

THE REVIEW OF SECURITIES & COMMODITIES REGULATION

AN ANALYSIS OF CURRENT LAWS AND REGULATIONS
AFFECTING THE SECURITIES AND FUTURES INDUSTRIES

Vol. 55 No. 11

June 8, 2022

POST-COVID CORPORATE ANTI-CORRUPTION ENFORCEMENT: READY FOR LIFTOFF?

Examining pronouncements, policies, and other developments, the authors are left with little doubt that anti-corruption enforcement remains a top priority for the U.S. and its international partners. In this article, after a brief retrospective, the authors discuss certain of these developments, and then consider some of the questions that will affect anti-corruption enforcement as a result. They conclude by highlighting certain steps companies can take to be prepared for an upward trend in cross-border anti-corruption enforcement.

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Recent policy pronouncements and initiatives in the United States and a continued emphasis on expanding and exploiting international enforcement partnerships, suggest that the downturn in corporate anti-corruption enforcement in 2021 will prove to be an outlier rather than a trend. Cooperation among international enforcement bodies and the pace of their enforcement efforts are expected to increase as COVID-19 becomes endemic in many parts of the world. This increase will necessitate a renewed focus on how a variety of challenging issues are confronted by targeted companies as they conduct internal investigations and engage with domestic and international enforcement authorities.

I. A BRIEF RETROSPECTIVE: 2021 ENFORCEMENT ACTIVITY

Relative to the years before it, 2021 was a slow year for corporate anti-corruption enforcement in the U.S. Slowdowns and headwinds arose in some key overseas jurisdictions as well.

A. U.S. Enforcement in 2021

The U.S. Department of Justice (“DOJ”) brought only three Foreign Corrupt Practices Act (“FCPA”) corporate enforcement actions in 2021, each of which was

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resolved by a deferred prosecution agreement (“DPA”).¹ David Last, Chief of the DOJ Criminal Fraud Section’s FCPA Unit, acknowledged FCPA corporate enforcement totals “were not quite the same as where [they] were in the last couple of years,”² and indeed, 2021’s total fell well below comparable totals from the previous five years, each of which saw at least six FCPA-related corporate criminal resolutions.³

The SEC likewise experienced a slowdown in corporate FCPA enforcement in 2021, bringing a total of only four actions: one each in parallel to the DOJ’s three resolutions, as well as a single stand-alone resolution.⁴ Here too this total fell well short of the comparable SEC totals in the previous five years, each of which saw at least seven FCPA-related corporate enforcement actions.⁵

Finally, the Commodity Futures Trading Commission (“CFTC”) brought no FCPA-related corporate enforcement actions in 2021, despite 2019 remarks by the CFTC’s then-Director of Enforcement, James

McDonald, announcing the CFTC’s intention to enforce violations of the Commodities Exchange Act (“CEA”) involving “foreign corrupt practices,”⁶ and the CFTC’s 2020 enforcement action against a large commodities trader based on corrupt payments to foreign state-owned entities.⁷

B. Activity by Key U.S. Enforcement Partners in 2021

The United Kingdom and Brazil have been among the most active international anti-corruption enforcement jurisdictions in recent years. Not coincidentally, they also have been the most frequent partners for global corporate anti-corruption enforcement actions brought in partnership with the U.S.

Despite questions surrounding the number and nature of investigations opened and closed by the UK’s Serious Fraud Office (“SFO”) in 2021,⁸ ongoing suggestions that the SFO is insufficiently resourced to fulfill its role as the UK’s anti-corruption enforcement leader,⁹ and continued delay in any legislative response to calls for changes to the legal framework of corporate criminal

¹ See *Fraud Section Year in Review*, U.S. DEP’T OF JUST. (2021) (summarizing 2021 corporate FCPA settlements), <https://www.justice.gov/criminal-fraud/file/1472076/download> [hereinafter “Fraud Section 2021 Year in Review”].

² David Last, Assistant Chief, FCPA Unit, Fraud Section, U.S. Dep’t of Just., Keynote Address at the ACI FCPA and Anti-Corruption for the Life Sciences Industry (July 21, 2022).

³ *Fraud Section Year in Review*, U.S. DEP’T OF JUST. (2020), <https://www.justice.gov/criminal-fraud/file/1370171/download>; *Fraud Section Year in Review*, U.S. DEP’T OF JUST. (2019), <https://www.justice.gov/criminal-fraud/file/1245236/download>; *Fraud Section Year in Review*, U.S. DEP’T OF JUST. (2018), <https://www.justice.gov/criminal-fraud/file/1123566/download>; *Fraud Section Year in Review*, U.S. DEP’T OF JUST. (2017), <https://www.justice.gov/criminal-fraud/file/1026996/download>; *Fraud Section Year in Review*, U.S. DEP’T OF JUST. (2016), <https://www.justice.gov/criminal-fraud/page/file/929741/download>.

⁴ *SEC Enforcement Actions: FCPA Cases*, U.S. SECS. & EXCH. COMM’N, <https://www.sec.gov/enforce/sec-enforcement-actions-fcpa-cases> (last modified Feb. 18, 2022).

⁵ *Id.*

⁶ James M. McDonald, Director of Enforcement, CFTC, Remarks at the American Bar Association’s National Institute on White Collar Crime (Mar. 6, 2019), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald2> [hereinafter “McDonald Remarks”].

⁷ Press Release, *CFTC Orders Vitol Inc. to Pay \$95.7 Million for Corruption-Based Fraud and Attempted Manipulation* (Dec. 3, 2020), <https://www.cftc.gov/PressRoom/PressReleases/8326-20> [hereinafter “CFTC Vitol Settlement”].

⁸ See, e.g., Michael Griffiths, *Low Number of New SFO Cases Sparks Concern*, GLOBAL INVESTIGATIONS REVIEW (Dec. 16, 2021), https://globalinvestigationsreview.com/enforcement/low-number-of-new-sfo-cases-sparks-concern?utm_source=Low%2Bnumber%2Bof%2Bnew%2BSFO%2Bcases%2Bsparks%2Bconcern&utm_medium=email&utm_source=E2%80%A6.

⁹ See, e.g., Kate Beioley, *UK Fraud Agency Under Scrutiny as Probe into Unaoil Near End*, FINANCIAL TIMES (Apr. 19, 2022), <https://www.ft.com/content/b272afc7-9bda-4a1c-80e8-c560154e4253>.

liability in the UK,¹⁰ the SFO resolved several large foreign corruption cases in 2021, including through two corporate guilty pleas and three DPAs.¹¹ The SFO also has publicly announced ongoing anti-corruption investigations into several large corporations.¹²

2021's relative slowdown in anti-corruption enforcement activity in and related to Brazil follows a historic peak in such activity as a result of the "Operation Car Wash" investigations. The Operation Car Wash task force was dissolved in February 2021,¹³ and Brazil's Ministério Público Federal ("MPF"), which led Operation Car Wash, faces continued investigative hurdles due to the nature of Brazil's corporate criminal liability regime,¹⁴ as well as a recent ruling by the Brazilian Supreme Court allowing individuals to exhaust their appeal options before serving prison time (which,

because of Brazil's extensive appeals process, discourages plea negotiations).¹⁵ Moreover, the upcoming Brazilian presidential election in October 2022 may significantly affect the commitment to and resourcing of anti-corruption enforcement in Brazil in the future. Enforcement activity in and related to Brazil remains ongoing, however, including corporate resolutions and leniency agreements brought by Brazil's MPF, Controladoria-Geral da União ("CGU"), and Advogado-Geral da União ("AGU"), and several publicly reported and high-profile anti-corruption investigations being conducted by Brazilian authorities.¹⁶

The enforcement actions brought by these key international anti-corruption enforcement agencies in 2021 reflect the significant global coordination that has become a hallmark of anti-corruption investigations and corporate resolutions in recent years. For example, the DOJ's 2021 FCPA corporate enforcement actions were brought in parallel with actions by the SEC, the SFO, the MPF, the CGU, the AGU, the UK's Financial Conduct Authority, and Switzerland's Financial Market Supervisory Authority ("FINMA").¹⁷ This ongoing international cooperation and coordination in the investigation and prosecution of large-scale, cross-border bribery and corruption cases, coupled with the policy statements and initiatives discussed in the next section, indicate that it would be a mistake to infer that 2021's slowdown in the U.S. marks the beginning of a trend, that corporate anti-corruption enforcement is no longer a priority for key global enforcement agencies, or that anti-corruption enforcement scrutiny can be expected to diminish.

II. LOOKING AHEAD: POLICY PRONOUNCEMENTS AND DEVELOPMENTS FROM KEY ENFORCERS

From the Biden Administration's declaration that the fight against corruption is a core U.S. national security interest to the DOJ's "Monaco Memo" and steps taken in the U.S., the UK, and elsewhere in response to events in Ukraine, senior officials and policymakers in the U.S. and beyond are unmistakably prioritizing the prevention, detection, investigation, and prosecution of bribery and

¹⁰ See, e.g., Ali Shalchi, *Corporate Criminal Liability in England and Wales*, HOUSE OF COMMONS LIBRARY (Feb. 8, 2022), <https://researchbriefings.files.parliament.uk/documents/CBP-9027/CBP-9027.pdf>; see also, Martin Coyle, *UK Review of Corporate Criminal Liability Law Not Facing Fresh Delay*, LAW COMMISSION SAYS, MLEX (Jan. 28, 2022), <https://mlexmarketinsight.com/news/insight/uk-review-of-corporate-criminal-liability-laws-not-facing-fresh-delay-law-commission-says>.

¹¹ HC Deb (24 Mar. 2022) (711) col. 10 (UK).

¹² See generally, *Our Cases – Our policy on making information about our cases public*, SFO, <https://www.sfo.gov.uk/our-cases/> (last visited May 11, 2022).

¹³ See, e.g., *Lava Jato passa a integrar o Grupo de Ação Especial de Combate ao Crime Organizado no Paraná*, MPF (February 3, 2021), <http://www.mpf.mp.br/pr/sala-de-imprensa/noticias-pr/lava-jato-passa-a-integrar-o-gaeco-no-parana/view> (reporting that Operation Car Wash task force ceased to exist since February 1, 2021, although some of its members joined a Special Group within Brazil's Ministério Público Federal with the goal of continuing the work).

¹⁴ See, e.g., Adam Dobrik, *After Boom Years, Demand for FCPA Work in Brazil Calms*, GLOBAL INVESTIGATIONS REVIEW (Dec. 16, 2021), https://globalinvestigationsreview.com/just-anti-corruption/after-boom-years-demand-fcpa-work-in-brazil-calms?utm_source=Low%2Bnumber%2Bof%2Bnew%2BSFO%2Bcases%2Bsparks%2Bconcern&utm_medium=E2%80%A6; Isabel Franco & Glaucia Ferreira, *Brazil: Internal Investigations and Cooperation with Enforcement Authorities*, GLOBAL INVESTIGATIONS REVIEW (Oct. 15, 2021), <https://globalinvestigationsreview.com/review/the-investigations-review-of-the-americas/2022/article/brazil-internal-investigations-and-cooperation-enforcement-authorities>.

¹⁵ See, e.g., Anthony Boodle, *Top Brazil Court Ends Early Prison Release Rule that Could Free Lula*, REUTERS (Nov. 7, 2019), <https://www.reuters.com/article/us-brazil-corruption-court/top-brazil-court-ends-early-prison-rule-in-decision-that-could-free-lula-idUSKBN1XI02O>.

¹⁶ Franco & Ferreira, *supra* note 14.

¹⁷ Fraud Section 2021 Year in Review, *supra* note 1.

corruption. This is expected to lead to a more empowered, aggressive, and resourced enforcement community around the world, which will exploit and expand their cross-border partnerships to advance their investigations. A few of the more notable portents of increased cross-border corporate anti-corruption enforcement activity are highlighted below.

A. United States

i. From the White House

On June 3, 2021, President Biden issued a National Security Study Memorandum that declared the fight against corruption to be a “core United States national security interest.”¹⁸ Days later, Vice President Harris announced that the United States was creating a “first-of-its-kind” anti-corruption task force focused on Guatemala, El Salvador, and Honduras.¹⁹ And on December 6, 2021, the White House issued the first-ever United States Strategy on Countering Corruption, which “outlines a whole-of-government approach to elevating the fight against corruption” with an emphasis on better understanding and responding to the transnational challenges posed by corruption.²⁰ The Strategy is comprised of five mutually reinforcing “pillars”: (1) modernizing, coordinating, and resourcing U.S. Government efforts to fight corruption, (2) curbing illicit finance, (3) holding corrupt actors accountable, (4) preserving and strengthening the multilateral anti-corruption architecture, and (5) improving diplomatic

¹⁸ *Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest*, THE WHITE HOUSE (June 3, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/03/memorandum-on-establishing-the-fight-against-corruption-as-a-core-united-states-national-security-interest/>.

¹⁹ Vice President Harris and President Giammattei of Guatemala, Remarks at Joint Press Conference in U.S. Embassy in Guatemala (June 7, 2021), <https://gt.usembassy.gov/remarks-by-vice-president-harris-and-president-giammattei-of-guatemala-in-joint-press-conference/>; *Fact Sheet: U.S. Guatemala Cooperation*, THE WHITE HOUSE (June 7, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/07/fact-sheet-u-s-guatemala-cooperation/>.

²⁰ *Fact Sheet: U.S. Strategy on Countering Corruption*, THE WHITE HOUSE (Dec. 6, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/06/fact-sheet-u-s-strategy-on-countering-corruption/>; *United States Strategy on Countering Corruption*, THE WHITE HOUSE (Dec. 6, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf>.

engagement and leveraging foreign assistance resources to achieve anti-corruption policy goals.²¹

ii. From the DOJ

Comments in 2021 by numerous DOJ officials also signal a coming uptick in anti-corruption enforcement. For example, in June, Acting Assistant Attorney General Nicholas McQuaid cautioned against doubting the strength of the DOJ’s pipeline of FCPA investigations, and warned that the DOJ is not waiting for companies to self-report misconduct, but instead is investigating companies “as much, if not more” using proactive techniques such as data analytics.²² And in October, to support the previously announced Northern Triangle Anticorruption Task Force, the DOJ announced a new tip line to report possible corruption or movements of ill-gotten gains in that region.²³

Most prominent among DOJ pronouncements, however, was the speech by Deputy Attorney General (“DAG”) Lisa Monaco on October 28, 2021 announcing a new set of DOJ corporate criminal enforcement policies, which are set forth in what has become known as the “Monaco Memo.”²⁴ Emphasizing that “it is

²¹ *Id.* As but one example of the steps U.S. Executive Branch agencies have taken in response to this prioritization of the fight against corruption, the U.S. Treasury Department’s Financial Crimes Enforcement Network (“FinCEN”) issued an advisory in April 2022 urging “financial institutions to focus efforts on detecting the proceeds of foreign public corruption,” and listing 10 financial “red flags” to help financial institutions identify potential kleptocratic or corrupt behavior, including various red flags for transactions involving public officials. *Advisory on Kleptocracy and Foreign Public Corruption*, FINCEN ADVISORY FIN-2022-A001 (Apr. 14, 2022), <https://www.fincen.gov/sites/default/files/advisory/2022-04-14/FinCEN%20Advisory%20Corruption%20FINAL%20508.pdf>.

²² Nicholas McQuaid, Acting Assistant Attorney General, U.S. Dep’t of Just., Keynote Address at the ACI Foreign Corrupt Practices Act Conference (June 2, 2021).

²³ Press Release, U.S. Dep’t of Just., *Justice Department Anticorruption Task Force Launches New Measures to Combat Corruption in Central America* (Oct. 15, 2021), <https://www.justice.gov/opa/pr/justice-department-anticorruption-task-force-launches-new-measures-combat-corruption-central>.

²⁴ Deputy Attorney General Lisa O. Monaco, U.S. Dep’t of Just., Keynote Address at ABA’s 36th National Institute on White Collar Crime (Oct. 28, 2021), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote->

unambiguously this department's first priority in corporate criminal matters to prosecute the individuals who commit and profit from corporate malfeasance," Monaco also explained that this focus would not deter the DOJ from holding corporations accountable, noting that "[w]hile the priority remains individual accountability, where appropriate, we will not hesitate to hold companies accountable."²⁵ She announced three specific DOJ initiatives regarding corporate criminal enforcement: (1) the return to a more demanding standard for receiving cooperation credit; (2) consideration of an expanded range of prior corporate misconduct as relevant for purposes of evaluating recidivism; and (3) a greater DOJ willingness to impose independent corporate compliance monitors in connection with corporate criminal resolutions.²⁶ She also signaled reluctance to offer corporate offenders DPAs and Non-Prosecution Agreements ("NPAs"), and explained that the DOJ would be closely scrutinizing whether companies currently subject to DPAs and NPAs are complying with their obligations.²⁷ Monaco

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address-abas-36th-national-institute [hereinafter "Monaco ABA Speech"]; see also Memorandum from Lisa O. Monaco, Deputy Attorney General, U.S. Dep't of Just., on "Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies" (Oct. 28, 2021), <https://www.justice.gov/dag/page/file/1445106/download> [hereinafter "Monaco Memo"].

²⁵ Monaco ABA Speech, *supra* note 24.

²⁶ *Id.* These initiatives have been the subject of extensive commentary since they were issued, including by the authors (see, e.g., Megan Zwiebel, *The Monaco Memo: Considering All Prior Misconduct*, ANTI-CORRUPTION REPORT (Feb. 16, 2022), <https://www.anti-corruption.com/18794361/the-monaco-memo-considering-all-prior-misconduct.shtml> (quoting Albert Stieglitz); Megan Zwiebel, *The Monaco Memo: The Corporate Crime Advisory Group*, ANTI-CORRUPTION REPORT (Mar. 2, 2022), <https://www.anti-corruption.com/18841776/the-monaco-memo-the-corporate-crime-advisory-group.shtml>) (same), and thus will not be analyzed in detail here.

²⁷ Monaco ABA Speech, *supra* note 24. Indeed, this latter commitment appears already to be operationalized, as public reporting and post-Monaco Memo DOJ corporate criminal resolutions demonstrate ramped-up DOJ focus on the sufficiency of compliance with existing DPAs and NPAs. See, e.g., Dave Michaels & Patricia Kowsmann, *Justice Department Told Deutsche Bank Lender May Have Violated Criminal Settlement*, WALL STREET JOURNAL (Dec. 8, 2021), [https://www.wsj.com/articles/justice-department-told-deutsche-](https://www.wsj.com/articles/justice-department-told-deutsche-bank-lender-may-have-violated-criminal-settlement-11638993595)

bank-lender-may-have-violated-criminal-settlement-11638993595. promised that these efforts and initiatives would be supported by a surge of resources to DOJ prosecutors, and would be only the first of a number of DOJ corporate criminal enforcement policy changes.

iii. The Anti-Money Laundering Act

To meet its anti-corruption objectives, the Biden Administration has at its disposal the tools and requirements brought into force by the Anti-Money Laundering Act of 2020 ("AMLA"), which was signed into law in early 2021 as part of the National Defense Authorization Act of 2020 ("NDAA").²⁸

Foremost among these tools are (1) the requirement that "reporting companies"²⁹ disclose their beneficial ownership information to the Department of the Treasury's FinCEN³⁰ and (2) the authority for prosecutors to subpoena any foreign bank that maintains a correspondent account in the United States for records maintained outside the United States relating to a violation of U.S. criminal law.³¹ The AMLA also includes increased penalty provisions for violations of the Bank Secrecy Act, which will further increase U.S.

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²⁸ William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, H.R. 6395 (116th Cong. 2021). Division F of the National Defense Authorization Act is the AMLA.

²⁹ The definition of "reporting company" includes foreign and domestic corporations, LLCs, or any other entity created by the filing of a document with a secretary of state or registered to do business in the United States. AMLA § 6403, 31 U.S.C. § 5336(a)(11)(A). However, 23 types of entities are exempt from the definition of "reporting company" including many classes of financial institutions and larger U.S. companies, which employ more than 20 full-time employees in the U.S., had more than \$5 million in gross revenue in the past year, and operate a physical office in the United States. AMLA § 6403, 31 U.S.C. § 5336(a)(11)(B). Thus, this requirement is aimed at smaller businesses and shell companies.

³⁰ AMLA § 6403, 31 U.S.C. § 5336. While this information will not be publicly available, law enforcement and regulators will be able to request access to the information from this new registry for national security, law enforcement, and intelligence purposes. AMLA § 6403, 31 U.S.C. § 5336(c).

³¹ AMLA § 6308(a)(3)(A)(i), 31 U.S.C. § 5318(k).

prosecutors' leverage in foreign bribery and corruption investigations.³²

B. Policies/Pronouncements from Foreign Authorities

In addition to the U.S. developments highlighted above, certain international developments also portend an increase in the volume and reach of anti-corruption enforcement activity. Two notable ones are discussed below.

i. UK Economic Crime Act

On March 15, 2022, the Economic Crime (Transparency and Enforcement) Act ("Economic Crime Act") received Royal Assent in the UK. Designed to increase transparency and give law enforcement enhanced powers to combat money laundering and sanctions evasion, it includes provisions such as (1) requiring registration of overseas entities, (2) strengthening the UK's unexplained wealth order ("UWO") regime, and (3) reforming the UK's sanctions regime.³³ While many longstanding issues regarding UK corporate criminal enforcement — most notably reform of the UK's legal framework for corporate criminal liability — were not addressed by the Economic Crime Act, further legislation has been promised by the UK government,³⁴ and consideration of long-awaited changes to the UK's corporate criminal liability regime remains ongoing.³⁵

ii. Revised OECD Recommendation

In November 2021, the Organisation for Economic Cooperation and Development ("OECD") adopted a revised Recommendation of the Council for Further

Combating Bribery of Foreign Public Officials in International Business Transactions (the "Revised Recommendation").³⁶ While it remains to be seen how much of and how widely the Revised Recommendation will be adopted by OECD member countries, the Revised Recommendation includes several items that would have a significant impact on international anti-corruption enforcement, from a call to address the demand side of foreign bribery cases to the recommendation that member countries implement a system of non-trial resolutions for foreign bribery and corruption cases.³⁷ It also re-emphasizes the need to expand and enhance international cooperation among enforcement agencies, and encourages the creation and articulation of clear and consistent incentives for increased investment in corporate compliance measures.³⁸ If widely and thoroughly adopted by OECD member countries, these and other provisions in the Revised Recommendation will considerably enhance the capabilities and thus the volume and pace of cross-border bribery and corruption investigations.

C. Related Issues

While the developments highlighted above suggest the imminence of more robust U.S. and international anti-corruption investigations, questions remain regarding the ultimate shape and impact of anti-corruption enforcement in the near term.

i. DOJ's Implementation of Monaco Memo Policies

Since October 2021, the Monaco Memo's pronouncements have existed in somewhat of a vacuum. Very few corporate criminal resolutions — only one of which involves FCPA violations — have been brought by the DOJ in the intervening months, no work by the DOJ's Corporate Criminal Advisory Group has been made public, and purportedly explanatory comments from senior DOJ officials have offered little guidance beyond assurances that prosecutors implementing the Monaco Memo should be trusted to exercise their

³² AMLA § 6309, 31 U.S.C. § 5321(f), § 6313, 31 U.S.C. § 5335(d).

³³ Economic Crime (Transparency and Enforcement) Act 2022, c. 10 (UK), <https://www.legislation.gov.uk/ukpga/2022/10/contents/enacted>. See also Kwasi Kwarteng, Secretary of State, UK's Department of Business, Energy and Industrial Strategy, Oral Statement to Parliament on Corporate Transparency and Economic Measures (Feb. 28, 2022), <https://www.gov.uk/government/speeches/statement-on-corporate-transparency-and-economic-crime-measures>.

³⁴ See, e.g., *Boris Johnson pledges to strengthen UK powers to fight economic crime*, REUTERS (May 10, 2022, 7:24 AM), <https://www.reuters.com/world/uk/uk-pm-johnson-pledges-strengthen-powers-fight-economic-crime-2022-05-10/>.

³⁵ See *Corporate Criminal Liability*, LAW COMMISSION, <https://www.lawcom.gov.uk/project/corporate-criminal-liability/> (last visited May 18, 2022).

³⁶ *Recommendation of the Council for Further Combating Bribery of Foreign Public Official in International Business Transactions*, OECD (amended Nov. 25, 2021), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0378>.

³⁷ *Id.* An interesting tension appears to exist between the Revised Recommendation's seemingly favorable view of such resolutions and DAG Monaco's October 2021 remarks suggesting that the DOJ will be less willing to enter into DPAs and NPAs.

³⁸ *Id.*

discretion responsibly. The nature and extent of increased DOJ aggressiveness thus remains unclear, although early signals suggest that the Monaco Memo's promises of a greater appetite for independent compliance monitors and a greater willingness to declare companies in breach of existing DPAs and NPAs have become a reality.³⁹

ii. Impact of Compliance Program Certification Requirements

In March 2022, Assistant Attorney General ("AAG") Kenneth Polite announced that in all DOJ Criminal Division corporate resolutions — which make up the overwhelming majority of white-collar corporate criminal resolutions in any given year — prosecutors should "consider requiring both the Chief Executive Officer and the Chief Compliance Officer to certify . . . that the company's compliance program is reasonably designed and implemented to detect and prevent violations of the law . . . and is functioning effectively."⁴⁰ While AAG Polite claimed that this requirement is not intended to be "punitive in nature," but is instead "intended to empower our compliance professionals,"⁴¹ it may have unintended consequences,

including a negative impact on the hiring and retention of qualified CCOs, the nature of engagement and cooperation between companies and the DOJ, and the nature and pace of resolution discussions at the conclusion of DOJ investigations.

iii. Legal Uncertainty

Recent decisions limiting the reach of the FCPA provide additional uncertainty. For example, in *United States v. Rafoi-Bleuler*,⁴² a federal district court in Texas dismissed FCPA and Money Laundering Control Act ("MLCA") charges against a Swiss resident and citizen, holding that a foreign individual who commits no act in the United States and otherwise has little connection to the United States is beyond the reach of the FCPA. Relying on another recent case narrowing the reach of the FCPA, *United States v. Hoskins*,⁴³ the district court held that it lacked jurisdiction over defendant Rafoi-Bleuler under the FCPA and the MLCA because she was not an agent of a "domestic concern," and that the FCPA and the MLCA are unconstitutionally vague in their application to her. It remains to be seen what additional guidance federal courts, including the appellate courts with jurisdiction over the *Rafoi-Bleuler* and *Hoskins* appeals, will give concerning when a defendant may be deemed an "agent" under the FCPA. Such guidance will in turn affect the range of entities and individuals that may face FCPA enforcement scrutiny from the DOJ, which will have ramifications for companies' decision-making with regard to employment arrangements, cross-border activity, and other issues.

iv. Whither CFTC?

As discussed above, following then-CFTC Director of Enforcement James McDonald's March 2019 announcement that the CFTC would seek to bring enforcement actions relating to "foreign corrupt practices,"⁴⁴ the CFTC has only brought one such enforcement action.⁴⁵ Whether, when, and how the CFTC will re-enter the anti-corruption enforcement landscape remains unclear, but the presence or absence of another federal enforcement agency in the anti-corruption space will affect companies' investigative decision-making and regulatory and enforcement responses.

³⁹ Three of the four post-Monaco Memo corporate criminal fraud and FCPA resolutions have included the imposition of an independent corporate compliance monitor, and at least one has taken a very expansive view of the defendant company's prior conduct, considering prior enforcement actions in which the company expressly did not accept or admit liability to be part of such conduct. See, e.g., Brian Frey & Albert Stieglitz, Alston & Bird, *Filip Factor Presentations in the Wake of the Monaco Memo*, ANTI-CORRUPTION REPORT (Apr. 13, 2022), https://www.anti-corruption.com/19087476/filip-factor-presentations-in-the-wake-of-the-monaco-memo.html?utm_source=hootsuite&utm_medium=&utm_term=&utm_content=&utm_campaign=. Moreover, as previously noted, public information suggests several companies have been informed of suspected breaches of DPAs and NPAs. See, e.g., Michaels & Kowsmann, *supra* note 27.

⁴⁰ Kenneth A. Polite, Jr., Assistant Attorney General, U.S. Dep't of Just., Remarks at ACAMS 2022 Hollywood Conference (Mar. 22, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-acams-2022-hollywood> [hereinafter "Polite ACAMS Remarks"]; Kenneth A. Polite, Jr., Assistant Attorney General, U.S. Dep't of Just., Remarks at NYU Law's Program on Corporate Compliance and Enforcement (Mar. 25, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-nyu-law-s-program-corporate> [hereinafter "Polite NYU Law Remarks"].

⁴¹ Polite ACAMS Remarks, *supra* note 40.

⁴² Memorandum Opinion & Order, No. 4:17-CR-0514 (S.D. Tex. Nov. 10, 2021), Dkt. No. 255.

⁴³ 902 F.3d 69, 96-97 (2d Cir. 2018).

⁴⁴ McDonald Remarks, *supra* note 6.

⁴⁵ CFTC Vitol Settlement, *supra* note 7.

v. *The Future of the SFO*

The SFO has been under considerable pressure in recent months, largely as a result of difficulties encountered in its prosecutions of individuals associated with its Unaoil and Serco investigations. External reviews of the SFO, including one commissioned by the UK's Attorney General, remain ongoing, and scrutiny of the agency by several Parliamentary committees continues.

Weighing against criticism of the SFO are the resource limitations under which the agency labors, the fragmented nature of the UK's white-collar criminal enforcement agencies,⁴⁶ as well as the aspects of the UK legal system — from the so-called “identification principle”⁴⁷ to the nature of disclosure in UK criminal cases⁴⁸ — that present substantial impediments to replicating the pace and productivity of U.S. corporate criminal enforcement in the UK. As noted previously, the SFO has continued to advance its cases and achieve significant enforcement results despite the administrative and executive bandwidth such scrutiny consumes. The outcome of this scrutiny is far from clear but can be expected to significantly affect the nature and extent of the UK's role in international anti-corruption enforcement.

⁴⁶ See, e.g., TREASURY COMMITTEE, ECONOMIC CRIME, 2021-22, HC 145, at 20 (UK), <https://committees.parliament.uk/publications/8691/documents/88242/default/>.

⁴⁷ In contrast to relatively strict vicarious corporate liability in the U.S. for the acts of individual agents or employees, in the UK corporate criminal liability for many white-collar criminal offenses (other than “failure to prevent” offenses, such as in Section 7 of the UK Bribery Act) requires identification of a criminally culpable “directing mind and will” of the company. *Corporate Prosecutions, Legal Guidance*, UK CROWN PROSECUTION SERVICE (Oct. 12, 2021), <https://www.cps.gov.uk/legal-guidance/corporate-prosecutions>. Reform to corporate criminal liability in the UK has long been anticipated, but as of now has not been formally proposed. See, e.g., TREASURY COMMITTEE, ECONOMIC CRIME, *supra* note 46, at 59, in which the House of Commons Treasury Committee expressed disappointment “that the Government has not yet implemented reform of corporate criminal liability,” and noting that “[i]n the meantime, corporate criminals will continue to be able to escape prosecution for economic crimes.”

⁴⁸ See, e.g., JUSTICE COMMITTEE, THE WORK OF THE SERIOUS FRAUD OFFICE, 2021-22, HC 1212, at responses to questions 12, 13, 28, 45, 46, and 49, <https://committees.parliament.uk/oralevidence/10045/pdf/>.

vi. *Brazil's Commitment to Anti-Corruption*

The future of bribery and corruption enforcement in Brazil remains particularly uncertain due to the imminence of Brazil's presidential election, scheduled for October 2022. One of the front-runners in the race (alongside the incumbent, Jair Bolsonaro) is former President Luiz Inacio Lula da Silva, who was convicted and imprisoned on corruption charges as part of Operation Car Wash.⁴⁹ Recently, Lula's conviction was vacated, rendering him eligible to run once again.⁵⁰ While the candidates' intentions for Brazil's future anti-corruption enforcement efforts have not been fully fleshed out as yet, it is expected that the nature and extent of Brazil's commitment to anti-corruption enforcement may differ significantly depending on the outcome of the race.

III. ANTICIPATING AN UPWARD TREND IN ENFORCEMENT

A. *Recognize that the U.S. Goalposts Have Moved (But It's Not Clear How Far)*

The Monaco Memo adds additional layers of complexity to companies' already challenging decisions regarding whether to self-report, cooperate, and otherwise pursue the maximum benefits available under the DOJ's FCPA Corporate Enforcement Policy (“CEP”).⁵¹ While those benefits have not changed, the

⁴⁹ *Polls show Lula's first rise this year in Brazil presidential race*, REUTERS (May 11, 2022, 1:09 PM), <https://www.reuters.com/world/americas/bolsonaro-attacks-brazil-voting-system-losing-him-moderate-voters-poll-says-2022-05-11/>.

⁵⁰ See, e.g., Ricardo Brito, *Brazil's Supreme Court confirms decision to annul Lula convictions*, REUTERS (Nov. 7, 2019) <https://www.reuters.com/world/americas/brazils-supreme-court-confirms-decision-annul-lula-convictions-2021-04-15/>.

⁵¹ U.S. DEP'T OF JUST., Just. Manual § 9-47.120 (2019). Under the CEP, where a company (1) voluntarily self-discloses misconduct, (2) fully cooperates, and (3) timely and appropriately remediates, DOJ will apply “a presumption that the company will receive a declination absent aggravating circumstances involving the seriousness of the offense or the nature of the offender.” *Id.* And if a criminal resolution is warranted, the DOJ will recommend or apply a reduced fine based on the extent to which a company meets these three requirements. *Id.* Additionally, if a company meets all three requirements and has an effective compliance program in place at the time of resolution, generally an independent compliance monitor will not be imposed. *Id.* See also, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, U.S. DEP'T OF JUST.

Monaco Memo's policy changes mean that companies should lower their expectations about whether they will actually be conferred.

For example, full cooperation credit is likely to be much more difficult to obtain following the Monaco Memo, which reinstated prior DOJ guidance directing that, "to qualify for any cooperation credit, corporations must provide to the Department . . . all nonprivileged information relevant to all individuals involved in the misconduct."⁵² At a minimum, this more demanding standard requires corporations to conduct more sprawling internal investigations and produce more information and more documents to the DOJ, thereby increasing the cost and duration of investigations, and exposing companies to a greater risk of further investigative scrutiny.

Additional factors also are likely to reduce the benefits companies can hope to obtain in exchange for cooperating with the DOJ. For example, the DOJ's expanded view of prior misconduct — which apparently includes even matters where the company has not accepted liability⁵³ — means that the "aggravating factor" of recidivism⁵⁴ is more likely to increase the severity of corporate resolutions, even where a company may have voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated. The likelihood of such increased severity is increased further if self-disclosure has not occurred, as reflected recently in remarks by the U.S. Attorney for the Southern District of New York, who stated that "[c]ooperation, even outstanding cooperation, is not the same thing as self-reporting, and cooperation after a fraud has already been caught by the government is not a get-out-of-jail free

card."⁵⁵ Further increasing the likelihood of more severe and punitive outcomes is the DOJ's apparent belief that DPAs and NPAs should be offered less frequently as a general matter,⁵⁶ as well as the DOJ's increased appetite for imposing independent compliance monitors as part of its corporate criminal resolutions, a clear limit to which has not yet been established following the Monaco Memo.⁵⁷

B. Recognize the Risks of Cross-Border Investigations and Multi-Jurisdictional Scrutiny

International anti-corruption enforcement agencies increasingly partner with one another to investigate and prosecute misconduct, which means companies facing investigative scrutiny from one agency or jurisdiction should anticipate incoming investigative demands from other jurisdictions. While such multi-jurisdictional investigative scrutiny is never welcome, if managed adroitly it presents an opportunity to "globally" resolve a company's legal liability, thereby achieving a degree of closure and finality that sequential investigations and resolutions do not. In order to obtain such benefits, however, companies must successfully respond to the many challenges of multi-jurisdictional scrutiny, such as gathering evidence in a way that (1) maximizes the company's ability to cooperate with multiple agencies (should it choose to do so) while not foregoing the protection afforded by privileges and protections in

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and U.S. SECS. & EXCH. COMM'N (2d ed. July 2020), <https://www.justice.gov/criminal-fraud/file/1292051/download>.

⁵² Memorandum from Deputy Attorney General Sally Quillian Yates, U.S. Dep't of Just., on "Individual Accountability for Corporate Wrongdoing" (Sept. 9, 2015), <https://www.justice.gov/archives/dag/file/769036/download>.

⁵³ See, e.g., Frey & Stieglitz, *supra* note 39.

⁵⁴ Aggravating circumstances that may warrant a criminal resolution include, but are not limited to, involvement by executive management of the company in the misconduct; a significant profit to the company from the misconduct; pervasiveness of the misconduct within the company; and criminal recidivism. U.S. DEP'T OF JUST., Just. Manual § 9-47.120 (2019).

⁵⁵ Bob Van Voris, *Allianz Fund Collapse Ends in Guilty Plea, \$5.8 Billion Deal (1)*, BLOOMBERG LAW (May 17, 2022, 7:07 PM), https://news.bloomberglaw.com/white-collar-and-criminal-law/allianz-global-us-to-plead-guilty-to-fraud-after-7-billion-loss?usertype=External&bwid=00000180-d234-d526-abdd-d3bfbdf00003&qid=7294203&cti=LFVL&uc=1320009599&et=NEWSLETTER&emc=wcnw_n1%3A4&source=newsletter&item=read-text®ion=digest&access-ticket=eyJjdHh0IjoiV0NOVYIsImklIjoiMDAwMDAxODAtZDZGR3ZZNGI4YllacVJrRzBCZ2tTd21rVVFFPSIsInRpbWUiOiIxNjUyODcwNzI1IiwidXVpZCI6InN4dXV6em5VTEQ5Q2ltTmFkbmMyNUE9PWVDRncvUnBORS9seDNLbTgwUmKxZmc9PSIsInYiOiIxIn0%3D.

⁵⁶ Monaco ABA Speech, *supra* note 24.

⁵⁷ As previously noted, three of the four corporate fraud and FCPA criminal resolutions brought since the Monaco Memo have included independent compliance monitors. This is despite the fact that the internal compliance programs at the three defendant companies appear (from public documents) to differ significantly. Frey and Stieglitz, *supra* note 39. The fourth criminal resolution involved an entity which reportedly faces a 10-year ban on certain activities and is about to be sold in whole or in part. Van Voris, *supra* note 54.

requesting jurisdictions; (2) does not violate the data privacy laws of jurisdictions in which information is maintained; and (3) respects, but is not obstructed by, blocking statutes in jurisdictions from which data or other information is to be obtained. Companies must also seek to de-conflict investigators' demands so that steps taken to satisfy one agency are also credited by others, and so that any difficulty in reconciling investigators' demands is not viewed by any investigators as detrimental to the company. Successful navigation of these and other related challenges is possible, but only if they are clearly identified at the outset of investigations, planned for strategically when designing investigations, and managed carefully and thoughtfully throughout those investigations and in any related engagement with enforcement authorities.

C. Coordinate Cooperation and Resolutions Across Enforcement Agencies

The most significant benefit of a “global” resolution of multiple (and especially multi-jurisdictional) investigations is the ability to avoid duplicative punishment. In 2018, the DOJ promulgated what has become known as its “anti-piling-on” policy,⁵⁸ which directs DOJ prosecutors to “endeavor, as appropriate, to coordinate with and consider the amount of fines, penalties, and/or forfeiture paid to other federal, state, local, or foreign enforcement authorities that are seeking to resolve a case with a company for the same misconduct.”⁵⁹ The DOJ frequently credits fines and penalties paid to its enforcement partners when participating in global resolutions,⁶⁰ and twice since promulgation of the policy — in 2018⁶¹ and 2022⁶² — the DOJ has publicly deferred to its international

partners to proceed with investigative or enforcement action against companies despite the DOJ having found credible evidence of FCPA violations. Moreover, on at least one occasion, the DOJ explicitly *refused* to credit payments made by a company to resolve an SEC investigation where the defendant company “did not seek to coordinate a parallel resolution” of the DOJ’s related investigation.⁶³

For companies facing multi-jurisdictional investigative scrutiny, the message is clear: failure to coordinate cooperation during, and resolution of, parallel investigations can significantly and unnecessarily increase the overall cost of closure and finality. Here again, ensuring the company deftly navigates sometimes competing investigative demands and proactively manages resolution discussions is critical, especially with multi-jurisdictional enforcement poised to increase.

IV. CONCLUSION

Pronouncements, policies, and other developments leave little doubt that anti-corruption enforcement is a top priority for the U.S. and its international partners. Empowered by new policies, strategies, and tools, investigators and prosecutors are equipped to subject more companies to scrutiny and are likely to impose more severe terms when resolving investigations. Companies will maximize their chances for favorable outcomes where they understand and monitor these new and evolving risks, calibrate the nature and extent of their engagement with enforcement agencies in a way that takes account of these revised and reemphasized priorities, and prepare themselves for what is likely to be a far busier and more crowded enforcement landscape than ever before. ■

⁵⁸ Memorandum from Rod J. Rosenstein, Deputy Attorney General, U.S. Dep’t of Just., to Heads of Department Components and U.S. Attorneys, on “Policy on Coordination of Corporate Resolution Penalties” (May 9, 2018), <https://www.justice.gov/opa/speech/file/1061186/download>.

⁵⁹ U.S. DEP’T OF JUST., Just. Manual §1-12.100 (2018).

⁶⁰ See, e.g., Fraud Section 2021 Year in Review, *supra* note 1.

⁶¹ Letter from Daniel S. Kahn, Deputy Chief, Fraud Section, to Matthew Reinhard, Miller and Chevalier Chartered regarding Guralp Systems Limited (Aug. 20, 2018), <https://www.justice.gov/criminal-fraud/page/file/1088621/download>.

⁶² Letter from Joseph S. Beamsterboer, Acting Chief, Fraud Section, et. al. to F. Joseph Warin, Gibson, Dunn & Crutcher LLP regarding Jardine Lloyd Thompson Group Holdings Ltd. (Mar. 18, 2022), <https://www.justice.gov/criminal-fraud/file/1486266/download>.

⁶³ Press Release, U.S. Dep’t of Just., *Beam Suntory Inc. Agrees to Pay Over \$19 Million to Resolve Criminal Foreign Bribery Case* (Oct. 27, 2020), <https://www.justice.gov/opa/pr/beam-suntory-inc-agrees-pay-over-19-million-resolve-criminal-foreign-bribery-case>.

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