of Sapin II's legal requirements. This includes the AFA Recommendations (described below), practical guides, responses to general interest questions published on the AFA website, and all other relevant standards for preventing and detecting corruption.

The second category of support is referred to as specific support. It consists of the AFA clarifying or providing expertise on issues raised by a group of companies that have already set up an anti-corruption program or are in the process of doing so. The AFA can provide specific support through proofreading documents for the companies or through technical workshops for small groups, which will be organized by sector of activity, job (*i.e.*, compliance officer), or anti-corruption issues.

The third category of support provided by the AFA is individual support, which consists of the AFA responding to the specific questions of a specific company. This can be done by mail or email, or through individual coaching at the request of the company for a period not to exceed five months. In the case of individual coaching, the AFA will guide a company in relation to the implementation or updating of its compliance program, in an effort to ensure that the company understands the applicable anti-corruption standards as well as the methods available for deploying a compliance program. AFA's guidance will be based on documents produced by the company, and will be discussed during regular meetings between the company and the AFA, scheduled jointly by the parties. It does not, however, constitute a certification of the company's compliance program. All companies, regardless of size and sector, can request individual coaching by the AFA, although AFA has the discretion to determine whether individual coaching or another form of support would be more appropriate. Individual coaching lasts as long as agreed between the AFA and the relevant organization (not to exceed five months), unless the organization decides to end the mission before the agreed date or the AFA considers that the company is not respecting its commitment to allocate relevant resources to the relevant project. Companies are not obligated to follow the recommendations made by the AFA in the course of the coaching period, and the information shared with the relevant AFA agents is confidential and subject to professional privilege. It is important to note that the support and advisory mission of the AFA is separate from its enforcement/control mission, as each function is exercised by a different division.

AFA's Recommendations for Compliance Programs

In January 2021, the AFA issued an updated version of its 2017 recommendations concerning some of the required elements of a compliance program under Sapin II, the relevant parts of which are included below.

- **Top management's commitment to preventing and detecting corruption**: While not formally part of the Sapin II legal requirements, the AFA emphasizes in its guidelines that senior management's commitment to a zero-tolerance policy is fundamental for preventing and detecting corruption.

- **Anti-Corruption Code of Conduct**: In addition to the legal requirements set forth in Sapin II, the AFA recommends that the Code of Conduct: (i) be initiated by the organization's top management; (ii) set out the organization's values and commitments; (iii) describe the internal whistleblowing system offered to employees; (iv) be written in French and translated to be understood by foreign employees; (v) be used as a tool for external communication when dealing with customers, users, suppliers, and any other partners of the organizations; and (vi) be regularly updated, especially after any significant update of the risk map (*e.g.*, in the case of a reorganization or restructuring).

- **Internal whistleblower system**: While Sapin II requires companies to implement an internal whistleblower system allowing employees to disclose conduct or situations that do not comply with the company's Code of Conduct, the AFA's recommendations are in line with the requirements pertaining to the whistleblower procedure as a more general feature of a company's organization, set out by Article 6 et seq. of Sapin II. As such, the AFA encourages entities to implement a single whistleblowing system, and recommends that it specify the information required with respect to the Article 6 whistleblowing system, including the following: (i) the person in charge of receiving whistleblowers' reports; (ii) the measures taken to ensure confidentiality of the disclosures and the identity of the persons alerting the company and affected by the alert; (iii) the procedures for communicating with the whistleblower to inform him/her of the progress made with processing and handling the alert; and (iv) where appropriate, the policy on processing anonymous reports. The whistleblower protection status may be applied in the framework of this system if conditions discussed in greater detail below are met.

- **Risk mapping**: According to the AFA, the risk mapping must be comprehensive, formalized, and adaptable over time to changing risks. The AFA's guidelines provide a specific methodology that they recommend companies follow, consisting of: (i) identifying risks that are inherent in the organization's activities; (ii) assessing the company's exposure to "gross risk" of corruption through the analysis of risk factors or sources (such as high-risk countries, new products, complex contracts, business pressure); (iii) determining the probability of occurrence of the identified risks (for instance, based on a history of incidents); (iv) assessing the existence of aggravating factors (by applying risk coefficients); (v) assessing the adequacy and effectiveness of mitigating measures in order to determine to what extent they allow computation of the "net" or "residual" risks exposure; (vi) prioritizing risks depending on their scores, and (vii) implementing an action plan.

- **Third-party due diligence procedures**: While Sapin II requires companies to conduct due diligence on certain categories of third parties (customers, lead suppliers and intermediaries), the AFA considers that such categories are only "priorities," and recommends that companies review (based on risk) all the third parties with which they have or are about to start a relationship. The AFA's guidelines provide that due diligence should be conducted before starting any relationship, updated periodically, and proportionate to the risk level. In addition to conducting third-party due diligence, the AFA recommends heightening third parties' awareness by: (i) notifying them of the company's compliance program; (ii) providing them with the company's Code of Conduct and anti-corruption training; and (iii) requiring them to provide a written commitment to combat corruption (including through anti-corruption clauses incorporated into risky contracts) and to check the integrity of their subcontractors.

- **Accounting control procedures**: In its guidelines, the AFA states that accounting control procedures have two main goals; first, safeguarding the company's assets and resources by checking that operations are well-managed and allocated resources are properly used; and second, ensuring that the company's books and accounts are not used to conceal acts of corruption. Such procedures provide reasonable assurances that a company provides a reliable, regular, sincere, faithful, and complete picture of its accounting and financial situation. Accounting controls can include controls (internal procedures), audits (independent assessments), or both, and can be carried out internally or externally.

- **Corruption risk training**: Companies are required to implement "robust [and] appropriately designed" internal anti-corruption training. Such training should particularly be attended by board members, directors, managers, and employees that are most exposed to corruption risks. The training may be delivered internally by the company itself, or through external consultants, and the company should develop a set of indicators to track the implementation of the training program. While Sapin II only refers to managers and the most exposed employees, the AFA recommends that other employees also be trained, at least on a general basis.

- **Internal monitoring and assessment system**: In addition to what is required by Sapin II, the AFA recommends three levels of controls in connection with each element of the company's compliance program. The first level of controls, performed by operational or support staff, or by line managers, aims to ensure that the operational or support tasks are carried out in compliance with the company's procedures. The second level of controls, performed by the head of compliance (or other designated compliance personnel or managers), is meant to ensure that the first level of controls is properly

implemented and that the internal monitoring and assessment system is working properly. The third level of controls, which typically consists of "internal audits," is intended to ensure that the system to prevent and detect corruption complies with the company's requirements and is efficiently implemented and kept up to date. The company's risk mapping is also intended to inform the audit plan and the functions and individuals involved in the monitoring system.

While companies subject to the U.S. FCPA or the UK Bribery Act are likely to have implemented compliance programs that comply with the above-mentioned Sapin II requirements and recommendations, there are certain specifics that need to be considered, including the need to follow applicable rules under French Labor Law and Data Privacy Laws. Although the AFA's guidelines are not legally binding, in practice the AFA generally follows its own recommendations—which in many instances are broader than what the law requires—when assessing companies' compliance programs.

AFA Guides on Specific Topics

As part of its advisory mission, the AFA also publishes guidelines and handbooks on particular topics. The AFA has published and/or submitted to public consultation guidance on numerous subjects, including on key components of the compliance program such as gifts and entertainment, third-party due diligence, risk mapping, and codes of conduct, and on themes such as conflicts of interest and facilitating payments. The AFA also published handbooks addressing selected themes (*e.g.*, monitorships, sanctions likely to be issued by the AFA Sanctions Commission, anti-corruption due diligence in the context of mergers and acquisitions, anti-corruption accounting controls, gifts and hospitality policies, conflicts of interest, and anti-corruption due diligence in the context of public procurement) and/or addressing specific actors (construction and public works entities, small and medium-size companies, sport federations and operators of the Ministry of Sports and Olympic and Paralympic Games, as well as nonprofit and public interest organizations).

In February 2019, the AFA published its Guide on the anti-corruption compliance function in companies. In this guide, the AFA underlines the strategic stake and cross-functionality of the anti-corruption compliance function, and emphasizes the role of the governing body with regard to the effective governance of the anti-corruption compliance program within the organization. The AFA points out that there is no "one-size-fits-all" anti-corruption compliance program, and the governance of the compliance function must be tailored to the specifics of particular companies.

- **Anti-corruption compliance function**. The Guide on the anti-corruption compliance function defines the anti-corruption compliance function as a strategic transversal element under the responsibility of the governing body. It indicates that although the main function of the Chief Compliance Officer is to implement and deploy the anti-corruption program within the company, this role may be quite broad. The AFA details

11 tasks that may be assigned to the compliance function, including monitoring; controlling and reporting on the implementation of the program; and coordinating all stages of an internal investigation following evidence or allegations of potential misconduct.

- **Governance of the anti-corruption compliance function**. As stated above, the governance of a company's compliance function will be determined by the characteristics of the organization. Accordingly, the compliance function can either be integrated into another service line (such as legal or finance), or it may be a dedicated function. The compliance function must be clearly identified within the organization, as a driver of the elaboration and implementation of the compliance program, and must have sufficient financial, human and material means allocated to this end. The Chief Compliance Officer must be formally designated by the governing body. The AFA Guide on the anti-corruption compliance function suggests that its appointment be communicated to all employees by an internal memo of the governing body. In addition, it is recommended to have an integrated and independent compliance function within the organization that would report to the governing body.

- **Qualifications and mandate of the chief compliance officer**. When nominating the Chief Compliance Officer, the governing body must choose someone that has sufficient integrity, knowledge of the organization, and strong regulatory skills. The Chief Compliance Officer is in charge of coordinating the risk mapping, the code of conduct, the training program, the escalating procedure, the disciplinary regime, the third-party due diligence process, and (in coordination with finance personnel) the accounting procedures and internal controls.

- **Liability of the chief compliance officer**. The AFA Guide on the anti-corruption compliance function addresses the issue of potential criminal liability of the Chief Compliance Officer. It indicates that in the event of cases of alleged corrupt activities, Chief Compliance Officers will not be held liable unless they participated in the conduct or failed to prevent it in a manner that was inconsistent with the performance of their professional duties.

Control Mission

Process

The AFA can initiate controls to assess an entity's compliance with the Sapin II compliance obligations on its own or at the request of, *inter alia*, either the President of the French *Haute Autorité pour la Transparence de la Vie Publique* ("HATVP") or the French Prime Minister. As partly presented in the latest version of its "Charter of Controls" issued by the AFA in June 2022 (which has modified the protocol previously in place) and through

experience in connection with actual controls (it being noted that the first controls subject to the new protocol are still ongoing at the time of this Alert), the process can be divided into the following eight steps:

- **Control notice**. The AFA sends a control notice to the representative of the company subject to the control by way of an official letter. This notice both informs the company of the identity of the agents in charge of the control, and requires the company to answer a general questionnaire of 163 questions focused on the compliance program and the company's activities and organization.

- **Communication of documents and response to the AFA questionnaire**. The company subject to the control typically has one month (noting that this timeframe has been extended from the previous 15-day delay) to submit its answers to the questionnaire and communicate supporting documents as well as those requested by the AFA through the questionnaire. Since the questionnaire has been made available on the AFA's website, many French companies have wisely started gathering information on a proactive basis in order to be able to provide required responses more efficiently and without freezing the organization in case of a control. It is worth noting that the Sanctions Commission indicated in its decision dated July 4, 2019 (*see below*) that the AFA is entitled to request documents that were created before the entry into force of Sapin II's Article 17.

- **Discussions with the AFA**. A preliminary courtesy meeting may be organized between the AFA's agents and the company subject to the control.

- **Phase 1—General Assessment**. As per the new Charter, this assessment is based on "*the responses provided in an initial questionnaire, interviews conducted, and the responses provided to any questions asked at the end of these interviews*." The Head of the AFA's Business Audit Department has specified in this respect that phase 1 will not go beyond what is requested in the initial questionnaire, as any additional requests that may be made during this phase are only intended to (i) follow up with the audited entities on the initial questions that were not answered or were insufficiently answered, and/or (ii) gain a clear understanding of the responses provided in the initial questionnaire. As regards interviews, those to be conducted during phase 1 will be limited, in theory, to a few key functions, such as senior management and the compliance function. The follow-up questionnaires and sampling requests we have seen in previous waves of audits will be reserved for phase 2.

- **Determination Phase**. At the end of the above-mentioned phase 1, which may take up to four months in our experience, the AFA decides whether the control should be pursued and give rise to a second phase. According to indications given by the

Head of AFA's Business Audit Department, the decision to submit an audited entity to phase 2 will not necessarily depend on the quality of the anti-corruption compliance program presented in phase 1. As such, moving on to phase 2 will not be reserved for "*underachievers*" (*sic*.). Indeed, it appears that phase 2 would be launched for those entities for which it would appear necessary or appropriate to assess the implementation and/or effective deployment of their compliance program. We understand from this reasoning that screening could be carried out in light of the existence of (i) an anti-corruption compliance program, as in *de facto* terms, there would be little point in trying to assess, within the framework of phase 2, the effective implementation of a nonexistent compliance program; and/or (ii) risk factors inherent to the organization and/or the geographical locations of the audited entity that should be analyzed during phase 2 instead. For those companies that are not selected to be subject to a phase 2, a closing meeting is organized to present the first observations and next steps.

- Interim meeting. For those entities that are subject to a phase 2, an interim meeting is organized with the AFA to discuss the observations made during phase 1 as well as the next steps to be undertaken as part of the second phase.

- Phase 2—Enhanced Assessment. The second phase (which is optional with the AFA and not systematic) consists in (i) interviews with a larger panel of persons than the one met during phase 1; (ii) follow-up questionnaires and document requests; and (iii) sample testing. This phase 2 also includes a closing meeting during which initial observations and next steps are discussed.

- Control report. At the end of either phase 1 or phase 2, depending on the status of the control for the respective entities, the AFA prepares a report discussing the control process and assessing the quality of the anti-corruption program in place within the entity, with a specific emphasis on "tone at the top." Subject to a change of practice that may stem from the new protocol, the report is divided into "Observations," "Recommendations," and "Findings of Breach."

- Observations of the company subject to the control in the control report. The company subject to the control has two months to comment on the AFA's findings, to challenge their merits and present a precise action plan aimed at implementing the AFA's recommendations. It is important to note that the new Charter provides that "the date of the audited entity's response to the provisional report constitutes the end of AFA's audit operations" (whereas it should be recalled that under the former protocol,

the audit ended at the conclusion of the onsite audit). This means that the controlled entity can refer to any progress that may have been made since the closing meeting.

- **Issuance of the final report**. The AFA issues the report in its final version, replying, as the case may be, on the company's comments and arguments.

The AFA has a number of choices in concluding the control. Its President may issue a warning and request that corrective actions be taken. Alternatively, it may decide to initiate sanctions proceedings before the AFA's Sanctions Commission. If a sanctions proceeding is held, the company will have the opportunity to present observations at a hearing. The Sanctions Commission may impose fines on responsible individuals of up to €200,000 and a fine of up to €1 million on companies. The Sanctions Commission can also enjoin the company to take appropriate action to adopt an effective compliance program (or certain elements of an effective compliance program).

These sanctions can be cumulative, but the amount of the fines shall be proportionate to the severity of the infringement, and will take into consideration the financial situation of the person or company in breach.

Any decision issued by the AFA's Sanctions Commission ordering an injunction or a financial penalty may be made public, and can be appealed before administrative courts. On this matter, the AFA's Control Division has indicated that appeals from the decisions of the Sanctions Commission are in the first instance the responsibility of the Paris Administrative Court.

Since the AFA is responsible for reviewing compliance with the Sapin II obligations to prevent and detect corruption and influence peddling, it does not have to establish the elements of underlying criminal offenses of corruption and influence peddling in order to sanction companies or bring them before the Sanctions Commission. In other words, a company can be sanctioned for not having in place the elements of a compliance program required by Sapin II, whether or not an underlying act of corruption has been established.

Statistics

The AFA's activities to date have shown it to be effective and ambitious in fulfilling its mission. The AFA had contemplated implementing control measures in approximately fifty private sector entities per year (out of the 1,570 private sector entities subject to the AFA's controls at the time of this Alert) to ensure compliance with Sapin II's requirements. However, and as stated above, the first controls, which began in October 2017, as well as the following ones launched every year since, show that not only does the AFA assess compliance with the legal requirements set out in Article 17 of Sapin II, it also assesses companies' compliance with its own recommendations—which, as explained above, appear broader than what is stated in the letter of the law.

As of December 31, 2021, the AFA had launched 152 controls, of which:

- 91 have been on private sector entities and 51 on government entities; and
- 142 were designed to ensure compliance with Sapin II requirements and 19 were meant to ensure execution of decisions by the AFA's Sanctions Committee or conducted in the context of court-ordered compliance remediation programs (either to assess the status of a program in view of such decision or to monitor the implementation of such decision).

Statistics tend to show that while the controls were initially covering the full spectrum of compliance programs, an increasing number of "thematic" controls (*i.e.* controls that focus on selected items of such compliance programs) are now conducted (13 thematic controls vs. 11 full controls in 2021).

Lessons Learned from the AFA's Controls

So far, nearly all controlled companies have been cited for some form of breach, but only two have been brought before the Sanctions Commission. Based on control reports assessed to date, the following points and expectations of the AFA appear worthy of focus:

- Tone at the top: the AFA has only made recommendations in this respect, as this is not, *per se*, part of the formal requirements of Sapin II's Article 17. However, the controls highlighted the key role of a company's managers, who need to be included and proactive in the implementation of compliance programs as well as in the communication of the "zero tolerance" policy within a company. It is noteworthy that these requirements are similar to what is expected by U.S. authorities when evaluating compliance programs. The AFA also recalled that the compliance function within a company needs to be sufficiently resourced and able to act independently in order to achieve its mission.
- Risk mapping: the AFA has focused extensively on the existence of a corruption Risk Mapping. The Risk Mapping needs to be comprehensive and cover all potential corruption risks that the organization can face. The AFA has carefully checked that all the steps involved in the assessment, from identification of such risks to implementation of remedial actions, are documented. These risks must be assessed based on a variety of criteria, including financial, geographical, commercial or political aspects of the company's activities. Some of these criteria have been identified as involving higher risks by the AFA (*i.e.,* public tenders, exports, and relations with institutional entities located abroad). It is noteworthy that this recommended comprehensive evaluation by the AFA appears to go beyond other international

guidance on conducting risk mappings, which counsel towards implementing a risk-based approach when assessing corruption risks throughout the organization.

- **Code of conduct**: the AFA specified that the definitions of the different types of corrupt behavior and influence peddling should be clear and complete, and the illustration of such conduct should reflect the findings contained in the Risk Mapping. Furthermore, in May 2019, the AFA published pedagogical support materials providing clear definitions of the various criminal offences related to corruption. Finally, the AFA has also specifically focused on the internal (*i.e.* available on the company's intranet) and external (*i.e.* provided during the hiring process) communication of the Code of Conduct.

- **Third-party due diligence**: third-party due diligence has been another key area of focus for the AFA, which insisted on the involvement of the compliance function and its participation in decision-making at the onboarding stage and during periodic recertification of these relationships. These controls have also been the occasion for the AFA to clarify that all third parties needed to be assessed and not only the "*client, first-ranked vendors and intermediaries*" as specified in the Sapin II. It will therefore be important for companies to develop a risk-based approach to assessing their third-party relationships in a manner that will satisfy the AFA's expectations.

- **Training**: in some reports, the AFA specified that anti-corruption training should be provided to all employees. The AFA also insisted on the fact that such training needed to cover influence peddling in addition to anti-corruption offences.

- **Accounting controls**: the AFA has stated that all accounting controls should be documented and consistent with the findings contained in the Risk Mapping. The AFA has also indicated that such controls may consist of both first- and second-level controls.

- **Whistleblowing system**: among other features, the AFA specified that companies could implement a single whistleblowing system designed to report any violations of the Code of Conduct, as well as any other criminal offences as required by Articles 6 to 16 of the Sapin II.

- **Disciplinary procedures**: the AFA insisted that examples of disciplinary measures applied following violations of the Code of Conduct should be communicated to employees.

- **Evaluation and monitoring**: finally, the AFA determined that internal mechanisms to assess and monitor the effectiveness of compliance measures needed to integrate action plans reflecting the issues identified at each level of control. Sufficient resources also need to be allocated to the third level of control to enable them to control the company's compliance with the new anti-corruption regulations.

AFA's Sanctions Commission Activity

As described in detail in our last Alert, in 2019 and 2020, the AFA brought two entities before its Sanctions Commission for alleged failures to implement anti-corruption compliance programs consistent with the requirements of Section 17 of Sapin II, but no such actions have been initiated to date in 2021 or 2022.

Oversight of Compliance with Law 68-678 (the "French Blocking Statute")

Another feature of Sapin II is that the AFA may verify, at the request of the Prime Minister, compliance with the French "Blocking Statute," where a company headquartered in France is subject to a monitorship arising out of settlement with a foreign authority and has to transfer information to the foreign authority in that context. Sapin II does not, however, mention that the AFA would carry out similar reviews for Blocking Statute compliance when the foreign settlements involve offenses outside of corruption or influence peddling. The law similarly does not indicate that the AFA should play this role in the context of foreign-led *investigations* (as opposed to completed settlements/monitorships). However, the PNF/AFA Guidelines may expand the powers of the AFA in this regard, as they state that:

- when a company suspects or detects an offense of transnational corruption within its own organization in the course of performing a resolution imposed on it by a foreign authority, it must inform the AFA of this offense before communicating this information to the foreign authority. The AFA shall assess if such a communication might be a violation of [the French Blocking Statute]. The AFA informs the [prosecution] of the progress of the disclosure to the foreign authority to allow the [prosecution] to assess if the offenses detected fall within its field of competence.

In other words, although the stance adopted in the PNF/AFA Guidelines may be intended to ensure that a legal entity is in compliance with the French Blocking Statute, it also seemingly places the legal entity in a position where it would be obligated to report to the AFA information relating to the commission of an offense, placing it in a delicate situation with respect to its right against self-incrimination.

Interactions Between the AFA and French Prosecutors

The AFA does not have the authority to investigate bribery or to impose criminal penalties, both of which continue to be the purview of prosecutors (including the PNF). Indeed, the 2020 Circular makes clear that the

PNF, due to its expertise and role in international anti-corruption matters, is to be the central authority when it comes to investigating and prosecuting significant and international corruption matters; the AFA, by contrast, is designed to be the primary authority on preventing corruption. Given the importance of both organizations in the fight against corruption, the AFA and PNF have undertaken the following coordination efforts over the past three years:

Interactions in the context of the negotiation of the CJIP. The implementation of the monitoring program following a CJIP is one area of collaboration between the AFA and prosecutors. The PNF/AFA Guidelines outline that when assessing (i) the measures and procedures and (ii) the cost of the program to be included in the agreement, the PNF shall consult with the AFA.

Interactions in the context of the implementation of the CJIP. The AFA is required to advise the PNF of any difficulty encountered in the payment of the expenses associated with its monitorship imposed under a CJIP.

Interactions in the context of the implementation of a foreign monitorship. The PNF/AFA guidelines note the possibility for international coordination and cooperation between French and foreign authorities to investigate or settle offenses of transnational corruption. The Guidelines specify a preference for one monitor when monitorships are imposed by different resolutions, as well as the AFA's role as monitor under the auspices of the PNF for companies subject to Sapin II. In addition, they underline that the PNF must respect the French Blocking Statute when providing foreign authorities with relevant information.

Interactions in the context of an AFA control. In accordance with both Article 40 of the French Code of Criminal Procedure and Article 2 of Sapin II, AFA agents must report to the prosecutor any information they become aware of in the context of their mission when such information is likely to prove the commission of an offense. In 2021, the AFA issued seven reports to prosecutors pursuant to Article 40 of the French Code of Criminal Procedure, which covered corruption, embezzlement of public funds, favoritism, unlawful taking of interest, complicity and concealment of these offenses, tax fraud, bankruptcy by misappropriation of assets, aggravated breach of trust, swindling, and concealing forgery and counterfeiting works of art.

The French Court-Imposed Monitorship

Under Sapin II, courts can sentence companies found guilty of corruption or influence peddling to a form of remediation by requiring them to submit to a compliance program monitorship under the supervision of the AFA for a maximum duration of five years. The requirement to submit to a monitorship may also be included as part of the CJIP settlement described above for a maximum duration of three years. In both instances, the AFA reports to the prosecutor at least annually on the implementation of the program. The AFA is also able to rely on the help of "experts" or "qualified authorities," suggesting an arrangement similar to the corporate monitorships used in the U.S. and other jurisdictions to assist regulators in determining whether a corporate

defendant is meeting its settlement or court-ordered obligations. However, to be similar to monitors used by U.S. authorities, such experts would have to be chosen by the company and approved by the prosecution authorities, which is not currently envisioned under the Sapin II framework. Nonetheless, any costs incurred by the supervision of the AFA and the assistance of such experts are to be paid by the company, although such costs shall not exceed the amount of the fine incurred for the offense of which the subject was prosecuted.

As partly presented in the "Guidelines on the court-imposed monitorship" issued by the AFA in April 2019, the process can be broken down into the following five steps: (1) the initial control by the AFA; (2) definition of an action plan by the company; (3) AFA validation of the action plan; (4) implementation of the action plan and permanent interactions between the AFA and the company over a longer period of time; and (5) the final control report sent to the prosecutor by the AFA.

The PNF/AFA Guidelines clarified in some respects the length of an AFA monitorship under a CJIP. In addition to what is legally provided for as far as a maximum duration (three years pursuant to Article 41-1-2, I, 2 of the French Code of Criminal Procedure), the PNF/AFA Guidelines provide for a minimum of two years. In most CJIP settlements to date, this two-year period has been used as the standard (with the exception of the Kaefer Wanner CJIP, which was for 18 months), which seems to reflect a view that this is the minimum period that will allow the AFA to perform an adequate review of a company's compliance program. In addition, the PNF/AFA Guidelines indicate that, if a compliance program obligation is considered in the context of a multi-jurisdictional negotiation, it is preferable to appoint only one monitor. Should the company at issue have its registered office or operating base in France or carry on all or part of its economic activities on French territory, the PNF/AFA Guidelines suggest that the AFA shall be appointed monitor. In cases involving other jurisdictions and regulators, it will be interesting to see how monitors are appointed to satisfy this expectation.

Successor Liability for Corruption Offenses

In a ruling dated November 25, 2020 (Decision No. 18-86955), the Criminal Division of the *Cour de Cassation* reconsidered its prior case law by establishing the principle of transfer of criminal liability where companies wholly acquire another legal entity, known as a "merger by acquisition." In doing so, the *Cour de Cassation* stated that in mergers by acquisition, the acquiring company could now be held responsible for offences committed by the acquired company prior to the transaction. Through this jurisprudence, France joins the ranks of other jurisdictions—such as the United States—in recognizing that companies that acquire other companies can be held liable for prior acts of the acquired company, placing even greater emphasis on the need for effective due diligence in the context of an acquisition.

Before this reversal in case law, the *Cour de Cassation* had long considered that Article L.121-1 of the French Criminal Code—which establishes that no one may be held liable for any actions other than his/her own—prevented an acquiring company from being prosecuted and convicted for offenses committed prior to the

merger by the acquired company, which was dissolved by effect of the merger. The court, which tended to draw parallels between a dissolved legal entity and a deceased individual, considered that at the time of a merger which results in the dissolution of the acquired company, the acquired company was considered to have lost its legal "personality," thereby resulting in the extinction of the possibility of prosecution under Article 6 of the French Code of Criminal Procedure. Accordingly, the acquiring company, which is a separate legal entity, could not be prosecuted for offences committed by the company it had acquired.

The reversal by the *Cour de Cassation* follows a broader European trend, which called for such reconsideration in order to take account of legal entities whose forms may change, as long as the acquired company has been liquidated and its activity continues within the acquiring company.

In 2015, the Court of Justice of the European Union ("ECJ") ruled that a "'*merger by acquisition' [...] results in the transfer to the acquiring company of the obligation to pay a fine imposed by final decision adopted after the merger by acquisition for employment law offences committed by the acquired company prior to that merger.*"[1] The ECJ considered that the extinction of such liability would be contrary to: (i) the nature of a merger by acquisition as defined by Directive 78/855, which considers that such operations result *ipso jure* in the transfer to the acquiring company of all the assets and liabilities of the company being acquired following a dissolution without liquidation; and (ii) the objective of protecting the interests of third parties in the context of mergers by acquisition, including those of the EU Member States, which could be harmed should a company use a merger by acquisition as a means of escaping the legal consequences of offences it has committed.

More recently, in a ruling on October 24, 2019, the European Court of Human Rights based its decision on the economic and operational continuity existing between the acquired company and the acquiring company, and ruled that "*the acquired company does not truly qualify as 'someone else' in relation to the acquiring company*," so that the application of a civil fine for antitrust violations committed by the acquired company prior to the merger by acquisition does not infringe on the principle of the personal nature of the penalties.[2]

The shift in case law brings France more in line with these EU decisions and jurisprudence in some other jurisdictions, including the United States, which recognize a theory of "successor liability"—that a successor entity in the context of a merger or acquisition can be held liable for prior acts committed by the entity being acquired. However, there are important distinctions to be appreciated, and practical implications of this case law that are summarized below:

Need for effective due diligence. Recognizing that criminal liability can transfer from an acquired company to the acquiring company, French companies should now ensure that pre-acquisition due diligence is

1 ECJ, ruling of March 5, 2015, Modelo Continente Hipermercados SA v. Autoridade para as Condições de Trabalho, C-343/13.

2 ECHR, ruling of October 24, 2019, Carrefour France v. France, no. 37858/14.

sufficiently robust to appreciate the risks associated with an acquisition, including latent risks that could present difficulties under relevant anti-corruption, economic sanctions, competition, human rights, or other laws sanctioning corporate misconduct. The possibility of potential sanction within French courts for misconduct of an acquired entity will likely focus and enhance the need for such risk mitigation measures. Additionally, in its 2015 ruling, the ECJ rejected the concern that the transfer of an acquired company's liability for an administrative offence would prejudice the interests of the creditors and shareholders of the acquiring company, since "an acquiring company is not precluded from conducting a detailed audit of the economic and legal situation of the company to be acquired before the merger by acquisition in order to obtain a more complete picture of that company's liabilities." Only such due diligence will allow the acquiring company to be in a position to factor the risks of criminal sanctions into the acquisition and negotiate adjustments to the purchase price, disclosures and/ or representation and warranty provisions, the drafting of which will require scrutiny to appropriately mitigate the risk and avoid invalidation on the basis of the individual nature of penalties.

Implications for acquiring companies. Since the ruling establishes that the acquiring company continues to operate in place of the legal entity being acquired, the acquiring company benefits from the same rights as the acquired company previously had. As such, the acquiring company will be able to avail itself of any defense that the latter could have raised during the course of a proceeding.

Date and scope of applicability. Given the scope and importance of this reversal, and for the sake of legal predictability and certainty, this ruling only applies to mergers falling within the scope of the Directive 78/855 as amended (*i.e.* transactions involving public limited liability companies such as French *sociétés anonymes* or *sociétés par actions simplifiées*) and which closed after the ruling on November 25, 2020. It is worth considering, however, whether this principle will be more broadly applied in the future to different types of acquisitions and/or to other types of companies formed in France, especially given current debate about the interpretation of the French Code of Commerce and the transfer of assets in mergers.

Sanctions faced by the acquiring companies. Acquiring companies held responsible for offences committed by the company that they acquired can only be ordered to pay a fine or be subject to confiscation measures. They cannot be subject to other sanctions available under French criminal law, such as debarment from public procurement or disqualification for public funding. However, where a merger was orchestrated to escape criminal liability, acquiring companies may still—as was the case before the *Cour de Cassation*'s new ruling—incur any available criminal sanction, regardless the date of the operation and/or the corporate form of the companies at stake.

With its November 25, 2020, ruling, the *Cour de Cassation* has not only reversed its position on an important principle of French criminal law, but also opened the door to the development of novel case law as additional types, forms, and contexts of mergers and acquisitions face scrutiny in a heightened enforcement environment.

LVMH

On December 15, 2021, French luxury goods conglomerate LVMH Moët Hennessy Louis Vuitton ("LVMH") entered into a CJIP with the French public prosecutor (*Procureur de la République*) to resolve allegations of influence peddling arising from its use of a consultant who formerly served as France's Central Director of Domestic Intelligence (*Directeur Central du Renseignement Intérieur*). Under the terms of the CJIP, which was validated by the court on December 17, 2021, LVMH agreed to pay a public interest fine of €10 million.

The allegations of influence peddling arose from LVMH's engagement of Bernard Squarcini, who served as Central Director of Domestic Intelligence in 2008-2012, as a consultant for the company in 2013. Mr. Squarcini was hired to provide assistance to LVMH in relation to, among other things, the prevention of counterfeiting, protection against industrial espionage and computer pirating, and crisis management. In his role as a consultant to LVMH, Mr. Squarcini is alleged to have used his influence to "unblock" situations involving the public sector and to obtain classified or privileged information on behalf of LVMH. He is alleged to have solicited the Director of the Judicial Police to obtain information regarding an investigation involving a complaint against LVMH by Hermès International, as well as soliciting multiple agents of the General Directorate of Homeland Security (*Direction Générale de la Sécurité Intérieure*, or "DGSI") to conduct screenings of individuals involved in counterfeiting cases in which LVMH was a victim and to obtain certain classified information, and intervening with the public authorities to facilitate obtaining visas and access badges at Bourget Airport, a private airport located outside of Paris. Mr. Squarcini is also alleged to have engaged a consultant to obtain information and conduct surveillance without appropriate authority on members of an association, FAKIR, who were producing a film that showed LVMH in a negative light. In addition, while serving as Central Director of Domestic Intelligence, Mr. Squarcini allegedly exceeded his authority by using State means to assist with an investigation to identify the source of blackmail received by LVMH. Mr. Squarcini contests each of these allegations against him.

In concluding the CJIP, LVMH did not make any acknowledgement of guilt as to the above allegations. When determining the amount of the fine, the authorities noted that it was difficult to evaluate the benefits obtained through the above acts and took into consideration part of the sums paid to the people who acted on behalf of LVMH. The authorities also took into consideration mitigating factors such as the fact that the acts in question occurred many years ago (2008-2016), that there had been an overhaul of the legal, ethics and public affairs organizations of LVMH, and that the company's ethics and compliance program had been reinforced since 2015, notably through the recruitment of an Ethics and Compliance Director who has a significant budget and a dedicated team located in Europe, the U.S. and Asia. Hermès International, the FAKIR association, and François Ruffin, director of the above-mentioned film featuring LVMH, were invited to provide evidence of their damages from the above acts to the court, but none of the parties established damages to be included in the CJIP settlement.

Doris Group

On June 9, 2022, the Doris Group SA ("Doris Group"), a French company specialized in the engineering of offshore oil and gas rigs, entered into a CJIP with the French Financial Public Prosecutor (*Parquet national financier*, or "PNF") to resolve allegations of corruption of foreign public officials. Under the terms of the CJIP, which was validated by the court on July 7, 2022, Doris Group agreed to pay a public interest fine of €3,463,491 and to enter into a three-year monitorship by the AFA.

Following the receipt of information from the American authorities in December 2018 and March 2019 relating to possible acts of corruption involving Doris Group and Angolan public officials, the PNF opened a preliminary investigation into the allegations in November 2019. The investigation found that Doris Group had begun operating in Angola in 2001 in the scope of the Angolan Deepwater Consortium ("ADC") with Angolan national oil and gas company Sociedade Nacional de Combustiveis de Angola EP ("Sonangol"). In 2007, Doris Group acquired 35% of the STAT MARINE group and the shares of STAT MARINE in its Angolan subsidiary, STAT Angola, which was renamed "DEAL" in December 2008. Due to Angolan legislation requiring local companies to be majority locally owned, DEAL's shareholding structure was held 49% by Doris Group and 51% by three Angolan shareholders (shareholder A held 21%, shareholder B held 15%, and shareholder C held 15%).

The PNF's preliminary investigation found that shareholder A had a privileged relationship with an executive of Sonangol who represented Sonangol in the Angolan Deepwater Consortium, to which he provided information obtained in the scope of his functions. It also discovered that a rental contract totaling more than $1 million for premises that were never occupied was signed with a company that was ultimately owned by the same Sonangol director representing Sonangol in the ADC consortium. In addition, Doris Group had entered into multiple contracts for sham services provided by different companies, all incorporated between 2009 and 2014 and owned by shareholder A, through which payments were provided to Angolan public officials within Sonangol in order to obtain contracts for the Doris Group. The investigation revealed that four engineering and technical assistance contracts obtained by the Doris Group between 2013 and 2016 were linked to payments for sham services in an amount totaling approximately 2% of the global value of the contracts obtained.

In determining the amount of the public interest fine, the authorities noted that the benefit received by the Doris Group from the four contracts obtained through inappropriate payments to public officials totaled €2,770,793. While the authorities recognized certain elements as mitigating factors (including the company's implementation of a compliance, ethics and accounting controls program beginning in 2016, as well as the active cooperation of the company's new management from the investigation phase through the CJIP negotiation process), they also noted that the seriousness of the acts of corruption of public officials and the former management team's use of sophisticated tools to conceal undue payments were factors justifying the application of an additional penalty of €692,698, in addition to the restitution of profits. The Doris Group also

agreed to undergo a three-year monitorship by the AFA, which will include a series of audits and verifications of the Doris Group's compliance program by the AFA, for which the company has agreed to dedicate €442,280.40.

IDEMIA

On June 20, 2022, Idemia France, which is part of the Idemia Group specializing in the development, production and sales of products and services in the security technology sector, entered into a CJIP with the French Financial Public Prosecutor (*Parquet national financier*, or "PNF") to resolve allegations of corruption of a foreign public official in Bangladesh by one of its subsidiaries, formerly known as Oberthur Technologies SA ("Oberthur"). Under the terms of the CJIP, which was validated by the court on July 7, 2022, Idemia France agreed to pay a public interest fine of €7,957,822.

Following information received from the British National Crime Agency on July 20, 2017, relating to possible acts of corruption involving Oberthur and a public official in Bangladesh, the PNF launched a preliminary investigation into the allegations on July 21, 2017. The investigation established that a call for tenders was launched in April 2014 for a contract for the manufacture of chip identity cards for residents of Bangladesh worth $113 million, which was partially financed by the World Bank. The contract was awarded to Oberthur in December 2014 and signed on January 14, 2015.

Documents obtained during the investigation revealed that Oberthur worked with an influential business agent with family connections to the Prime Minister of Bangladesh and close professional connections to the Bangladesh army and the commission that launched the tender, *i.e.* the Bangladesh Electoral Commission ("BEC") to obtain the contract. This business agent served as the executive officer of Tiger IT ("Tiger") and Decatur Europe Limited ("Decatur"), companies established in Bangladesh with, for one of them, the accreditation required to access Bangladesh's data base of citizens. Oberthur entered into agreements with these companies whereby Tiger would supply polycarbonate for the manufacturing of the ID cards and Decatur would provide the holograms at elevated prices so that part of the payments made by Oberthur to these two companies would be used to pay an advisor to Bangladesh's Prime Minister, who controlled the BEC and was influential in increasing the contract from 70 million ID cards to 90 million cards. Oberthur agreed to pay €0.24 to Decatur for each card above 70 million, part of which was intended to be passed on to the Prime Minister's advisor. The investigation found that Oberthur paid over €5 million in total to the Bangladeshi public official through this scheme.

The PNF determined that the profits gained by Oberthur as a result of the above arrangement totaled €5,134,079. While the authorities recognized certain elements as mitigating factors (including the company's acknowledgement of the facts, corrective measures taken, and the reinforcement of the company's compliance and ethics program and accounting controls, as well as the cooperation of management), they

also noted that the seriousness of the acts of corruption of a high-level foreign public official and the use of concealment were factors justifying a penalty of €2,823,743 in addition to the restitution of profits. The PNF did not impose a monitorship, likely because Oberthur had previously entered into a negotiated settlement with the World Bank in late 2017 covering the above acts. Under the terms of this agreement, the World Bank excluded all ex-Oberthur entities from participating in calls for tenders initiated by the World Bank and nominated an independent expert to assist Oberthur in implementing a compliance program during a period of 30 months. In May 2020, the World Bank's Integrity Compliance Officer determined that the quality of the company's compliance program warranted the lifting of the disqualification sanction against the ex-Oberthur entities of the Idemia Group.

Systra Sa

On July 12, 2021, Systra SA ("Systra"), a French company that provides engineering and consulting services in the transportation sector, entered into a CJIP with the PNF to resolve allegations of corruption of public officials in Uzbekistan and Azerbaijan to obtain public contracts. Under the terms of the CJIP, Systra agreed to pay a public interest fine of €7,496,000. The CJIP was validated on July 13, 2021. While the PNF noted elements that could have been considered as mitigating factors (including the fact that the acts occurred many years ago, the company implemented and reinforced a compliance program, undertook remediation measures, and cooperated during the investigation and negotiation of the CJIP), it also noted that the seriousness of the acts and the use of sophisticated tools to disseminate funds by local management were reasons justifying the application of an additional penalty of €2,498,572, in addition to the restitution of profits. A monitorship was not imposed, likely because of the company's implementation of a compliance program since the misconduct.

With respect to the corruption scheme involving public officials in Uzbekistan, the investigation into Systra began in June 2017, following a report from Japanese authorities. It was alleged that an employee of the Uzbek national railway company, UTY, who was responsible for the awarding of public contracts, had requested an employee of Japan Transportation Consultants, Inc. ("JTC") to submit an unsuitable offer in the context of a call for tenders so that the contract could be awarded to Systra. The UTY employee allegedly promised JTC that Systra would do the same in another call for tenders so that the relevant contract could be awarded to JTC. In addition, the UTY employee required Systra and JTC to use a particular subcontractor, Kirkliston Development LP, whose ultimate financial beneficiary was the UTY employee. The investigation further revealed that Kirkliston Development was renting apartments owned by members of the public works selection committee to workers and expatriate employees of Systra and JTC at above-market prices, and that Systra and JTC had hired a former UTY employee who facilitated the relationship between the companies and the members of the selection committee.

With respect to the corruption scheme involving public officials in Azerbaijan, the investigation revealed that Systra allegedly engaged in public corruption to obtain the engineering contract for the metro system in Baku,

Azerbaijan in May 2009. The investigation revealed that commissions were paid through two subcontractors, Foral and A+A, and that Systra was also paying a commercial agent who was an assistant manager of the project for the Baku public metro company and had access to the Azeri Minister of Economy, who supervised the metro company. A Systra employee indicated that the commissions paid to the subcontractors could represent up to 30% of the amounts billed by the consortium.

Bolloré Se and Financière de l'Odet

On February 9, 2021, Bolloré SE ("Bolloré") and its majority shareholder, the holding company Financière de l'Odet SE ("Financière de l'Odet"), entered into a CJIP with the PNF to resolve an investigation into alleged bribery of a foreign public official, money laundering in an organized group for bribery of a foreign public official, collusion, and concealment of these crimes for activities that took place in the Republic of Togo. Bolloré was criticized for providing communication services to Faure Gnassingbe, through one of the group's affiliates, Euro RSCG, for the election campaign of the President of Togo, in exchange for extensions of concession terms and tax advantages for two of its subsidiaries in Togo. The services (worth €400,000 in total) were paid, up to 75%, by SNC SDV Afrique, a subsidiary of the Bolloré group involved in transport and logistics, while the remaining €100,000 was billed to the Republic of Togo and was paid in January 2010 by a friend of President Gnassingbe. Around the same time, between September 2009 and May 2010, the Bolloré group obtained extensions to the duration of concessions and fiscal advantages for two subsidiaries in Togo, SE2M Togo and SE3M Togo.

Under the terms of the CJIP, Bolloré agreed to a public interest fine of €12 million, which was paid by Financière de l'Odet as its parent company and the beneficiary of Bolloré's misconduct. The fine includes the restitution of €6.4 million of ill-gotten gains, as well as an additional fine of €5.6 million. Although the PNF noted that a mitigating factor in the calculation of the fine was that the incident was limited to a single act, it also stated that the corruption of a top-level foreign public official and the delayed cooperation of the company justified the additional fine of €5.6 million. In addition to the payment of the fine, Bolloré also agreed to subject its compliance program to monitoring by AFA for a period of two years, and agreed to cover the costs associated therewith up to €4 million.

In parallel to the CJIP, three individuals (the company's chairman and two senior executives) had each negotiated CRPCs with the PNF. All of the agreements (the CJIP and the CRPCs) were submitted to the same judge for validation; however, contrary to the CJIP, the three plea agreements were rejected. Such asymmetry raises the question of the risks for individuals in negotiating plea agreements in parallel to a CJIP. Although unsuccessful agreements with the prosecutor are not to be published and/or referred to, so as to not alter the principle of the presumption of innocence, the judge vested to review all four agreements in the Bolloré case made reference, in the CJIP, to the individuals' declarations whereby they admitted guilt. The PNF objected to inclusion of this reference by appealing the CJIP validation order to the *Cour de cassation*; however, such validation orders are not subject to appeal, and thus the *Cour de cassation* rejected the appeal in this case.

If the appeal had been accepted, it would have provided occasion to debate the current applicability of provisions of the French Code of Criminal Procedure drafted in 2004—before the CJIP was introduced into French law—that prevent references to an unsuccessful CRPC. As it stands now, the French Code of Criminal Procedure only covers the situation where information stemming from the CRPC negotiations would be disclosed by the prosecutor and/or the parties, but not from a magistrate to whom both a CJIP and CRPC would be submitted in the same case. It remains to be seen how or whether this issue will be addressed in the future.

Chapter

4 Anti-Corruption Enforcement Update in Select Countries

Brazil

Overview

After the beginning of Operation Car Wash, Brazil assumed a position as a major player in the global fight against corruption. Brazilian regulators have been involved in some of the most significant FCPA enforcement actions to date. In addition, the U.S. DOJ and SEC reportedly have opened dozens of investigations with connections to Brazil, including probes into Brazilian companies across various industries (*e.g.*, food, power/energy, oil and gas, steel, air transport, telecommunications, and banking) and foreign companies operating in Brazil, with Brazilian regulators involved in many of the investigations.

Brazil continues to cooperate in cross-border corruption investigations. In 2022, for instance, Brazilian authorities have participated in the global resolutions of Glencore and Stericycle with American and British authorities. This follows the trend initiated with the Odebrecht, Braskem and TechnipFMC settlements in years past.

Changes to Brazil's political atmosphere, however, had significantly impacted its fight against corruption. In the 2018 presidential elections, the conservative candidate Jair Bolsonaro won the presidency on an anti-corruption platform, and in 2019 appointed Sérgio Moro, the main judge overseeing Operation Car Wash at the time, as Minister of Justice, one of the main cabinet positions in the executive branch. In April 2020, however, Mr. Moro decided to resign as Minister of Justice, accusing President Bolsonaro of exerting undue interference in the Federal Police's organizational structure and investigation work. In March 2022, the Federal Police concluded its investigation on the matter and ruled that there is no sufficient evidence that Mr. Bolsonaro interfered in the Federal Police's activities.

Former president Luis Inácio Lula da Silva, who had been arrested and prevented from running in the 2018 elections as a result of Operation Car Wash, had his sentences declared void, because Mr. Moro was found by the Supreme Court to be biased. As a result, Mr. Lula da Silva was allowed to run for a third term in 2022; he was once again elected President in October 2022.

In December 2020, the Brazilian Federal Government launched a five-year anti-corruption plan establishing coordination among different agencies for the development of regulation and adoption of measures to improve public transparency and governance, the improvement of anti-money laundering controls, and the increase in international cooperation and enforcement. As part of the International Day for the Fight Against Corruption held in December 2021, the Federal Government publicized the implementation of the anti-corruption plan, and indicated that 67% of the actions planned for 2020 and 2021 and 39% of the overall actions planned have been performed. Numbers for 2022 had not been announced at the time of publication.

In 2021, Congress enacted Federal Law 14,230/2021 to reform the regime of the Improbity Law (Federal Law 8,429/92). As analyzed in details below, among the relevant changes brought by the new legislation are: (i) the requirement of intent and exclusion of negligence for a violation of the Law; (ii) updates in the list of acts that are characterized as improbity acts; (iii) statute of limitations was extended from five years to eight years; and (iv) changes in the applicable penalties and in procedural rules.

Furthermore, a new Decree regulating the Clean Companies Act (Decree No. 11,129/2022) entered into force on July 18, 2022, revoking the previous regulation in force (Decree No. 8,420/2015). As analyzed in details below, the new Decree, among other changes: (i) improved and detailed the rules applicable to the preliminary investigation procedure and sanctioning administrative procedure (under which companies are sanctioned for breaches of the Clean Companies Act); (ii) updated some of the parameters for evaluating compliance programs under the Clean Companies Act; (iii) altered the parameters for calculating the monetary fine for breaches of the Clean Companies Act; and (iv) enhanced rules applicable to the procedure for negotiating and executing Leniency Agreements with enforcement authorities.

As Operation Car Wash wanes, on account of a number of the investigations having reached their conclusion and, according to some critics, the shutdown of the Task Force and assignment of the investigations to MPF's Special Groups for Enforcement against Organized Crimes (*Grupo de Atuação Especial de Combate ao Crime Organizado*—GAECO), the number of settlements by the Federal Government in 2021 and 2022 decreased vis-à-vis the past years. However, more actors became relevant in enforcement, such as some of the Brazilian States' Comptroller Offices, State Prosecutor's Offices, and even some State-owned companies, for instance Petrobras. Such agencies have the ability to enforce the Brazilian Clean Companies Act and, in the case of the State authorities, enter into settlements.

Below we highlight the most relevant settlements by Brazilian enforcement authorities over the last two years. In addition, we examine Brazil's anti-corruption framework, including the Clean Companies Act, as well as the negotiation and implementation of corporate settlements. We also analyze the new Decree regulating the Clean Companies Act (Decree No. 11,129/2022), the new changes to the Improbity Law, and their impact in the anti-corruption arena.

Enforcement Highlights

Recent Settlements

Anti-corruption enforcement against legal entities in Brazil remained active in 2022. Based on publicly available information, the Office of the Comptroller-General ("CGU"), the Office of the Attorney-General ("AGU") and the Federal Prosecutor's Office ("MPF") announced that they entered into four leniency agreements, which are analyzed below. Taken together, Brazilian authorities sought to recover approximately BRL 335 million in fines and reimbursement of damages in 2022.

2022

Stericycle

On April 20, 2022, the CGU and AGU announced the signing of a BRL 109 million Leniency Agreement with Stericycle Group, specializing in hospital-waste-management, due to misconduct committed in 2017 concerning medical waste collection contracts entered with bodies of the Brazilian Health System ("SUS"). The Leniency Agreement involved the companies Stericycle do Brasil Novas Participações Ltda., Stericycle Gestão Ambiental Ltda., Aborgama do Brasil Ltda., Stericycle Participações Ltda., Stericycle International LLC, and Stericycle Inc.

Simultaneously, Stericyle Inc. entered into a Deferred Prosecution Agreement with the DOJ for violations of the anti-bribery provisions and accounting provisions of the FCPA. Under the DPA, Stericyle was assessed a penalty of USD $52.5 million, but the agreement provides for it to be offset by amounts that will be paid in Brazil. In addition, Stericycle Inc. agreed to pay approximately USD $28 million to resolve a parallel investigation conducted by the SEC.

From 2011 to 2016, Stericycle offered and paid about USD $10.5 million in bribes to officials in Brazil, Mexico, and Argentina to obtain government contracts for medical waste management services.

In 2018, Stericycle proactively approached the CGU after conducting internal investigations that revealed violations of the Clean Companies Act and the Improbity Law. The disclosure of the violations and the cooperation with the investigations were reflected in the reduction of the sanctions applied against Stericyle.

In Brazil, Stericycle agreed to pay the total value of approximately BRL 109 million, of which BRL 65 million will be paid as reimbursement of damages, BRL 3 million as a fine under the Improbity Law, and BRL 41 million as a fine under the Clean Companies Act. In addition, Stericyle committed to update and improve its compliance and governance policies.

Stericycle's global resolution was a result of another coordinated action involving the CGU, AGU and DOJ. The agreements consolidate the role played by Brazilian authorities in cases involving multiple jurisdictions and reinforce the trend towards global resolutions of transnational bribery cases.

Glencore

On May 24, 2022, the trading company Glencore signed a Leniency Agreement with the MPF and entered into Plea Agreements with the DOJ and the CFTC to resolve investigations into corruption and market manipulation schemes in Glencore's business operations in multiple countries. Moreover, Glencore has indicated that it will plead guilty to corruption charges filed by the SFO. Overall, Glencore expects to pay up to USD $1.5 billion under the agreements with authorities in Brazil, the United States, and the United Kingdom.

In Brazil, Glencore signed a Leniency Agreement with the MPF within the scope of Operation Car Wash. The leniency involves the payment of bribes, through intermediary agents, to Petrobras employees in exchange for undue advantages in fuels purchase and sale operations carried out by Petrobras in the foreign market.

Under the Leniency Agreement, Glencore agreed to pay approximately USD $39.6 million directly to Petrobras, of which USD $29.6 million will be paid as reimbursement of damages and reversal of undue advantages, USD $9.8 million as a fine under the Improbity Law, and USD $145.9 thousand as a fine under the Clean Companies Act. Furthermore, Glencore committed to improve its Compliance Program.

For details in connection with the agreements entered into with the DOJ, CFTC and SFO, see above.

Despite the other Brazilian authorities (CGU and AGU) having not indicated being part of the resolution, Glencore's agreements reinforce the trend for global and simultaneous resolution of cases involving transnational bribery, and show strong cooperation between enforcement authorities in multiple jurisdictions. It is possible that Glencore is in negotiations with CGU and AGU for matters under their jurisdiction.

Hypera

On May 31, 2022, the company Hypera S.A.(Hypera) entered into a Leniency Agreement with the CGU and the AGU. The negotiations began at the initiative of Hypera in 2020, which reached out to the authorities after identifying the occurrence of irregularities provided for in the Clean Companies Act and the Improbity Law. The irregularities were identified through an internal investigation, which was conducted after the outbreak of "Operation Tira-Teima," conducted by the MPF in 2018.

The internal investigation identified that undue payments were made by Hypera, in the amount of BRL 110.557 million, in addition to BRL 33.195 million that was the subject of a Settlement entered into with Nelson José de Mello, Hypera's former officer, who also acknowledged his obligation to indemnify Hypera.

The Leniency Agreement establishes that Hypera must pay the Federal Government the total amount of BRL 110,882,122.19, which, as informed by the company, will be fully paid by its principal shareholder, João Alves de Queiroz Filho. In addition, Hypera has committed to renewing and improving its governance and compliance policies, including the necessary control mechanisms, which will be monitored by CGU during an 18-month period.

GOL

On September 15, 2022, the Brazilian airline GOL Linhas Aéreas Inteligentes S.A.("GOL") entered into a global resolution with the CGU, AGU, DOJ, and SEC to resolve bribery misconduct committed in Brazil.

In the United States, GOL will pay a criminal penalty of USD $17 million to the DOJ under a three-year Deferred Prosecution Agreement. In addition, GOL will pay USD $24.5 million as part of the resolution with the SEC. The total penalties under the DOJ and SEC's resolutions could have reached approximately USD $157 million; however, due to GOL's financial condition and inability to pay the fines in full, the DOJ and SEC waived payment of all but USD $17 million and USD $24.5 million of GOL's payment obligations. For more details on the settlement with the DOJ and the SEC, please see above.

In Brazil, GOL will pay USD $3.4 million to the CGU and AGU under a Leniency Agreement for breaches of the Clean Companies Act and Improbity Law. These amounts will be credited against the fines imposed under the DOJ and SEC resolutions. GOL self-reported the misconduct to the CGU and AGU and effectively cooperated with the authorities during the investigations, which resulted in the mitigation of the monetary sanction applied under the Leniency Agreement.

GOL paid about USD $3.8 million in bribes to Brazilian officials in 2012 and 2013 to secure the passage of two pieces of legislation that favored the company. The legislation involved reductions in payroll taxes and aviation fuel taxes that would have benefitted GOL and other Brazilian airlines. In connection with the bribery scheme, a member of GOL's Board of Directors caused the company to enter into sham contracts with and make payments to several entities connected to relevant Brazilian authorities. In addition, GOL maintained books and records that falsely listed the improper payments as legitimate expenses, including as advertising expenses and other services.

For the three-year term of the DPA, GOL will have to report annually on the improvement of its compliance program to the DOJ, although an independent compliance monitor was not imposed. Under the Leniency Agreement entered into with the CGU and AGU, GOL also committed to improving its compliance program.

Leniency Agreements under Secrecy

In 2022, the MPF has also entered into leniency agreements with two companies whose names and content, as of September 2022, remain under seal. One of such agreements is likely the agreement with Glencore, whose content has not been fully published by the MPF.

2021

Amec Foster Wheeler

On June 25, 2021, Amec Foster Wheeler entered into a global resolution with the CGU, AGU, MPF, DOJ, and SFO in connection with a bribery scheme to secure an approximately USD $190 million Petrobras contract to design a gas-to-chemicals complex in Brazil. The bribes were paid to Petrobras officials through third-party intermediaries based in Brazil and Monaco.

Under the Leniency Agreements entered into with the CGU, AGU and MPF, Amec Foster Wheeler admitted that it engaged in a bribery scheme and assumed the obligation to pay approximately BRL 86.2 million, of which approximately BRL 67.2 million will be paid to Petrobras as reimbursement of damages and approximately BRL 19 million will be paid to the Union as fines pursuant to the Improbity Law and the Clean Companies Act. In addition, Amec Foster Wheeler also undertook to enhance its compliance program and to present periodic reports on the improvement of its compliance program.

Simultaneously, Amec Foster Wheeler also entered into a Deferred Prosecution Agreement with the DOJ—under which Amec Foster Wheeler agreed to pay a monetary penalty totaling approximately USD $18.3 million—and a Deferred Prosecution Agreement with the SFO, under which Amec Foster Wheeler agreed to pay a financial penalty and costs amounting to GBP 103 million.

Amec Foster Wheeler is the second simultaneous global resolution involving Brazilian and foreign authorities, showing that anti-corruption authorities have continued the efforts to engage in cross-border cooperation to investigate and combat transnational bribery. The first global resolution involving Brazilian and foreign authorities was TechnipFMC's settlement with the CGU, AGU, MPF and DOJ in June 2019.

Samsung Heavy Industries

On February 22, 2021, Samsung Heavy Industries (SHI), entered into a leniency agreement with the CGU, AGU and MPF for bribery and money laundering misconduct aimed at securing Petrobras contracts.

In the leniency agreement, SHI assumed the obligation to pay approximately BRL 811 million, of which approximately BRL 706 million will be paid to Petrobras as reimbursement of damages. The remaining amount of approximately BRL105 million will be paid to the Union as a fine pursuant to the Improbity Law. Furthermore, SHI also assumed the obligation to enhance its compliance and governance-related policies and procedures.

The leniency agreement is a result of a global resolution involving Brazilian authorities and the DOJ. Differently from the Amex Foster Wheeler and TechnipFMC global settlements, which were entered into concomitantly, the SHI settlement was a two-step process. In November 2019, SHI had already entered into a Deferred Prosecution Agreement with the DOJ for the same misconduct, whereby SHI assumed the obligation to pay a fine of approximately USD $75.5 million. The agreement with the DOJ establishes that 50% of the total value of the fine (approximately USD $37.7 million) should be paid to the Brazilian authorities, and the credit was applied to the amounts paid under the leniency agreements entered into with the CGU, AGU and MPF.

SICPA and CEPTIS

On June 7, 2021, SICPA do Brasil e Indústria de Tintas e Sistemas Ltda. ("SICPA") and CEPTIS Indústria e Comércio de Tintas e Sistemas S.A. ("CEPTIS") entered into a Leniency Agreement with the CGU and AGU. After conducting an internal investigation, SICPA and CEPTIS confirmed that they engaged in bribery payments to Petrobras officials in connection with Operation Car Wash, and the companies voluntarily approached the CGU and AGU to negotiate a leniency agreement. The companies also provided to the Agencies information and documents on the misconduct found during the internal investigation.

Under the leniency agreement, SICPA and CEPTIS assumed the obligation to pay BRL 762 million as fines imposed under the Improbity Law and the Clean Companies Act. As part of the leniency agreement, SICPA and CEPTIS were exempted from the sanction of prohibition of entering into contracts with the public administration and receiving fiscal benefits and incentives. The leniency agreement also acknowledged the efforts made by the companies to improve their compliance programs.

Statkraft

On October 15, 2021, Statkraft Energias Renováveis S.A.("Statkraft") entered into a Leniency Agreement with the CGU and AGU. Statkraft voluntarily provided the conclusions of internal investigations carried out by the company in 2016 to the Brazilian authorities. The company admitted its liability for wrongful acts that occurred between 2011 and 2014, prior to the acquisition of Desenvix by Statkraft in 2015. The illicit acts were related to resources from the Constitutional Fund to the Financing of the Northeast (*Fundo Constitucional de Financiamento do Nordeste*—"FNE").

By entering into the agreement, the company committed to pay the amount of BRL 18 million, of which BRL 2,404,359.30 will be paid as disgorgement, BRL 6,542,383.94 will be paid as unjust enrichment, BRL 4,595,150.11 will be paid as a fine under the Clean Companies Act, and BRL 4,473,371.62 will be paid as a fine under the Improbity Law. In addition, Statkraft committed to update and enhance its governance and integrity policies.

Rolls-Royce PLC

On October 25, 2021, the multinational company Rolls-Royce entered into a leniency agreement with the CGU and the AGU resulting from the payments of bribes through third-party intermediaries in exchange for Petrobras contracts, which were revealed during the Operation Car Wash investigations.

Two Operation Car Wash whistleblowers revealed that Rolls-Royce paid a total of USD $9.3 million in bribes between 2003 and 2013 to secure contracts to supply power generation equipment to six oil platforms of Petrobras.

The CGU leniency agreement was entered in the context of Rolls-Royce's global resolution with Brazilian, American and UK authorities. In 2017, Rolls-Royce entered into simultaneous agreements with the MPF, the DOJ and the SFO to resolve bribe offences committed in several countries, including Brazil, China, Indonesia, Russia and Nigeria.

The total value of the CGU leniency agreement amounts to USD $27.8 million, of which USD $2.2 million will be paid to the Union, within 30 days of the signing of the agreement, in order to complement the payment of USD $25.6 million that had already been made in Brazil. In addition, the UK-based company committed to improve its compliance program.

By signing this agreement, the CGU and the AGU confirm their authority in leniency matters by imposing additional amounts to those previously paid under the agreement with the MPF.

Leniency Agreements Under Secrecy

In 2021, the MPF has also entered into leniency agreements with five other companies whose names are still being kept secret. As of September 2022, the contents of these leniency agreements remain under seal.

Relevant Leniency Agreements Entered Into by Brazilian States

Under the Clean Companies Act, the States can also enter into Leniency Agreements with legal entities to resolve misconduct committed against the public administration in the regional sphere. In 2021, the use of leniency agreements by States to resolve corruption and fraud misconduct was particularly active.

For instance, in August 2021, the Brazilian construction company Andrade Gutierrez entered into a Leniency Agreement with the State of Minas Gerais Comptroller General, the State Attorney General, and the State Prosecutor's Office for fraud schemes in connection with bid procedures launched by the State of Minas Gerais. Under the Leniency Agreement, Andrade Gutierrez assumed the obligation to pay BRL 128.9 million in installments until December 2030. This was the first Leniency Agreement entered into by the State of Minas Gerais.

Andrade Gutierrez has also signed a Leniency Agreement with the State of Rio de Janeiro Comptroller General and the State Attorney General for bribery payments in connection with contracts entered into with the State of Rio de Janeiro between 2007 and 2014. Under the Leniency Agreement, Andrade Gutierrez committed to pay a total amount of BRL 44.5 million to the State of Rio de Janeiro over a period of 16 years. Furthermore, Andrade Gutierrez also undertook to enhance its compliance program. This was the first Leniency Agreement entered into by the State of Rio de Janeiro.

Updates on Brazilian Anti-Corruption Laws

Brazil overhauled its anti-corruption framework with the enactment of the Clean Companies Act ("CCA") (Law No. 12846/13), which came into force in January 2014. Under the CCA, companies are subject to a strict liability standard for bribery and fraud against domestic and foreign public institutions, risking harsh punishment regardless of corrupt intent. Potential sanctions include monetary fines ranging from 0.1% to 20% of the company's latest annual gross revenues, or when these are undetermined, up to BRL 60 million, as well as debarment from public procurement, and even compulsory dissolution of the business. The CCA applies to domestic legal entities and any foreign companies (incorporated or not) that have an office, branch, or representation in Brazil.

The CCA was regulated until 2022 by Decree No. 8,420/2015. In 2022, the Federal Government enacted new regulation, replacing the 2015 Decree, to reflect the experience gained in the previous seven years of enforcement by the Brazilian Federal Government (particularly the CGU). It also incorporated guidelines previously issued by the CGU in internal ordinances and manuals.

Since the enactment of the CCA, several agencies have issued regulations aiming to clarify and facilitate the implementation of the CCA's requirements.

Decree No. 11,129/2022

On July 18, 2022, Decree No. 11,129/2022 came into force to regulate the application of the CCA, as an update from the previous regulation (Decree No.8,420, of March 18, 2015) that was revoked by the new decree. Among other matters, Decree No. 11,129/2022: (i) provides guidelines on the evaluation of compliance programs (that may result in a reduction of fines); (ii) regulates preliminary investigations and enforcement proceedings; (iii) provides for parameters for calculating the monetary fines under the CCA (by establishing aggravating and mitigating factors); and (iv) provides guidelines on the negotiation and execution of leniency agreements with enforcement authorities.

While the matters under Decree No. 11,129/2022 are practically the same as Decree No. 8,420, the new Decree provides more detail and consolidates some of the practices employed by the agencies responsible for enforcement. It has clarified the role of different agencies with overlapping powers to enforce the CCA. Civil sanctions must be pursued in court, through legal action initiated, as a rule, by the AGU. As for administrative sanctions, generally the government body directly affected by an alleged offense has primary jurisdiction to conduct and judge the corresponding sanctions proceeding. However, within the Federal Executive branch, the CGU has jurisdiction over the matter, *inter alia*, (i) where the entity primarily affected is unwilling or unable to do so; (ii) in complex cases; (iii) in cases involving large contracts with the federal public administration; and (iv) in cases involving more than one body or entity of the federal public administration. As

an innovation, the Decree authorized different entities of the Brazilian Federation to delegate the negotiation of leniency agreements to the CGU. The innovation is especially helpful for major corruption schemes, similar to Operation Car Wash, in which companies engaged in illicit conduct with the Federal, State and Municipal governments.

Among other changes, the new Decree (i) improved and detailed the preliminary investigation procedure and the sanctioning administrative procedure (under which companies are sanctioned for breaches of the CCA); (ii) altered the percentage and language of aggravating and mitigating factors for calculating the monetary fine for breaches of CCA; (iii) increased the incentives for companies to implement a compliance program, as the new Decree raised the mitigating factor of the monetary fine from 4% to 5% when companies have an adequate compliance program in place; (iv) updated some of the parameters for the evaluation of compliance programs under the CCA, including to (a) determine that top management commitment shall be evaluated also, considering the destination of adequate resources to the compliance program, (b) require periodical communication initiatives in connection with the compliance program (in addition to training), and (c) expressly require prior due diligence on politically exposed persons and sponsorships and donations; (v) acknowledged the leniency agreements as an instrument to improve government investigation capabilities, enhance asset recovery, and foster a culture of integrity in the private sector; (vi) reinforced the attribution of the CGU and AGU to negotiate and execute Leniency Agreements within the Federal Executive Branch; (vii) enhanced rules applicable to the negotiation and execution of leniency agreements with enforcement authorities; and (viii) established a methodology to standardize the calculation of illicit advantages obtained by companies through misconducts.

According to the CCA and the Decree, companies may benefit from a reduction of penalties if their compliance programs are deemed effective. The Decree establishes the minimum requirements for such programs: (i) tone at the top and adequate destination of resources to the compliance program; (ii) written integrity policies (*e.g.*, standards of conduct, code of ethics and anti-corruption procedures) applicable to all employees, members of management and, as appropriate, third parties; (iii) periodic compliance training and communication initiatives; (iv) periodic risk assessments, with an aim to enhance and update the compliance program; (v) thorough and truthful bookkeeping; (vi) internal controls ensuring the accuracy of financial reports; (vii) specific procedures to prevent fraud and other misconduct in connection with public tenders, government contracts, and any interactions with public officials (*e.g.* , paying taxes, handling inspections, or applying for licenses), including through third parties; (viii) a compliance function with adequate structure, independence, and powers to implement the compliance program; (ix) adequately publicized reporting mechanisms, which must be accessible to employees and third parties, as well as whistleblower protection measures; (x) disciplinary measures for misconduct; (xi) mechanisms ensuring detection, prompt discontinuation, and timely remediation of misconduct; (xii) due diligence for third parties (including suppliers, contractors, agents, and business partners), politically exposed persons, and sponsorships and donations; (xiii) due diligence, background checks and exposure assessments prior to any corporate reorganization

(including mergers and acquisitions); and (xiv) continuous monitoring of the compliance program. When assessing a compliance program, the authorities must consider the company's size and structural complexity, as well as the use of third-party intermediaries, among other factors. The methodology for the assessment of the compliance programs was published by the CGU by means of guidelines, as described below.

In addition to an effective compliance program, other mitigating factors of the applicable fine include: (i) cases of attempted or uncompleted misconduct; (ii) voluntary return of the values illegally obtained and reimbursement of the damages caused; (iii) cooperating with enforcement authorities; and (iv) voluntary admission of liability for the wrongdoing. Conversely, companies face fine increases when: (i) there is a pattern of continuous or recurrent offenses; (ii) company management has knowledge of the wrongdoing and fails to prevent it; (iii) the wrongdoing prompts interruption of public services; and (iv) the company is solvent.

Regulations by the CGU

The CGU issued a series of additional regulations and guidelines in connection with the CCA, a number of which have been incorporated in the Decree No. 11,129/2022. For instance, Normative Instruction No. 13/2019, which sets out the proceedings for determining administrative liability of legal entities under the CCA, and determines which government institutions are responsible for initiating and judging the administrative proceedings under the CCA. The Instruction also sets out detailed rules pertaining to the investigation of alleged misconduct. Such regulations have been incorporated into Decree No. 11,129/2015 without an express revocation of Normative Instruction 13/2019.

Prior to this most recent guidance, the CGU had also issued a regulation (in 2015) dealing with the evaluation of compliance programs (CGU No. 909/2015). That regulation establishes a three-pronged test for companies to earn a fine reduction based on the implementation of an effective compliance program. Specifically, companies must demonstrate: (i) which of the parameters provided for in Article 57 of Decree No. 11,129/2022 (described above) are included in the compliance program, and prove that they are adequate to the company's size, operations, and relevance in the market; (ii) that the program has been consistently and effectively implemented over time, including through written records, statistics, and sample case files; and (iii) that the program had been created prior to the alleged misconduct, and that it was used to prevent, detect, and remediate the specific acts under review. To satisfy such prongs, companies may submit evidence including official documents, emails, memoranda, minutes of meeting, reports, internal policies, and payment or accounting data.

To ensure greater uniformity in the evaluation of compliance programs by the different government institutions with jurisdiction under the CCA, the CGU released a "Practical Guide for the Evaluation of Compliance Programs" in September 2018. The Guide sets forth the requirements and methodology for the analysis and evaluation of a compliance program. More specifically, it classifies the 15 elements of an effective

compliance program provided by Article 57 of Decree No. 11,129/2022 into three blocks (organizational culture of integrity; integrity mechanisms, policies and procedures; and the legal entity's actions in response to the illegal act) and provides over 100 specific questions in relation to these blocks. The Guide contains an Evaluation Spreadsheet that automatically calculates the percentage of reduction of the fine based on (yes/no/partially) answers to those questions. By way of example, the Evaluation Spreadsheet asks whether senior management and employees have received anti-corruption training over the previous 12 months; whether the company's compliance representative has a direct reporting line to the highest management level; whether the company conducted anti-corruption and anti-fraud risk assessments over the previous 24 months; whether third-party due diligence includes a verification of past corruption cases and adoption of compliance programs; and whether the company took appropriate disciplinary action against those implicated in illegal acts.

Guidelines on Corporate Settlements under the CCA

The CCA created anti-corruption "leniency agreements," under which companies that effectively cooperate with the investigations and the administrative proceedings may avoid debarment sanctions and reduce administrative monetary fines by up to two-thirds. To be eligible for such benefits, companies must immediately cease any participation in the corrupt conduct, admit to the wrongdoing, cooperate fully and permanently with the investigation, and reimburse the damages caused by the wrongdoing. While the law detailed the requirements and benefits of such settlements, it failed to provide sufficient guidance on the negotiation process. This caused uncertainty among different agencies with anti-corruption responsibilities, arguably hampering enforcement.

Several agencies have taken steps to address this gap and better define and coordinate their respective roles, as well as the procedural rules for reaching leniency agreements. These agencies include: (i) the CGU; (ii) the AGU; (iii) the MPF; and (iv) the Federal Court of Accounts ("TCU"), which has powers to enforce certain administrative sanctions and also audit and suspend (where applicable) government acts involving federal entities or funds.

In August 2020, the CGU, AGU, TCU and the Ministry of Justice, under the coordination of the STF, entered into a technical cooperation agreement allowing for the sharing of information among these agencies. By encouraging coordination and cooperation among Brazilian enforcement agencies, the agreement reportedly aims to enhance anti-corruption enforcement, improve investigation capabilities of Brazilian authorities, and ensure legal certainty in the context of leniency agreements. The cooperation agreement establishes that the CGU and AGU are responsible for negotiating and approving leniency agreements, and the CGU, AGU and TCU will seek to standardize the methodology for calculating the value of damages to be reimbursed by legal entities. The cooperation agreement also established that the MPF and the Federal Police, during the course of investigations, would inform the CGU and AGU about corruption-related misconducts committed

by legal entities, and that the CGU, AGU, MPF and, when applicable, the Federal Police, will coordinate negotiations of leniency agreements. Although invited to the negotiation of the technical cooperation agreement, as of September 2022, the MPF had not joined the cooperation agreement, and instead issued Recommendation No. 10.

MPF's Recommendation No. 10, issued in November 2020, establishes the MPF's internal procedures for the elaboration and approval of settlement agreements in connection with the Improbity Law and the CCA. Under Recommendation No. 10, the MPF can enter into three types of settlement agreements with legal entities or natural persons to resolve misconduct involving administrative improbity: (i) Settlement Conditional on Adjusted Conduct; (ii) Non-Prosecution Agreement; and (iii) Leniency Agreement. Recommendation No. 10 establishes the principles and rules that must guide the MPF's actions during negotiation and approval of settlement agreements, as well as mandatory clauses in settlement agreements and the rights and obligations of individuals and legal entities that enter into settlement agreements. Under recommendation No. 10, the MPF is encouraged to impose obligations related to the improvement of compliance programs in settlement agreements.

While the precise role of each agency may continue to evolve, these developments suggest that the authorities are increasingly joining efforts to negotiate leniency agreements. For instance, in June 2019, the CGU, the AGU and the MPF, along with the DOJ, executed the TechnipFMC plc leniency agreement, the first leniency agreement deriving from a multilateral and joint investigation in connection with Operation Car Wash. In 2022, the CGU, the AGU and the MPF, along with the foreign agencies, also engaged in cross-border cooperation and entered into leniency agreements with Stericycle to resolve bribery offenses. As of September 2022, sixty-eight leniency agreements have been entered with federal agencies in Brazil (forty-eight with the MPF and twenty with CGU/AGU).

In July 2020, the CGU issued Guidelines on the Evaluation of Compliance Programs in Leniency Agreements, providing guidance on how companies should present and report their compliance programs for evaluation purposes, and how the CGU evaluates compliance programs within leniency agreement proceedings. The guidance refers to the previously enacted Practical Guide for the Evaluation of Compliance Programs discussed above.

Brazilian Central Bank and Securities and Exchange Commission (CVM) Regulations on Corporate Settlements

Since 2017 (following enactment of Law No. 13,506/17), the Brazilian Central Bank and the Securities and Exchange Commission of Brazil (CVM) can also enter into corporate settlements ("Administrative Settlement in Supervisory Proceedings"), similar to the leniency agreements provided for under the CCA.

Under the Administrative Settlement in Supervisory Proceedings regime, cooperating companies may receive full immunity or a two-thirds reduction of the administrative monetary fine. To be eligible for such benefits, companies must immediately cease any participation in illicit conduct, admit to the wrongdoing, and cooperate fully and permanently with the investigation. In addition, these benefits are only available if Central Bank or the CVM does not hold sufficient evidence to ensure conviction of the cooperating individuals or legal entities at the time of the proposal of the agreement. These corporate settlements (which are administrative in nature) do not prevent the MPF from commencing proceedings against the collaborating legal entities or individuals. Both the Brazilian Central Bank and the CVM issued additional regulations (BACEN Regulation No. 3,857/2017 and CVM Instruction No. 607/2019), further detailing, *inter alia*, procedural rules for negotiating and executing administrative settlements, and the benefits that may be provided to cooperating individuals and legal entities.

Improbity Law

The Improbity Law (Federal Law N. 8,429/1992) sanctions misconduct by a public official in the performance of his or her role. The Law was amended on October 26, 2021, by Law No. 14,230/2021. It was the most significant amendment to the Improbity Law since its enactment in 1992. The Improbity Law, which prohibits and punishes actions that cause unjust enrichment of the public agent, damage the Treasury (whether Federal, State, or local), or that violate principles of the public administration, has been largely applied in Brazil administratively—mainly by the Federal and State Audit Courts—and judicially.

The changes brought by the 2021 overhaul include the addition of new conduct such as nepotism to the roll of prohibited activities. Other relevant changes brought by Law No. 14,230/2021 include: (i) Improbity Lawsuits cannot be launched against individuals acquitted in the criminal sphere for the same facts; (ii) penalties imposed in other spheres shall be credited against sanctions imposed under Improbity Lawsuits; (iii) possibility of paying debts arising from convictions in installments; and (iv) the statute of limitations was changed from five years to eight years. The main change brought by the new legislation, however, is that only misconduct committed with intent can now be enforced under the Improbity Law. In the absence of intent (*e.g.*, conduct prompted by recklessness or negligence), the conduct can no longer be punished under the Improbity Law. Therefore, it is now necessary to prove intent. Previously, negligence and actions or omissions prompted by divergence in the interpretation of the law were subject to enforcement.

The applicable penalties for the violations are: (i) full restitution to the Treasury for the damages caused by the unlawful conduct; (ii) disgorgement of the assets accrued as a result of the practice; (iii) payment of a fine of up to two times the amount of the damages or 24 times the public agent's compensation (depending on the nature of the conduct); (iv) debarment for up to 14 years; and (v) prohibition to receive tax or financial public incentives.

Although the law was designed primarily to punish the conduct of public officials, sanctions under the Improbity Law are not limited to the public official(s), and any individual or corporation that induces or concurs to the improbity act or is benefited by it, directly or indirectly, can also be held liable. Therefore, companies can be held liable in an administrative improbity lawsuit when they participated in the illegal conduct. Nevertheless, the Brazilian Superior Court of Justice (STJ) has decided that private persons (individuals and corporations) can only be held responsible for the wrongful act under the Improbity Law alongside a public official. That is to say that a private person cannot be sanctioned independently, and the penalties will be, as applicable, the same as those or the public official.

The Improbity Law expressly provides for the debarment of companies convicted, including affiliates in which the sanctioned companies are the majority shareholders. This differs from the language of the CCA, which only extends monetary penalties (and not prohibitions on contracting with the government) to affiliates. Note that, pursuant to recent changes to the Improbity Law effective as of 2021, the sanctions established under the Improbity Law cannot be applied against legal persons if the improbity misconduct is also challenged under the CCA. Hence, enforcement authorities cannot apply the sanctions provided both by the CCA and the Improbity Law for the same wrongdoing.

Another innovation of Law No. 14,230/2021 was to establish the procedure and requirements for Non-Prosecution Agreements (*Acordos de Não Persecução Civil*) with the Prosecutor's Office to settle violations under the Improbity Law. At least two requirements must be met: (i) full reimbursement of damages; and (ii) return of the value illegally obtained. Moreover, in executing such agreements the nature, circumstance, gravity, and social repercussion of the improbity misconduct, as well as the characteristics of the agent, must be considered. Under Non-Prosecution Agreements, the obligation to implement or improve a compliance program can be imposed.

In August 2022, the STF ruled that the provisions of Law No. 14,230/2021 that prohibited prosecution of unintentional (negligent) improbity apply retroactively only for ongoing cases, still subject to appeal, but shall not apply retroactively in favor of persons convicted under the non-intentional modality of improbity act if the conviction is final. The STF ruled that the new eight-year statute of limitations under Law No. 14,230/2021 is not retroactive, including for ongoing proceedings. Furthermore, the STF declared null the provisions of Law No. 14,230/2021 that established that only the Prosecutor's Office had standing to prosecute an Improbity Lawsuit. Any public entity that is damaged by improbity misconduct has standing based on the STF ruling.

The Brazilian General Data Protection Law

The Brazilian General Data Protection Law (*Lei Geral de Proteção de Dados*—"LGPD") has been in force since September 18, 2020, while the articles that provide for the application of penalties by the National Data Protection Authority ("ANPD") came into effect almost a year later, on August 1, 2021, in order to grant the subject entities more time to comply with the Law. Although no penalties have yet been applied by the National Authority, with the increasing data breaches that have been involving companies in Brazil, it should not be long until the ANPD acts on it.

On October 28, 2021, the ANPD approved Resolution CD/ANPD N. 1, which provides the Regulation of the Monitoring and the Administrative Sanctioning Process within the ANPD. The Resolution aims to establish the procedures for the monitoring process and the rules to be observed within the scope of the Administrative Sanctioning Process by the ANPD. In addition, on September 15, 2022, the Data Protection Authority closed the public consultation period to approve the current draft Resolution that will regulate the application of sanctions by the ANPD, which is expected to be published by the end of the year.

The proposed draft regulation is intended to complement the Regulation of the Monitoring Process and the Administrative Sanctioning Process by establishing clear rules, in particular the parameters and criteria for calculating fines, for the application of administrative sanctions when monitoring and prevention activities have failed to persuade agents to comply with the legislation.

According to the draft, the sanctions calculation shall consider the good faith, cooperation, and recidivism, among other criteria. Infractions can be classified as mild, moderate, or severe, and the resolution provides fines up to BRL 50 million.

China

CChina has maintained its overwhelming momentum in the field of anti-corruption enforcement. During the first six months of 2022, the country's highest anti-corruption agency, the National Supervision Commission ("NSC"),[1] has commenced investigations against over 273,000 cadres in total, including 21 provincial/ministerial level and 1,237 department/bureau level senior governmental officials and SOEs senior managers.[2] China's Sky Net operation—the multi-agency effort to capture Chinese fugitive suspects abroad—continued to make progress despite the travel restrictions caused by the pandemic. Indeed, for the past five years from 2017 till September 2022, over 6,900 fugitives suspected of corruption were captured and returned to China, including 1,962 members of the Communist Party of China ("CPC") and government officials, and more than RMB 327.8 billion (approximately USD $46.2 billion) in illicit funds were recovered through this operation.[3]

At the same time, China made strides toward encouraging and fostering the development of corporate compliance programs, including through the nationwide promotion of a Pilot Compliance Non-Prosecution Program by China's Supreme People's Procuratorate ("SPP") and the promulgation of the *Measures for Compliance Management of Central State-Owned Enterprises* by the State-owned Assets Supervision and Administration Commission ("SASAC"). The past year also witnessed a significant number of anti-corruption actions within the healthcare sector. With consistent efforts in shoring up its protection of personal information, data security, and cybersecurity, the Cybersecurity Administration of China ("CAC") further published implementing measures and rules to fortify the tightened regime for cross-border data transfer—particularly when such information is sought by foreign enforcement agencies.

Pilot Compliance Non-Prosecution Program

In April 2022, the SPP issued its *Work Plan for Carrying Out Pilot Program of Corporate Compliance Reform*, further expanding its Pilot Compliance Non-Prosecution Program ("Pilot Program") from the original six provinces in 2020 to another ten selected provinces and at the national level. Under the Pilot Program, regional prosecutor's offices may enter into non-prosecution agreements with companies suspected of corporate crimes under certain conditions (including the adoption of an enhanced compliance program).[4] The prosecutors have discretion to propose lighter sentences or not prosecute a company suspected of criminal violations, and they are empowered to appoint third-party monitors selected from a database of third-party monitor candidates who will evaluate and assess that the companies implement an agreed compliance

1 The NSC is also known as the Central Commission for Discipline Inspection ("CCDI").

2 NSC 2022 Semi-Annual Report on Nationwide Discipline and Inspection Agencies' Supervision & Inspection and Review & Investigation Work (published on July 19, 2022), see CPC news at http://fanfu.people.com.cn/n1/2022/0719/c64371-32479100.html.

3 *"The "Net" is Getting Tighter and Tighter in the Pursuit of Fugitives and Stolen Goods—An Overview of International Cooperation Against Corruption Since the CPC's 19th Party Congress,"* at Chinese central government website http://www.gov.cn/xinwen/2022-09/07/content_5708658.htm (September 7, 2022).

4 China Pilots Enterprise Compliance Reform in 10 Regions, see at http://www.xinhuanet.com/english/2021-04/08/c_139867165.htm (April 8, 2021).

improvement program. As of July 2022, the People's Procuratorates at all levels in China have handled 2,382 compliance cases in total, among which 1,584 cases employed third-party monitorship, 606 companies have adopted a compliance program, and 1,159 individuals were exempted from prosecution.[5]

So far the SPP has published three sets of representative cases under the Pilot Program, respectively in June 2021, December 2021 and July 2022, demonstrating how the Pilot Program has been working to date. These 15 published representative cases involved environment pollution, falsifying VAT special invoices, bribing non-governmental personnel, bid collusion, trademark counterfeiting, an industrial production accident, merchandise smuggling, concealment of crime proceeds, illegal access to computer data, leaking inside information, an insider transaction, providing false documents, and illegal mining, covering both large companies and small or medium companies. All the companies involved have adopted compliance programs, and third-party monitors were duly appointed to evaluate the implementation of the compliance program.[6] The compliance rectification period for most of these cases lasted for one to three months, and three cases lasted for six to 12 months.

In one of these cases, a high-tech communications company colluded with other companies during the bidding process for three local government projects.[7] The high-tech company won the bid and completed the project. Afterwards, its General Manager and Vice General Manager voluntarily surrendered themselves to the local police, who then transferred the case to the local prosecutor.

- Phase 1: The local prosecutor served a Corporate Criminal Compliance Notification Letter on the company, which immediately submitted a Compliance Commitment Letter, pleaded guilty and provided relevant corporate materials. The local prosecutor reviewed the materials and investigated into the company background, and found the company eligible for the compliance non-prosecution program, and therefore initiated a compliance evaluation procedure and imposed a three-month rectification period.

- Phase 2: The local Management Committee for Third-Party Monitorship and Evaluation appointed a three-member monitor to initiate compliance monitoring and evaluation of the company. The prosecutor also guided the company in improving its internal control and compliance management system. The monitor and the prosecutor conducted *ad hoc* inspection and evaluation during the rectification period.

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5 The Supreme People's Procuratorate Released Corporate Crime Prosecution Data and Other Analysis Showing that the Pilot Compliance Reform of Enterprises is Beginning to Pay Off, see at http://m.legaldaily.com.cn/index/content/2022-07/27/content_8759054.htm (July 26, 2022).

6 Typical Cases of Corporate Compliance (second batch), see at https://www.spp.gov.cn/xwfbh/wsfbt/202112/t20211215_538815.shtml#2 (December 15, 2021); The SPP Released the Third Batch of Typical Cases Involving Corporate Compliance, see at https://www.spp.gov.cn/xwfbh/wsfbt/202208/t20220810_570413.shtml (August 10, 2022).

7 Representative Compliance Cases of Suspected Companies (Third Batch), Case No. 5: Bidding Collusion Case involving a Fujian Sanming Company, Yang, and Wang, see at https://www.spp.gov.cn/xwfbh/wsfbt/202208/t20220810_570413.shtml#2 (August 10, 2022).

- Phase 3: After the three-month rectification period, the monitor conducted inspection of the company's compliance rectification work and found the company fulfilled the compliance requirements. The local prosecutor organized a hearing with the representatives from the local community, who all agreed with the findings and acknowledged the company's compliance rectification work. Accordingly, the local prosecutor decided not to prosecute the General Manager and the Vice General Manager.

- Phase 4: Following the non-prosecution decision, the prosecutor further required the company to keep enhancing and improving its compliance controls, and also invited the third-party monitor to provide continued compliance and legal services to the company through follow-up site visits in order to ensure the long-term effectiveness of the company's compliance management system.

In January 2022, the SPP and other ministries promulgated the Implementing Rules for the Guiding Opinions on Establishment of a *Third-Party Supervision and Evaluation Mechanism for Compliance of Enterprises Involved in Cases (for Trial Implementation)* and *Management Measures for the Selection and Appointment of Professionals for Third-Party Compliance Supervision and Evaluation Mechanism for Enterprises Involved in Cases (Trial Implementation)*, with the purpose to further promote the Pilot Program, regulate the local Management Committees for Third-Party Monitorship and Evaluation and the relevant monitorship evaluation mechanism.[8] In April 2022, the SPP and eight other ministries issued the *Measures for Establishment, Assessment, and Review of Compliance Works for Enterprises Involved in Cases (for Trial Implementation)*, providing specific requirements and review standards for evaluating the companies undergoing compliance rectification.[9]

Measure for Compliance Management of Central State-Owned Enterprises

On August 23, 2022, SASAC, China's governmental agency who manages all Chinese state-owned enterprises ("SOEs"), enacted the *Measures for Compliance Management of Central State-Owned Enterprises* ("**Compliance Measures**"), directing central SOEs to establish their own compliance management system, cultivate compliance culture, strengthen supervision and accountability, among other compliance works.[10] The Compliance Measures took effect on October 1, 2022.[11]

8 See the Implementing Rules for the Guiding Opinions on Establishment of a Third-Party Supervision and Evaluation Mechanism for Compliance of Enterprises Involved in Cases (for Trial Implementation) (January 4, 2022) and Management Measures for the Selection and Appointment of Professionals for Third-Party Compliance Supervision and Evaluation Mechanism for Enterprises Involved in Cases (Trial Implementation) (January 4, 2022).

9 See the Measures for Establishment, Assessment, and Review of Compliance Works for Enterprises Involved in Cases (for Trial Implementation) (April 19, 2022).

10 SASAC, Compliance Measures, Art. 3.

11 *Id.*, Art. 42.

Pursuant to the Compliance Measures, the SASAC is responsible for guiding and supervising the compliance management works of central SOEs, by assessing and evaluating the effectiveness and improvement of the central SOEs' compliance management system.[12] Specifically, the Compliance Measures highlight:

- Four Basic Compliance Management Principles for the central SOEs, including CPC's leadership, compliance full coverage, clear compliance duties and responsibilities, and pragmatic and effective compliance management system.[13]

- Establishment of Compliance Function, such as the board of directors, company leadership, compliance committee, chief compliance officer, compliance department, relevant business departments, as well as disciplinary inspection department and audit department,[14] with the aim to build a "*Compliance Three Lines of Defense*", i.e., compliance checks at business departments, compliance department, and audit and supervision department.

- Adoption and Improvement of Compliance Rules, including general rules on compliance management, and specialized compliance rules in response to the red flags to which company's business is exposed and the compliance risks in specific countries/regions where the company operates, such as anti-bribery, data protection, tax management and others.[15]

- Establishment of the "*Closed-loop*" Compliance Check and Management Regimes, covering compliance risks identification and assessment regime, compliance review and audit regime, compliance rectification regime, compliance whistleblowing and reporting regime, compliance accountability regime, compliance coordination regime, compliance performance evaluation regime, and others. [16]

- Cultivation of Compliance Culture, through the tone at the top, regular compliance trainings, strengthened compliance communication and publicity for employees, among other.[17]

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12 *Id.*, Art. 4.
13 *Id.*, Art. 5.
14 *Id.*, Arts. 7-15.
15 *Id.*, Arts. 16-19.
16 *Id.*, Arts. 20-28.
17 *Id.*, Arts. 29-32.

- Development of Information Technology for Compliance Management. The central SOEs are encouraged to integrate compliance management into their information technology system, such as publication of compliance rules, training records, violation records, compliance review and checks in business process management, and data sharing with financial, investments, and procurement systems. The central SOEs are also required to utilize big data and other technologies to establish a dynamic monitoring of high-risk areas and to facilitate real-time warning and rapid disposal of compliance risks.[18]

For local SOEs at the provincial and municipal levels, Article 40 of the *Compliance Measures* requires that the various local SASACs shall issue the guidelines of compliance management according to the SASAC Compliance Measures.[19]

Healthcare Sector

As in years past, the healthcare industry is still a focus area of anti-corruption enforcement action in China. The *Key Points of Work for Correcting Malpractice in the Medicine Purchase and Sales Field and Medical Services 2022* issued by the National Health Commission, China's highest healthcare authority, and eight other ministries and commissions on May 9, 2022, emphasizes the continuous promotion of the "integrity initiative" for nationwide medical institutions and professional staff, and strictly punishes all malpractice activities in the healthcare industry, such as "red envelopes" and kickbacks.[20]

Indeed, China's healthcare sector has witnessed a significant number of anti-corruption enforcement cases by the NSC and local Supervisions Commissions in 2022. During the first eight months of 2022, 46 presidents of large hospitals and some senior government officials in the healthcare system in China were investigated for corruption, including Yu Luming, the former Director of Beijing Municipality Health Commission.[21] The NSC also endorsed local Supervision Commissions' anti-corruption enforcement in the healthcare sector. For example, in July 2022, the NSC website released seven representative corruption cases in Hunan province, two of these cases involving corruption by senior staff of one local hospital and the malpractice of another local hospital.[22] In August 2022, NSC further reported the special anti-corruption campaign carried out by the Hangzhou Municipality Supervision Commission of Zhejiang province, where over 219 medical staff voluntary

18 *Id.*, Arts. 33-36.

19 *Id.*, Art. 40.

20 National Health Commission and eight other ministries, Key Points of Work for Correcting Malpractice in the Medicine Purchase and Sales Field and Medical Services in 2022 (May 9, 2022), ¶ III(VII).

21 46 Directors Investigated, Medical Anti-corruption Storm is Coming, *see* at https://www.cn-healthcare.com/articlewm/20220819/content-1421032.html (August 19, 2022). Yu Luming Removed as Director of Beijing Health Commission, *see* at http://www.xhby.net/index/202205/t20220525_7556881.shtml (May 25, 2022).

22 Hunan Reported Seven Typical Cases of Corruption Using Public Resources for Personal Gain, *see* at https://baijiahao.baidu.com/s?id=1738981975390094122&wfr=spider&for=pc (July 22, 2022).

reported their misconduct and submitted "red packets," gifts and cash in the amount of over RMB 590,000 (approximately USD 82,900).[23]

Cross-Border Data Transfer Framework

To regulate cross-border data transfer following the promulgation of the *Personal Information Protection Law* ("**PIPL**") and *Data Security Law* promulgated in 2021 and the *Cyber Security Law* in 2017, the CAC published the *Security Assessment Measures for Outbound Data Transfer* in July 2022, which took effect in September 2022. Moreover, the CAC's over RMB 8 billion (approximately USD $1.2 billion) penalty imposed on Didi, the Chinese ride-sharing giant equivalent to Uber, in July 2022 reached a historical high record for a CAC penalty, showing its determination to strictly enforce the data protection laws and regulations nationwide.

Consistent with the *International Criminal Judicial Assistance Law*, the Ministry of Justice clarified that even if a Chinese domestic party *volunteers* to provide evidence and materials located in China to a foreign judicial or law enforcement agency, such cross-border data transfer shall still comply with the *Civil Procedure Law*, PIPL, and *Data Security Law*, and go through a security assessment by the CAC and relevant Chinese authorities.[24]

Security Assessment Measures for Outbound Data Transfers

On July 7, 2022, the CAC promulgated the *Security Assessment Measures for Outbound Data Transfers* (the "Measures"), which went into effect on September 1, 2022. The Measures provides that a data processor shall make a declaration requesting a security assessment for its outbound data transfer to the CAC through the local cyberspace administration at the provincial level if:

1. The data processor provides critical data abroad;

2. The data processor (i) is a key information infrastructure operator or processes personal information of more than one million individuals, and (ii) provides personal information abroad;

3. The data processor has provided abroad (i) personal information of 100,000 individuals or (ii) sensitive personal information of 10,000 individuals in total since January 1 of the previous year; or

4. Other circumstances required by the CAC.[25]

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23 Hangzhou Promoted Rectification Work Against Corruption in the Medical Field and Applied Targeted Treatment to Build Hospitals with Integrity, *see* at https://www.ccdi.gov.cn/yaowenn/202208/t20220815_211247.html (August 15, 2022).

24 PRC Ministry of Justice, Frequently Asked Questions on International Judicial Assistance in Civil and Commercial Matters, *see* at http://www.moj.gov.cn/pub/sfbgw/jgsz/jgszzsdw/zsdwsfxzjlzx/sfxzjlzxxwdt/202206/t20220624_458335.html (June 24, 2022).

25 CAC, Security Assessment Measures for Outbound Data Transfers, Art. 4.

Self-assessment: Before making a declaration for a security assessment, the data processor is obliged to conduct a self-assessment on the risks of the outbound data transfer. The self-assessment should evaluate various components of the outbound data transfer, including, among others: (i) the purpose, scope, and method of the transfer, (ii) scale, scope, type, and sensitivity of the data, (iii) responsibilities and capabilities of the overseas recipient, (iv) risks during and after the transfer, and available channels for protecting personal information rights, and (v) responsibilities and obligations to protect data security agreed between the parties in the legal documents. [26]

Procedures: Once the data processor submits the declaration materials to the provincial-level CAC, the materials will be examined for completeness within five business days and transferred to the CAC if the provincial-level CAC regards them as complete.[27] The CAC will decide on acceptance of the declaration application within seven business days.[28] Within 45 business days following the CAC's written notice of acceptance, the CAC will complete the security assessment, unless it deems it necessary to extend the assessment period and issues a written notice of the extension.[29] The data processor is entitled to object to the assessment results and apply to the CAC for a re-assessment within 15 business days after receiving the result; the re-assessment results will be final.[30]

Valid Period: The results of the security assessment for an outbound data transfer will be valid for two years, subject to re-assessment in case any circumstances affecting the security of the data transfer arise.[31]

Draft Provisions on Standard Contracts for Cross-Border Transfers of Personal Information

On June 30, 2022, the CAC published a draft of *Provisions on Standard Contracts for Cross-Border Transfers of Personal Information* ("**Draft Provisions**") for public comments. The Draft Provisions, once finalized and promulgated by the CAC, shall be followed by Chinese data processors to enter into contracts with the foreign data recipients involving cross-border transfers of personal information, which shall not conflict with the standard contract provided in the Draft Provisions.[32]

Applicability: The personal information processor who satisfies all of the following conditions may transfer data abroad through entering into a standard contract with the foreign recipients:

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26 *Id.*, Art. 5.
27 *Id.*, Art. 7.
28 *Id.*, Art. 7.
29 *Id.*, Art. 12.
30 *Id.*, Art. 13.
31 *Id.*, Art. 14.
32 Provisions on Standard Contracts for Cross-border Transfers of Personal Information (Draft for Comment) (June 30, 2022), Art. 2. PIPL, Art. 38.1(3).

- not being a key information infrastructure operator;
- handling not more than one million persons' personal information;
- providing to overseas parties the personal information of not more than 100,000 persons in the aggregate since January 1 of the previous year; and
- providing to overseas parties the sensitive personal information of not more than 10,000 persons in the aggregate since January 1 of the previous year.[33]

Self-assessment: Before providing personal information to overseas parties, the personal information recipient is similarly required to assess the impact on the protection of personal information. The assessment should focus on, among others: (i) the purpose, scope, and method of the transfer, (ii) the quantity, scope, type, and sensitivity of the personal information, (iii) the responsibilities and capabilities of the overseas recipient, (iv) the risks after the transfer, and available channels for protecting personal information rights, and (v) the impact of personal information protection policies and regulations of the country or region where the overseas recipient is located on the performance of the standard contract.[34] These elements should also be reflected in the standard contract, with additional contractual terms such as: (i) basic information on the personal information processor and the overseas recipient; (ii) measures taken to prevent the security risks; and (iii) the remedy, contract rescission, liability for breach of contract, and dispute resolution.[35]

Record-filing Requirement: The Draft Provisions further impose a record-filing requirement on the personal information processor, who shall file (i) the standard contract and (ii) an assessment report on impacts on personal information protection with the provincial-level CAC within 10 business days after the effective date of its standard contract.[36]

Didi Case

On July 21, 2022, the CAC concluded its year-long investigations against Didi Global Inc. ("**Didi**"), a Chinese ride-sharing giant equivalent to Uber, and imposed a fine of over RMB 8.26 billion (approximately USD $1.2 billion), finding Didi in serious violation of the *Cybersecurity Law*, the *Data Security Law*, and the PIPL. The decision also imposed a personal fine of RMB 1 million (approximately USD $141,000) against both the Chairman/CEO and President of Didi.[37]

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33 *Id.*, Art. 4.
34 *Id.*, Art. 5.
35 *Id.*, Art. 6.
36 *Id.*, Art. 7.
37 CAC's Decision of Administrative Publishment Related to Cybersecurity Review on Didi Global Inc., http://www.cac.gov.

The CAC investigations and cybersecurity reviews found Didi responsible for the following misconduct:

- illegal collection of screenshot information in the users' cell phone albums;
- excessive collection of users' clipboard information and application list information, passengers' information including facial identification, age group, occupation, kinship, and their home and company addresses, precise location, drivers' education information and storage of drivers' ID numbers;
- analysis without explicitly informing passengers of their travel intentions, resident cities, and business/travel information;
- frequent request for access to phone that is unrelated to Didi services; and
- failure to accurately and clearly explain the purpose of processing 19 items of personal information.

The Didi case was part of the CAC's efforts to "increase the exposure of representative cases and maintain both a strong momentum and a strong deterrent, [...] and to educate and guide internet companies to operate in accordance with law."[38]

cn/2022-07/21/c_1660021534306352.htm (July 21, 2022).

38 CAC Official's Responses to Reporters' Questions on Decision of Administrative Publishment Related to Cybersecurity Review on Didi Global Inc., http://www.cac.gov.cn/2022-07/21/c_1660021534364976.htm (July 21, 2022).

Mexico

Mexico's anti-corruption legal framework has its foundations in the constitutional reform of 2015, through which the National Anti-corruption System ("SNA" for its abbreviation in Spanish language) was adopted. Though significant work remains to be done in the implementation and enforcement of the system, some areas of the Mexican government continue to explore paths to increase its anti-corruption efforts. One of these paths relates to whistleblower protection. This section provides an overview on (i) the SNA and its key elements; and (ii) recent efforts to enhance whistleblower protection.

The National Anticorruption System

Mexico's new approach to fighting corruption involves some key elements, including: (i) the enactment of new and amended laws; (ii) the creation of several new institutions specialized in anti-corruption; (iii) the issuance of a National Anticorruption Policy; (iv) the participation of civil society in the development of policies and coordination efforts; (v) real coordination between federal and local government and its different levels; and (vi) the adoption of essential anti-corruption features (such as corporate administrative liability, consideration of compliance programs, and transparency into the assets of public officials).

New and Amended Laws

In May 2015, Mexico amended its constitution to create the SNA. The SNA provides for the enactment and amendment of several laws. The enacted laws include the General Law of the SNA ("SNA Law"), the Federal Tribunal's Administrative Justice Organizational Law ("Administrative Justice Law"), the General Administrative Responsibilities Law ("Administrative Responsibilities Law") and the Federal Audit and Accountability Law ("Audit and Accountability Law"). Other existing laws were also amended to support and align with the SNA, including the Federal Criminal Code, the Federal Public Administration Organizational Law, and the Federal Attorney General's Office Organizational Law.

New Institutions

A key focus of the SNA was the establishment of new institutions specialized in anti-corruption. When establishing these new institutions, the SNA also sought to promote greater involvement of civil society in the fight against corruption and ensure better cooperation between civil society and anti-corruption authorities.

The following are the institutions created by the SNA:

Anticorruption Prosecutor's Office. A specialized office tasked with the investigation and charging of corruption related offenses. The Anticorruption Prosecutor's Office maintains independence through its

special appointment and removal processes, autonomy in the exercise of human, material and budgetary resources, and autonomy in the investigation of cases, among other things.

Specialized administrative judges. These judges oversee administrative proceedings involving public officials and private parties accused of corruption. Specialized administrative judges belong to the Federal Tribunal of Administrative Justice—which is part of the federal executive branch. This tribunal is tasked with their appointment: three within its Superior Chamber (its highest court) and 15 distributed among its Regional Tribunals (highest regional federal administrative courts). As of November 2022, the appointment of one judge at the Superior Chamber and all 15 at the Regional Tribunals have still not occurred.

Coordinating Committee. The Coordinating Committee is in charge of the development of national anti-corruption policies, coordination between institutions, monitoring and evaluating progress. It is composed of the heads of the Ministry of the Public Function, the Federation's Superior Audit Committee, the Federal Tribunal of Administrative Justice, the Anticorruption Prosecutor's Office, the National Institute for Transparency, Access to Information and Protection of Personal Data, the Federal Judicial Council, and the Citizens' Participation Committee.

Citizens' Participation Committee. This committee is tasked with providing opinions and proposals for the development of anti-corruption national policies. Through the participation of its head in the Coordinating Committee, it is also involved in the coordination, monitoring and evaluation of the SNA. Five prestigious citizens who have made contributions towards transparency, accountability, or the battle against corruption form the committee. All five members of the Citizen's Participation Committee have been appointed.

Governing Committee. The Governing Committee is responsible for (i) designing, approving and promoting comprehensive policies on oversight; (ii) implementing the coordination mechanisms among all members of the SNA; and (iii) implementing the system for information exchange regarding the control of public resources. The Governing Committee is formed by the Federation's Superior Audit Committee, the Ministry of the Public Function, and seven rotating members from the states' anti-corruption systems.

Executive Secretariat. A technical support body entirely dedicated to the SNA, although it is part of the Federal Administration, and its budget is allocated by the Ministry of Finance, it is endowed with operational autonomy. Its mission is to support the Coordinating Committee to improve and implement its decisions, as well as the coordination of the SNA. It proposes public policies, designs evaluation methodologies and manages the National Digital Platform.

Local anti-corruption systems. As part of the SNA, states are required to establish their own local anti-corruption systems, mirroring the federal one, which are to have full coordination with the federal institutions for the prevention, detection, investigation, and punishment of corruption. At the state level,

the implementation landscape looks rather encouraging. With the appointments made in 2021, the implementation of the state systems is considered as virtually concluded. However, two states have not appointed their Anticorruption Prosecutors yet.

National Anticorruption Policy

In a continuous effort to strengthen the SNA, the Coordinating Committee approved the National Anticorruption Policy in January 2020, establishing a national agenda in the fight against corruption. The National Anticorruption Policy establishes the public policy priorities that should guide the actions of all public institutions in the country. It is a long-term strategy designed to tackle corruption in a comprehensive manner by focusing on four issues: (i) fighting corruption and impunity; (ii) combatting arbitrariness in public services; (iii) promoting the improvement of management at the government-society contact points; and (iv) involving civil society and the private sector in the fight against corruption.

Unfortunately, many of the objectives laid out in the National Anticorruption Policy have not in fact been pursued or, in some instances, the actions of the government have been in direct contradiction with them.

Participation of Civil Society

The SNA is designed to ensure the participation of civil society in the development of policies. This participation is made possible through the work of the president of the Citizens' Participation Committee in the Coordinating Committee, and the latter's approval of the National Anticorruption Program. However, the main driver of civil society participation is through the Citizens' Participation Committee which, in addition to its mission of proposing comprehensive anti-corruption policies for the Mexican State, is the civilian oversight body meant to serve as the connection between SNA institutions and civil society, academia and the business sector.

We note from the Citizens' Participation Committee's 2021 Annual Report that it maintained high levels of activity, among others, through the holding of quarterly meetings, the signature of relevant agreements, the issuing of recommendations and communications, as well as the organization of engagement events with civil society and public entities.

The involvement of civil society is also ensured by the local citizens' participation committees within each state. Non-governmental organizations reporting on activities of local citizens' participation committees observed that, in some states, members of these committees have worked with journalists to gather additional information about reported cases and shared the findings with investigative authorities, while in other states they have used social media outlets to increase public awareness about the system's initiatives and to inform citizens about how to report corruption to the proper authorities.

Real Coordination

Coordination efforts are at the forefront of the SNA, as demonstrated in various forms, including the centralized publication of public officials' financial disclosure statements (about their assets, taxes and interests) through the National Digital Platform, the implementation of technology to coordinate efforts by the Executive Secretariat, and the adoption of the country's first National Anticorruption Policy by the Citizens' Participation Committee.

National Digital Platform

One particular aspect to highlight on the coordination front is the creation and operation of the National Digital Platform.

The National Digital Platform is a key tool contemplated by the SNA to help combat corruption. The data on the platform comes from the federal government and state governments, as well as from autonomous bodies. It is conceptualized as an interoperable platform, which will integrate and connect the various information systems held by the authorities that have a role in the fight against corruption.

It is anticipated to be a centralized database designed to host and process the following information about federal and state officials: (i) assets, personal interests and tax information of public officials; (ii) the names of public officials involved in public procurement processes; (iii) the names of public officials, and private entities and individuals that have been sanctioned for certain offenses; (iv) information obtained from public audit committees; (v) corruption complaints; and (vi) public procurement contracts.

While the platform is not fully functional, as it does not yet have any available information from audit committees or information about corruption complaints, the current version incorporates information from state governments regarding assets, personal interests and tax information. It also contains data on public procurement contracts and information regarding sanctioned public officials.

The full functionality of the National Digital Platform is an important element in the fight against corruption. Among other things, it will allow the SNA to better evaluate risks and prevent corruption.

Essential Anti-corruption Features

With the adoption of the SNA, corruption is still mainly dealt with through criminal law enforcement, yet with a more specialized focus and robust process. However, there is also a new emphasis on administrative enforcement. The Administrative Responsibilities Law establishes two different sanctioning procedures depending on the severity of the alleged offense: serious and less serious offenses. For less serious offenses, internal control bodies within different government entities are responsible for investigating offenses and imposing relevant sanctions. For serious offenses, the Federal Tribunal of Administrative Justice is now also

entrusted with deciding cases related to serious corruption offenses, through its specialized administrative judges.

The SNA has several features, some of them completely new to the Mexican legal system, which include:

Prohibition of active and passive, direct or indirect, domestic and foreign, bribery. The Federal Criminal Code prohibits active and passive bribery, direct or indirect, as well as active bribery of foreign government officials, but does not cover commercial bribery. Similarly, the Administrative Responsibilities Law forbids active and passive bribery, direct or indirect, including facilitation payments.

No gifts or entertainment. Although it was formerly tolerated, government officials are no longer allowed to accept gifts and entertainment "from any person or organization." As it stands, there is no exception to this rule, since the Administrative Responsibilities Law does not refer to other forms of hospitality such as meals, entertainment, and travel. In addition, the Administrative Responsibilities Law requires public officials to disclose their assets and taxes, and declare conflicts of interest.

Corporate liability is imposed through both criminal and administrative routes. The Federal Criminal Code (Article 11) give judges the power to suspend or dissolve a corporation, or impose financial penalties, for acts committed by any member or representative in a crime committed in the name or under the protection of or for the benefit of the corporation. The Administrative Responsibilities Law (Article 24) provides for the sanction of corporations for acts related to serious administrative misconduct, including corruption committed by individuals acting on behalf or in representation of the corporation and seeking to obtain benefits for the corporation.

Anti-corruption Compliance Programs. The Administrative Responsibilities Law (Article 25) requires corporate entities to have an "integrity policy," which will be assessed as part of the determination of a corporation's administrative liability (including as a mitigating factor).

Pursuant to the Administrative Responsibilities Law, compliance programs must contain the following elements: (i) an exhaustive organization and procedures manual; (ii) a code of conduct; (iii) adequate and effective control, monitoring, and auditing systems; (iv) adequate alert mechanisms and disciplinary processes; (v) appropriate training systems and processes; (vi) human resources policies aimed at avoiding hiring personnel who create a risk to the integrity of the corporation; and (vii) mechanisms that guarantee the transparency and publicity of the corporation's various activities.

Implementation of the SNA

To date, while all institutions have been created and most high-profile positions have been filled, full

implementation has not been attained. Moreover, there is no evidence to date that the new framework and infrastructure created by the SNA are being utilized in major corruption investigations.

Although there have been some efforts to fight notorious corruption cases, either these efforts have not gone through the SNA or results of ongoing investigations have proved slow and remain to be seen. For instance, in its 2020-2021 annual report (corresponding to the period from March 12, 2020, to March 10, 2021), the Anticorruption Prosecutor's Office stated it had initiated 121 new investigation files and undertaken 22 prosecutions, but that the COVID-19 crisis had delayed investigations, and that the recruitment process for new officers has also been impeded.

Furthermore, the Anticorruption Prosecutor's Office reported that at the close of the 2021 report (the latest report published), 1,688 investigation files had been initiated in 2019, 2020 and 2021. From the total number of investigation files: 662 were closed (275 of which the Anticorruption Prosecutor's Office declined jurisdiction), 8 were resolved through alternative dispute resolution mechanisms, and only 22 were prosecuted. We understand that 1,026 investigation files were still ongoing as of the date of submission of the report.

It is worth noting that out of a budget of 110 million MXN (~$5.5 million USD) for 2020, the Anticorruption Prosecutor's Office spent only 63 million MXN. For 2021, it was budgeted a slightly larger amount, 123.5 million MXN (~$6.2 million USD).

By all indications, the Anticorruption Prosecutor's Office has not been involved in any major corruption investigation, demonstrating that the SNA is still not being utilized in the most serious corruption matters.

On the appointment of all the specialized administrative judges, as mentioned above, one judge at the Superior Chamber and all 15 at the Regional Tribunals have still not been appointed. President Lopez Obrador seems to be blocking those appointments. For example, in 2020, he presented a legislative initiative to reduce the number of specialized Regional Tribunals from five to only one. While not achieved yet, related legislative developments point to a backtrack on the designation of the 15 judges distributed among the Regional Tribunals. On March 22, 2021, the Senate pushed an initiative to amend the Administrative Responsibilities Law to eliminate the specialized administrative judgeships, arguing that these are not established by the Federal Constitution and should not be filled. As of November 2022, this initiative has not succeeded yet. The appointment of these anti-corruption specialized administrative judges is fundamental for the proper functioning of the SNA, since only they can punish serious administrative misconduct committed by public officials and by individuals involved in acts related to corruption under the SNA.

As mentioned above, at the state level, with the appointments made in 2021, the implementation of the state systems is considered as virtually concluded. However, two states have not appointed their Anticorruption Prosecutors yet. Regarding legislative support, the Executive Secretariat reports that each state congress

carried out actions aimed at promoting law reforms and the issuance of regulations to give full strength to local anti-corruption systems and notes that, regarding the administrative responsibilities regulation, some states opted to apply the Administrative Responsibilities Law.

Whistleblower Protection in Mexico

Mexico is a party to numerous international treaties containing whistleblower protection provisions, including the United Nations Convention against Corruption, the Inter-American Convention against Corruption of the Organization of American States, and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Despite these international commitments, as of this time, Mexico does not have a comprehensive and well-coordinated whistleblower protection system, only a handful of norms scattered in different laws and no internal coordination. However, some efforts to improve the situation are underway by different government actors.

Historical Approach

Prior to the constitutional and legislative reforms of 2015 (through which the SNA was created), the historical approach in Mexico focused on establishing mechanisms to reward, rather than to protect, the provider of information. The main objective was to obtain the information. These norms were scattered in different laws and regulations, among them, the Federal Law Against Organized Crime, which provides for rewards to whistleblowers who report serious crimes.

Recent Changes

With the adoption of the SNA and related laws, the focus shifted towards the protection of the whistleblower, particularly those reporting government misconduct. The Audit and Accountability Law, for example, designated the Federation's Superior Audit Committee as the body in charge of protecting whistleblowers' identities in cases where whistleblowers report irregular management or diversion of federal public resources. Also, in line with the new approach, the Administrative Responsibilities Law incorporated controls aimed at ensuring the protection of whistleblowers.

Status of Whistleblower Protection

In addition to the changes adopted through the SNA, the main efforts from the federal government to protect whistleblowers are contained in the "Internal and External Citizens' Corruption Alert Program" (the "Alert Program") deployed by the Ministry of Public Function. The bases for the operation of the Alert Program were settled in the Executive Agreement establishing the Guidelines for the Promotion and Operation of the Alert Program (the "Operational Guidelines") published in the Official Gazette on September 6, 2019 (amended June 11, 2020) and completed with the Executive Agreement adopting the Protection Protocol for Whistleblowers of Corruption (the "Protection Protocol") published on October 19, 2020.

The Alert Program benefits from a technological tool to capture and respond to alerts, as well as to guarantee anonymity and the confidentiality of the information, for acts that have been committed or are likely to be committed by federal public officials, regarding alleged serious administrative offenses of bribery, embezzlement and diversion of public resources (the "Technological Platform").

The Alert Program and Protection Protocol create a mechanism for citizen participation in the fight against corruption and establish the methodology for the determination and implementation of protective measures to safeguard the integrity of whistleblowers. This constitutes the first mechanism of this kind in the country, since there were no prior instruments that adopted specific methodology for risk assessment and the implementation of protective measures for whistleblowers.

Proposals to Enhance Whistleblower Protection

While these advances pave the way for broader whistleblower encouragement and protection, overall, the efforts to protect whistleblowers are still currently limited, particularly given that the duty to protect the identity of whistleblowers, and protections against retaliation, are not broad enough. We should not fail to note that the Ministry of Public Function's Alert Program covers whistleblowers only in investigations related to federal public officials.

Some proposals to enhance whistleblower protection have been brought to the attention of the Mexican legislators, but have not succeeded, including: (i) a proposed bill presented in 2015; (ii) an initiative to adopt a "General Law for the Protection of Witnesses and Whistleblowers of Acts of Corruption" presented to the Senate in December 2018 and February 2019; and (iii) a 2020 constitutional reform initiative.

However, in July 2022, a new legislative initiative was presented to the Senate and is currently under discussion, of which we provide a general assessment below.

At the local level, two states (out of 32) have taken the lead with the adoption of comprehensive whistleblower protection laws: Nuevo Léon in 2013 and Hidalgo in 2021.

July 2022 Legislative Initiative

The enhancement of federal whistleblower protection was the object of a legislative initiative presented to the Senate in July 2022. However, at this stage, the proposed bill seems to be mainly focusing on the interface between the electronic system of public complaints of the National Digital Platform and a "protection registry" to be created at the federal level (the "Federal Whistleblower Protection Registry"), as well as on the access to it for the investigating authorities of the three branches of government. Furthermore, the draft bill states that, upon request, and based on the assessment made by the corresponding authority, protection against possible retaliation may be provided. Nevertheless, the protective measures are not specified in the draft, contrasting with previous initiatives. The authorities empowered to apply the proposed law would be the Ministry of the

Public Function, the Executive Secretariat of the SNA and the internal control bodies within the three branches of the federal government, the autonomous constitutional bodies and state-owned productive enterprises.

The Work of the SNA's Executive Secretariat

As mentioned above, the Executive Secretariat is the competent body in the SNA to analyze and propose public policy, and is entrusted with the management of the National Digital Platform.

Following the adoption of the National Anticorruption Program in January 2020, the Coordinating Committee of the SNA instructed the Executive Secretariat to integrate a technical group to establish guidelines for the implementation of the National Anticorruption Program (the "National Anticorruption Program Implementation Guidelines").

As part of the Executive Secretariat's response to that instruction, the Executive Secretariat engaged in a dialogue with relevant national stakeholders on a proposal to address the gap in whistleblower protection. The Executive Secretariat's preparatory work highlights the importance of an alert system to complete the anti-corruption combat cycle (prevention, identification, investigation, and sanction). It has identified that in Mexico, less than one out of every 100 acts of corruption is reported, and that whistleblowers are afraid of retaliation. Among the reasons for such a low reporting rate, the Executive Secretariat has identified the following: (i) widespread perception of the ineffectiveness of reporting mechanisms; (ii) lack of effective whistleblower protection and anonymity programs; as well as (iii) low institutional trust.

The National Anticorruption Program Implementation Guidelines were approved by the Coordinating Committee in January 2022. These guidelines propose the adoption of 64 strategies and 140 lines of action, as well as results indicators associated with each of the strategies.

The Executive Secretariat's specific proposal regarding whistleblower protection consists of the implementation of five strategies and six lines of action for the creation of a nationwide whistleblower system, with general protocols for the protection of whistleblowers, as well as coordination mechanisms for follow-up and the development of an adequate criminal policy among the competent authorities.

The adopted strategies for the prevention, reporting, detection, investigation, resolution and punishment of administrative offenses and crimes related to acts of corruption focus on the promotion of: (i) systematic coordination among federal and local anti-corruption agencies; (ii) the adoption of open government and open justice practices through proactive transparency schemes; (iii) the adoption of a nationally standardized regulatory framework for the protection of whistleblowers; (iv) the articulation of a criminal policy based on adequate coordination, with a human rights approach, gender perspective and cultural relevance; and (v) the generation of data standards, corporate integrity implementation schemes, and a whistleblower protection model to improve cross-sector collaboration and measurement of compliance.

In furtherance of such strategies, the lines of action contemplate: (i) the development of a database with an alert system for whistleblower processes that enhances the investigation processes and provides warning of the estimated social, political and legal impact of the same, safeguarding personal data; (ii) the definition and dissemination of accessibility and open data standards applicable to public information; (iii) the preparation of a diagnosis on the regulatory and operational framework, which will serve to prepare non-binding recommendations to the responsible authorities; (iv) the establishment of a methodology for the development of a framework that includes a standardized whistleblower protection procedure; (v) training for whistleblower institutions and prosecutors' offices on relevant protocols and criminal policy guidelines; and (vi) promoting the adoption of mechanisms for the protection of whistleblowers in business.

We understand that the Executive Secretariat is planning on putting together a working group with experts from private and public entities to contribute to the design of the Mexican whistleblowing protection system. For instance, the Executive Secretariat has shared experiences internally with the Ministry of Public Function and externally with the British embassy in Mexico. The Executive Secretariat is aiming for a comprehensive approach to whistleblower protection, which will benefit from exchanges with different stakeholders, including international ones.

United Kingdom

Overview

The UK Bribery Act 2010 ("Bribery Act") contains four categories of offenses: (i) offenses of bribing another person (*i.e.*, bribery of private persons); (ii) offenses related to being bribed; (iii) bribery of foreign public officials; and (iv) failure of a commercial organization to prevent bribery.

The first category prohibits a person or company from offering, promising, or giving a financial or other advantage: (a) in order to induce a person to improperly perform a relevant function or duty; (b) to reward a person for such improper activity; or (c) where the person knows or believes that the acceptance of the advantage is itself an improper performance of a function or duty.

The second category of offenses prohibits a person from requesting, agreeing to receive, or accepting such an advantage in exchange for performing a relevant function or activity improperly.

The third category of offenses, bribery of foreign public officials, is the most similar to the FCPA. Under the Bribery Act, a person or company who offers, promises, or gives any financial or other advantage to a foreign public official, either directly or through a third-party intermediary, commits an offense when the person's intent is to influence the official in his capacity as a foreign public official, and the person intends to obtain or retain either business or an advantage in the conduct of business. In certain circumstances, offenses in this category overlap with offenses in the first category, which generally prohibits both foreign and domestic bribery. The overlap between the general bribery offenses and the offenses relating to bribery of foreign officials provides prosecutors the flexibility to bring general charges when a person's status as a foreign official is contested or to seek foreign official bribery charges when an official's duties are unclear.

Most significantly for large multinational corporations, the Bribery Act creates a separate offense for failure to prevent bribery, applicable to any corporate body or partnership conducting part of its business in the UK. Under this provision, a company is responsible for an offense where an "associated person" commits an offense under either the "offenses of bribing another person" or "bribery of foreign public officials" provisions unless the company can show it had in place "adequate procedures" to prevent bribery. An "associated person" includes any person who performs any services for or on behalf of the company, and may include employees, agents, subsidiaries, as well as subcontractors and suppliers to the extent they perform services on behalf of the organization.

The Serious Frauds Office is the UK agency responsible for investigating and prosecuting violations of the Bribery Act. Over the past several years, it has published insightful guidance regarding cooperation with the agency's investigations, the standards that it uses to evaluate compliance programs, and the use of deferred prosecution agreements.

SFO Corporate Cooperation Guidance

In August 2019, the SFO issued guidance as to the steps that a company should take to earn cooperation credit from the SFO during an investigation. The SFO explained that cooperation requires companies to go "above and beyond what the law requires," including by identifying suspected wrongdoing and the individuals responsible, and reporting it to the SFO within a reasonable amount of time, as well as preserving evidence and providing it promptly in an "evidentially sound format."

Examples of Cooperation: The guidance provides examples of actions that would constitute cooperation. In particular, entities should preserve digital and hard-copy materials; provide these materials promptly and in an organized manner; promptly inform the SFO of any suspected data loss, deletion, or destruction; identify material held by third parties and assist with its production; signify material that may undermine the case of prosecution; and provide a list of withheld documents due to privilege and the basis for the assertion of privilege.

Examples of Uncooperative Behavior: The guidance also provides examples of actions that are "inconsistent" with cooperation, such as protecting certain individuals, wrongly blaming others, notifying individuals that they are the subject of an investigation (thereby creating a risk of tampering with evidence or altering testimony), and tactical delays or "information overloads."

Privilege: The guidance states that a company that chooses to invoke a valid privilege claim will (ostensibly) not be penalized by the SFO, but will also not earn cooperation credit.

SFO Guidance on Evaluating Compliance Programs

In January 2020, the SFO released internal guidance on how it evaluates the compliance programs of organizations that are being investigated and prosecuted. The guidance describes the SFO's views on the impact that compliance programs have on various key decisions in investigations and prosecutions, how the SFO investigates the effectiveness of compliance programs, and what it believes constitutes an effective compliance program.

Relevance of Compliance Programs

The SFO examines an organization's compliance program when making certain key decisions in investigations and prosecutions, such as deciding whether moving forward with a prosecution would be "in the public interest," whether resolving the allegations through a Deferred Prosecution Agreement would be appropriate, and how to make certain sentencing determinations. In addition, prosecutors and investigators must consider whether a company could invoke the affirmative "adequate procedures" defense to allegations of failure to prevent bribery brought under the Bribery Act, which could alter charging decisions.

Evaluating Compliance Programs During Different Stages of Investigation and Prosecution

The guidance directs prosecutors to consider the state of a company's compliance program as it existed during different relevant periods. This includes considering the program at the time of the offense, at the time of the investigation or charging decision, and even considering how the program may change going forward through remedial measures. The guidance confirms that compliance efforts that fall short of preventing misconduct at the time of the offense can nevertheless benefit an organization in charging and settlement decisions, depending in part on whether the company has undertaken remedial compliance measures after learning of misconduct to improve their compliance programs.

Deciding whether to prosecute: An ineffective compliance program at the time of the offense will weigh in favor of prosecution, while an effective program, even though it did not prevent the misconduct, may weigh against prosecution. Likewise, a company that took remedial efforts to improve its compliance program between the time of the offense and the charging decision is less likely to be prosecuted, while a company that failed to take remedial measures is more likely to face charges.

Evaluation of Defenses: In evaluating whether a company will be able to invoke the "adequate procedures" defense to a charge of failure to prevent bribery, prosecutors look to the state of the compliance program at the time of the offense. If a company had in place an effective program, it is more likely to successfully invoke this affirmative defense. While it will be up to the company itself to establish this defense in court, prosecutors also make this evaluation themselves to make charging decisions.

Sentencing: The state of a company's compliance efforts, both at the time of the offense and at the time of the charging decision, will be relevant to sentencing issues. Courts will credit companies for their compliance efforts during both periods when making a sentencing determination.

DPAs: Companies that have engaged in serious remedial efforts are more likely to be considered candidates for DPAs than unreformed entities. Similarly, prosecutors will consider how a company may be able to improve its compliance efforts going forward through terms imposed by a DPA. Specifically, a DPA may be appropriate in certain circumstances where a company does not yet have an effective compliance program, but the DPA can be used to require it to implement compliance improvements.

Investigating Compliance Programs

Investigators can use a variety of tools to obtain information about a company's compliance program, including voluntary or compelled disclosures and interviews, and other similar practices. Companies should maintain written records of their compliance efforts, including their due diligence on third parties, training and audits, which can be used to demonstrate the effectiveness of the program, as well as their dedication to compliance practices, to investigators and prosecutors.

Substantive Guidance on Effective Compliance Programs

The guidance acknowledges that there is no single best approach to compliance that works for all companies. Instead, a compliance program must be designed to address a company's specific risks, and it will differ in scope depending on the size and risk profile of an organization. Larger organizations, or those in high-risk sectors, will likely need dedicated compliance departments and more stringent controls, while others can likely use less burdensome approaches.

The guidance points to the six principles of effective compliance programs previously outlined in the Ministry of Justice's 2011 guidance as a good framework for effective compliance efforts:

1. Proportionate Procedures: a compliance program's policies and procedures should be commensurate with the company's risk profile.

2. Top Level Commitment: senior management must be committed to the compliance program, actively involved in its design and implementation, and foster a culture of compliance.

3. Risk Assessment: companies must conduct risk assessments that evaluate internal and external risk factors, and use the results of these assessments to properly tailor the company's compliance program.

4. Due Diligence: compliance programs must include appropriate risk-based due diligence procedures that cover relationships with third parties, employees, and mergers and acquisitions.

5. Communication (and training): companies must ensure that employees and relevant third parties are familiar with the compliance program and the various compliance risks facing the company. This includes issuing communications to employees and conducting targeted training, particularly for those in higher-risk positions.

6. Monitoring and Review: Companies must have appropriate procedures for monitoring and reviewing their compliance programs and employee conduct, to ensure their programs are effective and to make adjustments as necessary.

For the SFO, 2022 has been a difficult year. Although it did secure one conviction (discussed below), the SFO also saw three previous convictions quashed because of its own misconduct and failure to make proper disclosures to defendants:

- In 2020, the SFO had secured convictions against Ziad Akle and Stephen Whiteley, two former executives of Unaoil, on charges that they conspired to make corrupt payments to secure contracts in Iraq. Akle was sentenced to five years in prison; Whitely, to three. The following year, Paul Bond, a former executive of SBM Offshore, was convicted of the same charge and sentenced to a prison term of three and a half years.

- Between December 2021 and July 2022, however, all three convictions were quashed by the UK Court of Appeal as a result of the SFO's failure to disclose its "wholly inappropriate" contacts with David Tinsley, who was described as a U.S.-based "fixer" whom the Ahsanis (the family that owned and controlled Unaoil) had engaged to help them resolve the investigations in the U.S. and the UK.

- Tinsley had met with the Director of the SFO and other senior officials, arguing that he could get other defendants in the Unaoil case (such as their Iraqi partner Basil Al Jarah) to plead guilty (which Al Jarah then did in 2019) in return for the SFO abandoning its prosecution of the Ahsanis (which the SFO then did as well).

- At the trials of Akle, Bond, and Whiteley, the SFO used Al Jarah's guilty plea as evidence that the three had engaged in a conspiracy, but the SFO had not fully disclosed the documents detailing its interactions with Tinsley, as it should have done.

- The Court of Appeals overturned the convictions because the SFO's failure to disclose the information prevented the defendants from making significantly stronger arguments regarding Al Jarah's guilty plea (namely, the argument that Al Jarah was innocent and had only pleaded guilty due to improper pressure from Tinsley). In criticizing "the misconduct of the SFO," the Court also prohibited a retrial.

In light of the identified failures, the UK Attorney General commissioned an independent review of the SFO's conduct. The report, issued in July 2022, concluded that the SFO had poor record-keeping practices and inadequate resources, and that there had been significant distrust between the case team and senior SFO management relating to Tinsley's involvement. The SFO accepted to undertake the recommendations laid out in the report.

To cap off the year, Transparency International issued a report in October 2022 in which it downgraded its assessment of anti-corruption enforcement in the UK from "active" to "moderate."

The agency did have one success though. In June 2022, Glencore Energy pleaded guilty to five substantive counts of bribery and two counts of failure to prevent bribery, as part of its global resolution with authorities in the U.S., UK, and Brazil. Glencore Energy was ordered to pay £276.4 million (approximately $310 million), comprised of a £182.9 million criminal fine and a £93.5 million confiscation order.

Chapter

5 Anti-Corruption Efforts of Multilateral Development Banks

Context

Multilateral development banks ("MDBs") are international financial institutions established and managed by sovereign states. These institutions support economic development in their member countries by funding large public infrastructure projects, mobilizing private sector investment, sharing technical expertise, and similar mechanisms. MDBs also play a significant role in the global fight against corruption. Several MDBs have established administrative investigative and sanctions systems to review allegations of corruption, fraud, collusion, and other similar misconduct (collectively, "Sanctionable Practices" or "Prohibited Practices") by parties participating in the transactions they finance or administer, and to impose related sanctions.

MDB sanctions include formal censure or reprimands, debarment (ineligibility with or without conditional release), conditional non-debarment (imposition of remedial conditions to avoid debarment), restitution, and fines. For additional detail and context regarding MDB sanctions processes, please refer to the Hughes Hubbard & Reed MDB Sanctions and Investigations Primer (https://analytics.clickdimensions.com/cn/abbym/MDBPrimer1).

Sanctions can function as a powerful deterrent as they can have far-reaching reputational and business consequences. A debarment imposed by an MDB that is a signatory to the Agreement for Mutual Enforcement of Debarment Decisions may be recognized across other signatories. For instance, a debarment imposed by the African Development Bank ("AfDB") will be published on the AfDB's website and restrict the debarred company from participating in projects financed or administered by the AfDB. It may also make the company ineligible to participate in projects financed by the Asian Development Bank, the European Bank for Reconstruction and Development, Inter-American Development Bank Group ("IDB"), World Bank Group ("World Bank"), and other MDBs.

Recent Sanctions for Corrupt Practices

A significant percentage of MDB sanctions concern fraudulent practices, particularly misstatements made by bidders in bid documents. Nonetheless, MDBs continue to aggressively investigate and sanction corruption, with both the World Bank and the IDB sanctioning multiple companies for corruption over the past couple of years. Illustrative cases involving corrupt practices announced over the last two years are provided below:

Construcap and Copasa do Brasil. On July 5 and August 11, 2022, the IDB announced sanctions against two Brazilian companies for corrupt and fraudulent practices. The companies (Construcap CCPS Engenharia e Comércio S.A.("Construcap") and Sociedad Anónima de Obras y Servicios Copasa do Brasil ("Copasa do Brasil")) were part of a consortium awarded a construction contract financed by the IDB to build a road in the São Paolo Metropolitan Region in Brazil. A manager of Construcap, the leading partner, made illicit payments of approximately $1 million to a public official involved in the supervision and management of the contract. According to the IDB's press release reporting the sanction, Construcap made the payments on behalf of the consortium to avoid unjustified delays in project approvals, and misrepresented the payments as project expenses. A manager of Copasa do Brasil had known of the improper solicitations and refused to pay but did not report these improper requests because he believed that the payments would not be made. The IDB debarred each company for 18 months.

Voith Hydro. On April 14, 2022, the World Bank announced sanctions against a Germany-based hydropower company, Voith Hydro Holding GmbH & Co. KG ("Voith Hydro Holding"), and its German and Chinese subsidiaries, for engaging in corrupt, fraudulent, and collusive practices in connection with projects in Pakistan and the Democratic Republic of Congo. On three occasions, Voith Hydro Holding's Chinese subsidiary made improper payments to a commercial agent to obtain favorable decisions from public officials during contract performance. Both subsidiaries also worked with a commercial agent to obtain advance access to confidential information from public officials. The Chinese subsidiary was debarred for 34 months, followed by six months of conditional debarment for collusive and corrupt practices. The German subsidiary was debarred for 15 months and conditionally non-debarred for six months for collusive and fraudulent practices. Voith Hydro Holding was conditionally non-debarred for 21 months. The sanctions reflect the companies' cooperation, voluntary restraint, and voluntary remedial actions, including an internal investigation and disciplinary action against responsible parties.

SoftTech Nigeria. On October 20, 2021, and March 30, 2022, the World Bank announced two sets of sanctions against two Nigerian nationals and SoftTech IT Solutions and Services Limited ("SoftTech"), a Nigeria-based information technology solutions company, for corrupt practices associated with a national social safety nets project in Nigeria. The individual consultants had made certain "appreciation payments" to project officials

as a reward for receiving contracts to provide cash transfers to poor and vulnerable households in Nigeria. The payments were made through SoftTech, under the supervision of its Managing Director, who was also an individual consultant. The World Bank debarred the company and its Managing Director for 50 months and 60 months, respectively. The second individual consultant was debarred for 38 months.

Construtora COESA. On March 18, 2022, the IDB announced sanctions against Construtora COESA S.A. ("Construtora COESA") and its 26 subsidiaries. Construtora COESA, a Brazilian construction company, made illicit payments of approximately $1.7 million to public officials supervising and managing IDB-financed road construction contracts in Brazil. Construtora COESA also failed to act in response to knowledge of corruption by its joint venture partner. The IDB imposed a three-year debarment against Construtora COESA and its subsidiaries.

AIM Consultants. On February 23, 2022, the World Bank announced sanctions against AIM Consultants Limited ("AIM Consultants"), a Nigeria-based consultancy firm, and its Managing Director. During the implementation of two consultancy contracts for an erosion and watershed management project in Nigeria, AIM Consultants and its Managing Director made improper payments of approximately $45,500 to project officials. The World Bank debarred AIM Consultants for 34 months followed by 18 months of conditional non-debarment. The Managing Director was personally debarred for 34 months.

Zhejiang First Hydro. On June 16, 2021, the World Bank announced sanctions against China-based Zhejiang First Hydro & Power Construction Group Co. ("Zhejiang First Hydro") in connection with a water environment project in China. The company's *de facto* agent and subcontractor paid bribes to two government officials in exchange for a contract on the project. Zhejiang First Hydro also participated in a fraudulent practice by misrepresenting its intent to mobilize resources required to implement the contract, including its available experts. The World Bank debarred Zhejiang First Hydro for two years. The reduced sanction was a reflection of its "extraordinary cooperation" and voluntary remedial actions.

Tractebel. On November 29, 2021, the IDB announced that it had imposed sanctions on Tractebel Engineering S.A. ("Tractebel"), a Belgium-based engineering company, in connection with a construction contract in Haiti. Tractebel offered paid positions to former colleagues of officials at a Haitian government agency. Tractebel's offer was made through its subcontractor following "inappropriate discussions" between the subcontractor and the officials. Tractebel also failed to disclose fees paid to agents and misrepresented the availability of its key personnel. The IDB debarred Tractebel Engineering for 46 months.

Grupo Mecánica. On March 3, 2021, the World Bank announced sanctions against Grupo Mecánica del Vuelo Sistemas, S.A.U. ("Grupo Mecánica"), a Spanish technology company, in connection with development projects in Vietnam. Certain members of Grupo Mecánica's former management team colluded with two designing consultants to gain unfair competitive advantage in the tendering process, agreed to pay an agent

commission for improperly influencing the tender process, and also failed to disclose the agent's role in drafting tender documents. The World Bank debarred Grupo Mecánica for three-and-a-half years, crediting its "extraordinary cooperation," voluntary restraint during the World Bank audit, and voluntary remedial actions.

Berky GmbH. On November 4, 2020, the World Bank announced sanctions against Berky GmbH ("Berky"), a German water maintenance machinery manufacturer, in connection with a river basin management project in Myanmar. Berky provided trips to three officials from the project management unit to improperly influence their acceptance of equipment provided under a World Bank contract. Berky also participated in fraudulent and collusive practices by failing to disclose commissions paid to a local agent, and by submitting a second bid using its subsidiary's name in order to increase its chances of winning the contract. The World Bank debarred Berky for two-and-a-half years, crediting Berky for its "extraordinary cooperation" and voluntary remedial actions.

Egis India. On June 17, 2020, the World Bank announced sanctions against Egis India Consulting Engineers Private Limited ("Egis India"), an engineering consulting firm, in connection with road projects in India. Egis India made improper payments to influence the release of contractual payments during contract implementation, and also submitted inflated invoices for reimbursable expenses (a fraudulent practice). In light of the company's voluntary disclosures, cooperation, acceptance of responsibility, and voluntary remedial actions, the World Bank imposed a two-year conditional non-debarment against Egis India.

Lessons From Sanctions Decisions Regarding Corrupt Practices

Thing of Value is Broadly Defined: In line with international anti-corruption standards and laws, MDBs recognize that a range of benefits may constitute corrupt value or benefits. Things of value include (i) paid internships and employment contracts (World Bank Decision No. 78 ¶¶ 53 – 54 (2015) *and* AfDB Decision No. 1 (2014)), (ii) vehicles (World Bank Decision No. 109 ¶ 29 (2018)), (iii) offers to employ additional personnel to assist the project implementation unit with public relations efforts and project assistance (World Bank Decision No. 111 ¶¶ 13 & 30 (2018)), and (iv) recreational trips (World Bank Decision No. 93 ¶ 69 (2017), No. 85 ¶ 25 (2016), and World Bank Uncontested Case No. 310 (2015)), including those disguised as study tours (World Bank Decision No. 108 ¶¶ 52 – 55 (2018), No. 97 ¶ 55 (2017)).

Things of value also include payments, which may be (i) one-off compensation to suppliers (World Bank Decision No. 136 ¶ 16 (2022)), (ii) consulting fees (World Bank Decision No. 130 ¶¶ 70 – 71 (2020), No. 108 ¶¶ 31 – 33, 39 (2018) and World Bank Uncontested Case No. 631 (2021)), (iii) lobbying fees (World Bank Decision No. 94 ¶ 24 (2017)), (iv) commissions (World Bank Decision No. 125 ¶ 20 (2020), No. 97 ¶ 55 (2017), No. 95 ¶ 22 (2017), No. 93 ¶ 40 (2017), and World Bank Decision Uncontested Case No. 453 (2017)), or (v) facilitation payments (World Bank Uncontested Case No. 675 (2021)). Payments may also be in cash (World Bank Decision No. 92 ¶¶ 81 & 88 (2017), No. 87 ¶ 91 (June 2016), and AfDB Decision No. 4 (2015)) or made via bank transfers (World Bank Decision No. 110 ¶ 22 (2018)).

Bribes Paid Through Intermediaries are Sanctionable. Indirect offers, transfers, or solicitations, as well as the transfer of improper value through intermediaries, are sanctionable (World Bank Decision No. 136 ¶ 27 (2022), No. 133 ¶¶ 22, 25, 28 (2021), No. 125 ¶ 21 (2020), No. 105 ¶ 19 (2017), No. 103 ¶ 22 (2017), No. 92 ¶ 79 (2017), No. 78 ¶ 53 (2015), and World Bank Uncontested Case No. 498 (2018), No. 427 (2016), No. 348 (2015), No. 310 (2015)).

Corrupt Practices Require Proof of Improper Intent. A finding of corrupt practice requires proof of corrupt intent by the offeror or soliciting party associated with influence on the procurement process or contract execution (World Bank Decision No. 136 ¶ 31 (2022), No. 133 ¶¶ 28 – 29 (2021), No. 93 ¶ 40 (2017)). However, corrupt intent is often inferred from the circumstances.

For example, if the desired influence materialized after providing a thing of value to the beneficiary, such evidence may support proof of corrupt intent (World Bank Decision No. 136 ¶ 35 (2022), No. 103 ¶ 28 (2017), No. 102 ¶ 47 (2017), No. 97 ¶ 56 (2017), No. 95 ¶ 28 (2017), No. 93 ¶ 46 (2017), No. 87 ¶ 97 (2016), No. 78 ¶ 56 (2015)). More broadly, corrupt intent can be inferred if the beneficiary of the thing of value has an actual or perceived role in taking or reviewing procurement decisions or another official role important to the

respondent, even if the beneficiary has not been officially assigned such responsibility (World Bank Decision No. 94 ¶ 27(2017)). Similarly, inference of corrupt intent may be drawn from evidence that a solicitation was directed at a party potentially interested in the procurement or selection process or a person who played a significant role, such as the project manager (World Bank Decision No. 125 ¶ 24 (2020), No. 109 ¶ 31 (2018), No. 108 ¶¶ 35, 43 (2018), No. 85 ¶¶ 30 – 35 (2016), No. 78 ¶¶ 65 – 66 (2015)).

Burden of Proof. The investigation function bears the burden of proof to present evidence showing that it was more likely or more probable than not that the respondent had corrupt intent. This includes evidence that satisfactorily demonstrates a link between corrupt intent and the thing of value (World Bank Decision No. 108 ¶¶ 57 – 58 (2018)). For instance, the facts showing that the investigation team failed to interview persons with central involvement in the underlying facts may result in a dismissal for failure to satisfactorily demonstrate such link (World Bank Decision No. 130 ¶¶ 74 – 75 (2020)). Once the investigation team meets this burden, it shifts to the respondent (World Bank Decision No. 102 ¶ 48 (2017)).

National Standards Are Not Binding. National standards or judgments are not binding on sanctions proceedings. In fact, a respondent may be liable despite a not guilty verdict in national proceedings (World Bank Decision No. 136 ¶ 36 (2022)).

Corporate Entities May Be Liable for Employees' Acts. The principle of *respondeat superior* applies to acts of employees within the course and scope of their employment, and motivated at least in part by the intent of serving their employer (World Bank Decision No. 130 ¶ 76 (2020), No. 102 ¶ 59 (2017), No. 94 ¶ 36 (2017), No. 93 ¶ 86 (2017), No. 78 ¶¶ 60 & 61 (2015)). For instance, the employer of a manager with specific responsibility to work on a bid will be deemed to have acted within the course and scope of employment (World Bank Decision No. 97 ¶ 60 (2017)).

This is especially so where the company's controls and supervision were inadequate to prevent or detect the corrupt practices (World Bank Decision No. 111 ¶ 40 (2018), No. 109 ¶ 37 (2018), No. 95 ¶ 33 (2017), No. 92 ¶ 102 (2017), No. 87 ¶ 120 (2016), No. 85 ¶ 34 (2016)). The rogue employee defense will not be available merely because the employee deliberately concealed the misconduct (World Bank Decision No. 95 ¶ 33 (2017)).

Rosenkrantz v. IDB

A recent decision in the D. C. Circuit confirmed that parties that are dissatisfied with the outcome of an MDB sanctions procedure have little recourse in U.S. courts. On June 3, 2022, the U.S. Court of Appeals for the District of Columbia Circuit in *Rosenkrantz, et al. v. IDB*, affirmed the decision of the U.S. District Court for the District of Columbia granting the IDB's motion to dismiss a suit brought against the IDB by three parties previously debarred by the IDB.

In May 2020, IDB debarred Noah Rosenkrantz and Christopher Thibedeau, along with Thibedeau's company, TTEK, Inc. (collectively, "Respondents"), for periods ranging from four to 10 years. In December 2020, Respondents sued the IDB in the U.S. District Court for the District of Columbia, alleging that the IDB had violated its own Sanctions Procedures in at least three ways. Respondents alleged that these violations also breached duties the IDB owed to the Respondents through "contractually-imposed Sanctions Procedures," violated the IDB's implied duty of good faith and fair dealing, and tortiously interfered with clauses in a separate agreement Respondents had with another company cooperating with the IDB's investigation. Although IDB and other MDBs are protected by broad immunity under the International Organizations Immunity Act of 1945 ("IOIA"), the Respondents claimed that the IDB's investigations and sanctions process was commercial activity and therefore qualified as an exception under the IOIA.

In April 2021, the district court granted the IDB's motion to dismiss on grounds that it is immune from suit under the IOIA. In June 2022, the D.C. Circuit agreed. The court rejected the Respondents' argument that the injurious conduct arose out of commercial activity because the investigation and sanctions processes are imposed on parties through contract. The court held that the alleged wrongful conduct related entirely to how the IDB was carrying out its Sanctions Procedures and had little to do with IDB-financed contracts. The court found that the IDB's application of the Sanctions Procedures is not the type of activity typically performed by commercial parties in the market but more "akin to those powers exercised by a sovereign." The court also found out that the IDB's sanctioning power as codified in its Sanctions Procedures is derived from its charter rather than any contractual relationship. Indeed, the court noted that the Sanctions Procedures permit the IDB to take disciplinary action against any party involved with an IDB-financed contract, regardless of the existence of a contractual relationship.

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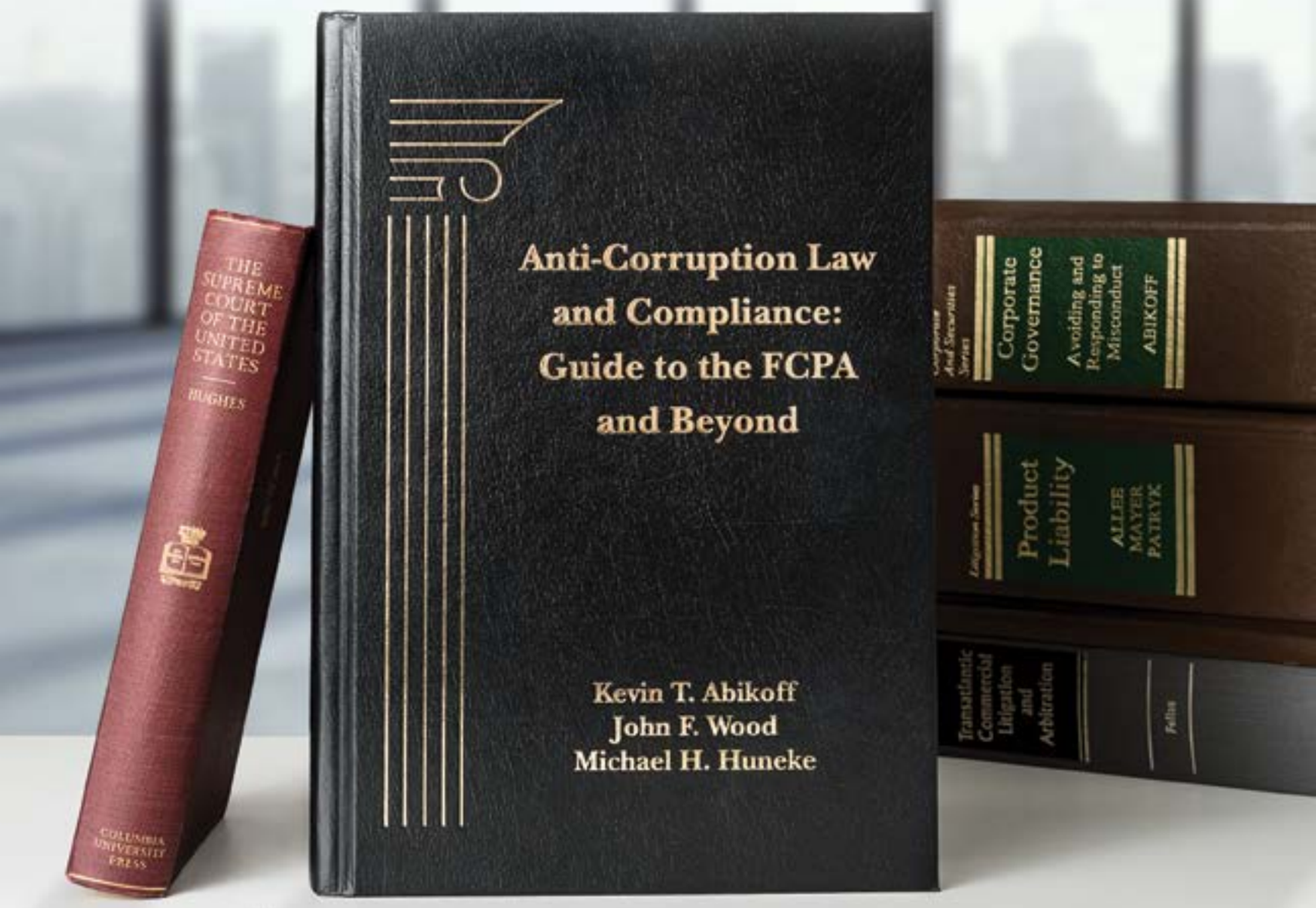

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