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WHITE PAPER

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FCPA 2023 Year In Review

Foreign Corrupt Practices Act ("FCPA") enforcement continues to slowly rebound from pre-pandemic levels. In 2023, the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC") resolved 13 corporate FCPA matters for $733 million in penalties, disgorgement, and interest. Meanwhile, the DOJ announced nine FCPA indictments against individuals and, for the third year in a row, the SEC announced no individual FCPA enforcement actions. DOJ and SEC leadership attributed their enforcement statistics to the natural ebb and flow of FCPA cases and the lingering effects of the COVID-19 pandemic, and not due to any lack of focus on FCPA enforcement. Indeed, the Biden administration continues to prioritize anticorruption enforcement, reiterating that fighting corruption is a core national security interest.

This *White Paper* reviews 2023 FCPA enforcement, the DOJ's enhanced incentives for companies to voluntarily self-disclose FCPA issues, and other changes to corporate criminal enforcement policies and guidance on corporate compliance programs.

THERE WERE FIVE KEY HIGHLIGHTS FROM FCPA ENFORCEMENT IN 2023.

1

The number of corporate FCPA resolutions rebounded to pre-pandemic levels, but the total amount of fines imposed has yet to do the same. In 2023, the DOJ and the SEC resolved a total of thirteen corporate FCPA cases, accounting for $733 million in penalties, disgorgement, and interest. Individual FCPA enforcement activity continues to lag pre-pandemic levels. The DOJ announced only nine indictments of individuals and no plea agreements under the FCPA, and SEC resolved no FCPA actions with individuals for the third year in a row.

2

The slow rebound in FCPA enforcement activity can be attributed to the lingering impact of the COVID-19 pandemic and what may be a general reluctance on the part of companies to voluntarily self-disclose to the DOJ and the SEC. Moving forward, we anticipate that FCPA enforcement statistics will continue to rebound, especially given the backlog of over 90 publicly announced DOJ and/or SEC FCPA investigations in the pipeline.

3

The DOJ announced important revisions to its corporate enforcement policies. Most significantly, in January, the Criminal Division announced a new and narrow path for companies with what the DOJ considers "aggravating circumstances" to receive a declination of prosecution and decrease in fine amounts.

4

The DOJ announced additional guidance on corporate compliance programs regarding the use of personal devices and third-party messaging platforms to conduct company business, how companies can use compensation incentives and clawbacks to incentivize compliant behavior, and a focus on the use of data analytics. These steps intend to further the DOJ's goal of elevating standards for corporate compliance programs.

5

In other news, the DOJ announced an international anti-bribery initiative and issued two new FCPA opinions, President Biden signed a law addressing the demand side of bribery, and the SEC issued a record-breaking $279 million whistleblower award in an FCPA case.

CONTINUED REBOUND IN POST-PANDEMIC FCPA ENFORCEMENT

In 2023, President Biden reiterated that fighting corruption is a core national security interest for his administration, and DOJ and SEC enforcement leadership continued to stress the importance of corporate and individual FCPA enforcement. As outlined below, the number of resolved corporate FCPA enforcement matters rebounded to pre-pandemic levels, while the total fine amount still lags. As they have done in prior years, DOJ and SEC officials stated that there is a healthy backlog of FCPA investigations and predicted "a lot more" enforcement activity in 2024 and beyond, especially given that FCPA cases often take several years to investigate and resolve.

DOJ AND SEC RESOLVED 13 CORPORATE FCPA CASES AND COLLECTED $733 MILLION IN FINES AND PENALTIES IN 2023

In 2023, the DOJ and the SEC resolved a total of 13 corporate FCPA cases, totaling $733 million in penalties, disgorgement, and interest, when considering credits and offsets in one related foreign enforcement action and one company's inability to pay in another enforcement action. The DOJ and the SEC coordinated only two corporate resolutions with each other. The 13 corporate cases are on par with pre-pandemic levels. The total monetary penalties of $733 million assessed in 2023, however, fall far short of the $2.65 billion and $2.78 billion collected by the DOJ and the SEC in 2019 and 2020, respectively.

Meanwhile, coordinated FCPA resolutions with regulators outside the United States dropped from prior years. In 2023, the DOJ and the SEC coordinated only two resolutions with authorities outside the United States. In August, the DOJ and the SEC, in coordination with authorities in Colombia, resolved an FCPA matter resulting in an additional $20.3 million in fines and penalties paid to Colombian authorities, and in mid-December, the DOJ separately agreed to credit a criminal penalty up to a maximum of $22.4 million paid by the resolving company to authorities in Brazil for violations of Brazilian law related to the same conduct. The Brazil investigation is ongoing.

FIGURE 1: Total Fines and Penalties Collected in FCPA Corporate Actions and in Actions Involving a Coordinated Global Anticorruption Resolution, 2019–2023

Corporate Actions	2019		2020		2021		2022		2023	
	#	US$	#	US$	#	US$	#	US$	#	US$
DOJ/SEC Total	14	$2.65B	12	$2.78B	4	$259.0M	8	$877.9M	13	$733.3M
Non-U.S. Total (Involving a Coordinated Non-U.S. Resolution)	2	$0.37B	4	$6.31B	2	$359.6M	4	$348.0M	2	$42.7M
Global Total		**$3.02B**		**$9.09B**		**$618.6M**		**$1.23B**		**$776.0M**
Resolving Authorities	Brazil U.S.		Brazil France Hong Kong Singapore UK U.S.		Brazil Switz. UK U.S.		Brazil Germany South Africa Switz. UK		Brazil Colombia	

Individual FCPA Enforcement Statistics Continue to Lag Pre-Pandemic Enforcement Levels

In 2023, DOJ and SEC officials emphasized individual accountability and encouraged companies to provide information about the conduct of executives and employees to qualify for full cooperation credit. However, individual FCPA enforcement statistics continue to lag pre-pandemic enforcement levels. In 2023, the DOJ announced nine FCPA indictments involving individuals, four of which related to a corporate FCPA resolution. Meanwhile, the SEC announced zero FCPA individual actions. In fact, the SEC has not brought an FCPA matter against an individual since April 2020. These statistics nearly equal 2022's enforcement activity against individuals and reflect a trend of a drop in individual FCPA enforcement since the onset of the pandemic. By comparison, in 2019, the DOJ announced 25 indictments and pleas, and the SEC announced six enforcement actions against individuals.

FIGURE 2: DOJ and SEC Individual FCPA Enforcement Actions, 2019–2023

Type of Action	2019	2020	2021	2022	2023
Indictments	16	7	6	6	9
Pleas	9	8	3	1	0
DOJ – Total	25	15	9	7	9
SEC – Total	6	1	0	0	0

FIGURE 3: DOJ Individual FCPA Indictments, 2023

	Individual	Date	Description
1	Glenn Oztemel	Feb. 17 (indictment)	U.S.-based oil trader at Freepoint (Glenn Oztemel), his brother who worked at another company (Gary Oztemel), and a Brazil-based intermediary (Innecco) indicted for their alleged roles in a scheme to pay bribes to Brazilian officials to win contracts with Brazil's state-owned and state-controlled energy company, Petróleo Brasileiro S.A. (Petrobras). Freepoint resolved an FCPA enforcement action with the DOJ in December 2023 related to payments to Petrobras officials in Brazil.
2	Eduardo Innecco	Feb. 17 (indictment)	
3	Gary Oztemel	Aug. 29 (indictment)	
4	Javier Alejandro Aguilar Morales	Aug. 3 (indictment)	Former oil and commodities trader indicted for his alleged role in a scheme to make improper payments to Mexican government officials. Morales's former employer resolved an FCPA enforcement action with the DOJ in December 2020 related to improper payments to officials in Brazil, Ecuador, and Mexico.
5	Samuel Bankman-Fried	Mar. 28 (superseding indictment)	Former CEO of cryptocurrency exchange indicted for his alleged improper transfer of millions in cryptocurrency to Chinese officials to unfreeze certain cryptocurrency trading accounts that collectively contained approximately $1 billion in cryptocurrency.
6	Orlando Alfonso Contreras Saab	Sept. 11 (criminal information)	Criminal information filed against a Venezuelan national for allegedly conspiring with Colombian and Venezuelan individuals to make improper payments to Venezuelan officials to obtain contracts to distribute food in Venezuela.
7	Amadou Kane Diallo	Sept. 20 (superseding indictment)	Senegalese national indicted for allegedly making improper payments to Senegalese government officials to secure a land grant from the Senegal government.
8	Carl Alan Zaglin	Dec. 20 (unsealed indictment)	A Georgia businessman (Zaglin) and a former Florida resident (Marchena) indicted for their alleged participation in a scheme to pay and conceal bribes to Honduran government officials to secure contracts to provide goods to the Honduran National Police.
9	Aldo Nestor Marchena	Dec. 20 (unsealed indictment)	

Several individuals were sentenced for FCPA-related offenses in 2023. In May, a former banker was sentenced to 10 years in prison after he was convicted by a jury in April 2022 for conspiring to launder billions of dollars from a Malaysian development fund and conspiring to pay more than $1.6 billion in bribes to Malaysian government officials. Four individuals who previously pled guilty to FCPA charges were also sentenced.

- In January, a federal court sentenced a former chief executive officer and chief operating officer of a European oil company to one year in prison and a fine of $1.5 million, following a guilty plea to one count of conspiracy to violate the FCPA.
- In May, a federal court sentenced a former non-governmental organization president to three and a half years in prison, following a guilty plea to one count of conspiracy to violate the FCPA.
- In August, a federal court sentenced a former Petróleos de Venezuela SA ("PDVSA") director to one year and a day in prison and a fine of $472,000, following a guilty plea to one count of conspiracy to violate the FCPA.
- In September, a federal court sentenced a Canadian cofounder of an energy startup to three years in prison, following a guilty plea to one count of conspiracy to violate the FCPA related to a bribery scheme involving former Chadian diplomats. Notably, the DOJ recommended a

shorter sentence because the Canadian proactively cooperated with the DOJ by sharing information regarding his co-conspirators. The judge, however, stated that the DOJ's recommended sentence was too lenient given the scale of the bribery and opted for a three-year sentence to help deter future crimes.

Since the onset of the pandemic in the United States in early 2020 and through the end of 2023, the DOJ has tried only one FCPA case. According to the chief of the FCPA unit, in 2024, there will be an "active and full trial docket" of cases under the FCPA, anti-money laundering laws, and other anticorruption laws.

Meanwhile, the DOJ filed indictments against two foreign government officials who were the alleged recipients of corrupt payments under U.S. anti-money laundering laws, while the alleged payers were charged under the FCPA.

As another tool to combat foreign corruption, the Office of Foreign Assets Control ("OFAC") continued to sanction individuals and entities under the Global Magnitsky Act to discourage "the transfer or the facilitation of the transfer of the proceeds of corruption." Last year, OFAC issued sanctions against dozens of individuals and entities tied to corruption or human rights abuses.

POTENTIAL REASONS FOR LAG IN FCPA ENFORCEMENT ACTIVITY

The lack of a full rebound in FCPA enforcement statistics as compared to pre-pandemic levels is likely the result of a few factors, most notably the medium-term impact of the COVID-19 pandemic.

- **Continued Impact of the COVID-19 Pandemic on FCPA Enforcement.** DOJ and SEC officials acknowledged the continued impact of the COVID-19 pandemic on FCPA enforcement; in particular, the pandemic has impacted the agencies' ability to conduct in-person FCPA investigations, coordinate with foreign counterparts, and meet with company and individual counsel. Since FCPA cases typically take years to investigate, the impact of the pandemic on enforcement may continue to linger for some time.
- **Fewer Self-Reports to DOJ and SEC.** Notwithstanding DOJ and SEC efforts to encourage companies to voluntarily self-disclose potential misconduct, companies have questioned the benefits of self-disclosure, which has potentially led to fewer reports of potential FCPA violations to the DOJ and the SEC. Still, the DOJ's enhanced incentives programs for companies to self-disclose FCPA violations, as summarized in this *White Paper*, may lead to increased incidence of self-disclosures moving forward.
- **DOJ and SEC Focus on Other Issues.** Another potential reason for the recent decline in FCPA resolutions is the DOJ and SEC focus on other enforcement priorities. In October, the deputy attorney general (the "DAG") stated that the rapid expansion of national security-related corporate crime has led to the biggest shift in corporate criminal enforcement during her time in government. This expansion covers a variety of criminal and regulatory violations in addition to international bribery, including sanctions violations, export controls violations, money laundering, terror financing, and crypto-related crime. The DOJ plans to look for FCPA violations connected to these violations. Meanwhile, the SEC is focusing on other emerging issues, such as cryptocurrency and cases based on environmental, social, and governance ("ESG") matters. Indeed, in its enforcement statistics for its fiscal year ending September 30, 2023, the SEC's FCPA enforcement amounted to only 2% of the SEC's total new enforcement actions for the year.

Nevertheless, the DOJ and the SEC have made clear that they remain committed to enforcing the FCPA. The chief of the SEC's FCPA Unit acknowledged the SEC's relatively low enforcement numbers but attributed the trend to the "ebb and flow" of new cases, rather than any drop in actual enforcement activity. We anticipate that FCPA enforcement statistics will continue to rebound in the coming years, especially given the backlog of more than 90 publicly announced DOJ and/or SEC FCPA investigations in the pipeline, and the DOJ's and the SEC's shared objective of strengthening partnerships with their anticorruption enforcement counterparts around the world.

DOJ ANNOUNCED MAJOR UPDATES TO CORPORATE CRIMINAL ENFORCEMENT POLICIES

The DOJ continued to take steps to revise corporate enforcement policies to incentivize companies to voluntarily self-disclose, cooperate, remediate, and implement effective compliance programs.

Criminal Division Announced Revised Corporate Enforcement Policy

In January, the assistant attorney general for the Criminal Division (the "AAG") announced significant revisions to the Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy, which is set forth in Section 9-47.120 of the Justice Manual (the "Corporate Enforcement Policy"). The revised Corporate Enforcement Policy is an outgrowth of the Criminal Division's prior FCPA Corporate Enforcement Policy, which outlined the Division's approach in FCPA cases involving companies that self-disclose wrongdoing and cooperate with investigations. The requirements for companies to receive full cooperation credit under the revised Corporate Enforcement Policy are stringent, and DOJ prosecutors retain significant discretion to determine the form and size of any eventual resolution with the agency.

The FCPA Corporate Enforcement Policy, adopted in 2017, created a presumption that, absent any "aggravating factors," the DOJ will decline to take any enforcement action against a company that: (i) voluntarily self-discloses criminal conduct to the DOJ; (ii) fully cooperates with the DOJ's investigation; and (iii) takes timely and appropriate remediation steps. "Aggravating factors" include, but are not limited to, "involvement by executive management of the company in the misconduct, significant profit to the company from the misconduct, or pervasive or egregious misconduct."

Like the previous FCPA Corporate Enforcement Policy, if there are no "aggravating factors" present, such as the involvement of senior management in the misconduct at issue, a company can qualify for a presumption of a declination if it voluntarily self-disclosed the misconduct, fully cooperated, and timely and appropriately remediated the misconduct. This option is available not only for FCPA cases, but for all cases handled by the Criminal Division.

Moving forward, under the revised policy, a company with "aggravating factors" that voluntarily self-discloses corporate criminal conduct, including potential FCPA violations, may nevertheless qualify for a declination of prosecution if the company meets three more stringent requirements:

1. The voluntary self-disclosure was made immediately upon the company becoming aware of the allegation of misconduct;
2. At the time of the misconduct and the disclosure, the company had an effective compliance program and system of internal accounting controls that enabled the identification of the misconduct and led to the company's voluntary self-disclosure; and
3. The company provided extraordinary cooperation with the DOJ's investigation and undertook extraordinary remediation.

While these changes are intended to provide an enhanced incentive for companies to self-disclose misconduct and cooperate, it remains to be seen whether they will have this effect in practice. What qualifies as truly extraordinary cooperation and remediation will vary depending on each case and will be subject to prosecutorial discretion. In January, the AAG "note[d] some concepts—immediacy, consistency, degree, and impact—that apply to cooperation by both individuals and corporations . . . [and] will help to inform [the DOJ's] approach" in making these assessments under the Revised Policy. Addressing this ambiguity in March, the AAG noted that for "extraordinary" cooperation and remediation, companies must go "above and beyond." With respect to cooperation, this includes voluntarily making foreign-based employees available for interviews in the United States, producing relevant documents outside the country that do not implicate foreign data privacy laws, and collecting, analyzing, translating, and organizing information from abroad. And, with respect to remediation, this includes conducting root-cause analyses and taking action to prevent the misconduct from occurring, even in the face of substantial cost or pressure from the business, and holding wrongdoers accountable, whether through termination, suspension, or recoupment of compensation.

As for what constitutes an "immediate" self-disclosure, the DOJ attempted to provide additional clarity. In March, the then-chief of the DOJ's FCPA Unit explained that a company should self-disclose suspected misconduct in a "reasonably prompt" manner. The chief contrasted one company—which did not qualify for a presumption of declination because it took nine months to self-disclose to the DOJ after it had substantiated the allegation—with a separate company that did qualify for a presumption of declination because it took only three months to self-disclose to the DOJ after learning of the potential misconduct and less than a day after substantiating that misconduct.

Earlier, in March, the head of the DOJ Fraud Section's Corporate Enforcement, Compliance & Policy Unit stated his "personal opinion" that in order to qualify for a presumption of declination, a company with aggravating factors should take only a "matter of weeks" as opposed to several months to self-disclose. He acknowledged that the DOJ is aware that companies may need time to hire and consult with lawyers and their boards before disclosure. It remains to be seen how the DOJ will interpret these requirements under the Revised Corporate Enforcement Policy given various fact scenarios.

Even if a company does not meet the requirements for a presumption of declination, the Revised Corporate Enforcement Policy provides significant potential benefits in other contexts.

- If a criminal resolution is warranted for a company that voluntarily self-discloses misconduct, fully cooperates, and timely and appropriately remediates, the Criminal Division generally will not require a guilty plea and will apply a fine reduction of between 50% and 75% off the low end of the applicable U.S. Sentencing Guidelines ("U.S.S.G.") penalty range—up from a previous maximum reduction of 50%. The AAG emphasized that in all cases, prosecutors have discretion to determine the starting point within the Guidelines range—including in cases where the company has a history of prior misconduct. In such cases, the reduction generally will not be from the low end of the range.
- For companies that do not voluntarily self-disclose misconduct but nevertheless fully cooperate and timely and appropriately remediate, the Criminal Division will recommend up to a 50% reduction off the low end of the U.S.S.G. fine range—twice the maximum amount of 25% available under the previous version of the Corporate Enforcement Policy. As in self-disclosure cases, where a company has a history of prior wrongdoing, the reduction will likely not be off the low end of the range.

FIGURE 4: A Comparison of the FCPA Corporate Enforcement Policy and the Corporate Enforcement Policy

	FCPA Corporate Enforcement Policy (Nov. 2017–Jan. 2023)	Corporate Enforcement Policy (Jan. 2023–Present)
Scope	• Applied to all nationwide FCPA cases	• Applies to nationwide FCPA cases and all matters handled by the Criminal Division
Voluntary Self-Report, Full Cooperation, and Remediation and One or More "Aggravating Factors"	• No presumption of declination	• The DOJ may determine that a declination is appropriate if the company demonstrates it: – Made an "immediate" voluntary self-disclosure to the DOJ; – Had an effective compliance program and system of internal accounting controls at the time of misconduct that detected the suspected wrongdoing; – Provided "extraordinary" cooperation; and – Undertook "extraordinary" remediation

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	FCPA Corporate Enforcement Policy (Nov. 2017–Jan. 2023)	Corporate Enforcement Policy (Jan. 2023–Present)
Voluntary Self-Report, Full Cooperation, and Remediation and No "Aggravating Factors"	• Presumption of declination • In the event presumption of declination is overcome, 50% off the low end of the U.S.S.G. fine range • Generally will not require a corporate monitor if the company had implemented an effective compliance program	• Presumption of declination • In the event presumption of declination is overcome, 50%–75% off the low end of the U.S.S.G. fine range • Generally will not require a corporate monitor if the company had implemented an effective compliance program
Full Cooperation and Remediation but No Voluntary Self-Report (With or Without "Aggravating Factors")	• Up to 25% off the low end of the U.S.S.G. fine range (except in the case of a criminal recidivist)	• Up to 50% off the low end of the U.S.S.G. fine range (except in the case of a criminal recidivist)

The Corporate Enforcement Policy provides significant incentives for companies to consider when deciding whether to self-disclose conduct that may violate the FCPA. However, it is still the case that companies will face uncertainty in various respects in connection with their decision-making processes. These include, but are not limited to, the broad range of interpretation afforded to DOJ prosecutors under the Corporate Enforcement Policy and potential collateral consequences, such as the prospect of a parallel investigation by the SEC or a foreign regulator, civil litigation, reputational harm, and administrative sanctions (e.g., suspension or debarment).

Last year, the DOJ issued FCPA-related declinations to two companies pursuant to the Corporate Enforcement Policy. To date, 19 FCPA declinations have been issued under this policy and the predecessor FCPA Corporate Enforcement Policy.

FIGURE 5: DOJ Declinations Pursuant to the Corporate Enforcement Policy, 2023

	Company	Date	Disgorgement	Description
1	Corsa Coal Corp. (U.S.: Energy)	Mar. 8	$1.2M (based on inability to pay a total of $32.7M)	Improper payments to Egyptian government officials to obtain and retain lucrative contracts to supply coal to an Egyptian state-owned and -controlled coke company.
2	Lifecore Biomedical, Inc. (U.S.: Health Care)	Nov. 16	$406.5K	Improper payments to one or more Mexican government officials, by Lifecore's former U.S. subsidiary, paid both prior to and after Lifecore's acquisition, to secure a permit and prepare fraudulent manifests.

DOJ Announced Safe Harbor Policy for Voluntary Self-Disclosures in Mergers and Acquisitions

In October, the DAG delivered remarks announcing a new Mergers & Acquisitions ("M&A") Safe Harbor Policy (the "Safe Harbor Policy"), which applies across all DOJ divisions. The Safe Harbor Policy builds upon a similar policy previously applied by the DOJ's Criminal Division in FCPA cases under the former FCPA Corporate Enforcement Policy.

Under the Safe Harbor Policy, to receive a presumption of a declination from the DOJ, an acquiring company in a "bona fide, arm's-length" M&A transaction must:

- Voluntarily self-disclose the suspected misconduct at the acquired entity within six months of the date the deal closed, whether the conduct is discovered pre- or post-acquisition;
- Cooperate with any ensuing DOJ investigation;

- Fully remediate the misconduct within one year from the closing date; and
- Pay any applicable restitution or disgorgement.

The DAG noted that the post-closing timelines for self-disclosure (six months) and remediation (one year) "are subject to a reasonableness analysis," reflecting the DOJ's understanding that "deals differ and not every transaction is the same." As a result, the deadlines could be extended by prosecutors in certain cases. But, as the DAG noted, the converse is also true where there is a threat to national security or ongoing or imminent harm; in these circumstances, companies that have discovered wrongdoing cannot wait for the deadline to self-disclose. Nevertheless, as the acting assistant attorney general for the Criminal Division ("Acting AAG") stated in follow-up remarks in October, "while early reporting is best, self-reporting late is always better than never," and companies that miss the deadline may still be eligible for "significant benefits," such as penalty reductions and the form of the resolution.

Under the Safe Harbor Policy, the presence of aggravating factors at the acquired entity, such as involvement by senior management, does not impact the acquiring company's ability to receive a declination; those aggravating factors may, however, preclude the acquired entity from receiving

otherwise applicable voluntary self-disclosure benefits. The Safe Harbor Policy does not apply to misconduct that was otherwise required to be disclosed (e.g., under a non-prosecution or deferred prosecution agreement) or to misconduct already known by the DOJ. Additionally, the DAG noted that the Safe Harbor Policy will not impact the DOJ's civil merger enforcement.

As with other DOJ policies incentivizing voluntary self-disclosure and remediation, the path to receiving the Safe Harbor Policy's full benefits is a narrow one that leaves prosecutors with significant discretion. Thus, companies considering whether to self-disclose under the Safe Harbor Policy must carefully weigh the pros and cons of self-disclosure.

DOJ ANNOUNCED CHANGES CONCERNING ITS EVALUATION OF CORPORATE COMPLIANCE PROGRAMS AND STANDARDS FOR IMPOSING COMPLIANCE MONITORS

In March, the DOJ announced enhanced compliance programs guidance (the "Compliance Guidance"). Under DOJ practice, all DOJ prosecutors must evaluate the adequacy of a company's compliance program—both at the time of the offense and the charging decision—when determining the terms of a resolution. The updates include additional guidance on use of personal devices and third-party communication platforms, a new pilot program to promote corporate compensation incentives and clawbacks, and updated standards for appointing corporate monitors.

DOJ Provided Additional Guidance Regarding Use of Personal Devices and Third-Party Communication Platforms

The new Compliance Guidance requires prosecutors to consider personal device use and communication platforms when evaluating the adequacy of a company's compliance program. The Compliance Guidance states that corporate policies should be tailored to the corporation's risk profile, with the goal of making business-related data accessible to the company for preservation and review. To do this, DOJ prosecutors will consider three topics related to company-related data and communications: (i) the company's communication channels; (ii) the company's policy environment; and (iii) the company's risk management. Relevant questions for each topic are as follows:

- **Communication Channels**. What communication channels do employees use, and what are the preservation settings available to each employee in each channel? Has the company implemented procedures to manage and preserve electronic communications?
- **Policies**. Does the company have policies in place to make sure business-related data is preserved and accessible, even on employees' personal devices used for work-related matters? Is there a policy governing transferring data between work and personal devices? Are the company's policies communicated to employees and regularly enforced?

- **Risk Management**. Has the company exercised policy rights to access business-related data? How does the company exercise control over its communication policies? What are the consequences for employees who do not comply with the policies? Does employees' use of personal devices or third-party messaging applications impair a company's compliance program?

The updated Compliance Guidance reflects the DOJ's interest in preserving and collecting relevant business information from company-related data on personal devices, company issued devices, and third-party messaging platforms. A company's failure to provide relevant communications during an investigation will prompt further questioning from the Criminal Division and can impact the DOJ's charging decision.

DOJ Provided Additional Compliance Programs Guidance Regarding Compensation Incentives, Clawbacks, and Related Pilot Program

The enhanced Compliance Guidance also provides information on how prosecutors will assess whether a company's compensation system promotes compliant behavior. The Compliance Guidance section previously titled "Incentives and Disciplinary Measures" was changed to "Compensation Structures and Consequence Management," and added revisions related to: (i) compensation structures; (ii) disciplinary measures; and (iii) incentives. Further, a new DOJ pilot program will be implemented to promote compensation systems and compensation clawbacks to remedy violations of law.

- **Compensation Structures**. There is new guidance on how to evaluate a company's compensation structure and whether it fosters a culture of compliance. In this regard, questions the Criminal Division will consider are: Does the company have policies to recoup or reduce compensation due to compliance violations, policy violations, or misconduct? Has the company enforced clawback provisions? Does the compensation system tie certain compensation to conduct consistent with the company's values?
- **Disciplinary Measures**. The guidance includes additional questions used to evaluate a company's disciplinary program, such as: Has the company publicized disciplinary actions internally? Is the company tracking the effectiveness of disciplinary actions? Is the company monitoring the number of compliance-related allegations that are substantiated, the average time to complete a compliance investigation, and the effectiveness and consistency of disciplinary measures throughout the organization?
- **Incentives to Promote Compliant Behavior**. The Criminal Division also updated its evaluation of whether a company has effective incentives to promote compliant behavior. Considerations here are, among other things, whether the company had made compliance a means of career advancement, offered opportunities for management to serve as a compliance "champion," or made compliance a significant metric for management bonuses.
- **Compensation Incentives and Clawbacks Pilot Program**. The Criminal Division introduced a new Pilot Program Regarding Compensation Incentives and Clawbacks ("Pilot Program"). The Pilot Program is effective as of March 15, and will be in effect for three years. The Program has two parts:

First, each corporate resolution with the Criminal Division will include a requirement that the company involved implement compliance-promoting criteria within its compensation and bonus system. This criteria can include withholding bonuses, disciplinary measures, and incentives for compliance. Under the Pilot Program, every Criminal Division resolution now requires companies to add compliance-promoting criteria to their compensation systems. These incentive requirements were included in the DOJ's two most recent corporate FCPA resolutions in 2023.

Second, companies that seek to claw back compensation from corporate wrongdoers will be eligible for fine reductions in connection with DOJ resolutions. If a company complies with the Pilot Program procedures, the DOJ will accord a fine reduction equal to the amount of any compensation that is recouped within the term of the resolution. A company whose clawback efforts are ultimately unsuccessful, but pursued in good faith, can still be eligible for a fine reduction of up to 25% of the amount of sought compensation. In September, for example, the DOJ credited one company close to $765,000 under the Pilot Program, based on the value of bonuses it withheld from employees who engaged in suspected wrongdoing in connection with the conduct under investigation.

DOJ Announced Revised Criteria for the Selection of Corporate Compliance Monitors

In March, the AAG separately issued a revised memorandum on the selection of monitors in Criminal Division matters. The revised memorandum clarifies four policy positions: (i) monitor selections are and will be made in keeping with the DOJ's commitment to diversity, equity, and inclusion; (ii) DOJ prosecutors should not apply presumptions for or against monitors; (iii) the requirements for monitors apply to a monitor's entire team in addition to the lead monitor; and (iv) the cooling-off period for monitors is now not less than three years, rather than two years from the date of monitorship termination.

The Criminal Division is directed to impose a monitor where there is a demonstrated need for, or benefit from, a monitorship. This includes situations where the company's compliance program and controls are untested, ineffective, inadequately resourced, or not fully implemented at the time of a resolution. If the converse is true, a monitor may not be necessary.

Last year, no new FCPA corporate monitors were imposed. The chief of the SEC's FCPA unit stated that he views fewer monitorships as a "success story," since companies today tend to have more effective anticorruption compliance programs than in the past.

DOJ Announced Ongoing Use of Data Analytics to Identify FCPA Cases

In November, the Acting AAG stated that the DOJ is increasing the use of data analytics to proactively identify potential FCPA cases. According to the Acting AAG, the DOJ has invested in personnel and tools to "harness and analyze" public and nonpublic data to "identify potential wrongdoing involving foreign corruption." She noted that the DOJ's approach has generated successful FCPA investigations and prosecutions and that the DOJ is "just getting started" in this area. Highlighting this emphasis on data analytics, in September 2022, the Fraud Section announced the hiring of a dedicated compliance and data analytics counsel. Noting that companies have "better and more immediate access to their own data," the Acting AAG stated that she expects companies, as part of an effective anticorruption compliance program, to adopt a similar data-driven approach to compliance. As part of its assessment of a company's compliance program, the DOJ will also ask what a company has done to analyze its data at the time of misconduct and resolution.

DOJ ANNOUNCED AN INTERNATIONAL ANTI-BRIBERY INITIATIVE AND ISSUED TWO NEW FCPA OPINIONS, AND PRESIDENT BIDEN SIGNED A LAW ADDRESSING THE DEMAND SIDE OF BRIBERY

DOJ Announced International Corporate Anti-Bribery Initiative

In November, the Acting AAG announced a new International Corporate Anti-Bribery Initiative, which will build on existing international partnerships and form new ones to facilitate cross-border cooperation and information-sharing in foreign bribery investigations. Led by three FCPA Unit prosecutors, the Acting AAG announced that this Initiative will start by focusing on key threats to financial markets and the rule of law in regions where it can have the most impact in both coordination and case generation. The Initiative will look to facilitate cooperation and enhance information-sharing with foreign partners by leveraging prosecutors' particular experience, expertise, and language skills.

Members of the Initiative will work across the Criminal Division—including with the DOJ's Money Laundering and Asset Recovery Section ("MLARS"), the Office of International Affairs, the Office of Overseas Prosecutorial Development, Assistance, and Training, and the International Criminal Investigative Training Assistance Program—as well as with other parts of the DOJ, law enforcement partners, and the State Department. The Initiative's members will also work with data experts in Fraud and MLARS to develop proactive leads in their respective regions and determine how the DOJ can force multiply and assist foreign authorities in their parallel investigations.

In October, the Acting AAG highlighted several "successful partnerships" between the DOJ and foreign enforcement counterparts through cooperating on cases and working together in several international organizations, such as the Organization for Economic Cooperation and Development's Working Group on Bribery.

DOJ Issued Two New Opinions

After issuing only two FCPA opinions over the preceding eight years, the DOJ issued two FCPA opinions in 2023 under its FCPA opinions procedure.

- In FCPA Opinion Release 23-01 (issued on August 14), the DOJ stated that it would not take an enforcement action against a U.S.-based child welfare agency that intended to pay expenses for two government officials from a foreign country to visit the United States. The DOJ stated the payments do not reflect any corrupt intent since the expenses are reasonable and bona fide expenses directly related to the promotion, demonstration, or explanation of the agency's products or services, which are permitted under the FCPA.
- In FCPA Opinion Release 23-02 (issued on October 25), the DOJ stated that it would not take an enforcement action against a U.S.-based provider of training events and logistical support that intended to provide stipends to foreign officials attending training events. The training company is required to establish training events utilized by multiple U.S. government entities. As part of these events, the company must provide stipend payments to foreign officials to attend these training events. The DOJ stated that the proposed foreign official stipends reflect no corrupt intent by the company, since the contemplated payments to the foreign officials are both called-for and ultimately delivered by agencies and/or personnel of the U.S. government.

President Biden Enacted Bill Addressing Demand Side of Foreign Bribery

In December, President Biden signed the Foreign Extortion Prevention Act ("FEPA"), which targets the "demand side" of foreign bribery. The FCPA extends only to those who offer or pay bribes, or the "supply side." The FEPA received bipartisan support in Congress.

Although the DOJ has charged government officials for receiving bribes under related statutes, such as anti-money laundering laws, the FEPA amends the U.S. federal domestic bribery statute to allow for the criminal prosecution of foreign officials who seek or receive bribes from U.S. persons or businesses. FEPA's definition of "foreign official" is broader than that of the FCPA. Not only does the statute extend to officials and employees of foreign governments, but also to any person acting in an unofficial capacity on behalf of such a government. Such improper activities must have a sufficient nexus to the United States to trigger criminal liability. Thus, the FEPA uses the same jurisdictional categories as the FCPA: the FEPA applies to demands made to issuers of U.S.-listed securities, to U.S. domestic concerns (i.e., U.S. citizens, residents, and companies), or to any person while in the territory of the United States. Penalties for violating the statute may include imprisonment of up to 15 years and a fine of up to $250,000 or three times the value of the bribe, whichever is greater.

SEC Announced Increase in FCPA Whistleblower Tips and $279 Million FCPA Reward

Under the SEC's whistleblower program, whistleblowers who provide the SEC with original, timely, and credible information that leads to a successful enforcement action are eligible to receive an award that can range from 10%-30% of the money collected when monetary sanctions exceed $1 million.

In November, the SEC announced that it had received more than 18,000 whistleblower tips in its fiscal year ending September 30, 2023—50% more than the record setting year in fiscal year 2022. The SEC also announced that it had awarded 68 whistleblower awards totaling nearly $600 million in fiscal year 2023, including a $279 million award to a whistleblower in an FCPA-related case, even though the whistleblower provided information to the SEC after it had already opened its investigation. The SEC received 237 FCPA tips during the SEC's fiscal year 2023, up from 202 tips the prior fiscal year.

FIGURE 6: Number of Whistleblower Tips to the SEC's Whistleblower Program, FY 2019–FY 2023

Type of Action	FY2019	FY2020	FY2021	FY2022	FY2023
Number of Whistleblower Tips	5,212	6,911	12,210	12,322	18,354
Number of FCPA Tips	200	208	258	202	237

KEY TAKEAWAYS

For both the DOJ and the SEC, FCPA enforcement remains a centerpiece of their enforcement agendas. As such, companies are advised to continue to assess their corruption risks in light of their business operations and the locations in which they do business and adopt and implement effective anticorruption compliance programs that take into consideration their risk profiles, as well as the current enforcement environment in the United States and other relevant jurisdictions. In particular, the updates covered in this *White Paper* underscore that companies should take steps to ensure:

- Their compliance policies, procedures, and other internal controls are appropriately designed and effectively operate to prevent, detect, investigate, and remediate any potential issues as they arise.
- Their policies and protocols for use of personal devices and third-party communication platforms, data monitoring tools, and employee-discipline procedures are up to date based on recent DOJ guidance.
- Their internal reporting and investigation processes for addressing potential FCPA issues help the company make prompt and informed determinations as to whether self-disclosure may be warranted in particular circumstances, among other important considerations.

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