

# FCPA Update

A Global Anti-Corruption Newsletter



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## The Year 2021 in Review: Anti-Corruption Enforcement in a Time of Transition

After a record-breaking year of anti-corruption enforcement activity in 2020, the year 2021 was characterized by transitions, including the arrival of a new administration in the United States and the ongoing impact of Brexit on the United Kingdom and Europe. Although the overall level of enforcement activity dropped from the prior year, the Biden Administration signaled through significant policy changes and public statements that enforcement soon would ramp up, and expectations grew for additional cross-border cooperation in investigations and resolutions. Across Europe, Asia, and Latin America, governments that have been active on the anti-corruption front in recent years considered further legislative and policy initiatives, while others shifted their areas of focus or let recent advances languish for lack of attention or resources.

In this first issue of 2022, we survey the past year's most significant anti-corruption developments in the United States, the United Kingdom, France, Germany, Asia, and Latin America.

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## United States

After three years of historic numbers in FCPA resolutions, 2021 brought a lull reflective of the times. 2021 had the lowest number of corporate enforcement actions in 15 years and the lowest total penalties imposed by U.S. authorities since 2015. But just as investigations do not follow a single, standard course, FCPA resolutions depend on a pipeline of investigations, each with its own timing largely unrelated to the calendar year. In our 2017 Year in Review, we noted the “return to normalcy” after a record-breaking year in 2016. Perhaps 2021 will prove to be the calm before the storm – certainly, that’s what the Biden Administration has signaled through various new initiatives and policies. Indeed, just last week, a senior DOJ official noted the “very robust pipeline” of FCPA cases and the likelihood of “some significant resolutions in the next year.”<sup>1</sup>

There are several possible explanations for 2021’s fall-off in corporate enforcement. Among others: (1) the pandemic has impacted significantly the speed of conducting investigations and negotiating resolutions; (2) the Trump Administration may have opened fewer investigations than prior administrations; (3) the Trump DOJ and SEC may have focused on finalizing their major settlements before the term’s end; (4) the Biden DOJ and SEC may be taking time to scrutinize cases in their pipelines; and (5) the agencies may be prioritizing discussions with international partners and seeking global, coordinated resolutions, which takes time.

The small number of FCPA resolutions can be contrasted with the many ambitious policy initiatives announced in 2021:

- The Biden Administration has made fighting corruption one of its highest priorities. The Administration released a National Security Study Memorandum in June 2021 that, for the first time, established the fight against global corruption as a core national security priority and launched an interagency review that yielded in December the first U.S. Strategy on Countering Corruption (the “Anti-Corruption Strategy”). The Anti-Corruption Strategy was designed to marshal the full resources of the federal government to combat global corruption. It calls for, among other things, aggressive enforcement, a surge in resources, increased cooperation among U.S. agencies, strengthened engagement and coordination with foreign partners, enhanced anti-money

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1. Dylan Tokar, “DOJ Promises Robust Antibribery Enforcement Despite Dip in Cases,” Wall Street Journal (Jan. 27, 2022), <https://www.wsj.com/articles/doj-promises-robust-antibribery-enforcement-despite-dip-in-cases-11643328054>.

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laundering regulations, and greater scrutiny of digital assets and the risks they pose to anti-corruption and anti-money laundering efforts.<sup>2</sup>

- More controversially, in October, Deputy Attorney General Lisa Monaco announced revised corporate enforcement policies with significant implications for companies under investigation and those considering self-reporting misconduct to DOJ (“Monaco Memo”).<sup>3</sup> In particular, prosecutors now must consider *all* prior corporate misconduct (not just similar misconduct) in making charging decisions; companies under investigation must (as during the Obama years) disclose all relevant facts regarding *all* persons involved in misconduct in order to obtain any cooperation credit; and the Trump-era presumption against the imposition of independent monitorships has been reversed.

“Perhaps 2021 will prove to be the calm before the storm – certainly, that's what the Biden Administration has signaled through various new initiatives and policies.”

- The SEC similarly messaged a get-tough approach, with SEC Chairman Gary Gensler stating that DOJ's new approach is “broadly consistent with [his] view of how to handle corporate offenders” as well.<sup>4</sup> And in February, the SEC restored the delegated authority of Enforcement Division senior officials to issue formal orders that authorize SEC staff to issue subpoenas and take testimony without the need for authority from the full Commission or the division's director. This reversal of a Trump-era revocation of a power granted during the Obama Administration allows SEC staff “to act more swiftly to detect and stop ongoing frauds” and likely will lead to an uptick in the issuance of subpoenas.<sup>5</sup>

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2. See Andrew M. Levine, Winston M. Paes, Douglas S. Zolkind, Cara Ortiz & Jennifer Romero, “Biden Administration's Strategy on Countering Corruption Seeks New Era of Global Anti-Corruption Enforcement and Cooperation” at 1-12, FCPA Update, Vol. 13, No. 5 (Dec. 2021), <https://www.debevoise.com/insights/publications/2021/12/fcpa-update-december-2021> [hereinafter “Dec. 2021 FCPA Update”].
  3. See Kara Brockmeyer et al., “DOJ Revises Corporate Criminal Enforcement Policies” at 1-7, FCPA Update, Vol. 13, No. 4 (Nov. 2021), <https://www.debevoise.com/insights/publications/2021/11/fcpa-update-november-2021> [hereinafter “Nov. 2021 FCPA Update”].
  4. Chair Gary Gensler, “Prepared Remarks At the Securities Enforcement Forum,” (Nov. 4, 2021), <https://www.sec.gov/news/speech/gensler-securities-enforcement-forum-20211104>.
  5. See Kara Brockmeyer et al., “A Shot Across the Bow: Acting SEC Chair Lee Reinstates Delegated Authority for Senior Enforcement Leadership and Rescinds Clayton's Waiver Policy,” Debevoise Update (Feb. 16, 2021), <https://www.debevoise.com/insights/publications/2021/02/a-shot-across-the-bow-acting-sec> (citing statement of Acting Chair Allison Herren Lee).



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- Enforcement authorities reported that the pipeline of cases remains strong<sup>6</sup> and that whistleblowers, cooperators, and other law enforcement techniques continue to be major sources of case detection, in addition to voluntary self-reports. DOJ officials announced plans to “surge resources” to its prosecutors, including by embedding a new FBI squad in the Fraud Section, and to continue providing prosecutors with additional data-driven tools to proactively identify, investigate and prosecute cases.<sup>7</sup> The National Defense Authorization Act enacted in January 2021 now empowers DOJ and Treasury to subpoena bank records held outside the United States by any foreign bank that maintains a correspondent account in the United States – a massive expansion in the government’s ability to investigate financial activity overseas.<sup>8</sup>

Although corporate enforcement declined in 2021, enforcement against individuals in FCPA-related cases – which as in prior years has been largely divorced from corporate enforcement – continued apace in 2021, in line with DOJ’s stated priority.<sup>9</sup>

Below is a brief overview of some of the year’s more noteworthy developments in corporate and individual enforcement, case law, and policy announcements.

## **I. Corporate Enforcement Trends**

### **A. Enforcement Actions**

In 2020, the SEC and DOJ assessed approximately \$6 billion in penalties under the FCPA in 12 corporate actions with \$2.8 billion being paid to U.S. authorities.<sup>10</sup> On the heels of that record-breaking enforcement, 2021 saw only four corporate enforcement actions (the lowest number since 2006) that imposed a total of \$458<sup>11</sup> million in penalties (the lowest total penalties imposed since 2015).

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6. Clara Hudson, “Dan Kahn: ‘Our pipeline of cases has never been stronger,’” Glob. Investigations Rev. (Mar. 15, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/dan-kahn-our-pipeline-of-cases-has-never-been-stronger>.
  7. U.S. Dep’t of Justice, “Deputy Attorney General Lisa O. Monaco Gives 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-address-abas-36th-national-institute> [hereinafter “Monaco Speech”]; Principal Associate Deputy Attorney General John Carlin, “John Carlin on stepping up DOJ corporate enforcement,” Glob. Investigations Rev. (Oct. 11, 2021), <https://globalinvestigationsreview.com/news-and-features/in-house/2020/article/john-carlin-stepping-doj-corporate-enforcement>. And Attorney General Merrick Garland also announced in June the establishment of law enforcement Joint Task Force Alpha to marshal DOJ’s resources with the Department of Homeland Security to specifically increase corruption-related investigations and asset recovery in the Northern Triangle. U.S. Dep’t of Justice Press Release No. 21-525, “Attorney General Announces Initiatives to Combat Human Smuggling and Trafficking and to Fight Corruption in Central America” (June 7, 2021), <https://www.justice.gov/opa/pr/attorney-general-announces-initiatives-combat-human-smuggling-and-trafficking-and-fight>.
  8. See Satish M. Kini, Winston M. Paes, Zila Reyes Acosta-Grimes, Robert T. Dura & Caroline Novogrod Swett, “Congress Passes Sweeping Anti-Money Laundering and Corporate Beneficial Ownership Law,” Debevoise In Depth (Jan. 4, 2021).
  9. Monaco Speech (noting that “Attorney General Garland has made clear it is unambiguously this department’s first priority in corporate criminal matters to prosecute the individuals who commit and profit from corporate malfeasance”).
  10. See Kara Brockmeyer et al., “The Year 2020 in Review: Another Record Breaking Year of Anti Corruption Enforcement,” FCPA Update, Vol. 12, No. 6 (Jan. 2021), <https://www.debevoise.com/insights/publications/2021/01/fcpa-update-january-2021>.
  11. This total would be \$282 million if excluding DOJ’s portion of the Credit Suisse resolution, where DOJ charged wire fraud but no FCPA violations.

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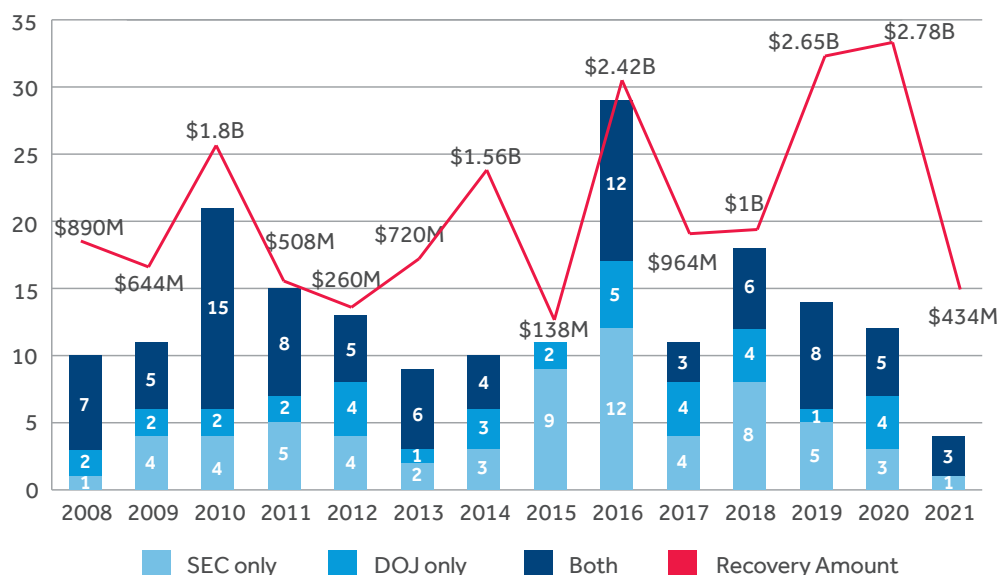
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Three of these actions were parallel actions brought by the SEC and DOJ together (though DOJ charged wire fraud rather than FCPA violations in the case against Credit Suisse), and the fourth was brought by the SEC alone.

The SEC and DOJ brought actions against companies in three industries, including two institutions previously subject to FCPA enforcement actions (Deutsche Bank and Credit Suisse). To date, individuals have been charged publicly in connection only with the Credit Suisse case, though, as noted below in Section II, it is not uncommon for such charges to be announced years later (e.g., Ericsson, Odebrecht).

The four corporate actions are far below the 10-year average of 14.2 resolutions announced per year. Enforcement numbers tend to dip slightly during the first year of a new presidential administration, but the numbers here are likewise far below the 11 settlements announced during the first years of the Trump and Obama presidencies in 2017 and 2009.

## FCPA Corporate Enforcement Actions



The SEC resolved all of its corporate actions through settled cease-and-desist orders, and DOJ resolved its actions through DPAs (one of which included a guilty plea by a subsidiary). There were zero NPAs for the second year in a row, and zero declinations with disgorgement pursuant to DOJ's Corporate Enforcement Policy ("CEP") for the first time since 2016, when this type of resolution was first introduced.

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Here are our key corporate enforcement takeaways from 2021:

- *Continued Coordination with Multiple Enforcement Authorities.* Cross-border coordination was again on display in 2021 where two of the four actions included credits for amounts paid to non-U.S. authorities – and such coordination is likely only to increase given the Anti-Corruption Strategy’s emphasis. In October 2021, global investment bank **Credit Suisse** was assessed more than \$547 million in penalties in a global coordinated resolution with the SEC, DOJ, and UK Financial Conduct Authority (“FCA”) for FCPA violations and for fraudulently misleading investors in bond offerings raising funds on behalf of state-owned enterprises (“SOEs”) in Mozambique.<sup>12</sup> After accounting for crediting, Credit Suisse agreed to pay approximately \$475 million of this amount – approximately \$99 million in disgorgement and prejudgment interest and a civil penalty to the SEC, \$175 million of a \$247.5 million penalty imposed by DOJ (crediting approximately \$72 million in amounts paid to the SEC and FCA), and \$200 million to the FCA. Interestingly, only the SEC (and not DOJ) charged the conduct as violations of the FCPA. In addition to the coordinated settlement with the UK, the SEC and DOJ also thanked enforcement counterparts in Switzerland and the United Arab Emirates for their assistance in this matter.<sup>13</sup> Switzerland’s Financial Market Supervisory Authority separately brought an action in October and imposed a third party to review the bank’s implementation of compliance measures.

Earlier in the year, oil and gas services company **Amec Foster Wheeler** agreed to pay more than \$41 million to settle FCPA charges related to conduct in Brazil brought by DOJ and the SEC in coordinated resolutions with Brazil’s Controladoria-General da União (“CGU”), Advocacia-Geral da União (“AGU”), and Ministério Público Federal (“MPF”) and the UK Serious Fraud Office (“SFO”). DOJ imposed an \$18 million penalty, but credited 25% of the amount the company paid in a settlement with the SFO and 33% of the penalty owed in a settlement with CGU, AGU, and MPF; the SEC similarly credited sums paid to Brazil and UK against its disgorgement. This type of “crediting back” of amounts paid to non-US authorities has been commonplace, particularly with Brazil and the UK.<sup>14</sup>

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12. U.S. Securities & Exchange Commission Press Release No. 2021-213, “Credit Suisse to Pay Nearly \$475 Million to U.S. and U.K. Authorities to Resolve Charges in Connection with Mozambican Bond Offerings,” (Oct. 19, 2021), <https://www.sec.gov/news/press-release/2021-213> [hereinafter “SEC Credit Suisse Press Release”].
  13. *Id.*; U.S. Dep’t of Justice Press Release No. 21-1024, “Credit Suisse Resolves Fraudulent Mozambique Loan Case in \$547 Million Coordinated Global Resolution” (Oct. 19, 2021), <https://www.justice.gov/opa/pr/credit-suisse-resolves-fraudulent-mozambique-loan-case-547-million-coordinated-global> [hereinafter “DOJ Credit Suisse Press Release”].
  14. Karolos Seeger, Jane Shvets, Thomas Jenkins, Andrew Lee & Aisling Cowell, “UK, US, and Brazil Reach Bribery-Related Settlements with Amec Foster Wheeler Energy,” FCPA Update, Vol. 12, No. 12 (July 2021), <https://www.debevoise.com/insights/publications/2021/07/fcpa-update-july-2021> [hereinafter “July 2021 FCPA Update”].

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- *Use of Wire Fraud in Lieu of FCPA Charges.* While prosecutors often charge individual defendants with non-FCPA criminal violations like money laundering, Travel Act violations, and wire fraud, the practice is less common in corporate cases, which usually focus on the FCPA's anti-bribery or accounting provisions. In the **Credit Suisse** case, however, for the first time in over a decade, DOJ declined to bring FCPA charges and brought wire fraud-only charges against the company. In that case, DOJ charged the bank's making of material misrepresentations and omissions in offering materials in connection with arranging loans that were in part used to pay bribes to government officials as a conspiracy to commit wire fraud. The SEC's parallel action charged violations of the FCPA's books and records and internal controls provisions (along with fraud charges), demonstrating both authorities' willingness to prosecute foreign bribery using fraud statutes where the FCPA anti-bribery provisions may not apply.

**“Although corporate enforcement declined in 2021, enforcement against individuals in FCPA-related cases – which as in prior years has been largely divorced from corporate enforcement – continued apace in 2021, in line with DOJ’s stated priority.”**

Continuing a trend that we’ve seen in recent years, in January 2021, DOJ charged **Deutsche Bank** with conspiracy to violate the FCPA’s accounting provisions without an accompanying anti-bribery charge.<sup>15</sup> While the SEC often charges companies with violating only the accounting provisions of the FCPA without a corresponding anti-bribery charge, DOJ does so much less frequently. Deutsche Bank settled its second FCPA case in less than eighteen months, agreeing to pay more than \$122 million to resolve probes into alleged accounting violations related to its dealings with business development consultants in multiple jurisdictions. This \$100+ million accounting-only settlement joins Herbalife (2020), Walmart (2019), and Avon (2014) as the only settlements of such magnitude to feature solely violations of the accounting provisions in an FCPA case.

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15. Andrew M. Levine, Winston M. Paes & Matthew Specht, “Deutsche Bank Resolves FCPA Investigation Regarding Business Development Consultants” at 6-8, FCPA Update, Vol. 12, No. 7 (Feb. 2021), <https://www.debevoise.com/insights/publications/2021/02/fcpa-update-february-2021> [hereinafter “Feb. 2021 FCPA Update”]. The bank paid over \$130 million when adding amounts paid to settle the commodities fraud portion of the case.

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- *Continued Scrutiny of Financial Institutions' Relationships with Sovereigns.* With actions in the last few years brought against Goldman Sachs, Société Générale, Legg Mason, and Och-Ziff related to arranging financing for state-owned entities, the warning is clear: interactions with sovereign wealth funds and similar entities can pose significant corruption risk, particularly when intermediaries are involved. The October 2021 **Credit Suisse** resolution mentioned above involved an admission to defrauding, through a UK subsidiary, investors in the financing of loans to develop state-owned maritime projects in Mozambique. With misleading offering materials that did not disclose the serious risk of Mozambique's default or risk of bribes being paid from investor funds, Credit Suisse bankers and agents diverted loan proceeds, including to a UAE-based contractor that supplied boats for the project and paid approximately \$200 million in kickbacks to Credit Suisse bankers and bribes to senior government officials in Mozambique. The bank admitted to identifying red flags that were not disclosed to investors, including learning of significant bribery risks related to the third-party contractor. In addition to settling an SEC cease-and desist order, Credit Suisse entered into a three-year DPA with DOJ, its UK subsidiary pleaded guilty to wire fraud conspiracy, and in 2019 three of the subsidiary's bankers pleaded guilty to wire fraud and money laundering conspiracy charges. The 2021 action against **Deutsche Bank** also involved FCPA accounting violations tied to concealing payments to third parties used to improperly secure business with an investment vehicle indirectly owned by the government of Abu Dhabi.<sup>16</sup>
- *Diminishing Appeal of Declinations with Disgorgement?* For the first time since the introduction of declinations with disgorgement under DOJ's CEP in 2016, DOJ did not resolve any cases using this method. Such declinations bottomed out in 2021 after consecutive years of diminishing use (four in 2018; two in 2019; one in 2020; none in 2021). Only time will tell whether this is just a temporary blip or whether declinations with disgorgement have fallen out of favor.
- *Expansion into New Markets Requires Appropriate Controls, Timely Integration, and Ongoing Monitoring* Two of the four corporate cases brought last year highlighted the significant risks inherent in expanding into new markets without robust due diligence of targets and third parties – and the need to take appropriate action based on that due diligence and any red flags. In September, UK-based advertising agency **WPP plc** agreed to pay more than \$19 million to settle an SEC cease-and-desist order that reflects the SEC's expectations for companies that expand into higher-risk markets. WPP was charged with

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16. See Feb. 2021 FCPA Update.



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violations of the FCPA's anti-bribery, books and records, and internal controls provisions related to failures to ensure that acquired entities in Brazil, China, India, and Peru implemented WPP's internal accounting controls (e.g., over accounts payable and vendor management) and anti-corruption compliance policies and failures to adequately respond to repeated warning signs of corruption or control failures. According to the SEC's order, WPP expanded by acquiring small local advertising agencies owned by founders that WPP retained to operate as CEOs of the subsidiaries with "wide autonomy." WPP grew to employ approximately 100,000 people at over 3,000 locations in 112 countries, but had no compliance department and lacked, according to the SEC's order, meaningful coordination among its legal department, internal audit department, and department responsible for managing local subsidiaries. Among other examples, the SEC found that a subsidiary in India continued to bribe officials for advertising contracts despite the conduct being flagged in seven complaints.<sup>17</sup>

- Similarly, in June, **Amec Foster Wheeler** agreed to pay more than \$43 million to settle FCPA charges brought by the SEC and DOJ in connection with a coordinated resolution (mentioned above) that serves as another warning of the risks of not following up on red flags. According to the SEC's order, from 2012 to 2013, Amec Foster Wheeler's UK subsidiary paid approximately \$1.1 million in bribes through third-party sales agents to Brazilian officials to establish a presence in Brazil's oil and gas industry and to secure an engineering and design contract from Brazilian state-owned oil company Petrobras. The company allegedly continued to use a sales agent that had failed its due diligence processes. This case also underscores the importance of pre-acquisition diligence. Amec Foster Wheeler, now owned by non-issuer John Wood Group PLC, settled the SEC's cease-and-desist order finding that it violated the FCPA's anti-bribery and accounting provisions (since none of the improper payments were accurately reflected in books and records and the company failed to have sufficient internal accounting controls) and entered into a three-year DPA with DOJ. The SEC's jurisdiction was based on the fact that Amec Foster Wheeler's predecessor had traded on the NASDAQ during the relevant period, and DOJ's jurisdiction was based on pre-acquisition actions taken in furtherance of the scheme while located in the United States. The investigation was already underway at the time Wood purchased the company. Beyond the loss associated with the penalties paid by its subsidiary, Wood inherited three years' worth of continuing obligations to DOJ.<sup>18</sup>

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17. See Kara Brockmeyer, Winston M. Paes & Philip Rohlik, "WPP Settlement Highlights Risks of Expansion By Acquisition" at 1-7, FCPA Update, Vol. 13, No. 3 (Oct. 2021), <https://www.debevoise.com/insights/publications/2021/11/fcpa-update-october-2021>.

18. July 2021 FCPA Update at 1-6.

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DOJ repeatedly has emphasized the importance of integrating newly acquired companies into compliance programs over the past few years. DOJ's 2020 updates to its Evaluation of Corporate Compliance Programs guidance specifically ask prosecutors to evaluate whether an acquiring company was able to complete its pre-acquisition due diligence (and, if not, why) and instructs prosecutors to determine whether the company has a process for timely and orderly integration of the acquired entity into the acquirer's existing compliance program.<sup>19</sup> And in October 2021, DAG Monaco warned that "[c]ompanies need to actively review their compliance programs to ensure they adequately monitor for and remediate misconduct – or else it's going to cost them down the line."<sup>20</sup> The lesson is that companies can expose themselves to immense risk when expanding into high-risk jurisdictions via acquisition or growth without a compliance program that reflects that growth and enhanced risk. Companies should seek to: (1) conduct risk-based pre-expansion due diligence; (2) ensure adequate enhancement of compliance infrastructure as they expand; (3) address any red flags or internal complaints, and (4) closely monitor acquisitions to avoid having formal ownership without exerting control.

**“The lesson is that companies can expose themselves to immense risk when expanding into high-risk jurisdictions via acquisition or growth without a compliance program that reflects that growth and increased risk.”**

- *Continued Increases in Whistleblower Reports and Awards.* FY2021 was a record-breaking year for the SEC's whistleblower program, representing the highest number of awards, both in terms of dollar amount and number of individuals receiving awards, and the greatest number of whistleblower tips received (76% increase over FY2020). In fact, the SEC awarded a total of \$564 million to whistleblowers last year – more than in all prior years combined.<sup>21</sup>

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19. Kara Brockmeyer, Andrew J. Ceresney, et al., “DOJ Updates Guidance on Corporate Compliance Programs,” Debevoise Update (June 2020), <https://www.debevoise.com/insights/publications/2020/06/doj-updates-guidance-on-corporate-compliance>.

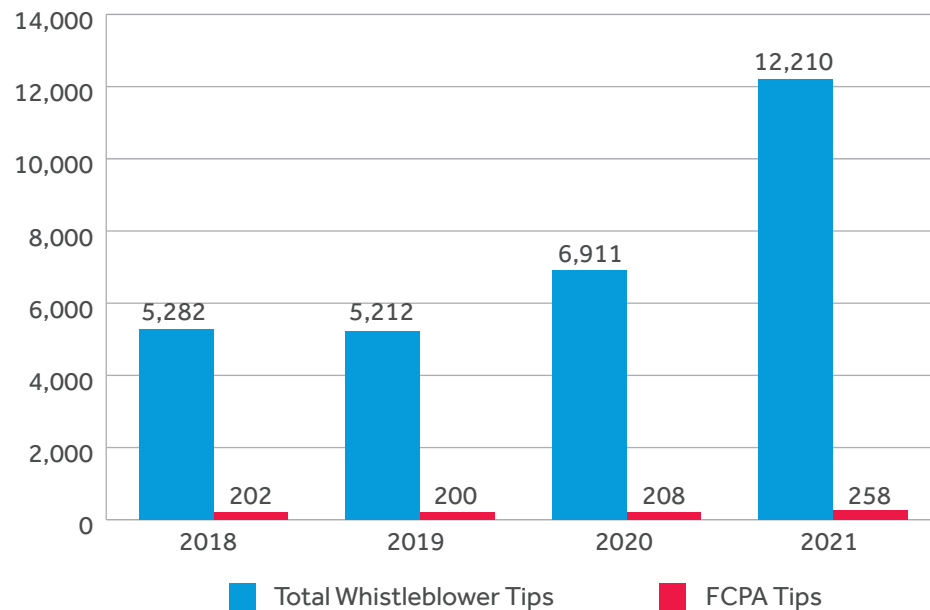
20. Monaco Speech.

21. U.S. Securities and Exchange Commission, “2021 Annual Report to Congress: Whistleblower Program,” U.S. Securities & Exchange Commission (Nov. 15, 2021), <https://www.sec.gov/files/owb-2021-annual-report.pdf>, at 1.

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Although tips involving FCPA violations comprise only 2% of the total whistleblower tips received, last year saw an increase of nearly 25% in the total FCPA tips received.<sup>22</sup>



In May 2021, the SEC announced that it had awarded more than \$28 million to a whistleblower in the 2018 FCPA case against Panasonic Avionics. The award was 10% of the total amount that Panasonic Avionics paid in penalties and disgorgement to DOJ and the SEC and was granted despite the fact that the whistleblower’s information was not the basis for the eventual charges brought against the company. As we noted in our May FCPA Update, this would seem to indicate that the SEC is broadly interpreting the criteria for whistleblower awards and likely will encourage even more whistleblower awards in 2022.<sup>23</sup>

The Biden Administration is continuing to build out additional whistleblower programs, including the Treasury Department’s Kleptocracy Asset Recovery Rewards Act (“KARRA”) program; and the CFTC, which first entered the anti-corruption enforcement space last year.

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22. *Id.* at 36

23. Winston M. Paes, Bruce E. Yannett, Philip Rohlik & Taylor Booth, “SEC Pays \$28 Million in FCPA Whistleblower Award” at 1-8, FCPA Update, Vol. 12, No. 10 (May 2021), <https://www.debevoise.com/insights/publications/2021/05/fcpa-update-may-2021>.

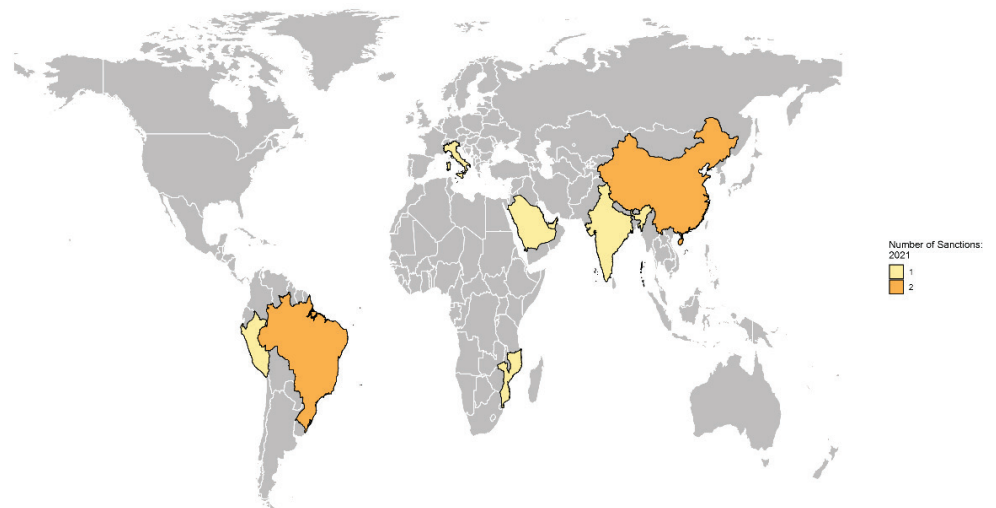
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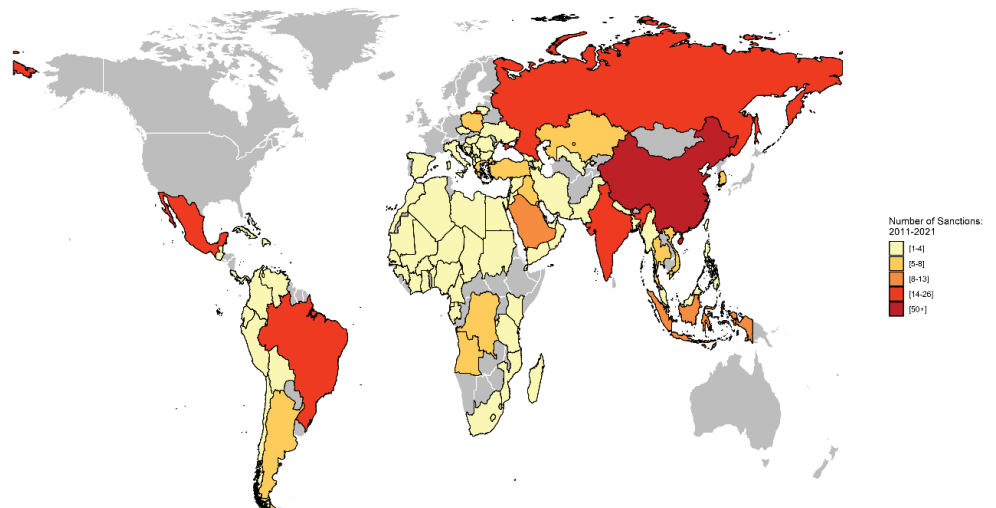
**B. Heat Map by Geography**

Although limited to only four total corporate enforcement actions, it's worth noting that three of the four cases involved conduct in China and/or Brazil, recently the two most frequent jurisdictions with conduct implicated in FCPA resolutions. More broadly, U.S. authorities brought corporate enforcement actions based on conduct that occurred in eight countries in Africa (Mozambique), Asia (China, India), Europe (Italy), the Middle East (Saudi Arabia and UAE), and South America (Brazil and Peru). U.S. authorities thanked their counterparts in five jurisdictions for their assistance (Brazil, India, Switzerland, UAE, and UK).

**Corporate Resolutions: 2021 Heat Map**



**Corporate Resolutions: 2011-2021 Heat Map**



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## C. Follow-on Litigation Related to FCPA Issues

### *Ericsson Agrees to \$97 Million FCPA-Related Settlement with Nokia*

After the resolution of FCPA enforcement actions with U.S. agencies or non-U.S. counterparts, companies may face related follow-on litigation. These lawsuits typically take the form of securities fraud class actions and shareholder derivative suits. In 2021, however, we saw follow-on litigation initiated by competitors.

In December 2019, Swedish telecommunications company Telefonaktiebolaget LM **Ericsson** paid \$1 billion to settle FCPA charges with DOJ and the SEC alleging that, over a 16-year period, Ericsson bribed high-level officials in Djibouti and committed multiple books and records and internal control violations relating to its operations in China, Djibouti, Indonesia, Kuwait, Saudi Arabia, and Vietnam.<sup>24</sup>

Several knock-on effects of the Ericsson case arose in 2021. First, in May 2021, Ericsson announced that it had reached a \$97 million settlement of a damages claim from competitor Nokia<sup>25</sup> that related to the bribery scheme. Second, in September 2021, DOJ brought criminal FCPA charges against Ericsson's former account manager for the Horn of Africa region, Afework Bereket, alleging that he bribed Djiboutian officials to obtain a contract with the state-owned telecommunications.<sup>26</sup> And finally, in October 2021, DOJ accused Ericsson of breaching the terms of its three-year 2019 DPA "by failing to provide certain documents and factual information."<sup>27</sup>

As we wait to see how DOJ's new accusations against Ericsson and its former officer play out in 2022, it is notable that the company has now faced financial consequences for its admitted FCPA violations not from shareholders or investors, but at the hands of a commercial competitor. Though generally uncommon, this result reinforces that companies facing FCPA inquiries should be wary of follow-on litigation risks not only from investors but also from potential collateral economic victims.

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24. Kara Brockmeyer, Andrew M. Levine, & Suzanne Zakaria, "U.S. Authorities Reach Record-Breaking Settlement with Swedish Telecom Company" at 1-2, FCPA Update, Vol. 11, No. 5 (Dec. 2019), <https://www.debevoise.com/insights/publications/2019/12/fcpa-update-december-2019>.
  25. Press Release, Ericsson, "Ericsson announces settlement with impact in second quarter 2021" (May 12, 2021), <https://www.ericsson.com/en/press-releases/2021/5/ericsson-announces-settlement-with-impact-in-second-quarter-2021>; "Ericsson to pay \$97 mln to Nokia for after settling damages claim," Reuters (May 12, 2021), <https://www.reuters.com/technology/ericsson-pay-97-mln-nokia-after-settling-damages-claim-2021-05-12/>.
  26. U.S. Dep't of Justice Press Release No. 21-842, "Former Ericsson Employee Charged for Role in Foreign Bribery Scheme" (Sept. 8, 2021), <https://www.justice.gov/opa/pr/former-ericsson-employee-charged-role-foreign-bribery-scheme>.
  27. Press Release, Ericsson, "Update on Deferred Prosecution Agreement," (Oct. 21, 2021), <https://www.ericsson.com/en/press-releases/2021/10/update-on-deferred-prosecution-agreement>. See also Dylan Tokar, "Ericsson Accused of Breaching Bribery Settlement With Justice Department," Wall St. J. (Oct. 22, 2021), <https://www.wsj.com/articles/ericsson-accused-of-breaching-bribery-settlement-with-justice-department-11634911285>.



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*Cognizant Reaches \$95 Million Settlement with Shareholders*

New Jersey-based information technology and cloud services company **Cognizant** recently reached a \$95 million settlement with shareholders to end a class action lawsuit stemming from the same conduct underlying its \$25 million 2019 FCPA settlement with the SEC and DOJ declination with disgorgement. Between 2014 and 2016, some of Cognizant's most senior executives allegedly authorized approximately \$3.6 million in bribes to Indian government officials in order to obtain construction permits and operating licenses related to the building of a new office campus.<sup>28</sup>

“After the resolution of FCPA enforcement actions ..., companies may face related follow-on litigation. These lawsuits typically take the form of securities fraud class actions and shareholder derivative suits. In 2021, however, we saw follow-on litigation initiated by competitors.”

**II. FCPA Enforcement Against Individuals**

DOJ and the SEC announced charges of at least 16 individuals in 2021 in connection with FCPA matters. This number is likely even higher since charges often remain under seal for a period of time while an investigation proceeds.

**A. Individual Enforcement Actions Related to Corporate Resolutions**

In contrast to 2020, where nearly half of the corporate actions had associated individual actions, none of DOJ's or the SEC's corporate enforcement actions in 2021 involved simultaneous charges against individuals.

Several individuals settled charges before their related company:

- *Credit Suisse*. In 2019, three former Credit Suisse employees (Andrew Pearse, Surjan Singh, and Detelina Subeva) pleaded guilty in connection with the Credit Suisse settlement announced in October 2021 (discussed above), involving more than \$2 billion in fraudulent loans guaranteed by the government of Mozambique. However, the only individual so far brought to

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28. “Cognizant Reaches \$95 mln settlement with U.S. shareholders over India bribery allegations,” Reuters (Sept. 8, 2021), <https://www.reuters.com/technology/cognizant-reaches-95-mln-settlement-with-us-shareholders-over-india-bribery-2021-09-08/>; Order, *In re Cognizant Technology Solutions Corp.*, Securities Exchange Act Release No. 85149 (Feb. 15, 2019), <https://www.sec.gov/litigation/admin/2019/34-85149.pdf>.

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trial, Jean Boustani, was acquitted in 2019.<sup>29</sup> Prosecutions are ongoing of four other individuals accused of involvement in the scheme (Najib Allam, Antonio Do Rosario, Teofilo Nhangumele, and Manuel Chang). In November 2021, a South African court ordered the extradition of Chang, a former Mozambican finance minister, to the United States to face charges.<sup>30</sup>

Several individuals faced charges years after their related companies settled FCPA charges:

- *Ericsson (Bereket)*. Following telecommunication company Ericsson's \$1 billion settlement with DOJ and the SEC in 2019, DOJ unsealed in September 2021 an indictment charging former Ericsson employee Afework Bereket with conspiracy to violate the FCPA and commit money laundering for his role in the scheme.<sup>31</sup>
- *Odebrecht (Martinelli Linares)*. Following Brazilian construction conglomerate Odebrecht's 2016 guilty plea to FCPA charges related to a bribery scheme involving over \$700 million in bribes in several countries, DOJ indicted for money laundering in February 2021 two relatives of a high-ranking Panamanian government official that were accused of serving as his intermediaries for corrupt payments from Odebrecht. Both brothers pleaded guilty in December 2021.<sup>32</sup>
- *Odebrecht (Weinzierl and Waldstein)*. In May 2021, DOJ unsealed charges against two Austrian bankers, Peter Weinzierl and Alexander Waldstein, accused of helping Odebrecht launder bribe payments through the U.S. financial system. Weinzierl was arrested in the United Kingdom in May pursuant to a provisional arrest request from the United States, and Waldstein remains at large.<sup>33</sup>

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29. Kara Brockmeyer, et al., "The Year 2019 in Review: A Record-Breaking Year of Anti-Corruption Enforcement" at 22-23, FCPA Update, Vol. 11, No. 6 (Jan. 2020), <https://www.debevoise.com/insights/publications/2020/01/fcpa-update-january-2020>.

30. Matthew Hill, "Court Orders Ex-Mozambique Minister to Be Extradited to U.S.," Bloomberg (Nov. 10, 2021), <https://www.bloomberg.com/news/articles/2021-11-10/court-orders-ex-mozambique-minister-be-extradited-to-u-s>.

31. U.S. Dep't of Justice Press Release No. 21-842, "Former Ericsson Employee Charged for Role in Foreign Bribery Scheme" (Sept. 8, 2021), <https://www.justice.gov/opa/pr/former-ericsson-employee-charged-role-foreign-bribery-scheme>.

32. U.S. Dep't of Justice, "Panamanian Intermediary Extradited to the United States Pleads Guilty to International Bribery and Money Laundering Scheme" (Dec. 14, 2021), <https://www.justice.gov/opa/pr/panamanian-intermediary-extradited-united-states-pleads-guilty-international-bribery-and>.

33. U.S. Dep't of Justice Press Release No. 21-485, "Two Bank Executives Charged for Conspiring to Launder Hundreds of Millions of Dollars Through U.S. Financial System in Connection with Odebrecht Bribery and Fraud Scheme" (May 25, 2021), <https://www.justice.gov/opa/pr/two-bank-executives-charged-conspiring-launder-hundreds-millions-dollars-through-us-financial>.

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- *Braskem (Grubisch)*. In October 2021, Jose Grubisich, the former CEO of the Brazilian petrochemical company Braskem, was sentenced to 20 months in prison as a co-conspirator in a scheme to divert approximately \$250 million from Braskem into a secret slush fund, through which he personally negotiated and agreed to pay bribes to Brazilian government officials for contracts with Brazilian state-owned oil company Petrobras.<sup>34</sup> As part of the scheme, he also falsified Braskem's books and records and signed false Sarbanes-Oxley certifications. In April 2021, he pleaded guilty to one count of conspiracy to violate the FCPA's anti-bribery provisions and one count of conspiracy to violate the FCPA's books and records provisions. Grubisich was also ordered to forfeit \$2.2 million and pay a \$1 million fine in addition to the prison sentence.

**B. Stand-Alone Enforcement Actions Against Individuals**

In addition to the charges related to corporate resolutions, there was a continued trend in 2021 of pursuing individuals for alleged FCPA-related misconduct in stand-alone enforcement actions, the vast majority of which continue to relate to conduct in Latin America:

- *Comité Local de Abastecimiento y Producción ("CLAP")*. On October 7, 2021, DOJ charged three Colombian nationals and two Venezuelan nationals in the Southern District of Florida for an alleged conspiracy to commit money laundering, in connection with a scheme to launder proceeds of inflated contracts from the Venezuelan food and medicine distribution program, CLAP, which totaled approximately \$1.6 billion.<sup>35</sup>
- *Instituto de Seguridad Social de la Policía Nacional ("ISSPOL")*. On October 14, 2021, DOJ filed an indictment against two Ecuadorian nationals for their alleged roles in a bribery scheme to obtain business from the Ecuadorian public police pension fund, ISSPOL.<sup>36</sup> In connection with the same scheme, another Ecuadorian national entered into a plea agreement with DOJ on July 7, 2021.<sup>37</sup>

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34. U.S. Dep't of Justice Press Release No. 21-986, "Former Chief Executive Officer of Petrochemical Company Sentenced to 20 Months in Prison for Foreign Bribery Scheme" (Oct. 12, 2021), <https://www.justice.gov/opa/pr/former-chief-executive-officer-petrochemical-company-sentenced-20-months-prison-foreign>.

35. U.S. Dep't of Justice Press Release No. 21-1036, "Five Individuals Charged with Money Laundering in Connection with Alleged Venezuela Bribery Scheme" (Oct. 21, 2021), <https://www.justice.gov/opa/pr/five-individuals-charged-money-laundering-connection-alleged-venezuela-bribery-scheme>.

36. Indictment, U.S. v. Cherrez Mino et al., Case No. 21-cr-20528 (S.D. Fla. Oct. 14, 2021), <https://www.justice.gov/criminal-fraud/file/1445011/download>.

37. Plea Agreement, U.S. v. Villamar, Case No. 21-cr-20308 (S.D. Fla. July 7, 2021), <https://www.justice.gov/criminal-fraud/file/1421556/download>.

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- *Venezuelan SOEs.* On August 4, 2021, DOJ's Fraud Section and the SDFL announced the arrest of Naman Wakil, a Syrian national with permanent U.S. residence, on charges of conspiring to violate the FCPA, violating the FCPA, conspiring to commit money laundering, committing money laundering, and engaging in transactions involving property derived from criminal activity.<sup>38</sup> DOJ accused Wakil and his co-conspirators of paying millions of dollars in bribes to Venezuelan government officials between 2010 and 2017 to obtain at least \$250 million in contracts to: (a) sell food to Corporación de Abastecimiento y Servicios Agrícola, a Venezuelan state-owned entity responsible for purchasing food; and (b) do business with certain joint ventures involving Venezuelan state-owned energy company Petróleos de Venezuela S.A. ("PDVSA"). Wakil's trial is scheduled for November 7, 2022 in the Southern District of Florida.<sup>39</sup>

**"In addition to the charges related to corporate resolution, there was a continued trend in 2021 of pursuing individuals for alleged FCPA-related misconduct in standalone enforcement actions, the vast majority of which continue to relate to conduct in Latin America."**

- *PDVSA.* In addition to the above, other PDVSA-related enforcement actions continued, including with the guilty pleas of a former PDVSA official,<sup>40</sup> a former official at a PDVSA subsidiary,<sup>41</sup> a former legal advisor to the Ministry of Oil,<sup>42</sup> and a Venezuelan businessman.<sup>43</sup> In July 2021, a PDVSA contractor was sentenced to a year in prison.<sup>44</sup>

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38. See Kara Brockmeyer, Winston M. Paes, Douglas S. Zolkind & Daniel Aun, "New Prosecution Continues DOJ's Trend of Pursuing Foreign Individuals for Alleged FCPA-Related Misconduct Involving Latin America" at 2, FCPA Update, Vol. 13, No. 1 (Aug. 2021), <https://www.debevoise.com/insights/publications/2021/08/fcpa-update-august-2021>.
39. Paperless Minute Order, U.S. v. Wakil, No. 21-cr-20406 (S.D. Fla. Dec. 22, 2021).
40. See Andrew M. Levine, Winston M. Paes, Douglas S. Zolkind & Javier Alvarez-Oviedo, "DOJ Uses Money Laundering Statute To Prosecute Foreign Officials for Bribery – But Will This Change with New Legislation" at 3-4, FCPA Update, Vol. 12, No. 9 (Apr. 2021), <https://www.debevoise.com/insights/publications/2021/04/fcpa-update-april-2021>.
41. U.S. Dep't of Justice Press Release No. 21-258, "Former Venezuelan Official Pleads Guilty in Connection with International Bribery and Money Laundering Scheme" (Mar. 23, 2021), <https://www.justice.gov/opa/pr/former-venezuelan-official-pleads-guilty-connection-international-bribery-and-money>.
42. Plea Agreement, US v. Aqui, Case No. 18-cr-20685 (S.D. Fla. July 14, 2021), <https://www.justice.gov/criminal-fraud/file/1421351/download>.
43. Plea Agreement, U.S. v. Fermin, No. 20-cr-20163 (S.D. Fla. Apr. 19, 2021), <https://www.justice.gov/criminal-fraud/file/1388226/download>.
44. Ines Kagubare, "Ex-oil contractor sentenced to a year for PDVSA bribery scheme," Global Investigations Review (July 8, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/bribery/ex-oil-contractor-sentenced-year-pdvsa-bribery-scheme>. See also U.S. Dep't of Justice, Press Release No. 17-025, "Two Businessmen Plead Guilty to Foreign Bribery Charges in Connection with Venezuela Bribery Schemes," (Jan. 10, 2017), <https://www.justice.gov/opa/pr/two-businessmen-plead-guilty-foreign-bribery-charges-connection-venezuela-bribery-schemes>.

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- *Bribery of government officials in Bolivia.* In May 2021, DOJ charged two Bolivian government officials and three U.S. citizens with conspiracy to commit money laundering in connection with an alleged bribery scheme for a Florida-based company to secure a \$5.6 million contract from the Bolivian Ministry of Defense.<sup>45</sup> Four of the individuals charged have agreed to plead guilty.<sup>46</sup> The remaining defendant, the former Bolivian Minister of Government, is scheduled for trial in May 2022.<sup>47</sup>
- *Petroecuador.* On April 6, 2021, DOJ unsealed charges against Canadian citizen Raymond Kohut, who is accused of involvement in a scheme to pay bribes on behalf of a European energy trading company to Ecuadorian officials to obtain business from Petroecuador, Ecuador's state-owned oil company.<sup>48</sup> Kohut entered a guilty plea in April.<sup>49</sup>
- *FIFA.* Though not an FCPA case, in August 2021, the former President of the El Salvadorean soccer federation pleaded guilty to racketeering conspiracy in connection with the ongoing investigation into corruption related to FIFA.<sup>50</sup>

In addition to the enforcement actions involving Latin America, DOJ pursued stand-alone enforcement actions against at least six other individuals in 2021 related to misconduct in Chad, Egypt, and Nigeria:

- *Oil Rights in Chad.* On May 20, 2021, DOJ unsealed bribery charges from a grand jury proceeding concluded on February 7, 2019, arising from a decade-old corruption case involving Griffiths Energy International Inc. ("Griffiths"), against two former diplomats from the Republic of Chad (and one of their partners), as well as against a Canadian national and founding shareholder of Griffiths. According to the indictment, the diplomats engaged in a bribery scheme between 2009 and 2014 in their capacity as diplomats serving in Washington, D.C., in which they demanded and obtained bribes in the form of

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45. U.S. Dep't of Justice Press Release No. 21-489, "Former Minister of Government of Bolivia, Owner of Florida-Based Company, and Three Others Charged in Bribery and Money Laundering Scheme" (May 26, 2021), <https://www.justice.gov/opa/pr/former-minister-government-bolivia-owner-florida-based-company-and-three-others-charged>.
46. Plea Agreement, U.S. v. Mendizabal, No. 21-cr-60257 (S.D. Fla. Sept. 29, 2021), <https://www.justice.gov/criminal-fraud/file/1443271/download>; Plea Agreement, U.S. v. Luis Berkman, No. 21-cr-60258 (S.D. Fla. Sept. 29, 2021), <https://www.justice.gov/criminal-fraud/file/1443261/download>; Plea Agreement, U.S. v. Bryan Berkman, No. 21-cr-60255 (S.D. Fla. Sept. 29, 2021), <https://www.justice.gov/criminal-fraud/file/1443256/download>; Plea Agreement, U.S. v. Lichtenfeld, No. 21-cr-60256 (S.D. Fla. Sept. 29, 2021), <https://www.justice.gov/criminal-fraud/file/1443266/download>.
47. Order, U.S. v. Prijic, No. 21-cr-60340 (S.D. Fla. Dec. 29, 2021).
48. Information, U.S. v. Kohut, No. 21-cr-115 (E.D.N.Y. Apr. 6, 2021), <https://www.justice.gov/criminal-fraud/file/1388211/download>.
49. Chris Prentice & Jonathan Stempel, "Former Gunvor employee pleads guilty in Petroecuador bribery case," Reuters (Apr. 6, 2021), <https://www.reuters.com/article/us-usa-petroecuador-corruption-plea/former-gunvor-employee-pleads-guilty-in-petroecuador-bribery-case-idUSKBN2BT2DR>.
50. U.S. Dep't of Justice, "Former FIFA Official Pleads Guilty to Racketeering Conspiracy" (Aug. 23, 2021), <https://www.justice.gov/usao-edny/pr/former-fifa-official-pleads-guilty-racketeering-conspiracy>.



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a \$2 million payment and shares of Griffiths stock in exchange for using their influence in Chad to help the company obtain oil rights.<sup>51</sup> After arranging the bribes, Griffiths was able to contract with Chad's Ministry of Petroleum and Energy regarding the development of Chadian oil blocks. The Griffiths shareholder pleaded guilty in 2019 and is scheduled to be sentenced in February 2022.<sup>52</sup> The others remain at large.

- *Commodities Traders and Oil Contracts.* On July 26, 2021, a UK citizen and former Glencore employee, pleaded guilty for his role in a conspiracy to pay millions of dollars in bribes on behalf of Glencore to officials in Nigeria and other countries to advance Glencore's business with a Nigeria's state-owned oil company.<sup>53</sup> Another former Glencore trader entered a guilty plea in a separate proceeding related to a conspiracy to manipulate fuel prices in March.<sup>54</sup>
- *Egyptian Mining SOE.* On November 17, 2021, a former executive of a Pennsylvania coal company, pleaded guilty to charges related to a conspiracy to pay bribes to Egyptian government officials to obtain coal contracts from an Egyptian state-owned mining company.<sup>55</sup>

The SEC did not bring any charges against individuals for FCPA violations in 2021. It did, however, resolve a prior case. In June 2021, the SEC obtained a final judgment involving charges brought in 2020 against Asante Berko, a former executive of a Goldman foreign-based subsidiary, for arranging a \$2.5 million bribe from a Turkish energy company to government officials in Ghana to obtain a contract for an electrical power plant, as well as for arranging other bribes and personally paying bribes to several Ghanaian officials. The final judgment permanently enjoined Berko from violating the anti-bribery provision of the FCPA and ordered him to pay more than \$325,000 in disgorgement and prejudgment interest.<sup>56</sup>

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51. Winston M. Paes, Bruce E. Yannett & Douglas S. Zolkind, "DOJ's Prosecution of Former Chadian Diplomats Signals Focus on Holding Individuals Accountable in Foreign Corruption Cases," FCPA Update, Vol. 12, No. 11 (June 2021), <https://www.debevoise.com/insights/publications/2021/06/fcpa-update-june-2021>.

52. Robert Thomason, "Former Canadian oil executive to be sentenced Feb. 22 over bribery scheme," mLex (Nov. 22, 2021), <https://mlexmarketinsight.com/news/insight/former-canadian-oil-executive-to-be-sentenced-feb-22-over-bribery-scheme>.

53. Dylan Tokar, "Glencore Probe Yields Charges Against Another Former Trader," Wall Street Journal (July 27, 2021), <https://www.wsj.com/articles/glencore-probe-yields-charges-against-another-former-trader-11627427537>.

54. Aruna Viswanatha, "Former Glencore Oil Trader Pleads Guilty to Manipulating Prices," Wall Street Journal (Mar. 24, 2021), [https://www.wsj.com/articles/former-glencore-oil-trader-pleads-guilty-to-manipulating-prices-11616627967?mod=article\\_inline](https://www.wsj.com/articles/former-glencore-oil-trader-pleads-guilty-to-manipulating-prices-11616627967?mod=article_inline).

55. Ines Kagubare, "Former coal exec pleads guilty in Egyptian corruption case," Global Investigations Review (Nov. 17, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/bribery/former-coal-exec-pleads-guilty-in-egyptian-corruption-case>.

56. U.S. Securities & Exchange Commission Litigation Release No. 25121, "SEC Obtains Final Judgment Against Former Executive of Financial Services Company" (June 23, 2021), <https://www.sec.gov/litigation/litreleases/2021/lr25121.htm>.

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**C. DOJ Appeals and Trial Updates**

Beyond the announced arrests, indictments, and guilty pleas, DOJ litigated appeals of four convictions secured in 2019 and 2020:

- *Boncy and Baptiste*. In April 2021, the First Circuit heard DOJ's appeal of a district court's 2020 decision to grant a new trial to Roger Boncy and Joseph Baptiste, who were found guilty of conspiracy to violate the FCPA and the Travel Act in June 2019.<sup>57</sup> On August 9, 2021, the First Circuit upheld the decision to grant Boncy and Baptiste a new trial, based on a finding of ineffective assistance of counsel.<sup>58</sup> The joint retrial is scheduled for July 2022.<sup>59</sup>
- *Hoskins*. In 2019, Lawrence Hoskins, the former senior vice president for the Asia Region of Alstom Holdings S.A., was convicted in a jury trial of 11 FCPA and money laundering charges. In 2020, the FCPA charges were overturned, and Hoskins was sentenced to 15 months in prison for the money laundering counts. In August 2021, the Second Circuit heard DOJ's arguments on its appeal of the acquittal of the FCPA convictions and the judgment imposed for the money-laundering convictions, as well as Hoskins' cross-appeal raising Sixth Amendment, jury instruction, and venue issues.<sup>60</sup> We await the ruling.
- *Inniss*. In April 2021, Donville Inniss, a former member of the Barbados Parliament and Minister of Industry, was sentenced to two years in prison for his role in a bribery scheme involving insurance contracts after DOJ secured a conviction for money laundering and conspiracy to commit money laundering in his 2020 trial.<sup>61</sup> On November 24, 2021, Inniss filed an appeal in the Second Circuit, arguing that DOJ proved he received bribes but not that he laundered the proceeds, and challenging certain jury instructions. DOJ's response is due in 2022.

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57. Chris Villani, "Botched FCPA Defense May Taint Conviction, 1st Circ. Hints" Law360 (April 7, 2021), <https://www.law360.com/articles/1373062/botched-fcpa-defense-may-taint-conviction-1st-circ-hints>.

58. Hailey Konnath, "1st Circ. Agrees Atty's Botched FCPA Defense Merits New Trial," Law360 (Aug. 9, 2021), <https://www.law360.com/articles/1411201/1st-circ-agrees-atty-s-botched-fcpa-defense-merits-new-trial>.

59. Pretrial Order, *United States v. Baptiste*, Case No. 17-cr-10305-ADB (D. Mass. Sept. 18, 2021).

60. Jody Godoy, "Feds urge 2nd Circuit to revive ex-Alstom exec's bribery conviction," Reuters (Aug. 17, 2021), <https://www.reuters.com/legal/government/feds-urge-2nd-circuit-revive-ex-alstom-execs-bribery-conviction-2021-08-17>; Stewart Bishop, "Feds Tell 2nd Circ. Alstom Exec's FCPA Acquittal Was Faulty," Law 360 (Aug. 17, 2021), <https://www.law360.com/articles/1413592/feds-tell-2nd-circ-alstom-exec-s-fcpa-acquittal-was-faulty>.

61. Clara Hudson, "Ex-Barbados minister appeals against money laundering conviction," Global Investigations Review (Nov. 29, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/ex-barbados-minister-appeals-against-money-laundering-conviction>.

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In addition to the pending appeals, several FCPA-related trials, some of which were delayed from 2021, are scheduled in 2022:

- *Prijic*. The jury trial of former Bolivian minister of government Arturo Carlos Murillo Prijic for conspiracy to commit money laundering is currently scheduled for May 2022, in the Southern District of Florida.<sup>62</sup> The government of Bolivia has also brought a civil conspiracy suit against Prijic and his alleged co-conspirators in Miami-Dade Circuit Court, which is scheduled for trial in October 2022.<sup>63</sup>
- *Roger Ng*. Former Goldman Sachs executive Ng Chong Hwa (Roger Ng), whose motion to dismiss was denied in September, is scheduled for trial in February 2022 in connection with his alleged role in the 1MDB bribery and embezzlement scheme in Malaysia.<sup>64</sup>

“[I]n October 2021, DAG Monaco announced in a speech and accompanying memo revised corporate enforcement policies and reversals of certain Trump-era DOJ positions.”

- *Adoption Cases*. On November 17, 2021, Debra Parris pleaded guilty to charges brought in 2020 against her and two others in connection with an international criminal adoption scheme involving bribe payments to Ugandan government officials in exchange for permitting adoptions of Ugandan and Polish children.<sup>65</sup> The trial of one of her alleged co-conspirators, Margaret Cole, is scheduled for February 7, 2022, and the third alleged co-conspirator, Dorah Mirembe, remains at large.
- *Coburn and Schwartz*. Originally scheduled for 2021, the trial of former Cognizant president Gordon J. Coburn and chief legal officer Steven Schwartz has been delayed to 2022.<sup>66</sup>

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62. Order, *United States v. Prijic*, Case No. 21-CR-60340 (S.D. Fl. Dec. 28, 2021).

63. Jay Weaver, “Former top Bolivian official faces bribery trial over tear-gas deal with South Florida firm,” *Miami Herald* (Dec. 22, 2021), <https://www.miamiherald.com/news/local/article256737237.html>.

64. Patricia Hurtado, “Ex-Goldman Banker Roger Ng’s 1MDB Trial Delayed Over Omicron,” *Bloomberg* (Jan. 7, 2022), <https://www.bloomberqint.com/markets/ex-goldman-banker-roger-ng-s-1mdb-trial-postponed-to-feb-7>.

65. U.S. Dep’t of Justice, “Texas Woman Pleads Guilty to Schemes to Procure Adoptions from Uganda and Poland through Bribery and Fraud” (Nov. 17, 2021), <https://www.justice.gov/usao-ndoh/pr/texas-woman-pleads-guilty-schemes-procure-adoptions-uganda-and-poland-through-bribery>.

66. Robert Thomason, “Former Cognizant executives’ US Foreign Corrupt Practices Act trial set for March 21” *mlex* (July 8, 2021), <https://mlexmarketinsight.com/news/insight/former-cognizant-executives-us-foreign-corrupt-practices-act-trial-set-for-march-21>.

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- *Wakil*. The jury trial of Naman Wakil is scheduled for November 11, 2022 in the Southern District of Florida.<sup>67</sup>
- *FIFA*. The trial of two individuals for wire fraud and money laundering charges (not the FCPA), in connection with the FIFA bribery investigation, is scheduled for May 2022.<sup>68</sup>

### **III. FCPA-Related Legal, Policy, and Enforcement Updates**

#### **A. Enforcement Policy Updates**

##### **1. DOJ Announces More Aggressive Corporate Enforcement Policies**

As previously reported, in October 2021, DAG Monaco announced in a speech and accompanying memo revised corporate enforcement policies and reversals of certain Trump-era DOJ positions.<sup>69</sup> DAG Monaco addressed four developments with potentially significant implications for companies under investigation or considering whether to self-report potential misconduct. These changes, however, may make companies less inclined to self-report, which in turn could lead to fewer cases.

- First, taking a more aggressive approach in assessing a company's record, prosecutors now must consider all prior corporate misconduct in deciding whether to charge a corporation and, if so, what type of resolution to seek. DOJ will consider prior civil, criminal, and regulatory violations (including violations of state or foreign law) in assessing a company's commitment to compliance. DOJ will assess how to weigh this record, including how recent the misconduct was, whether the same individuals or business units were involved, the type of sanctions imposed, and the similarity of the misconduct to the conduct now at issue. In combination with the new advisory panel just announced (see below), this change may impact meaningfully companies caught in DOJ's crosshairs.
- Second, DOJ will return to the "Yates Memo" standard on individual liability that requires companies to disclose all relevant facts regarding all persons involved in corporate misconduct – both inside and outside the company – to obtain any cooperation credit. From DOJ's perspective, companies and counsel are not in a position to assess the relative culpability of individuals; rather, prosecutors must decide who is substantially involved so they need all relevant info on all involved individuals. This reversed previous Trump Administration guidance limiting the

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67. Paperless Minute Order, *United States v. Wakil*, Case No. 21-CR-20406 (S.D. Fl. Dec. 22, 2021).

68. Rachel Scharf, "FIFA Bribe Trial Will Include World Cup Testimony, With Caveat," *Law360* (Jan. 13, 2022), [https://www.law360.com/articles/1455412?utm\\_source=rss&utm\\_medium=rss&utm\\_campaign=articles\\_search](https://www.law360.com/articles/1455412?utm_source=rss&utm_medium=rss&utm_campaign=articles_search).

69. Kara Brockmeyer, et al., "DOJ Revises Corporate Criminal Enforcement Policies," *Debevoise In Depth* (Nov. 1, 2021), <https://www.debevoise.com/insights/publications/2021/11/doj-revises-corporate-criminal-enforcement>.

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disclosure obligation to those “substantially involved” in misconduct. The re-imposition of this broader requirement will increase the length and burdens associated with investigations and provide prosecutors additional leverage in negotiations with defense counsel.

- Third, DOJ reversed the Trump Administration guidance that independent corporate monitors should be imposed as the exception rather than the rule. Instead, prosecutors will consider a monitor where a company’s compliance program and controls are “untested, ineffective, inadequately resourced, or not fully implemented at the time of a resolution.” This may trigger a return to the more frequent use of monitors in corporate resolutions and associated significant costs and burdens associated with monitorships. It also highlights the importance of a robust compliance programs. If a compliance program is fully resourced and implemented, there is a stronger argument against DOJ imposing a monitor. There have been only 10 monitorships imposed in connection with FCPA resolutions since 2017, and none in 2021, but the updated guidance (and a review of recent corporate enforcement actions, outside the FCPA space, in which monitors were imposed)<sup>70</sup> suggests that we may see them more frequently in the future.
- Lastly, DAG Monaco announced the formation of a Corporate Crime Advisory Group (“CCAG”) that will further consider updating DOJ’s approach to corporate criminal enforcement, including the use of cooperation credit, handling of recidivists and use of pre-trial resolutions like NPAs and DPAs. We’ll be closely watching what comes out of the CCAG in the coming months. For example, will DOJ presumptively oppose NPAs and DPAs for companies that have received such agreements in the past? This would be a significant shift in DOJ policy, which some fear may be on the horizon.

DAG Monaco also highlighted the substantial premium on risk-based compliance programs, stressing that corporations can mitigate risks when they “proactively put in place compliance functions and spend resources anticipating problems.” She also cautioned that not doing so is “going to cost them down the line.”

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70. Ben Penn, “U.S. Signals Corporate Crime Shifts in Pair of Fraud Settlements,” Bloomberg Law (Jan. 12, 2022), <https://news.bloomberglaw.com/white-collar-and-criminal-law/u-s-signals-corporate-crime-shifts-in-pair-of-fraud-settlements/?utm>.



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**2. United States Issues First Ever U.S. Strategy on Countering Corruption**

In June, the Biden Administration issued a National Security Study Memorandum declaring fighting corruption a core national priority.<sup>71</sup> This Memorandum demonstrates a heightened focus on cross-border anti-corruption efforts and strengthened FCPA enforcement measures. A few months later, the Biden Administration released its Anti-Corruption Strategy, which details how the Administration will approach anti-corruption efforts and articulates five different pillars: (1) modernizing, coordinating, and resourcing U.S. government efforts to better fight corruption; (2) curbing illicit finance; (3) holding corrupt actors accountable; (4) preserving and strengthening multilateral anti-corruption architecture; and (5) improving diplomatic engagement and leveraging foreign assistance resources to advance policy objectives.<sup>72</sup> Some key takeaways:

**“[The Biden Administration’s National Security Study Memorandum] demonstrates a heightened focus on cross-border anti-corruption efforts and strengthened FCPA enforcement measures.”**

- *Strengthened enforcement regime and refocused efforts.* While the Anti-Corruption Strategy does not itself amend the FCPA or other laws or regulations, it provides insight into areas of enforcement this Administration will increasingly scrutinize. Greater funding will be accompanied by increased coordination efforts between agencies and foreign partners. Additionally, this Administration seeks to criminalize the demand side of bribery, which is significant to balance the FCPA’s supply-side focus. This effort may spur the creation of new targeted laws or encourage foreign countries to enact their own.
- *Potential changes for companies and gatekeepers.* The Anti-Corruption Strategy suggests that there are insufficient AML regulations in place for investment entities, such as private equity funds, hedge funds, and trusts, potentially allowing corrupt actors to evade accountability. The Treasury Department will

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71. Andrew M. Levine, et al., “President Biden Declares the Fight against Corruption a National Security Priority and Directs Federal Agencies to Enhance Enforcement,” Debevoise Update (June 7, 2021), <https://www.debevoise.com/insights/publications/2021/06/president-biden-declares-the-fight>.

72. Andrew M. Levine, Winston M. Paes, Douglas S. Zolkind, Cara Ortiz, & Jennifer Romero, “Biden Administration’s Strategy on Countering Corruption Seeks New Era of Global Anti-Corruption Enforcement and Cooperation,” FCPA Update, Vol. 13, No. 5 (Dec. 2021), <https://www.debevoise.com/insights/publications/2021/12/fcpa-update-december-2021>.

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revisit a 2015 Notice of Proposed Rulemaking that would require minimum standards for AML programs and new requirements for suspicious activity reporting, and digital assets will be subjected to greater scrutiny around their use in furthering corruption and other criminal activities. Similarly, the Anti-Corruption Strategy notes that gatekeepers like lawyers and accountants lack necessary oversight, which may lead to greater penalties and increased regulation for those who enable corrupt transactions or facilitate money laundering. Companies and their lawyers, auditors, bankers, and other partners must pay close attention as federal agencies promulgate new AML regulations, and ensure that compliance systems are updated accordingly.

- *Collaboration with overseas partners.* Throughout the Anti-Corruption Strategy, there is a clear emphasis on working with non-U.S. counterparts to address corruption risk. The Administration strongly signals a commitment to assist foreign partners in developing and implementing anti-bribery laws, continue implementation of the UN Convention Against Corruption, and reform anti-corruption programming for international financial institutions. Further, this Administration will create the United States Agency for International Development's Anti-Corruption Response Fund and the Global Anti-Corruption Rapid Response Fund, which will both confront "transnational organized crime."

### **3. FinCEN Proposes Beneficial Ownership Reporting Rule**

In December 2021, the Financial Crimes Enforcement Network ("FinCEN") requested comments on a proposed rule that would require certain legal entities to report beneficial ownership information to FinCEN (the "Proposed Rule").<sup>73</sup> The Proposed Rule seeks to implement the beneficial ownership obligations of the Anti-Money Laundering Act of 2020 ("AML Act") by instructing domestic and foreign reporting companies to provide this information.

Under the Proposed Rule, the information that a reporting company must submit concerns (1) each beneficial owner and company applicant; and (2) the reporting company itself. The Proposed Rule clarifies that a beneficial owner is any individual who exercises substantial control over the reporting company, or who owns or controls at least 25% of the reporting company's ownership interest. "Substantial control" is defined via a non-exclusive list of activities, including service as a senior officer of the reporting company and direction, determination or decision of important matter.

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73. Satish M. Kini, Aseel M. Rabie, Robert T. Dura, Josie Dikkers, & Jonathan R. Wong, "FinCen Proposes Beneficial Ownership Reporting Rule," Debevoise In Depth (Dec. 10, 2021), <https://www.debevoise.com/insights/publications/2021/12/fincen-proposes-beneficial-ownership>.

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The Proposed Rule is only the first step in an ongoing process under the AML Act; FinCEN has already stated that it intends to publish additional rules concerning who may access beneficial ownership information in its registry and how its existing Customer Due Diligence Rule from 2018 will need to be revised to reconcile its provisions with the new reporting regime. The comment period on the Proposed Rule will close in early February. We will continue to monitor its progress, as well as FinCEN's other efforts to implement the beneficial ownership reporting requirements in the coming year.

**B. Developments in Case Law**

**1. Federal Judge Dismisses FCPA Case for Lack of Jurisdiction**

In November 2021, the U.S. District Court for the Southern District of Texas dismissed DOJ's three-count indictment against Swiss money manager Daisy Rafoi-Bleuler. Rafoi-Bleuler was accused of assisting in a foreign bribery scheme where the officials of Venezuelan state-owned oil company PDVSA accepted kickbacks in exchange for awarding lucrative energy contracts.<sup>74</sup>

Specifically, DOJ asserted that Rafoi-Bleuler acted as an "agent of a domestic concern" by helping three of her co-defendants and their U.S. based companies conduct interstate financial transactions related to the bribes. Rafoi-Bleuler, on the other hand, argued that she was not an "agent" within the meaning of the FCPA because she was not a U.S. citizen and none of her extraterritorial acts were connected to the United States.<sup>75</sup>

The court agreed with Rafoi-Bleuler, finding that the government had not produced direct evidence of her agency because the acts that it pointed to were not committed by Rafoi-Bleuler but by her co-defendants. The court further rejected DOJ's assertion that it had jurisdiction over Rafoi-Bleuler because she conspired with her co-defendants. Finally, the court accepted Rafoi-Bleuler's claim that the term "agent" was unconstitutionally vague as applied to her.<sup>76</sup>

DOJ appealed the decision to the U.S. Court of Appeals for the Fifth Circuit.<sup>77</sup> The appeal may be influenced by the result in the similar case of Lawrence Hoskins, mentioned above, which is currently pending before the Second Circuit.<sup>78</sup>

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74. Memorandum & Order, *United States v. Rafoi-Bleuler*, Case No. 4:17-CR-0514-7 (S.D. Tex. Nov. 12, 2021), at 1-4.

75. *Id.* at 5.

76. *Id.* at 16, 23.

77. See Ines Kagubare, "DOJ to appeal adverse FCPA jurisdictional ruling," Global Investigations Review (Dec. 8, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/bribery/doj-appeal-adverse-fcpa-jurisdictional-ruling>.

78. See Dylan Tokar, "Dispute Over Agency in Foreign Bribery Case Gets Second Hearing," The Wall Street Journal (Aug. 17, 2021), <https://www.wsj.com/articles/dispute-over-agency-in-foreign-bribery-case-gets-second-hearing-11629240990>. See also Kara Brockmeyer, Andrew M. Levine, Andreas A. Glimenakis, & Katherine R. Seifert, "District Courts Address Significant Aspects of Individual Criminal Liability under the FCPA," FCPA Update, Vol. 11, No. 8 (March 2020), <https://www.debevoise.com/insights/publications/2020/03/fcpa-update-march-2020>, at 7-11.

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**2. Ruling in Ng's 1MDB Case Signals Low Bar for Internal Controls Charges**

As briefly noted above, the trial of former Goldman Sachs executive Roger Ng on charges stemming from the 1MDB scandal is scheduled for trial in February 2022. The case has already produced a significant 160-page ruling that we covered in our September 2021 FCPA Update.<sup>79</sup>

DOJ charged Ng with, in part, conspiracy to circumvent internal accounting controls at Goldman. Ng was accused of continuing to engage in bond transactions that were assisted by Malaysian financier Low Taek Jho ("Jho Low"), even after Goldman's Compliance Group refused to approve a client relationship with Low due to concerns about the source of his wealth. Ng argued to the district court that this charge should be dismissed because: (1) the FCPA's internal accounting provisions do not apply to bribes paid from the assets of the 1MDB fund, a non-issuer; (2) precedent does not support a conviction where a defendant's company did not engage in a transaction concerning its own funds; (3) the government failed to identify an internal accounting control that was violated, as Goldman's compliance group was not "accounting related;" (4) violations of the internal accounting controls provision must be proven through falsified documents; and (5) the internal accounting controls provision of the FCPA is unconstitutionally vague.

The district court rejected Ng's motion to dismiss, reasoning that there *was* a use of company assets sufficient to trigger the internal accounting provisions because the relevant transaction was Goldman's purchase of 1MDB bonds. The court further found that the jury should decide whether an internal control is "accounting related" or not, and that falsified documents were not required to prove violations of the accounting provisions. Finally, the court decided it would be premature to resolve the constitutional issue at this stage of the proceedings.<sup>80</sup>

Although the district court's ruling in *Ng* does not appear to break new ground, it reflects the relatively low bar needed to allege violations of the FCPA's internal accounting controls provisions. Accordingly, the decision serves as a cautionary tale regarding how broadly these provisions potentially can be interpreted, setting a high bar for challenges to FCPA charges on a motion to dismiss.<sup>81</sup>

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79. Kara Brockmeyer, Bruce E. Yannett, Michael P. Geraltowski, & Andreas A. Glimenakis, "Ruling in Ng's 1MDB Case Signals Low Bar for Internal Controls Charges," FCPA Update, Vol. 13, No. 2 (Sept. 2021), <https://www.debevoise.com/insights/publications/2021/09/fcpa-update-september-2021>, at 2.

80. *Id.* at 4-5.

81. *Id.* at 2-7.

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### 3. Eleventh Circuit Upholds DOJ's Use of a "Taint Team" to Screen for Potentially Privileged Materials

In August 2021, the Eleventh Circuit published a significant ruling approving DOJ's use of a "taint team" to screen for potentially privileged materials in a white-collar criminal case.<sup>82</sup> Such teams are made up of government lawyers and federal agents who are not associated with the prosecution in a given case, and who are tasked with screening for privileged material. Defense counsel, as well as some courts, consistently have challenged the use of such teams, arguing, among other things, that the government cannot be entrusted with protecting the attorney-client privilege of the individuals the government is itself prosecuting or investigating.<sup>83</sup>

**"Perhaps most significantly, the OECD now expressly urges member countries to use non-trial resolutions ... for foreign bribery cases involving both corporations and individuals."**

In *United States v. Korf*, DOJ deployed a taint team to "conduct a privilege review of materials seized from a suite of offices in connection with an international money laundering investigation."<sup>84</sup> Their review, however, took place only after the defendants were permitted to go over all the materials and create a privilege log. Moreover, the privilege holders were allowed to challenge the taint team's privilege determinations before any materials were shared with the prosecution team. The Eleventh Circuit ruled that these steps made the taint team protocol reasonable and appropriate under the circumstances. This result appears to be at odds with the Fourth Circuit's conclusion in a much-commented on 2019 case, where it sharply curtailed DOJ's ability to rely on taint teams.<sup>85</sup> It remains to be seen whether other circuits or the Supreme Court will weigh in on this issue, and how the comparatively strong safeguards that the Eleventh Circuit approved in *Korf* will influence.

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82. *United States v. Korf*, 11 F.4th 1235 (11th Cir. 2021).

83. Kara Brockmeyer, Andrew M. Levine, Douglas S. Zolkind, & Delia M. Arias D. Leon, "Eleventh Circuit Upholds Taint Team Procedures, Finding Safeguards Sufficient to Protect Attorney-Client Privilege" at 9, FCPA Update, Vol. 13, No. 3 (Oct. 2021) [hereinafter "Oct. 2021 FCPA Update"].

84. Kara Brockmeyer, Andrew M. Levine, & Douglas S. Zolkind, "Key Factors For Challenging DOJ 'Taint Team' Procedure," Law360 (Dec. 8, 2021), <https://www.law360.com/articles/1445667/key-factors-for-challenging-doj-taint-team-procedure>.

85. Oct. 2021 FCPA Update at 9-10.



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**C. Other Updates**

**1. Congressional Caucus Against Foreign Corruption and Kleptocracy**

June 2021 was “Counter-Kleptocracy Month” in Congress, an initiative of the bipartisan Caucus against Foreign Corruption and Kleptocracy.<sup>86</sup> The newly-formed Caucus introduced the Combating Global Corruption Act (“CGCA”) bill, which would require the State Department to publish annually a tiered ranking of all countries. Countries listed in the first tier would be those “that meet minimum standards for combatting public corruption.”<sup>87</sup> The CGCA defines these standards to include “making serious and sustained efforts to address corruption,” “enact[ing] and implement[ing] laws . . . structures, policies, and practices that prohibit corruption,” and “prescrib[ing] punishment for significant corruption that is commensurate with punishment for serious crimes.”<sup>88</sup> Countries in tier two would be those “making efforts” to meet the minimum standards, while countries in tier three would be those “making de minimis or no efforts” to comply. (Notably, the United States itself, now ranked 27th in the world, has seen its Corruption Perceptions Index score fall from a high of 76/100 in 2015 to 67/100 in Transparency International’s most recent rankings.)<sup>89</sup>

As of June 2021, the CGCA had cleared the Senate Foreign Relations Committee.<sup>90</sup> Whether or not it is ultimately enacted, its introduction further indicates a renewed focus from the current Congress on the problem of foreign corruption, much like the White House’s Anti-Corruption Strategy discussed above.

**2. OECD Launches Revised Anti-Bribery Recommendation**

In November 2021, the OECD published revised anti-corruption guidelines, the Recommendation for Further Combating Bribery of Foreign Officials, based on the proposal of the Working Group on Bribery. The new guidelines update the original Recommendation from 2009, which set the standard against which the OECD Working Group on Bribery evaluates whether its member countries are meeting their obligations under the Anti-Bribery Convention. The new guidelines significantly expand the expectations of member countries regarding enforcement

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86. “Launch of the Congressional Caucus Against Foreign Corruption and Kleptocracy,” Commission on Security and Cooperation in Europe (June 10, 2021), <https://www.csce.gov/international-impact/events/putting-kleptocracy-crosshairs>.

87. Combating Global Corruption Act of 2021, S.14, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/senate-bill/14/text>.

88. *Id.*

89. Transparency International, corruption Perceptions Index (2021), <https://www.transparency.org/en/cpi/2021/index/usa>.

90. “Cardin Human Rights and Anti-Corruption Legislation Approved by Senate Foreign Relations Committee,” Commission on Security and Cooperation in Europe (June 23, 2021), <https://www.csce.gov/international-impact/press-and-media/press-releases/cardin-human-rights-and-anti-corruption>.

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by emphasizing: international cooperation in anti-bribery enforcement; enhanced protections for whistleblowers; “transparent, effective, proportionate, and dissuasive” sanctions for foreign bribery actors (that account for mitigating factors); incentives for companies to adopt compliance programs in line with robust accounting standards; and the reduction of officials’ susceptibility to bribery through a multipronged approach. In addition, the 2021 Recommendation addresses the tension between data protection rules and foreign bribery cases, directing member countries with such protections to consider issuing regulations that would allow for data processing in both anti-corruption due diligence and internal investigations.<sup>91</sup>

Perhaps most significantly, the OECD now expressly urges member countries to use non-trial resolutions (“NTRs”) for foreign bribery cases involving both corporations and individuals. The 2021 Recommendation highlights the importance of member countries developing clear standards for NTRs, in the interest of “due process, transparency, and accountability.” To that end, the OECD advises that, when using a NTR, member countries should, if possible, publish the central facts and identities of the key persons involved, the factors weighed when deciding to deploy the NTR, the basis for any sanctions imposed and the nature of those sanctions, and the remedies to be adopted.

Thus, the 2021 Recommendation provides a broad framework for multijurisdictional settlements in foreign bribery cases, offering much-needed guidance for countries that have not yet adopted concrete NTR standards. We anticipate that this new international model for NTRs will widen their use and encourage a more coordinated global approach to settlements.

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91. See Kara Brockmeyer, Andrew M. Levine, Bruce E. Yannett, Ada Fernandez Johnson, & Katelyn McNelis, “OECD Raises the Bar with New Recommendations for Combating Bribery of Foreign Officials,” Debevoise In Depth (Dec. 3, 2021), <https://www.debevoise.com/insights/publications/2021/12/oecd-raises-the-bar-with-new-recommendations>.

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The last year has certainly been mixed for the UK Serious Fraud Office (“SFO”). As in recent years, the agency has successfully resolved a number of corporate matters. However, those successes may well prove to be overshadowed by the continued challenges the agency faces in prosecuting individuals and criticisms of the way in which it has handled its disclosure obligations. Of particular note was the successful appeal by former Unaoil executive Ziad Akle, which not only saw a high-profile conviction overturned, but has also resulted in an independent review into the SFO’s conduct of the case.

The coming year may show whether the approach taken by the SFO on some matters is indicative of a new trend in enforcement methods. In 2021, in addition to securing three new DPAs, the SFO obtained two major guilty pleas, expeditiously ending two longstanding investigations. The SFO has received praise for using this approach, but it remains to be seen whether it is able to pursue similar methods in other ongoing investigations. It will also be interesting to see whether the suspended sentence given to David Lufkin in relation to the Petrofac case will be indicative of a broader sentencing trend in cases in which the individual pleading guilty has material evidence against other corporates or individuals being investigated.

For the UK Financial Conduct Authority (“FCA”), 2021 saw the highest total amount of fines imposed in six years and a continued focus on financial crime. While the total number of penalties issued was lower than in previous years, the FCA had some high-profile successes, not least securing the criminal conviction of NatWest Bank for breaching anti-money laundering regulations.

### I. Enforcement Activity

#### **A. SFO**

##### **1. Guilty Pleas**

In a slight departure from recent years, when DPAs have been the SFO’s dominant method of resolving corporate enforcement cases, the agency secured two significant guilty pleas from companies last year.

In October 2021, Petrofac Ltd. (“Petrofac”) pleaded guilty to seven counts of failing to prevent bribery under the UK Bribery Act 2010. Petrofac’s former senior executives used a complex scheme involving intermediaries to pay £32 million in bribes to win contracts in the oil and gas industry in Iraq, Saudi Arabia and the UAE

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between 2011 and 2017. Overall, Petrofac earned around £2.6 billion through these contracts. The corruption scheme was typical of many recent high-profile bribery cases and further demonstrates the risks associated with using intermediaries, particularly in high risk jurisdictions. The Court was particularly critical of Petrofac's compliance controls, noting that they did not carry real weight, were easily bypassed by the sales teams and could be overruled by senior business personnel.

Following a plea agreement with the SFO, Petrofac was ordered to pay a total of £77 million, consisting £23 million in disgorgement of profits, a £47 million penalty, and the SFO's costs of £7 million. Though Petrofac received a sentence reduction for its guilty plea, the penalty appears largely to reflect Petrofac's submissions that it would be unable to pay a larger fine, and an alternative calculation method used in order to close the case more expeditiously. The SFO's approach in this case and the successful outcome of a guilty plea were widely viewed as positive indicators of the SFO's enforcement direction. As discussed below, Petrofac's former head of sales, David Lufkin, was sentenced on the same day as Petrofac.

In April 2021, GPT Special Project Management Limited ("GPT") pleaded guilty to making corrupt payments in relation to work carried out for the Saudi Arabian National Guard between December 2008 and July 2010. The Court ordered GPT to pay a confiscation amount of £21 million, fine of £7.5 million, and costs of £2.2 million. The guilty plea marks an eventual success for the SFO, which had opened its investigation into GPT more than eight years earlier. Three individuals have also been charged in connection with GPT's corruption; they await trial in May 2022.

## **2. DPAs**

The SFO also secured three DPAs in 2021, taking the total to twelve since DPAs were introduced in the UK in 2014. The SFO has not yet announced whether it will be charging any individuals in connection with the misconduct underlying these DPAs; the charging decisions and any subsequent prosecutions will be watched with interest.

In July 2021, Lord Justice Edis approved a DPA with Amec Foster Wheeler Energy Limited ("AFWEL"), a UK energy company.<sup>1</sup> The DPA relates to corrupt payments AFWEL made between 1996 and 2010 in Nigeria, Saudi Arabia, Malaysia and India, as well as bribery in Brazil from 2011 to 2014. In the UK, AFWEL agreed to pay a financial penalty of £100 million and the SFO's costs of £3.4 million, together with £210,000 compensation to the people of Nigeria. This is only the second time that a company has agreed to pay compensation to those impacted by its offences as part of the DPA.

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1. See Karolos Seeger, et al., "UK Serious Fraud Office Reaches Deferred Prosecution Agreement with Amec Foster Wheeler Energy – Some Key Takeaways" (July 2021), <https://www.debevoise.com/insights/publications/2021/07/uk-serious-fraud-office-reaches-deferred>.

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Also in July 2021, Mrs Justice May approved DPAs with two UK-based companies for bribery offences. The SFO has not disclosed the identities of the companies or published the DPAs and supporting documents. However, the SFO has stated that the DPAs share a common factual background involving the payment of bribes in relation to multi-million pound UK contracts. The two companies will pay a total of £2.5 million, comprising disgorgement of profits and a financial penalty.

### **3. Pursuing Individuals**

In 2021, the SFO had both successes and failures in prosecuting executives who played substantive roles in the unlawful conduct of companies that subsequently entered into plea agreements or DPAs. This was an important year for the SFO, given its limited recent success in convicting individuals.<sup>2</sup> Unfortunately for the SFO, the nature of the problems it endured, as well as the attention those issues received in the press, greatly undermined the positive news.

**“[The SFO’s] successes may well prove to be overshadowed by the continued challenges the agency faces in prosecuting individuals and criticisms of the way in which it has handled its disclosure obligations.”**

Petrofac’s former head of sales, David Lufkin, was sentenced to two years’ imprisonment (suspended for 18 months) and ordered to pay a confiscation order of over £140,000 for his role in Petrofac’s unlawful conduct. Lufkin had previously pleaded guilty to 14 counts of bribery and admitted making corrupt payments to influence the awarding of contracts to Petrofac. The SFO noted that Lufkin had cooperated with the SFO investigation and assisted in the wider investigation against the company, which likely contributed to his fairly lenient punishment.

The SFO was successful in prosecuting former Unaoil executives who had made corrupt payments to Iraqi officials. Paul Bond, a former senior sales manager, was found guilty on two counts of conspiracy to make corrupt payments. Bond paid \$900,000 to Iraqi public officials in order to access sensitive information about future business opportunities for Unaoil. He received a three-and-a-half year

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2. See Bruce E. Yannett, Karolos Seeger et al., “The SFO’s Failed Barclays Prosecutions: The Limitations of English Corporate Liability Exposed?”, FCPA Update Vol. 11, No. 8 (March 2020), <https://www.debevoise.com/insights/publications/2020/03/fcpa-update-march-2020>.



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custodial sentence and was ordered to pay £400,000 in confiscation. Bond's conviction followed the convictions of Ziad Akle and Stephen Whiteley, fellow former Unaoil executives, who in 2020 were found guilty of a number of bribery offences in relation to the same conduct. A fourth former executive, Basil Al Jarah, pleaded guilty to similar offences in 2019.

Although the SFO initially appeared to have secured a clean sweep of convictions against former Unaoil executives, concluding its five-year investigation into them, its success may prove to be short-lived.

In December 2021, the Court of Appeal overturned the conviction against Akle due to the SFO's failure to disclose "embarrassing" evidence that would have detailed its "wholly inappropriate" dealings with a private investigator during its Unaoil investigation. Specifically, the SFO held several meetings with David Tinsley, a private investigator engaged by the Ahsani family, the owners and principals of Unaoil. It was alleged that, during these meetings, Tinsley arranged for the Ahsani family to cooperate fully with the SFO and for Tinsley to obtain guilty pleas from Akle and other Unaoil executives. In exchange, Tinsley allegedly secured more lenient treatment of members of the Ahsani family, two of whom ultimately entered into plea deals with U.S. DOJ. The Court ruled that the SFO failed to disclose key documents relating to the SFO's interactions with Tinsley, which "significantly handicapped" Akle's defence. Consequently, the Court of Appeal quashed Akle's conviction and rejected the SFO's application for a retrial. This dealt a serious blow to the SFO and its credibility in conducting investigations. Nor is this likely to mark the end of the Unaoil saga: Bond intends to appeal his conviction, and it remains to be seen whether Whiteley and Al Jarah will follow suit.

In the aftermath of the Court of Appeal's judgment, the UK's Attorney General, Suella Braverman, announced an independent review into the SFO's conduct in the Akle case. In addition to investigating the specific circumstances of the interactions with Tinsley, the review is expected to consider the SFO's approach to its investigations more broadly, particularly with respect to its disclosure failings (which have also been criticised in connection with the ENRC and Serco cases, described below).

Akle's case was not the only prosecution to fall apart in 2021 due to the SFO's procedural errors. In April, the trials of two former Serco executives, Nicholas Woods and Simon Marshall, collapsed after the Judge instructed jurors to return a not guilty verdict. Woods and Marshall had been charged with fraud and false accounting in artificially reducing Serco's reported profit margins on

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service contracts with the Ministry of Justice; both denied the allegations. The Judge's instruction followed the SFO's failure to disclose significant evidence to the defendants. Although the SFO sought a retrial after it identified the errors, the Judge determined that a retrial was not in the public interest. Woods and Marshall now form part of the growing number of individuals (currently 11) who have been acquitted in cases linked to companies that have entered into DPAs.

#### **4. New Investigations**

Last year, the SFO announced several new investigations, although none of these publicly-disclosed cases appeared to be notable corruption matters. The most high-profile investigation announced by the SFO related to suspected fraud, fraudulent trading and money laundering by the Gupta Family Group Alliance, one of the UK's largest steel groups.

#### **5. Investigations Closed**

The SFO also closed two investigations that had been running for several years, without pursuing any charges.

In January 2021, the SFO announced that it had concluded its investigation into British American Tobacco ("BAT"). BAT faced allegations that it bribed officials in Burundi, The Comoros and Rwanda since 2015, following investigations by the BBC and The Guardian which allegedly showed that BAT made corrupt payments in these countries to obstruct measures introduced as part of the World Health Organisation's Framework Convention on Tobacco Control.

In addition, the SFO closed its investigation into Kellogg Brown & Root Ltd ("KBR UK") after its attempt to obtain documents from KBR UK's U.S. parent company (KBR Inc.) using a notice under s.2(3) of the Criminal Justice Act 1987 (a "Section 2 Notice") was quashed by the UK courts.

The SFO launched an investigation into KBR UK in 2017, following allegations that the company had potentially made corrupt payments worth over \$23 million. At a case update meeting, the SFO served KBR Inc.'s senior officers with a Section 2 Notice, compelling KBR Inc. to provide various documents it held outside the UK. KBR Inc. applied for a judicial review of the SFO's actions. The case was ultimately appealed to the Supreme Court, which held that the SFO was not permitted to issue a Section 2 Notice against KBR Inc.<sup>3</sup> In particular, the Supreme Court noted that KBR Inc. does not have a UK presence and does not conduct business in the UK,

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3. See Karolos Seeger, et al., "UK Supreme Court Rules That SFO Cannot Require Foreign Companies to Produce Documents Held Overseas" (February 2021), <https://www.debevoise.com/insights/publications/2021/02/uk-supreme-court-rules-that-sfo>.

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meaning there was a presumption (which was not rebutted on the facts) that a Section 2 Notice could not apply extraterritorially to KBR Inc. The Supreme Court indicated that the SFO should instead utilise international mutual legal assistance mechanisms to obtain the documents.

While attempting to serve a Section 2 Notice on a foreign company in these circumstances was an ambitious approach by SFO, it is clear that the judgment was highly fact specific. It remains to be seen whether the SFO can issue Section 2 Notices against foreign entities that have a registered office, or conduct business, in the UK, and the SFO continues to have a range of other legal mechanisms for obtaining overseas evidence. Nonetheless, it appears that obtaining these documents may have been a final attempt by the SFO to build a case against KBR UK. One month after the Supreme Court's judgment, and almost four years after commencing the investigation, the SFO announced that it had closed its investigation into KBR UK.

## **6. Litigation with ENRC**

Last year, there were significant developments in the SFO's ongoing interactions with Kazakh natural resources company Eurasian Natural Resources Corporation Ltd ("ENRC"), which has been under formal investigation since 2013. In early 2021, ENRC launched a £70 million civil claim against the SFO, former SFO Case Controller John Gibson, and its former counsel, Dechert. The trial commenced in May. The claim, for breach of contract and fiduciary duty, alleges that a former Dechert partner provided information to his contacts at the SFO without ENRC's authorisation and leaked confidential and privileged documents to the media while Dechert was representing ENRC. In documents submitted to the court, Dechert admitted to failing to turn over copies of text messages that the former partner exchanged with SFO officials. These claims mark further difficulties for the SFO in its protracted legal battles with ENRC, which is still awaiting a charging decision from the SFO since it opened its investigation in 2013. Judgment is expected in 2022.

## **B. FCA**

In 2021, the FCA imposed financial penalties on 10 firms and individuals, totalling £568 million. Although the number of penalties was fewer than in previous years, the total amount of fines was the highest since 2015. An unusually high number and value of the FCA's penalties last year (five cases totalling £477 million) related to failings in firms' controls for preventing money laundering, bribery and corruption,

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demonstrating that financial crime remains at the top of the FCA's agenda. Two of the most significant enforcement outcomes are outlined below.

### 1. NatWest Prosecution

The most high-profile FCA case in 2021 was the criminal conviction of a major UK bank, National Westminster Bank Plc ("NatWest"), for breaching anti-money laundering ("AML") regulations. This was the first time that the FCA has used its criminal powers, rather than regulatory or civil powers, to prosecute a firm for deficient AML controls. NatWest pleaded guilty to three charges and was fined almost £265 million for lacking adequate controls to identify high-risk customers and conduct enhanced due diligence and ongoing monitoring of those relationships.

**"It is still too early to predict how the UK's laws in relation to corporate criminal liability will change, but it will likely be some time before a new framework is implemented."**

One of NatWest's customers, a jewellery business, made increasingly large deposits between 2012 and 2016, totalling £365 million, a large portion of which was in cash. Numerous other red flags indicating a large-scale money laundering operation were missed or not followed up by the bank. NatWest's prosecution and conviction serves as a clear warning that, finally, the FCA is actively seeking to use criminal powers that it has had for well over a decade. However, such prosecutions are likely to be appropriate only in somewhat exceptional cases where a firm's AML controls were seriously deficient and there is evidence that this facilitated significant money laundering by a third party.

### 2. Credit Suisse Final Notice

In October, the FCA fined Credit Suisse £147 million (\$200 million) as part of a global resolution involving the U.S. SEC and DOJ, and totalling \$475 million. As part of Credit Suisse's settlement with the FCA, the bank agreed to forgive \$200 million of debt owed to it by the Mozambique government.

Several former Credit Suisse employees shared over \$50 million in kickbacks from a ship-building contractor for facilitating the bank's approval of loans totalling over \$1.3 billion made to the Mozambique government to fund two naval projects. It was

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later alleged in the press that the contractor used substantial portion of the loans to enrich government officials. The FCA criticised several aspects of the bank's anti-bribery systems and controls including: a lack of compliance resources, insufficient scrutiny and challenge of the transactions and the associated corruption risks, failure to investigate concerns raised internally and in the press, failure to follow the bank's internal approval procedures, and lack of engagement by senior managers in reviewing the due diligence work that had been carried out.

**II. Legislative Developments**

In recent years, there has been growing momentum in favour of reforming the UK's corporate criminal responsibility framework. In 2020, the Law Commission began its review of the UK's corporate criminal liability laws following the government's request to assess various avenues for reform.

In June 2021, the Law Commission published a discussion paper containing several alternative mechanisms for corporate criminal liability. One option being considered is a form of vicarious corporate liability, whereby a company is generally criminally liable for the acts of its employees – a system commonly used in U.S. federal law. Another option is to implement a broader offence of failure to prevent economic crime committed by employees or other associated persons, similar to the current s.7 Bribery Act 2010 offence. This would cover offences such as money laundering, fraud, false accounting, fraudulent trading and breach of financial sanctions. The Law Commission's report is due in early 2022 and will likely be instrumental in defining the approach taken by the UK government. It is still too early to predict how the UK's laws in relation to corporate criminal liability will change, but it will likely be some time before a new framework is implemented. In the meantime, the restrictive approach to the identification principle remains.

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## France

2021 was an active year in France, as the country continued to strengthen its white collar regulatory and enforcement structure. In late December, France enacted a new law addressing various criminal law issues including criminal investigations and privilege issues. A landmark parliamentary report on France's anti-corruption law, Sapin II, made recommendations to improve France's anti-corruption enforcement arsenal. And vigorous enforcement of corruption and tax fraud-related statutes led to high-profile settlements and charging decisions.

France's recent efforts to improve its anti-corruption efforts were recognized in December, when the OECD Working Group on Bribery published its Phase 4 review of France. The report commended the country for its progress regarding the fight against corruption since the Working Group's last report in 2012.<sup>1</sup> However, the Phase 4 Report also noted that France does not provide sufficient resources to its authorities to act on its ambitious legal arsenal. It remains to be seen whether those circumstances will change in 2022.

### I. Legislative Developments

#### **A. New Law On Criminal Proceedings**

On December 22, 2021, France passed a new law addressing various criminal law issues, including with regard to criminal investigations, attorneys' professional secrecy, and pre-trial guilty pleas.<sup>2</sup>

*Guidance on criminal investigations.* The new law provides that criminal investigations conducted under a regime called "preliminary investigation" (usually used for white collar crimes) will now generally be limited to two years from the first act of investigation, with a possible extension of one year at the discretion of the public prosecutor. These new statutory deadlines may, however, be suspended in the event of a request for international mutual legal assistance. Moreover, in order to improve due process during this type of investigation, the suspect will now have easier access to the investigation file

*Professional secrecy.* Under French law, communications between an attorney (a member of a French Bar) and a client are protected by what in France is known as the professional secrecy. That statutory protection is meant to apply to all attorney-client communications, in the context of both litigation and other legal advice. Since the late 1990s, however, the French Cassation Court has limited the

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1. OECD, France Phase 4 Report (Dec. 9, 2021), <https://www.oecd.org/daf/anti-bribery/France-Phase-4-Report-EN.pdf>.

2. Law no. 2021-1729 of Dec. 22, 2021, <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000044545992>.



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protection against seizures and compelled disclosures solely to attorney-client communications made “in connection with defence work.”

The new law now recognizes attorneys’ professional secrecy for both their “defense” and “advisory” activities; with the caveat that “advisory” attorney-client communications remain unprotected against seizures and compelled disclosures, *if* these communications “establish the proof” that they have actually been used to commit or facilitate tax fraud, money laundering, corruption, or terrorism financing.

*Expanded use of guilty pleas.* Under French law, a pre-trial guilty plea procedure called “CRPC” (“*comparution sur reconnaissance préalable de culpabilité*”) exists for most ordinary crimes, including business crimes. The defendant agrees to plead guilty to a particular charge in return for a more lenient sentence. If the defendant accepts the agreement, it can only become effective with the approval of the court. If the defendant refuses the proposed agreement, the case will be tried following the ordinary rules.

The new law now extends the possibility of agreeing to a pre-trial guilty plea up until the trial, in particular in the context of judge-led investigations. It also now offers some possibility of such a settlement even during the appellate phase. This is in line with France’s recent efforts to increase the use of negotiated resolutions.

## B. Parliamentary Report on Sapin II Leads to New Anti-Corruption Bill

On July 7, 2021, a French National Assembly Committee published a long-awaited review of France’s anti-corruption law, the so-called “Sapin II Law”<sup>3</sup>. The report, which recognizes the significant progress made by France in its fight against corruption and tax fraud, contains 50 recommendations to strengthen the existing legal framework. The recommendations include:

- expanding the use of the French-style DPA (known as “CJIP”, “*convention judiciaire d’intérêt public*”),
- encouraging self-reporting and cooperation,
- loosening corporate criminal liability criteria,
- introducing a new pre-trial guilty plea for individuals,
- boosting French extraterritorial enforcement of corruption crimes, and
- upgrading the existing French whistleblower protection rules and lobbying activities framework.

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3. See Debevoise & Plimpton LLP, “France Moves to Boost Its White Collar Enforcement” (July 13, 2021), <https://www.debevoise.com/insights/publications/2021/07/france-moves-to-boost-its-white-collar-enforcement>.

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As a reminder, in France, a CJIP is available to legal entities only. Individuals may enter into a CRPC that also has to be approved by a judge. But contrary to what exists for CJIPs, French judges may dismiss a CRPC deal when, for instance, “the facts” or “the public interest” warrant a full criminal trial. This procedural misalignment between corporate and individual defendants may limit executives’ appetite to self-report corporate crimes and to cooperate. The report therefore recommends the introduction of a new CRPC mechanism, whereby judges would have less flexibility to dismiss CRPCs, but that would apply only when the individual defendants self-reported and fully cooperated.

“France’s recent efforts to improve its anti-corruption efforts were recognized in December, when the OECD Working Group on Bribery published its Phase 4 review of France [which] commended the country for its progress [but] also noted that France does not provide sufficient resources to its authorities....”

On October 19, 2021, drawing on the recommendations of this evaluation report, MP Raphaël Gauvain presented a bill to support the fight against corruption. The bill proposes, among other things: (i) to extend anti-corruption compliance requirements to French subsidiaries of foreign groups, including when the parent entity is located outside of France; and (ii) to extend corporate criminal liability to offences committed by an employee due to a lack of supervision. The recommendation on the introduction of a new CRPC mechanism is not yet included in the Gauvain bill, but it may surface at a later stage of the parliamentary process.

It remains to be seen if and when this bill will be discussed. It has not been scheduled in the parliament agenda yet; and likely will not be scheduled on that agenda until after the French presidential and parliamentary elections of April and June 2022.

**C. Bill on Whistleblower Protection**

A bill implementing the EU Whistleblowing Directive is still under final discussions in the French parliament.<sup>4</sup> It probably will be adopted during the first quarter of 2022 and will likely include better protections for whistleblowers and simplifications to the reporting process.

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4. Bill no. 4398 for the improvement of whistleblower protection, [https://www.assemblee-nationale.fr/dyn/15/textes/l15b4398\\_proposition-loi](https://www.assemblee-nationale.fr/dyn/15/textes/l15b4398_proposition-loi).

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## **II. Enforcement Activity**

### **A. CJIPs**

Since the creation of the French-style DPA in 2016, the French have concluded 15 cases through CJIPs, including four in 2021. Two of these cases involved corruption charges.

- *Bolloré*. In February 2021, French holding company Bolloré SE agreed to pay €12 million to settle charges for active corruption of a foreign public official, complicity in breach of trust, and complicity in forgery and use of forgeries.<sup>5</sup> Interestingly, the judge approved the CJIP of the company, but dismissed the plea agreement (or CRPC) of the executive defendants, who may now have to face trial.
- *Systra*. In July 2021, French transport infrastructure company Systra agreed to pay €7.5 million to settle charges for bribery of a foreign public official regarding an engineering contract for the modernization and electrification of a railroad line in Uzbekistan.<sup>6</sup>
- *JPMorgan*. In August 2021, the bank entered into a CJIP with a penalty of €25 million for charges of complicity in tax fraud.<sup>7</sup>
- *LVMH*. In December 2021, the luxury giant agreed to pay €10 million to settle charges of setting up an espionage system targeting a French MP and his association, as well as influence peddling with French public authorities.<sup>8</sup>

### **B. The Alcatel-Lucent Case**

On June 16, 2021, France's highest court, the Court of Cassation, upheld the decision by the Paris Court of Appeals to impose a €150,000 fine on Alcatel-Lucent for bribing foreign public officials.<sup>9</sup> This case, which involved the same set of facts under which Alcatel-Lucent paid a \$137 million fine to the US authorities in 2010, concerned a scheme to pay bribes to public officials at Costa Rica's Institute of Electricity between 2001 and 2004. In the judgment, the Court of Cassation rejected Alcatel-Lucent's argument that it could not be held liable for the acts of its subsidiary.

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5. CJIP (Feb. 9, 2021), [http://www.justice.gouv.fr/art\\_pix/CJIP\\_bolloré\\_20210902.pdf](http://www.justice.gouv.fr/art_pix/CJIP_bolloré_20210902.pdf).

6. CJIP (July 12, 2021), [https://www.agence-francaise-anticorruption.gouv.fr/files/files/CJIP\\_SYSTRA\\_definitive\\_20210713.pdf](https://www.agence-francaise-anticorruption.gouv.fr/files/files/CJIP_SYSTRA_definitive_20210713.pdf).

7. CJIP (Aug. 26, 2021), [https://www.tribunal-de-paris.justice.fr/sites/default/files/2021-09/CJIP%20JPMORGAN\\_26%20ao%C3%BBt%202021.pdf](https://www.tribunal-de-paris.justice.fr/sites/default/files/2021-09/CJIP%20JPMORGAN_26%20ao%C3%BBt%202021.pdf).

8. CJIP (Dec. 15, 2021), [http://www.justice.gouv.fr/art\\_pix/CJIP\\_LVMH\\_20211215.pdf](http://www.justice.gouv.fr/art_pix/CJIP_LVMH_20211215.pdf).

9. Court of Cassation, Criminal Chamber, June 16, 2021, no. 20-83.098, [https://www.legifrance.gouv.fr/juri/id/JURITEXT000043684156?page=1&pageSize=10&query=20-83098&searchField=ALL&searchType=ALL&sortValue=DATE\\_DESC&tab\\_selection=juri&typePagination=DEFAULT](https://www.legifrance.gouv.fr/juri/id/JURITEXT000043684156?page=1&pageSize=10&query=20-83098&searchField=ALL&searchType=ALL&sortValue=DATE_DESC&tab_selection=juri&typePagination=DEFAULT).

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Under French criminal law, legal entities may only be held criminally liable for offenses committed “on their behalf by their organs or representatives.” Here, for the first time, the Court ruled that a *parent* company could be held criminally liable for acts of corruption committed on its behalf by employees of its *subsidiary*. The Court viewed employees of the subsidiary as *de facto* representatives of the parent company, and found that corruption had been committed by employees of subsidiary companies and by the group’s Risk Assessment Committee. That decision is in line with French courts’ recent tendency to interpret the statutory conditions for corporate criminal liability more broadly.

### C. The UBS Case

On February 20, 2019, the Paris Criminal Court convicted and fined UBS AG €3.7 billion for illegal solicitation of financial services and aggravated laundering of the proceeds of tax fraud.<sup>10</sup> This was by far the largest fine ever imposed by a French criminal court. By way of comparison, the largest settlement ever imposed in France was the Airbus CJIP, with a penalty of €2.1 billion for criminal charges of alleged bribery.<sup>11</sup>

Interestingly, it was publicly reported that CJIP discussions between UBS AG and the PNF (the French Financial National Prosecutor) took place before trial but eventually failed, reportedly because French authorities refused to accept a financial penalty below €1.1 billion, and both sides took the view they would be able to achieve better results at trial. Pending appeal, the €3.7 billion fine imposed on UBS AG therefore sent a clear signal to companies weighing the pros and cons of entering into a CJIP or risking a criminal trial.

On December 13, 2021, the Paris Court of Appeal upheld UBS AG’s conviction but substantially reduced the total amount that the Swiss bank will have to pay to France to €1.8 billion euros.<sup>12</sup> UBS AG has appealed to the French Court of Cassation.

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10. Paris Criminal Court, 32nd Chamber, Feb. 20, 2019, no. 11055092033.

11. See Antoine F. Kirry et al., “Airbus Reaches Record-Breaking Global Settlement,” FCPA Update, Vol. 11, No. 7 (Feb. 2020), <https://www.debevoise.com/insights/publications/2020/02/fcpa-update-february-2020>.

12. Paris Court of Appeal, Dec. 13, 2021, no. 19/05566.

## Germany

### I. Legislative Developments

Prior to the September 2021 general elections, the German Parliament enacted a reform of the crime of money laundering, but could not finish the envisioned adoption of the Corporate Sanctions Act or the implementation of the EU Whistleblower Directive 2019/1937. In that regard, the new coalition of the Social Democratic Party, the Green Party, and the Liberal Democratic Party has set out its priorities in their Coalition Agreement, as summarized below.

#### **A. Crime of Money Laundering: All-Crimes Approach**

Predicate offences for the revised crime of money laundering are no longer a catalogue of enumerated serious crimes but instead *all* criminal acts (felonies and misdemeanors). The new law implements and exceeds the requirements of EU Directive 2018/1673 on combating money laundering by criminal law. That Directive defined a minimum standard of criminal activities constituting predicate offences for the crime of money laundering.

The extended scope of the crime impacts both criminal prosecution and the now much broader scope of suspicious activity reporting by obliged entities (such as financial institutions) under Germany's Anti-Money Laundering Act.

#### **B. Corporate Criminal Liability**

The draft Corporate Sanctions Act, which would provide for mandatory prosecution of and severe sanctions for corporate misconduct, was meant to replace the current regime of administrative liability with corporate criminal liability. However, the proposed law was not passed in Parliament as the former coalition could not agree on various issues, including the mitigating effects of an internal investigation when protected by German professional secrecy.

The new governing coalition proposes to revise the sanctions system of the current legal regime, rather than introducing corporate criminal liability in a separate Act. The Coalition Agreement further calls for greater legal certainty with regard to compliance duties, and a precise legal framework for internal investigations.

#### **C. Whistleblowing**

The EU Whistleblower Directive 2019/1937 requires EU Member States to introduce minimum standards for secure reporting channels and effective protection from retaliation for whistleblowers (broadly defined) who report on alleged breaches of

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certain EU laws, such as laws with regard to money laundering or competition. While Germany missed the deadline for implementation, the new coalition plans to extend protection to whistleblowers who report possible violations of certain national laws in the national public interest.

**II. Judicial Decision on Employee Data Protection and Works Council Rights**

The use of employee personal data for an internal investigation can trigger information and co-determination rights of the Works Council. The Works Council is a body representing the interests of non-leading personnel vis-a-vis an employer, and is tasked with control of the employer's compliance with labor laws protecting employees, including data protection. It can enforce these control rights in labor court proceedings, and apply for a preliminary injunction in support of its claims.

A 2019 decision of the Cologne Labor Court dealt with a case in which the Works Council was not informed about the review of employee emails as part of an internal investigation. The court suggested that the Works Council must not only be informed about the names of the concerned employees to exercise its control duties, but also that the violation of co-determination rights required that documents in the possession of the investigating auditor or law firm had to be destroyed.

Relief came from the Federal Labor Court (1 ABR 31/19), which determined as the court of last instance that the exercise of the Works Council control rights does not necessarily require the disclosure of the names of the employees affected by the investigation. The violation of co-determination rights was held to result in remedies with future effect and not, as the Works Council requested, in the deletion or destruction of already collected evidence.

Notwithstanding this clarification, navigating the Works Council information and co-determination rights remains a key threshold factor in conducting successful employee-focused investigations in Germany.

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## Asia

As in 2020, anti-corruption legislation and enforcement in the Asia-Pacific region in 2021 was generally less active than in the years leading up to the COVID-19 pandemic. However, domestic anti-corruption campaigns continued in the People's Republic of China and Vietnam, a former minister in Indonesia was convicted of COVID-19 related corruption, South Korea's new anti-corruption regulator brought its first indictment, Malaysia's Court of Appeal affirmed former Prime Minister Najib's conviction, and an Indian court adopted an expansive definition of "public servant" in connection with the unexplained wealth offense.

### I. China (Mainland)

#### **A. Recent Trends in Anti-Corruption Campaign Enforcement**

In 2018, the PRC declared victory in the first phase of its anti-corruption campaign.<sup>1</sup> That declaration did not result in a reduction of enforcement activities in the country, as 2021 demonstrates.

The Central Commission for Discipline Inspection ("CCDI") reported that 25 senior cadres were held accountable in 2021 for disciplinary and legal violations (which usually, but not always, involve corruption violations). This was an increase in comparison to the 18 such senior officials (or "tigers") disciplined in 2020.

In 2021, China's anti-corruption regulators focused on the financial sector. This year, at least 70 financial officials were investigated, disciplined, or prosecuted as authorities stepped up scrutiny over the financial system at a time of growing turmoil in the property market.<sup>2</sup> Among the officials investigated or prosecuted were officials from the People's Bank of China ("PBOC"), the China Securities Regulatory Commission, and state-owned banks including China Construction Bank. In the first weeks of 2022, investigations were announced against a senior former official of the PBOC, a former vice president of a state-owned bank, and the chairman of a state-owned insurance company.<sup>3</sup>

In 2021, Chinese authorities also focused on the legal sector, investigating former judges and prosecutors who allegedly misused their government connections after

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1. "Crushing Victory in the Fight against Corruption – Central Political Bureau Meeting Releases New Signals in the Fight against Corruption," XinhuaNet (Dec. 13, 2018), [http://www.xinhuanet.com/2018-12/13/c\\_1123850237.htm](http://www.xinhuanet.com/2018-12/13/c_1123850237.htm) (in Chinese); see also Nectar Gan and Choi Chi Yuk, "'Crushing victory': what's next for Chinese President Xi Jinping's war on corruption?," South China Morning Post (Dec. 14, 2018), <https://www.scmp.com/news/china/politics/article/2178019/crushing-victory-whats-next-chinese-president-xi-jinpings-war>.
2. "Financial Anti-corruption Storm: Nearly 70 people Fell This Year and Banks Industry Is the Hardest Hit," The Beijing News (Nov. 30, 2021), <https://www.bjnews.com.cn/detail/163825560614604.html>.
3. "The Anti-corruption Storm Continues in Financial Sector," Shenzhen Securities Times (Jan. 24, 2022), [https://www.stcn.com/xw/sd/202201/t20220124\\_4103036.html](https://www.stcn.com/xw/sd/202201/t20220124_4103036.html).

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entering private practice. According to numbers published by the Central Political and Legal Affairs Commission, during the “2021 Nationwide Ethics Review” of the judicial sector, 178,431 cadres and officials in China’s judicial sector have been punished for various “disciplinary and legal violations.”<sup>4</sup> Six of the 25 senior officials disciplined in 2021 came from the legal sector.

2021 also saw a crackdown involving the country’s private sector, targeting its biggest property and technology firms. At the beginning of 2021, a vice president of one of China’s leading commercial property firms, Dalian Wanda Commercial Management Group, was apprehended by Shanghai police for investigation on suspicion of corruption.<sup>5</sup> In August 2021, Chinese authorities arrested a top public relations executive at Chinese social media giant Weibo Corp for allegedly taking bribes. Earlier last year, a former vice-president of video-sharing app Kuaishou was arrested for alleged corruption, and Tencent Holdings conducted an internal review, ultimately reporting 40 employees to authorities and firing more than 100 staff over embezzlement and bribery allegations.<sup>6</sup>

## B. A New Focus on Bribe-Givers?

Giving a bribe is illegal in the PRC, and bribe-givers are often prosecuted. In 2021, as in prior years, the national anti-corruption campaign focused on bribe-takers, in both the public and private sector. But this focus may change in the future. On September 8, 2021, six Chinese authorities, including government, Party, and judicial bodies,<sup>7</sup> jointly published an anti-bribery document entitled “*Opinion on Furthering the Investigation of Giving and Taking Bribes*” (the “Opinion”), outlining their intention to crack down on bribe-givers as well as bribe-takers.

According to disclosed summaries of the Opinion,<sup>8</sup> which itself is not available to the public, “one of the major reasons corruption has continued is because bribe-givers have resorted to whatever means to ‘entrap’ Communist Party of China (“CCP”) members and cadres.”<sup>9</sup> At a press conference announcing the Opinion, the representative of the

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4. “Shan Yuxiao and Cai Xuejiao, “Two Thousand Former Chinese Judges, Prosecutors Fail Nationwide Ethics Review,” Caixin Global (Aug. 31, 2021), <https://www.caixinglobal.com/2021-08-31/two-thousand-former-chinese-judges-fail-nationwide-ethics-review-101764552.html>.”
  5. “Wanda Executive Under Investigation For Suspected Corruption,” GlobalTimes (Dec. 29, 2020), <https://www.globaltimes.cn/page/202012/1211303.shtml>.
  6. “Corruption in Internet Companies,” ThePaper (Aug. 12, 2021), [https://www.thepaper.cn/newsDetail\\_forward\\_14001514](https://www.thepaper.cn/newsDetail_forward_14001514).
  7. The Opinion was released by the Central Commission for Discipline Inspection of the Communist Party of China and the National Supervisory Commission, The Supreme People’s Court, Supreme Peoples Procuratorate, the Central Organization Department of the CCP, the Central Political and Legal Affairs Commission, and the United Front Work Department of the CCP.
  8. 中央纪委国家监委会同有关单位联合印发《关于进一步推进受贿行贿一起查的意见》 (Opinion on Furthering the Investigation of Giving and Taking Bribes Together) (Sept. 8, 2021).
  9. *Id.*

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CCDI stated his view that the main source of corruption in society is the act of giving bribes, and he criticized the status quo in which rates of prosecution and penalties for bribe-giving are lower than similar metrics for bribe-taking.<sup>10</sup>

The Opinion announces five areas of focus in future anti-corruption enforcement in China: (1) repeated bribery, “huge bribery,” or bribery of many people; (2) CCP members and state functionaries who give bribes; (3) bribery in important state work and major projects; (4) bribery in key sectors (law enforcement, justice, ecological and environmental protection, finance, product safety, food and drug administration, poverty alleviation and disaster relief, pension and social security, education and health care, etc.); and (5) major commercial bribery.

**“In 2021, as in prior years, [China’s] anti-corruption campaign focused on bribe-takers, in both the public and private sector. But this focus may change in the future.”**

The Opinion also stated that the relevant government and Party entities were exploring the creation of a blacklist as a new punishment for bribe-givers. The blacklist has not been published, and a Q&A recently published by the CCDI states that designated parties on the blacklist could be stripped of their access to China’s markets, denied the privilege of doing business in China, and left with negative records in the credit system.<sup>11</sup>

## **C. Other Legislative Developments**

### **1. Possible Adoption of a “Non-Prosecution for Compliance” Mechanism**

Although China’s Criminal Law specifically provides for corporate criminal liability, publicly reported criminal prosecutions of corporations for corruption-related offenses are rare in comparison to prosecutions of individuals or administrative actions against corporations. Since 2020, China’s Supreme People’s Procuratorate (“SPP” – China’s national prosecutors’ office) has been signaling an intention to

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10. Committee for Discipline and Inspection, 中央纪委国家监委案件监督管理室负责人就《意见》答本报记者问 (transcript of press conference regarding the Opinion) (Sept. 8, 2021), [https://mp.weixin.qq.com/s/vcOLWochpwCNisO\\_hDtIYQ](https://mp.weixin.qq.com/s/vcOLWochpwCNisO_hDtIYQ).

11. Committee for Discipline and Inspection, 如何建立行贿人“黑名单”制度 (How to Establish a “Blacklist” System for Bribe-Payers) (Dec. 16, 2021), [https://www.ccdi.gov.cn/hdjl/nwwd/202112/t20211216\\_159254.html](https://www.ccdi.gov.cn/hdjl/nwwd/202112/t20211216_159254.html).

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establish a “Non-Prosecution for Compliance” mechanism.<sup>12</sup> This mechanism can be used to resolve bribery cases as well as cases involving other types of corporate crime, similar to the non-prosecution agreement mechanism used in the United States, United Kingdom, Singapore, France, and elsewhere.

According to the SPP, if a company accused of economic criminal violations makes a commitment to compliance and “actively corrects its wrongdoings,” prosecutors could make a decision not to approve the arrest, not to prosecute, or to propose a lighter sentence based on the system of “imposing lenient punishments on those confessing to their crimes and accepting punishments” under the Criminal Law. Thus far, the mechanism has mainly been available for small and medium enterprises and only when the offenses involved were minor crimes (those for which the responsible persons may be sentenced to less than three years in prison).<sup>13</sup>

To assess whether companies have fulfilled their compliance commitments, in June 2021, the SPP and eight other top authorities promulgated Guiding Opinions on Establishing a Mechanism for Third-Party Monitoring and Evaluation of Corporate Compliance Programs for Trial Implementation.<sup>14</sup> The Third-Party Monitoring Mechanism proposed that an expert database consisting of compliance professionals (including lawyers) from various fields should be established to assist with supervising the compliance status of implicated enterprises and to facilitate improvements to their compliance systems.

China’s “Non-Prosecution for Compliance” mechanism is still in its infancy and is not provided for in any existing law. It is an innovative exercise of discretion by the SPP that could increase domestic corporate enforcement in China in the future.

## **2. New Restrictions on Cross-Border Investigations and Proceedings**

On September 1, 2021, the PRC Data Security Law (the “DSL”)<sup>15</sup> became effective. The DSL includes legal and regulatory restrictions on cross-border data transfer, including transfers in connection with foreign judicial proceedings.<sup>16</sup> The DSL

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12. The Supreme People’s Procuratorate, 最高检下发工作方案 依法有序推进企业合规改革试点纵深发展 (The Supreme People’s Procuratorate Issued the Work Plan to Promote the Pilot Corporate Compliance Reform) (Apr. 8, 2021), [https://www.spp.gov.cn/xwfbh/wsfbt/202104/t20210408\\_515148.shtml#1](https://www.spp.gov.cn/xwfbh/wsfbt/202104/t20210408_515148.shtml#1).

13. The Supreme People’s Procuratorate, 最高检发布企业合规改革试点典型案例, (Case Study of the Pilot Corporate Compliance Reform,) (June 3, 2021), [https://www.spp.gov.cn/spp/xwfbh/wsfbh/202106/t20210603\\_520232.shtml](https://www.spp.gov.cn/spp/xwfbh/wsfbh/202106/t20210603_520232.shtml).

14. The Supreme People’s Procuratorate, 关于建立涉案企业合规第三方监督评估机制的指导意见（试行）, (Guiding Opinions on Establishing a Mechanism for Third-party Monitoring and Evaluation of Corporate Compliance Programs for Trial Implementation) (June 3, 2021), [https://www.spp.gov.cn/spp/xwfbh/wsfbh/202106/t20210603\\_520224.shtml](https://www.spp.gov.cn/spp/xwfbh/wsfbh/202106/t20210603_520224.shtml).

15. 《中华人民共和国数据安全法》(Data Security Law of the People’s Republic of China), full text available at <http://www.npc.gov.cn/npc/c30834/202106/7c9af12f51334a73b56d7938f99a788a.shtml>.

16. Debevoise & Plimpton LLP, “China Passes Anti-Foreign Sanctions and Data Security Laws” (June 15, 2021), <https://www.debevoise.com/insights/publications/2021/06/china-passes-anti-foreign-sanctions-and>.

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prohibits transfer of any data stored within the PRC to a foreign judicial or law enforcement authority without prior approval by competent PRC authorities.<sup>17</sup> Consistent with the DSL, the Personal Information Protection Law (the “PIPL”), which took effect on November 1, 2021, requires that any transfer of personal information stored within the PRC to foreign judicial or law enforcement bodies must be pre-approved by competent Chinese authorities.

These measures are consistent with 2018’s International Criminal Judicial Assistance Law, which prohibited furnishing evidence to foreign criminal proceedings outside of MLAT-like procedures,<sup>18</sup> as well as Art. 177 of the Securities Law adopted in 2019, which requires approval of the Chinese securities regulator for transfers of data to foreign securities authorities. The International Criminal Judicial Assistance Law did not specify any penalties for violating its provisions. The DSL and PIPL do include penalty provisions; under the PIPL penalties can reach a maximum of 5% of the prior year’s turnover.

Although some regulatory clarification remains outstanding and there have not yet been any public enforcement actions for violations of these laws, China’s intention to regulate the flow of data out of the country (as it does with the flow of data into the country) is clear. Foreign companies operating in China may be forced to confront a clear conflict of laws between China and their home-country regulators.

### **3. New Powers for China’s Anti-Corruption Regulator**

On August 20, 2021, the National People’s Congress Standing Committee adopted a new Supervisors Law, which came into effect on January 1, 2022.<sup>19</sup> The Supervisors Law is concerned with the organization of (and grants new powers to) China’s anti-corruption super-regulator, the National Supervisory Commission (“NSC”). The NSC works with the CCDI in policing China’s civil servants and CCP members. The new Supervisors Law defines the rights and duties of NSC officials, as well as prescribing their qualifications and the manner of oversight, evaluations, appointments, and removals. The Supervisors Law also creates new offenses (disciplinary, administrative, and criminal) for obstruction of supervisors’ work.<sup>20</sup>

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17. Data Security Law, *supra* n.15 at Article 36.

18. “The Year 2018 in Review,” FCPA Update, Vol. 10, No. 6 (Jan. 2019), <https://www.debevoise.com/insights/publications/2019/01/fcpa-update-january-2019>.

19. 《中华人民共和国监察官法》(Supervisors Law of the People’s Republic of China), full text accessible at <http://www.npc.gov.cn/npc/c30834/202108/c5439b50d1614851aeae97dde63b863.shtml>; an unofficial English translation accessible at [https://www.pkulaw.com/en\\_law/fc56e12c41d55616bdfb.html](https://www.pkulaw.com/en_law/fc56e12c41d55616bdfb.html).

20. Supervisors Law at Article 56 (“对任何干涉监察官依法履职的行为，监察官有权拒绝并予以全面如实记录和报告；有违纪违法情形的，由有关机关根据情节轻重追究有关人员的责任。”) (“In case of any interference with a supervisor’s performance of duties in accordance with the law, the supervisor shall have the right to refuse it, and make a record of and report it in a comprehensive and faithful manner; and, in case of any violation of discipline or law, the relevant authority shall hold the relevant persons liable according to the seriousness of circumstances.”)

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The law also prohibits persons from serving as NSC officials if their spouses (or their children, if there is no spouse) are based outside the PRC.<sup>21</sup>

One month after the Supervisors Law was passed, the NSC issued Regulations on the Implementation of the Supervision Law.<sup>22</sup> The Regulations clarify the duties of the NSC, its jurisdiction, its supervisory power, and its working procedure. They also introduce rules concerning international cooperation and oversight. The Regulations enumerate more than 100 crimes and infractions that may be committed by civil servants and that the NSC is primarily responsible for investigating.

## **II. China (Hong Kong SAR)**

In 2021, Hong Kong's anti-corruption regulator, the Independent Commission Against Corruption ("ICAC"), joined other regulators, including the Securities and Futures Commission ("SFC") and the Financial Reporting Council ("FRC"), in investigating private sector corruption in the securities industry.

In July 2021, the ICAC arrested a senior executive of a listed company who was suspected to have offered bribes (or "advantages," according to the Prevention of Bribery Ordinance) to the staff of an underwriter in the initial public offering of the company. The SFC and the ICAC searched a number of premises, including the offices of the listed company and one of the IPO underwriters.<sup>23</sup>

The next month, the SFC and the ICAC jointly mounted another operation, with the ICAC arresting five individuals, including an executive director and a former director of another listed company who were alleged to have conspired with others to accept bribes ("advantages") in connection with a number of loans made by the listed company. The borrowers in the transactions were also controlled by the arrested senior executives of the listed company or their associates.<sup>24</sup>

Separately, the ICAC and the FRC launched a joint operation against suspected misconduct and bribery in November 2021. This operation was conducted pursuant to the Memorandum of Understanding signed in September 2021 between the ICAC and the FRC, Hong Kong's audit regulator. Three certified public accountants and two auditors were arrested for suspected corruption offences under the Prevention of Bribery Ordinance, involving the acceptance of bribes exceeding HK \$1 million (USD 128,300) to compile a false report for the listing of a Macau construction firm in Hong Kong.<sup>25</sup>

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21. *Id.*, at Article 13.

22. XinhuaNet, "Implementation Rules for China's Supervision Law Take Effect," the official website of the State Council (Sept. 21, 2021), [http://english.www.gov.cn/news/topnews/202109/21/content\\_WS614915f6c6d0df57f98e09c6.html](http://english.www.gov.cn/news/topnews/202109/21/content_WS614915f6c6d0df57f98e09c6.html).

23. ICAC Press Release (July 7, 2021), [https://www.icac.org.hk/en/press/index\\_id\\_1136.html](https://www.icac.org.hk/en/press/index_id_1136.html).

24. ICAC Press Release (Aug. 13, 2021), [https://www.icac.org.hk/en/press/index\\_id\\_1159.html](https://www.icac.org.hk/en/press/index_id_1159.html).

25. "Three accountants among nine arrested by ICAC for alleged bribery over listing of Macao construction firm," ICAC Press Release (Nov. 22, 2021), [https://www.icac.org.hk/en/press/index\\_id\\_1230.html](https://www.icac.org.hk/en/press/index_id_1230.html).



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**III. India**

In 2021, the Karnataka High Court adopted an expansive definition of “public servant” under India’s Prevention of Corruption Act. *G Krishnegowda vs State of Karnataka*<sup>26</sup> involves a motion in a case brought under Section 13(e) of the Prevention of Corruption Act, which prohibits a “public servant” from being in possession of pecuniary resources or property disproportionate to his known sources of income. The accused, a project manager for an entity that carried out civil construction work for the state government, denied that he was a “public servant.”

**“In 2021, Hong Kong’s anti-corruption regulator, the Independent Commission Against Corruption ..., joined other regulators ... in investigating private sector corruption in the securities industry.”**

While the High Court provided several explanations for why the accused could be seen as a “public servant” under the law, it made clear that “public servant” was broader than civil servant: “a public servant need not be a Government/civil servant, but a Government/civil servant is always a public servant.”<sup>27</sup> According to the court, the key distinction is not a person’s title or the statutory basis under which an entity was created, but whether a person is carrying out a public duty (in this case, civil construction work for the state): “even if a person is not a public servant, but by virtue of his office if he is discharging public duty, then he is covered under the ambit of the [Prevention of Corruption] Act.”<sup>28</sup>

**IV. Indonesia**

In August 2021, the Jakarta Anti-Corruption Court sentenced former Indonesian social affairs minister Juliari Batubara to 12 years imprisonment for receiving IDR 32.4 billion (approximately USD 2.25 million) in kickbacks relating to procurement of COVID-19 supplies. The court also ordered Batubara to repay IDR 14.5 billion (approximately USD 1.1 million) in misused funds and pay a fine of IDR 500 million (approximately USD 35,000).<sup>29</sup>

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26. *G Krishnegowda vs State of Karnataka*, CRL.P.No.2801/2021 (Karnataka High Court, July 15, 2021), [https://indiankanoon.org/doc/17899960/?\\_\\_cf\\_chl\\_f\\_tk=ZSbrU3D2Vh9CA3MQzMP\\_GSo\\_aUjFQ4TcFQ6XInVR0WM-1642449576-0-gaNycGzNCHO](https://indiankanoon.org/doc/17899960/?__cf_chl_f_tk=ZSbrU3D2Vh9CA3MQzMP_GSo_aUjFQ4TcFQ6XInVR0WM-1642449576-0-gaNycGzNCHO).

27. *Id.* at ¶ 13.

28. *Id.* at ¶ 20.

29. Agustinus Beo Da Costa, “Ex-Indonesian minister jailed for 12 years in COVID-19 graft scandal,” Reuters (Aug. 23, 2021) <https://www.reuters.com/world/asia-pacific/ex-indonesian-minister-jailed-12-years-over-covid-19-graft-scandal-2021-08-23>.

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2021 also saw corruption-related verdicts against two former executives of PT Asabri, a state-owned insurance company that provides insurance to the military, police officers, and employees of the defense ministry. The pair were sentenced to 20 years' imprisonment for graft and for causing IDR 2.7 trillion (approximately USD 1.58 billion) in losses to the state.<sup>30</sup>

**V. Malaysia**

Following the conviction of former Prime Minister Datuk Seri Najib Razak for abuse of power and money laundering offenses linked to the \$4.5-billion 1MDB scandal in July 2020, Malaysia's Court of Appeal in December 2021 unanimously affirmed the conviction and sentence, which includes a 12-year term of imprisonment and a \$50 million fine.<sup>31</sup> The court, however, granted Najib's request to stay his sentence and submit a final appeal to Malaysia's Federal Court, the country's highest juridical authority.<sup>32</sup>

Pristine Offshore Sdn. Bhd., a Malaysian vessel service provider, became the first commercial organization charged under Section 17A of the Malaysian Anti-Corruption Commission Act, a corporate liability provision that became effective in June 2020. The company allegedly offered a bribe of MYR 321,350 (approximately USD 76,500) to win a subcontract from Petronas Carigali Sdn Bhd., a state-owned oil and gas company, between June and October 2020.<sup>33</sup> The company requested a trial, and could face a fine of no less than 10 times the bribe amount (MYR 3.2 Million or approximately USD 765,000).<sup>34</sup>

**VI. South Korea**

In January 2021, South Korea formally launched the Corruption Investigation Office for High-ranking Officials ("CIO") after a former judge, Kim Jin-wook, was sworn in as the chief of the agency.<sup>35</sup> The CIO is legally authorized to investigate corruption-related crimes involving current or retired "High-ranking Officials," a category

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30. "Indonesia corruption court jails executives at insurer for 20 years," Reuters (Jan. 5, 2022), <https://www.reuters.com/world/asia-pacific/indonesia-corruption-court-jails-executives-insurer-20-years-2022-01-05>.
  31. Rozanna Latiff and Mei Mei Chu, "Malaysia court upholds guilty verdict for former PM Najib," Reuters (Dec. 8, 2021), <https://www.reuters.com/world/asia-pacific/malaysia-appeals-court-upholds-former-pm-najibs-guilty-verdict-2021-12-08/>.
  32. Feliz Solomon and Chester Tay, "Former Malaysian Prime Minister Loses Appeal of 1MDB Conviction," Wall Street Journal (Dec. 8, 2021), <https://www.wsj.com/articles/former-malaysian-prime-minister-loses-appeal-of-1mdb-conviction-11638945640>.
  33. Hafiz Yatim, "Oct 11 fixed for case management in corporate liability case involving Pristine Offshore" The Edge Markets (Aug. 4, 2021), <https://www.theedgemarkets.com/article/oct-11-fixed-case-management-corporate-liability-case-involving-pristine-offshore>.
  34. The statutory penalties include a fine of no less than ten times the bribe amount or RM 1 million (~USD 240,000), whichever is higher, or imprisonment for a term not exceeding twenty years, or both. See Section 17(A), Malaysian Anti-Corruption Commission Act, [https://www.sprm.gov.my/admin/files/sprm/assets/images/sprm/laman-utama/s-17/Act\\_A1567.pdf](https://www.sprm.gov.my/admin/files/sprm/assets/images/sprm/laman-utama/s-17/Act_A1567.pdf).
  35. Lee Ji-yoon, "Powerful new anti-corruption watchdog unleashed," The Korea Herald (Jan. 21, 2021), <http://www.koreaherald.com/view.php?ud=20210121000851>.

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that includes presidents, justices and judges, prime ministers, lawmakers, and prosecutors, among other high-ranked officials, as well as certain family members of such officials when the crime is committed in connection with the duties of such officials.<sup>36</sup>

Over the course of the year, the CIO opened 24 investigations of high-profile officials and conducted related searches, although only one, involving an alleged abuse of position by a Seoul education official related to hiring decisions, has thus far resulted in an indictment.<sup>37</sup> The CIO conducted four unsuccessful investigations regarding Yoon Suk-Yeol, the former Prosecutor General and a current presidential nominee of the opposition People Power Party, leading some to question the office's political neutrality.<sup>38</sup>

2022 is an election year in Korea, but the country's recent trend toward stricter enforcement of anti-corruption laws is likely to continue regardless of the outcome.

## **VII. Vietnam**

President and Party Leader Nguyen Phu Trong's anti-corruption campaign continued, as 2021 marked the beginning of his third term. As in prior years, Vietnam's anti-corruption campaign has focused on punishing public officials and party members for taking bribes or misusing state funds.

In April 2021, the Hanoi People's Court convicted the former Minister of Industry and Trade, Vu Huy Hoang, imposing an 11-year prison sentence for mismanagement and misuse of state assets. A Director in the Ministry of Industry and Trade was also convicted of the same charge and sentenced nine years in prison, while eight other former officials were convicted of violating regulations on land management and received sentences ranging from 30 months to seven years.<sup>39</sup> Nguyen Duc Chung, the former Chair of the Hanoi People's Committee who last year was sentenced to five years' imprisonment on corruption charges and then was convicted again on separate charges in 2021, receiving a sentence of an additional eight years' imprisonment.<sup>40</sup>

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- 36. Article 2, Act on the Establishment and Operation of the Corruption Investigation Office for High-Ranking Officials, [https://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=53133&lang=ENG](https://elaw.klri.re.kr/eng_service/lawView.do?hseq=53133&lang=ENG).
  - 37. "The CIO in controversy," Korea JoongAng Daily (Dec. 28, 2021), <https://koreajoongangdaily.joins.com/2021/12/28/opinion/editorials/Kim-Jinwook-PPP/20211228203627506.html>.
  - 38. See, e.g., "Unfair probes," The Korea Herald (Nov. 11, 2021) <http://www.koreaherald.com/view.php?ud=2021110000860>; Jo He-rim, "Yoon accuses CIO of being 'out of mind,'" The Korea Herald (Dec. 30, 2021) <http://www.koreaherald.com/view.php?ud=20211230000625>.
  - 39. "Ex-minister of industry and trade gets 11-year jail sentence," Vietnam News (Apr. 2021) <https://vietnamnews.vn/politics-laws/936754/ex-minister-of-industry-and-trade-gets-11-year-jail-sentence.html>.
  - 40. "Vietnam jails ex-Hanoi chairman for 8 more years for power abuse," CNA News (Dec. 13, 2021), <https://www.channelnewsasia.com/asia/vietnam-jail-ex-hanoi-chairman-corruption-2376376>.

## Latin America

Over the last year, Latin American countries have grappled with the pandemic's devastating impacts, acute economic challenges, and significant political upheaval. Unsurprisingly, these difficulties have hindered the region's anti-corruption efforts, disturbing some of the momentum built in recent years. Indeed, as reflected in the Capacity to Combat Corruption Index, the region struggled as a whole, with twelve out of the fifteen countries surveyed earning unchanged or declining scores.<sup>1</sup>

As discussed below, anti-corruption efforts in Argentina and Mexico, in particular, appear to have slowed relative to expectations, notwithstanding a push in Mexico to curb money laundering. Brazil has confronted the end of *Lava Jato* and a host of popular anti-corruption discontent, but nevertheless continues to lead the region in terms of overall enforcement. Elsewhere, domestic efforts to dismantle corruption have persisted, with notable investigations underway in Chile, Costa Rica, the Dominican Republic, and Peru. Central America's "Northern Triangle" (Guatemala, El Salvador, and Honduras), however, experienced enforcement setbacks, prompting scrutiny from the Biden Administration and new U.S. anti-corruption initiatives centered on the region. And across Latin America, questions persist about the strength and stability of certain democratic institutions, highlighting additional challenges in furthering the region's anti-corruption trajectory.

### I. Argentina

As reported previously, Argentina in recent years has made meaningful strides in bolstering its legal framework for combatting corruption, albeit undercut by frustrations with the ultimate reach of *Caso Cuadernos* (the Notebooks scandal) and related penalties.<sup>2</sup> The enactment of Argentina's Corporate Criminal Law (Law 27.401) represented a significant step toward combatting corruption in the private sector, but no company has been convicted under the law since it took effect in 2018.<sup>3</sup> The country also continues grappling with *Cuadernos* amidst the purported politicization of the judiciary, which threatens to impede anti-corruption efforts. These challenges have been compounded by political flux after

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1. Brian Winter & Geert Aalbers, "The Capacity to Combat Corruption (CCC) Index," Americas Society/Council of the Americas (June 14, 2021), available at <https://www.as-coa.org/articles/2021-capacity-combat-corruption-index>.
  2. Kara Brockmeyer, Andrew J. Ceresney, Andrew M. Levine, et al., "The Year 2020 in Review: Another Record-Breaking Year of Anti-Corruption Enforcement," FCPA Update, Vol. 12, No. 6 (Jan. 2021), <https://www.debevoise.com/insights/publications/2021/01/fcpa-update-january-2021>; Kara Brockmeyer, Andrew J. Ceresney, Andrew M. Levine, et al., "The Year 2019 in Review: A Record-Breaking Year of Anti-Corruption Enforcement," FCPA Update, Vol. 11, No. 6 (Jan. 2020), <https://www.debevoise.com/insights/publications/2020/01/fcpa-update-january-2020>.
  3. Paula Urien, "Corrupción privada: por qué la ley que la penaliza no se aplica" ["Private Corruption: Why the Law That Penalizes It Is Not Applied"], La Nación (Dec. 5, 2021), <https://www.lanacion.com.ar/economia/comercio-exterior/corrupcion-privada-por-que-la-ley-que-la-penaliza-no-se-aplica-nid05122021>.

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the November 2021 midterm elections, in which the center-left coalition lost its majority in Congress for the first time in nearly 40 years.<sup>4</sup> It remains to be seen how the opposition parties' gains may influence Argentine anti-corruption enforcement. This impact includes potentially undermining the current administration's stated plan to reform the judiciary, which plays a critical role in enforcing anti-corruption regulations and itself has been the subject of corruption allegations.<sup>5</sup>

## A. Legal and Policy Developments

In April 2021, Argentina's Anti-Corruption Office ("OA") issued a resolution requesting the creation of an integrity and transparency registry for companies and other entities (the "RITE") to promote good corporate compliance practices.<sup>6</sup> The OA and a team of consultants currently are designing the RITE and completed the initial stage in October 2021.<sup>7</sup> As currently envisioned, beginning later this year, the RITE will serve as a voluntary registry for anti-corruption compliance programs, relevant both for public and private due diligence and as potential evidence in anti-corruption investigations.<sup>8</sup>

Separately, the OA directed its Transparency Planning Office to establish a system for monitoring government officials' private activities both before and after public employment to ensure compliance with anti-corruption regulations. The system will record details about public officials' activities, associations, and private interests in the three years before they assume office and in the year after leaving their posts.<sup>9</sup>

Nevertheless, concerns persist regarding the adequacy of resources dedicated to Argentina's anti-corruption initiatives, which have been exacerbated by the pandemic and related economic difficulties.<sup>10</sup> *The Asociación Civil por la Igualdad y la Justicia* ("ACIJ"), an Argentine civil society nonprofit, highlighted such concerns

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4. Hugh Bronstein and Nicolás Misculin, "Argentina's Peronists on the ropes after bruising midterm defeat," Reuters (Nov. 15, 2021), <https://www.reuters.com/world/americas/argentina-vote-midterm-trial-by-fire-president-fernandez-2021-11-14>.
5. See Alicia Florez, "Corruption Plagues Argentina's Justice System," InSight Crime (May 18, 2021), <https://insightcrime.org/news/corruption-plagues-argentina-justice-system>.
6. "La Oficina Anticorrupción desarrollará el primer registro de integridad y transparencia" ["The Anti-Corruption Office Will Develop the First Integrity and Transparency Registry"], Argentina's Anti-Corruption Office (Apr. 5, 2021), <https://www.argentina.gob.ar/noticias/la-oficina-anticorrupcion-desarrollara-el-primer-registro-de-integridad-y-transparencia>.
7. "La Oficina Anticorrupción finalizó la primera etapa de diseño colaborativo del RITE" ["The Anti-Corruption Office Finalized the First Collaborative Design Phase of RITE"], Argentina's Anti-Corruption Office (Oct. 29, 2021), <https://www.argentina.gob.ar/noticias/la-oficina-anticorrupcion-finalizo-la-primera-etapa-de-diseno-colaborativo-del-rite>.
8. Luis Villanueva, "RITE: una iniciativa colaborativa para mejorar el entorno de los negocios" [RITE: A Collaborative Initiative to Improve the Business Environment], Consejo Profesional de Ciencias Económicas de la Ciudad Autónoma de Buenos Aires (Aug. 2021), <https://consejo.org.ar/medios-del-consejo/revista-consejo-digital/edicion-64/columna-de-opinion-64/villanueva-rite-una-iniciativa-colaborativa-para-mejorar-entorno-negocios>.
9. "Sistema de Monitoreo de Actividades Privadas Anteriores y Posteriores al Ejercicio de la Función Pública" ["System to Monitor Private Activities Before and After Exercising Public Office"], Argentina's Anti-Corruption Office (July 26, 2021), <https://www.argentina.gob.ar/noticias/sistema-de-monitoreo-de-actividades-privadas-anteriores-y-posteriores-al-ejercicio-de-la>.
10. Peter S. Goodman and Daniel Politi, "'We Were Left With Nothing': Argentina's Misery Deepens in the Pandemic," New York Times (Apr. 19, 2021), <https://www.nytimes.com/2021/04/19/business/argentina-economy.html>.

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as part of Argentina's UN Convention Against Corruption implementation review process. In particular, the ACIJ suggested that the main corruption prevention bodies in Argentina – including the OA, the Inspector General of the Nation, and the Office of the Auditor General of the Nation – lack the functional and financial independence necessary to fulfill effectively their anti-corruption responsibilities.<sup>11</sup>

**“Latin American countries have grappled with the pandemic’s devastating impacts, acute economic challenges, and significant political upheaval. Unsurprisingly, these difficulties have hindered the region’s anti-corruption efforts, disturbing some of the momentum built in recent years.”**

**B. Enforcement Efforts**

Former Argentine President and current Vice President Cristina Fernández de Kirchner remains embroiled in a series of corruption investigations.<sup>12</sup> The past year saw numerous court dismissals of charges against Fernández de Kirchner, her family members, and political allies, which international watchdogs have suggested reflects Fernández de Kirchner's apparent influence over the judiciary.<sup>13</sup> This increased politicization is evident also in a case targeting Fernández de Kirchner's presidential successor, Mauricio Macri. In December 2021, former President Macri was charged with ordering the Argentine intelligence service to illegally spy on relatives of crew members of a submarine that sank in 2017.<sup>14</sup>

Meanwhile, some *Cuadernos*-related prosecutorial efforts have progressed, even if slowly and with mixed success.<sup>15</sup> In August 2021, an Argentine court acquitted Paolo Rocca, the chief executive officer and chairman of steel pipe maker Tenaris SA (a subsidiary of the Argentinean-Italian Techint Group, which Rocca also leads),

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11. “New Civil Society Report on Argentina: More Independent Institutions, Stronger Oversight Mechanisms and Civil Society Participation Needed To Advance Anti-Corruption Efforts,” UNCAC Coalition (Aug. 23, 2021), <https://uncaccoalition.org/new-civil-society-report-on-argentina-more-independent-institutions-stronger-oversight-mechanisms-and-real-civil-society-participation-needed-to-advance-anti-corruption-efforts>.
12. Kara Brockmeyer et al., “The Year 2019 in Review,” *supra* note 2, at 65.
13. See, e.g., “Cristina Fernández de Kirchner and her children cleared in money-laundering case,” Buenos Aires Times (Nov. 27, 2021), <https://www.batimes.com.ar/news/argentina/vice-president-cristina-fernandez-de-kirchner-and-her-children-acquitted-in-money-laundering-case.phtml>; Daniel Politi, “Court in Argentina Dismisses Charges Against Kirchner in Bombing Case,” New York Times (Oct. 8, 2021), <https://www.nytimes.com/2021/10/08/world/americas/cristina-fernandez-de-kirchner.html>.
14. Daniel Politi, “Macri, Ex-President of Argentina, Is Charged With Illegal Surveillance,” New York Times (Dec. 2, 2021), <https://www.nytimes.com/2021/12/02/world/americas/macri-submarine-espionage.html>.
15. Diego Cabot, “Disparen contra los cuadernos: ¿en qué está la causa que sacudió a la política hace más de tres años?” [“Shoot the Notebooks: What Happened to the Case That Shook Politics Over Three Years Ago?”], La Nación (Dec. 25, 2021), <https://www.lanacion.com.ar/economia/disparen-contra-los-cuadernos-en-que-esta-la-causa-que-sacudio-a-la-politica-hace-mas-de-tres-anos-nid25122021>.



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in a *Cuadernos*-related corruption case.<sup>16</sup> Rocca had been charged in 2018 with bribery and illicit association. And in December 2021, Roberto Baratta – a former undersecretary for Coordination and Management of the Ministry of Central Planning – was summoned to a judicial inquiry in light of newly obtained evidence pertaining to *Cuadernos*.<sup>17</sup>

The next round of *Cuadernos* inquiries will begin in February 2022. Reportedly, they will focus on an alleged money laundering scheme involving the sale of \$70 million worth of properties in the United States. The seller, Daniel Muñoz, was a secretary under former President Néstor Kirchner and former advisor to Fernández de Kirchner. Although Muñoz died in 2016, a court has sought to extradite a Mexican national who allegedly facilitated the money laundering, and approximately fifteen individuals who reported to Muñoz are expected to be summoned to participate in a judicial inquiry on the matter.<sup>18</sup>

And in matters unrelated to *Cuadernos*, businessman Lázaro Báez – who reportedly was close to the Kirchner family – and others were convicted in February 2021 for laundering over \$55 million USD.<sup>19</sup> Báez was sentenced to twelve years' imprisonment on these money-laundering charges, but appealed to the Court of Cassation, which will review his conviction in May 2022.<sup>20</sup>

Additionally, the *Procuraduría de Criminalidad Económica y Lavado de Activos* (the Argentine Office of the Prosecutor for Economic Crimes and Money Laundering) is investigating possible money laundering and tax evasion stemming from the transfer of several Argentine players to Mexican football clubs. In September 2021, police raided four club offices and the Argentine Football Association headquarters in search of documents related to these trades.<sup>21</sup>

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16. "Italian Steel Pipe Maker Tenaris says Argentina Court Acquits CEO in Corruption Case," Reuters (Aug. 17, 2021), <https://www.reuters.com/article/tenaris-argentina-corruption-idUSL4N2PO3W8>.
17. Diego Cabot, "Shoot the Notebooks," *supra* note 15.
18. *Id.*; Diego Cabot, "Cuadernos: piden la extradición de un mexicano que lavó US\$ 30 millones para un secretario del matrimonio Kirchner" ["Notebooks: Extradition Requested for Mexican who Laundered \$30 Million USD for Kirchner Secretary"], *La Nación* (Dec. 12, 2021), <https://www.lanacion.com.ar/economia/cuadernos-piden-la-extradicion-de-un-mexicano-que-lavo-us-30-millones-para-un-secretario-del-nid12122021>.
19. Andrew M. Levine, Daniel Aun, Nestor D. Almeida, "Latin America's Ever Evolving Anti Corruption Landscape," *FCPA Update* Vol. 13, No. 1 at 10 (Aug. 2021), <https://www.debevoise.com/insights/publications/2021/08/fcpa-update-august-2021>.
20. "'Ruta del dinero K': Casación fijó fecha para revisar la condena del empresario Lázaro Báez" ["'Route of the K-Money': Cassation Sets Date to Review Businessman Lázaro Báez's Conviction"], *Infobae* (Dec. 25, 2021), <https://www.infobae.com/politica/2021/12/25/ruta-del-dinero-k-casacion-fijo-fecha-para-revisar-la-condena-del-empresario-lazaro-baez>.
21. "Allanamientos en la AFA y en otros clubes por lavado de dinero y evasión en la transferencia de jugadores" ["Raids at AFA and Other Clubs Based on Money Laundering and Evasion in Player Transfers"], *El Diario* (Sep. 29, 2021), [https://www.eldiarioar.com/sociedad/allanamientos-afa-clubes-lavado-dinero-evasion-transferencia-jugadores\\_1\\_8351162.html](https://www.eldiarioar.com/sociedad/allanamientos-afa-clubes-lavado-dinero-evasion-transferencia-jugadores_1_8351162.html).

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## II. Brazil

In 2021, Brazil's Operation *Lava Jato* concluded, marking the end of an anti-corruption era. The Public Prosecutor's Office ("MPF") dissolved the Paraná and Rio de Janeiro task forces that had spearheaded numerous significant investigations and prosecutions.<sup>22</sup> The Special Action Groups Combating Organized Crime ("Gaecos") absorbed pending work of the task forces,<sup>23</sup> which had faced increased public scrutiny and slowed in recent years.<sup>24</sup> In parallel, Brazil's anti-corruption landscape continued to evolve, including updates to its procurement and improbity laws and further meaningful enforcement. Nevertheless, *Lava Jato*'s conclusion and various political and economic challenges have prompted questions about Brazil's next phase of anti-corruption enforcement.

### A. Legal and Policy Developments

In April, Brazil enacted a new Public Procurement Law (Law N. 14,133/2021),<sup>25</sup> replacing existing Law N. 8,666/1993 and establishing fresh standards for public bidding and government contracts. This law incentivizes bidders to adopt compliance and other ESG-related programs and requires companies that win public bids exceeding R\$ 200 million (roughly \$35 million USD) to develop such programs. In addition, the new law establishes sanctions for companies that benefit from illicit acts in connection with public bidding, including fines and debarment.

Brazil also amended its Administrative Improbity Law (Law N. 14,230/21),<sup>26</sup> constituting the most significant modification of the existing Administrative Improbity Law (Law N. 8,429/1992), which had featured prominently in Brazilian anti-corruption enforcement. Perhaps most notably, the law now requires intent for public agents' liability: negligent acts resulting in harm no longer constitute "improbity." Of further note, the revised law adopted a principle against double jeopardy (*non bis in idem*), which provides that penalties under the Administrative Improbity Law cannot be stacked on top of sanctions levied under the Anti-Corruption Law (N. 12,846/2013) and, more broadly, must be offset against any

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22. Mauricio Savarese, "Brazil's anti-corruption 'Car Wash' task force ends in gloom," AP News (Feb. 3, 2021), <https://apnews.com/article/brazil-latin-america-fires-sao-paulo-alejandro-toledo-5883d4d8c0c81ae73b17d75b02b33a06>.

23. Sabrina Freire, "PGR define procuradores para compor grupo que substitui Lava Jato no Rio" ["PGR Defines Prosecutors to Integrate Group that Will Replace Lava Jato in Rio"], Poder 360 (Apr. 8, 2021), <https://www.poder360.com.br/justica/pgr-define-procuradores-para-compo-r-grupo-que-substitui-lava-jato-no-rio>; "Lava Jato passa a integrar o Grupo de Ação Especial de Combate ao Crime Organizado no Paraná" ["Lava Jato Is Integrated Into Paraná's Special Action Group Combating Organized Crime"], Brazilian Public Prosecutor's Office (Feb. 3, 2021), <http://www.mpf.mp.br/pr/sala-de-imprensa/noticias-pr/lava-jato-passa-a-integrar-o-gaeco-no-parana>.

24. Kara Brockmeyer et al., "The Year 2019 in Review," *supra* note 2.

25. Law No. 14,133/2021, Official Gazette, <https://www.in.gov.br/en/web/dou/-/lei-n-14.133-de-1-de-abril-de-2021-311876884>.

26. Law No. 14,230/2021, Official Gazette, <https://www.in.gov.br/en/web/dou/-/lei-n-14.230-de-25-de-outubro-de-2021-354623102>.

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sanctions from other jurisdictions involving the same facts.<sup>27</sup> The law also imposes a one-year time limit for the MPF to complete improbity investigations, limits the freezing of bank assets, and permits only the MPF to initiate administrative improbity cases. These amendments have faced some criticism, in particular for introducing an “interim statute of limitations” that would close cases after four years of dormancy.<sup>28</sup>

In July, Brazil’s Attorney General’s Office (“AGU”) issued an ordinance (N. 18/2021) that provides guidelines for non-prosecutorial agreements signed with the AGU and MPF following instances of administrative improbity.<sup>29</sup> This arguably conflicts to some degree with the new Administrative Improbity Law, which specifies that the MPF alone has authority over administrative improbity cases.<sup>30</sup> Given its novelty, this ordinance’s ultimate impact remains unknown.

And most recently, in December 2021, the Brazilian government issued Decree N. 10.889/2021 regarding gifts, presents, and hospitality provided to Federal Executive Branch officials – particularly notable given the recent OECD recommendations – and on the transparency of appointments and public hearings.<sup>31</sup> The decree also created an Electronic Agenda, where starting in October 2022 public officials must disclose information such as public appointments, schedules, and gifts received. That same month, the government issued Decree N. 10,890/2021, which increases access to the whistleblower and complaint hotline page of Brazil’s Comptroller General’s Office (“CGU”) and empowers the CGU to protect whistleblowers from retaliation.<sup>32</sup>

**B. Enforcement in a Post-*Lava Jato* World**

In April, the Brazilian Supreme Court (“STF”) voted to annul former President Luis Inácio “Lula” da Silva’s *Lava Jato*-related convictions on jurisdictional grounds, making him eligible to run for president in 2022.<sup>33</sup> Months later, the STF upheld a lower court decision that had found that former Federal Judge Sergio Moro was

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27. Law No. 12,846/2013, Official Gazette, [https://www.in.gov.br/materia/-/asset\\_publisher/Kujrw0TZC2Mb/content/id/30042702/do1-2013-08-02-lei-n-12-846-de-1-de-agosto-de-2013-30042696](https://www.in.gov.br/materia/-/asset_publisher/Kujrw0TZC2Mb/content/id/30042702/do1-2013-08-02-lei-n-12-846-de-1-de-agosto-de-2013-30042696).

28. “Senado aprova projeto de nova lei de improbidade, que volta à Câmara” [“Senate Approves New Improbity Law Project, Which Returns to the Chamber of Deputies”], Senado Notícias (Sept. 29, 2021), <https://www12.senado.leg.br/noticias/materias/2021/09/29/senado-aprova-projeto-de-nova-lei-de-improbidade-que-volta-a-camara>.

29. AGU Ordinance No. 18/2021, Official Gazette, <https://www.in.gov.br/en/web/dou/-/portaria-normativa-agu-n-18-de-16-de-julho-de-2021-332609935>.

30. Law No. 14,230/2021, Official Gazette, <https://www.in.gov.br/en/web/dou/-/lei-n-14.230-de-25-de-outubro-de-2021-354623102>.

31. Decree No. 10,889/2021, Official Gazette, <https://in.gov.br/en/web/dou/-/decreto-n-10.889-de-9-de-dezembro-de-2021-366039278>.

32. Decree No. 10,890/2021, [http://www.planalto.gov.br/ccivil\\_03/\\_ato2019-2022/2021/Decreto/D10890.htm](http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2021/Decreto/D10890.htm).

33. Gabriela Coelho et al., “Por 8 a 3, STF confirma decisão de Fachin que mantém Lula elegível para 2022” [“Ruling 8-3, STF Upholds Fachin Decision That Keeps Lula Eligible for 2022”], CNN Brasil (Apr. 15, 2021), <https://www.cnnbrasil.com.br/politica/maioria-do-stf-decide-por-anular-condenacoes-de-lula-na-lava-jato>.

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biased in convicting former President Lula in the Guarujá triplex matter, which involved the alleged bribe of an apartment in exchange for favorable Petrobras bids.<sup>34</sup> This ruling is one of many Moro-related cases that the Brazilian judiciary is reviewing following the 2019 *Intercept* leaks.<sup>35</sup>

In June, new corruption allegations emerged regarding President Jair Bolsonaro and the Brazilian Federal Government's efforts to acquire COVID-19 vaccines.<sup>36</sup> In response, a Senate Parliamentary Inquiry Commission launched an investigation focusing on the alleged attempted purchase of Covaxin from an Indian company for a price significantly higher than market. This matter reportedly has undercut President Bolsonaro's anti-corruption messaging<sup>37</sup> and could have a lasting impact on his chances of reelection, especially given former President Lula's renewed eligibility.

**“[Recent] charges point to a continued willingness by Brazilian prosecutors to hold corporate executives and politicians personally liable and underscore that *Lava Jato*'s end has not precluded further significant enforcement.”**

In December, the Brazilian government reported on the first year of its five-year anti-corruption plan initiated at the end of 2020,<sup>38</sup> announcing that 60 of the 153 cases contemplated by the plan were to conclude in 2021.<sup>39</sup> The CGU and AGU – the entities primarily responsible for jointly negotiating and executing leniency agreements since 2020<sup>40</sup> – reported signing leniency agreements with five companies

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- 34. Gabriela Coelho & Galton Sé, “STF mantém decisão que declarou Sergio Moro parcial ao condenar Lula” [“STF Maintains Decision that Declared Sergio Moro Partial in Condemning Lula”], CNN Brasil (June 23, 2021), <https://www.cnnbrasil.com.br/politica/stf-mantem-decisao-que-declarou-sergio-moro-parcial-ao-condenar-lula>.
  - 35. Kara Brockmeyer et al., “The Year 2020 in Review,” *supra* note 2.
  - 36. Afonso Benites, “Compra de vacina Covaxin arrasta Bolsonaro para sombra da corrupção” [“Purchase of Covaxin Vaccine Drags Bolsonaro Under the Shadow of Corruption”], El País (June 23, 2021), <https://brasil.elpais.com/brasil/2021-06-24/compra-de-vacina-covaxin-arrasta-bolsonaro-para-sombra-da-corruptcao.html>.
  - 37. Lobato Felizola, “Covid-19 Vaccine Scandal Could Be the Final Straw for Bolsonaro Supporters,” NACLA (Aug. 26, 2021), <https://nacla.org/vaccine-scandal-bolsonaro-brazil>.
  - 38. Kara Brockmeyer et al., “The Year 2020 in Review,” *supra* note 2.
  - 39. “Governo Federal apresenta primeiros resultados do Plano Anticorrupção,” [“Federal Government Presents First Results of Anticorruption Plan”], Federative Republic of Brazil (Sept. 12, 2021), <https://www.gov.br/cgu/pt-br/assuntos/noticias/2021/12/governo-federal-apresenta-primeiros-resultados-do-plano-anticorruptcao>.
  - 40. See Kara Brockmeyer, Andrew J. Ceresney, Andrew M. Levine, et al., “Brazilian Authorities Announce Anti-Corruption Cooperation and Leniency Framework; MPF's 5th Chamber Opposes It”, FCPA Update, Vol. 12, No. 2 (Sept. 2020), <https://www.debevoise.com/insights/publications/2020/09/fcpa-update-september-2020>.

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in 2021, an increase from 2020's single signed agreement,<sup>41</sup> and noted 24 others still in negotiations.<sup>42</sup> In total in 2021, the Brazilian government recovered close to R\$ 1.8 billion (roughly \$325 million USD) pursuant to corruption-related leniency agreements, comparable to the SEC's and DOJ's corresponding FCPA recovery.<sup>43</sup>

Last year, notable leniency agreements reached by the AGU and CGU included the following (two of which also involved coordinated global resolutions):

- **Samsung Heavy Industries (SHI):** A February 2021 agreement, part of a global resolution involving Brazilian and U.S. authorities, to settle alleged unlawful activity in contracts with Petrobras, pursuant to which Petrobras will receive R\$ 705 million (\$127.5 million USD) and the Brazilian government another R\$ 105 million (\$18.9 million USD) in fines;<sup>44</sup>
- **SICPA do Brasil Ltda. and CEPTIS S.A.:** A June 2021 agreement that included sanctions of R\$ 762 million (roughly \$138 million USD) and a commitment from both companies to enhance their compliance programs;<sup>45</sup>
- **Amec Foster Wheeler Energy Ltd. and Amec Foster Wheeler Latin America:** A June 2021 agreement reached in conjunction with U.S. and U.K. authorities, wherein the two companies agreed to pay R\$ 86 million (\$15.5 million USD) in penalties due to alleged misconduct in contracts with Petrobras;<sup>46</sup>
- **Statkraft Energias Renováveis S.A.:** An October 2021 agreement to resolve bribery allegations identified during a post-acquisition internal investigation, whereby Statkraft agreed to pay R\$ 18 million (\$3.3 million USD) in fines;<sup>47</sup> and

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41. Federative Republic of Brazil, First Results of Anticorruption Plan, *supra* note 39; Robson Bonin, "Acordos de leniência minguaram na CGU em 2020" ["Leniency Agreements Waned at CGU in 2020"], *Veja* (Dec. 9, 2020), <https://veja.abril.com.br/coluna/radar/acordos-de-leniencia-minguaram-na-cgu-em-2020>.
  42. Federative Republic of Brazil, First Results of Anticorruption Plan, *supra* note 39.
  43. "Governo Federal atua no combate à corrupção por meio da CGU" ["Federal Government Acts in the Fight Against Corruption Through CGU"], Federative Republic of Brazil (Dec. 12, 2021), <https://www.gov.br/pt-br/noticias/justica-e-seguranca/2021/12/governo-federal-atua-no-combate-a-corrupcao-por-meio-da-cgu>.
  44. "Leniência: CGU, AGU e MPF celebram acordo com a Samsung Heavy Industries" ["Leniency: CGU, AGU and MPF Enter into Agreement with Samsung Heavy Industries"], Federative Republic of Brazil (Feb. 22, 2021), <https://www.gov.br/cgu/pt-br/assuntos/noticias/2021/02/leniencia-cgu-agu-e-mpf-celebram-acordo-com-a-samsung-heavy-industries>.
  45. "CGU e AGU celebram acordo de leniência com as empresas SICPA e CEPTIS no valor de R\$ 762 milhões" ["CGU and AGU Enter into Leniency Agreement with Companies SICPA and CEPTIS for R\$ 762 Million"], Federative Republic of Brazil (June 7, 2021), <https://www.gov.br/cgu/pt-br/assuntos/noticias/2021/06/cgu-e-agu-celebram-acordo-de-leniencia-com-as-empresas-sicpa-e-ceptis-no-valor-de-r-762-milhoes>.
  46. "CGU e AGU celebram acordo de leniência de R\$ 86 milhões com empresas por ilícitos em projeto com a Petrobras" ["CGU and AGU Enter into R\$ 86 Million Leniency Agreement with Companies for Illicit Acts with Petrobras"], Federative Republic of Brazil (June 25, 2021), <https://www.gov.br/cgu/pt-br/assuntos/noticias/2021/06/cgu-e-agu-celebram-acordo-de-leniencia-de-r-86-milhoes-com-empresas-por-ilicitos-em-projeto-com-a-petrobras>.
  47. "CGU e AGU assinam acordo de leniência com Statkraft Energias Renováveis S.A." ["CGU and AGU Sign Leniency Agreement with Statkraft Energias Renováveis S.A."], Federative Republic of Brazil (Oct. 15, 2021), <https://www.gov.br/cgu/pt-br/assuntos/noticias/2021/10/cgu-e-agu-assinam-acordo-de-leniencia-com-statkraft-energias-renovaveis-s-a>.

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- **Rolls-Royce:** An October 2021 agreement to resolve bribery allegations related to contracts with Petrobras by paying R\$ 154 million (\$27 million USD) in penalties, of which roughly R\$ 139 million (\$25.6 million USD) was credited from prior payments agreed to by the company pursuant to a 2017 global resolution reached with the MPF and U.S. and U.K. authorities.<sup>48</sup>

Brazilian enforcement authorities have sought to safeguard the use of leniency agreements as an effective enforcement mechanism. In March, for example, the STF suspended sanctions imposed by the Federal Court of Accounts (“TCU”) on construction companies for alleged fraudulent activity, ruling that the TCU must not hinder leniency agreements between the companies and other Brazilian enforcement bodies.<sup>49</sup>

At the same time, the MPF has continued to investigate and prosecute corporations and individuals for corrupt acts. In June, the MPF signed a leniency agreement with Car Rental Systems do Brasil Locação de Veículos Ltda., a subsidiary of Localiza, involving corruption allegations stemming from a matter the company had settled in 2020 with the CGU and AGU. Because of the previous settlement with the CGU and AGU, the MPF leniency agreement did not involve the payment of additional fines.<sup>50</sup> And in August, the MPF charged two executives of Doris Engenharia, a Brazilian subsidiary of French company Doris Group, alongside a former treasurer of the Brazilian Workers’ Party and two assistants, for alleged bribery in acquiring Petrobras engineering contracts.<sup>51</sup> These charges point to a continued willingness by Brazilian prosecutors to hold corporate executives and politicians personally liable and underscore that *Lava Jato*’s end has not precluded further significant enforcement.

### C. Looking Ahead

In considering the future of Brazilian anti-corruption enforcement, the general election upcoming in October 2022 looms large. To date, former President Lula leads President Bolsonaro in the polls.<sup>52</sup> Trailing in third is former Judge Moro,

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48. “CGU e AGU assinam acordo de leniência com a Rolls-Royce PLC” [“CGU and AGU Sign Leniency Agreement with Rolls-Royce”], Federative Republic of Brazil (Oct. 26, 2021), <https://www.gov.br/cgu/pt-br/assuntos/noticias/2021/10/cgu-e-agu-assinam-acordo-de-leniencia-com-a-rolls-royce-plc>.
  49. “2ª Turma suspende sanções impostas pelo TCU a construtoras por supostas fraudes em obras de Angra 3” [“2nd Panel Suspends Sanctions Imposed by TCU on Construction Companies for Alleged Fraud in Angra 3 Construction Projects”], Brazilian Supreme Court (Mar. 30, 2021), <https://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=463299&ori=1>.
  50. “Localiza – Comunicado ao Mercado Acordo com o MPF” [“Notice to the Market MPF Agreement”], Localiza Rent a Car S.A. (June 29, 2021), <https://api.mziq.com/mzfilemanager/v2/d/08f327aa-e610-4d9d-b683-8ff0f7caae07/43884312-08b1-f9e5-5f32-0aa6b6fa9ed5?origin=1>.
  51. “MPF denuncia esquema fraudulento em contratos de oito navios plataforma de mais de US\$ 200 milhões” [“MPF Charges Fraudulent Scheme In Contracts for Eight Platform Ships Worth More Than US\$ 200 Million”], Brazilian Public Prosecutor’s Office (Aug. 26, 2021), <http://www.mpf.mp.br/pr/sala-de-imprensa/noticias-pr/mpf-denuncia-esquema-fraudulento-em-contratos-de-oito-navios-plataforma-de-mais-de-us-200-milhoes>.
  52. Raphael Coraccini, “Pesquisa Genial/Quaest: Lula tem 46%, Bolsonaro, 23% e Moro, 10%,” CNN Brasil (Aug. 12, 2021), <https://www.cnnbrasil.com.br/politica/pesquisa-genial-quaest-lula-tem-46-bolsonaro-23-e-moro-chega-a-10>.



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who indicated in November 2021 his intention to enter the race as a candidate of the Podemos Party and is expected to run on a strong anti-corruption platform.<sup>53</sup> The potential reelection of former President Lula – once under the scrutiny of *Lava Jato* and former Judge Moro – would contrast markedly with Bolsonaro’s successful 2018 campaign that anti-corruption attitudes propelled.

Given the upcoming OECD public integrity evaluation – a joint effort between the Brazilian government and the OECD to promote open government policies in Brazil – the November 2021 OECD recommendations on combating corruption may influence local anti-corruption initiatives. Additionally, continued implementation of Brazil’s five-year anti-corruption plan may facilitate future enhancements that focus on public integrity, access to information, and prevention strategies.<sup>54</sup> And within this framework, Brazil may see further increases in AGU and CGU-led leniency agreements and related civil actions, including under the newly-amended Administrative Improbity Law.

“While some prominent corruption cases involving high-level executives and politicians remain ongoing, questions persist regarding Mexico’s institutional capacity to combat corruption.”

### III. Mexico

Last year, President Andrés Manuel López Obrador declared that “there is no corruption” in Mexico anymore, continuing the vigorous anti-corruption enforcement platform of his 2018 campaign. Of course, this remains largely aspirational. In March 2021, the OECD Working Group on Bribery criticized Mexico for failing to prosecute foreign bribery cases, noting that it had not brought any new cases in two years and that no case had moved past the investigative stage in the twenty years since Mexico adopted the Anti-Bribery Convention.<sup>55</sup> While some prominent corruption cases involving high-level executives and politicians remain ongoing, questions persist regarding Mexico’s institutional capacity to combat corruption.

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53. João de Mari et al., “Sergio Moro é pré-candidato à Presidência, diz presidente nacional do Podemos” [“Sergio Moro Is a Pre-Candidate for the Presidency, Says National Podemos President”], CNN Brasil (Nov. 11, 2021), <https://www.cnnbrasil.com.br/politica/sergio-moro-e-pre-candidato-a-presidencia-diz-presidente-nacional-do-podemos>.

54. Federative Republic of Brazil, First Results of Anticorruption Plan, *supra* note 39.

55. “Implementing the OECD Anti-Bribery Convention,” Organization for Economic Cooperation and Development (Mar. 12, 2021), <https://www.oecd.org/daf/anti-bribery/mexico-phase-4-follow-up-report.pdf>.

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**A. Legal and Policy Developments**

Efforts to bolster Mexico's anti-corruption regime continue to lag behind popular expectations. Between 2015 and 2016, Mexico's Congress authorized the creation of a National Anti-Corruption System to coordinate anti-corruption efforts throughout the country. However, the government has been seemingly slow to develop the system, and its efforts have been hindered by staffing shortfalls and the lack of administrative and financial independence among Mexico's state-level anti-corruption offices.<sup>56</sup>

Despite these challenges, the government appears committed to increasing the anti-corruption capacities of the *Fiscalía Especializada en Combate a la Corrupción* (the Prosecution Bureau Specialized in the Combat of Corruption) under the Federal Prosecution Office. The Bureau's budget grew from roughly \$5.3 million USD in 2020 to \$6 million USD in 2021, and the office is slated to receive about \$8.5 million USD in 2022.<sup>57</sup>

Other legislative initiatives seemingly have consolidated President López Obrador's power, raised questions about the executive branch's potential involvement in the judiciary, and focused less on combatting corruption than some anticipated.<sup>58</sup> While Mexico lacked substantive anti-corruption legislative developments in 2021, it did experience the largest election in its history. In this election, President López Obrador and his governing party, MORENA, lost their majority in the lower house.<sup>59</sup> Against this political backdrop, prospects of imminent legislative efforts to bolster anti-corruption enforcement seem less likely.

The courts also have played an important role in helping shape Mexico's anti-corruption landscape. In August 2021, the Second Chamber of the Supreme Court of Justice held that anyone who reports corrupt practices has legal standing to challenge

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56. See Maureen Meyer and Moses Ngong, "Mexico Faces a Test for its Anti-Corruption and Justice Reform Efforts," Washington Office on Latin America (Nov. 25, 2020), <https://www.wola.org/analysis/mexico-faces-test-anti-corruption-justice-reform-efforts>.

57. See "Proyecto de Presupuesto de Egresos de la Federación 2022" ["Expense Budget Projections of the Federation 2022"], Mexico's Secretariat of Finance and Public Credit (Sept. 2021), [https://www.ppef.hacienda.gob.mx/work/models/bzPX2qB5/PPEF2022/qgp8v2PM/docs/49/r49\\_aae.pdf](https://www.ppef.hacienda.gob.mx/work/models/bzPX2qB5/PPEF2022/qgp8v2PM/docs/49/r49_aae.pdf); "Informe Annual de Actividades y Resultados 2021" ["Annual Activity and Results Report 2021"], Mexico's Prosecution Bureau Specialized in the Combat of Corruption (Mar. 11, 2021), [https://sna.org.mx/wp-content/uploads/2021/03/INFORME\\_ANUAL\\_2020-2021\\_FISCAL%C3%8DA\\_ANTICORRUPCI%C3%93N\\_2021.pdf](https://sna.org.mx/wp-content/uploads/2021/03/INFORME_ANUAL_2020-2021_FISCAL%C3%8DA_ANTICORRUPCI%C3%93N_2021.pdf).

58. "Mexico president defends Supreme Court chief justice's term extension," Reuters (Apr. 26, 2021), <https://www.reuters.com/article/us-mexico-politics-court/mexico-president-defends-supreme-court-chief-justices-term-extension-idUSKBN2CD2NS>.

59. Karol Suarez, Rafael Romo, and Joshua Berlinger, "Mexico's President loses grip on power in elections marred by violence," CNN (June 7, 2021), <https://www.cnn.com/2021/06/07/americas/mexico-elections-intl-hnk/index.html>.

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a prosecutor's decision to open or close an investigation of the reported conduct.<sup>60</sup> And in October 2021, the First Chamber of the Supreme Court of Justice held that federal and local judges must publish all of their final decisions.<sup>61</sup>

**B. Enforcement Efforts**

On March 11, 2021, the Prosecution Bureau Specialized in the Combat of Corruption issued its annual activity report. The report indicated the initiation last year of 779 cases investigating alleged corruption by public officials and a total of 1,688 cases opened between 2019 and 2021 (81% of which involved public officials). Additionally, the report noted final determinations in 662 cases since 2019, of which 22 were prosecuted, another eight settled, and one yielded a non-prosecution agreement.<sup>62</sup>

Investigations were launched in 2020 against former Mexican President Enrique Peña Nieto and several high-ranking officials, but they have not yet produced meaningful results.<sup>63</sup> The Public Administration Ministry has sanctioned several individuals who remain under formal investigation, including Luis Videgaray, the former Minister of Finance and former Minister of Foreign Affairs. Although Videgaray has not been charged criminally with corruption, he was disqualified in June 2021 from holding office for ten years because he failed to declare assets.<sup>64</sup> Videgaray immediately appealed the ministry's decision, and the ministry temporarily halted the ten-year ban in August.<sup>65</sup>

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60. "Responsabilidad de los Servidores Públicos. El denunciante de hechos a que hace referencia la Ley General de Responsabilidades Administrativas, posee interés jurídico para impugnar en Amparo Indirecto, la negativa para iniciar una investigación, así como la decisión que ordena su conclusión y archivo, por falta de elementos" ["Responsibility of Public Servants. A person denouncing facts referencing the General Law of Administrative Responsibilities possesses a judicial interest to challenge through an indirect action for *amparo*: a refusal to initiate an investigation, an order to conclude it, and an order to file it due to lack of elements"], Segunda Sala de la Suprema Corte de Justicia [SCJN], *Semanario Judicial de la Federación y su Gaceta*, Onceava Época, Tomo II, Agosto de 2021 [August 2021], Tesis PC.I.A./J/177 A (10a.), página 2648 (Mex.).
61. "Versiones públicas de todas las sentencias. Constituye una obligación de los poderes judiciales federal y locales ponerlas a disposición de la sociedad, por tener el carácter de información de interés público" ["Public versions of all decisions. Constituting an obligation for the local and federal judicial powers to put these to public disposition due to the public interest"], Primera Sala de la Suprema Corte de Justicia de la Nación [SCJN], *Semanario Judicial de la Federación y su Gaceta*, Onceava Época, Tomo II, Octubre de 2021 [October 2021], Tesis 1a. XLIV/2021 (10a.), página 2648 (Mex.).
62. Prosecution Bureau Specialized in the Combat of Corruption, "Annual Activity and Results Report 2021," *supra* note 57.
63. "La Fiscalía acusa a Peña Nieto de dirigir 'aparato de poder criminal' y pide detención de Videgaray" ["The Prosecutor General's Office Accuses Peña Nieto of Managing a 'Criminal Power Apparatus' and Asks for Videgaray's Arrest"], *El País* (Jan. 5, 2022), <https://elpais.com/mexico/2022-01-05/la-fiscalia-de-mexico-pide-39-anos-de-carcel-contra-emilio-lozoya-por-el-caso-odebrecht.html>.
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Despite Mexico's expanded anti-corruption infrastructure under President López Obrador, corruption remains significantly underpunished. As one example, in November 2021, Mexican authorities arrested Emilio Lozoya, the former Chief Executive Officer of Pemex, who is accused of accepting \$10.5 million USD in bribes from Brazilian construction company Odebrecht in exchange for securing government contracts. Lozoya previously had been extradited from Spain to Mexico in 2020 on graft charges, but once in Mexico with protected witness status agreed to testify against former Mexican President Enrique Peña Nieto in exchange for avoiding jail time. It was only after a photograph of Lozoya dining at a luxury restaurant surfaced and sparked public ire that prosecutors requested his detention.<sup>66</sup>

While anti-corruption enforcement in Mexico has encountered various challenges, anti-money laundering enforcement has remained comparatively prominent. In recent years, Mexico's Congress has adopted laws aimed at discouraging money laundering, such as the Asset Forfeiture Law of 2019, which allows for non-conviction-based asset forfeiture.<sup>67</sup> The government's Financial Intelligence Unit ("FIU") has played a key role in President López Obrador's anti-money laundering push.

In 2018, the FIU blocked 811 accounts linked to suspected money laundering transactions, and in 2019 – López Obrador's first full year in office – the number of blocked accounts increased to 12,552. The FIU blocked a further 20,614 and 10,130 accounts in 2020 and 2021, respectively. In addition, under the anti-money laundering provisions of the Secretariat of Finance and Public Credit, entities must report transfers of international funds exceeding the equivalent of \$1,000 USD. In 2021 alone, the FIU received over eight million reports of such transfers and filed 133 complaints against 720 individuals; financial crimes, corruption, and organized crime were the three most common crimes alleged in the complaints.<sup>68</sup>

Notwithstanding these advances in Mexican anti-money laundering enforcement, the former head of the FIU, Santiago Nieto, resigned in November 2021 following a scandal involving a private plane carrying influential guests to his wedding in Guatemala.<sup>69</sup> Santiago Nieto was replaced promptly by Pablo Gomez Alvarez,

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66. Maya Averbuch, "Mexico Arrests Ex-Pemex Chief After Flashy Meal Sparked Ire," Bloomberg (Nov. 3 2021), <https://www.bloomberg.com/news/articles/2021-11-03/mexico-arrests-ex-pemex-chief-lozoya-in-high-level-graft-case>.

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68. "Informe de Actividades Unidad de Inteligencia Financiera Enero-Diciembre 2021" ["Financial Intelligence Unit Activity Report January-December 2021"], Mexico's Secretariat of Finance and Public Credit (Jan 18. 2022), [https://www.gob.mx/cms/uploads/attachment/file/693405/Informe\\_Diciembre\\_2021.pdf](https://www.gob.mx/cms/uploads/attachment/file/693405/Informe_Diciembre_2021.pdf).

69. "Mexico's Anti-Money Laundering Chief Resigns Amid Scandal," AP News (Nov. 9, 2021), <https://apnews.com/article/lifestyle-mexico-caribbean-money-laundering-mexico-city-6941aa45677e3dab81ef6c7f676bd2dc>.

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a career politician whom some have criticized for a perceived lack of anti-corruption experience.<sup>70</sup> In January 2022, Gomez Alvarez and Attorney General Alejandro Gertz Manero signed an institutional agreement with the goal of strengthening the fight against corruption and the flow of information between the two offices.<sup>71</sup>

#### IV. Other Latin American Developments

As Latin American governments have focused resources and attention on responding to the pandemic, domestic anti-corruption enforcement efforts (and their associated funding) often have waned. Meanwhile, the publication of millions of financial documents known as the Pandora Papers in September 2021 highlighted offshore financial dealings that implicated numerous Latin American government officials and other prominent individuals, impacting anti-corruption enforcement across the region.<sup>72</sup>

**“As Latin American governments have focused resources and attention on responding to the pandemic, domestic anti-corruption enforcement efforts (and their associated funding) often have waned.”**

Below are some additional anti-corruption updates from Latin America over the past year:

- **Chile:** Former President Sebastián Piñera – who was implicated in the Pandora Papers for alleged corruption related to the sale of a mining company – narrowly avoided impeachment by the Senate.<sup>73</sup> The scandal likely influenced the 2021

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70. "Las críticas a Pablo Gómez por su ratificación como titular de la UIF" ["Criticism of Pablo Gómez's Appointment as UIF Chief"], Infobae (Nov. 24, 2021), <https://www.infobae.com/america/mexico/2021/11/24/las-criticas-a-pablo-gomez-por-su-ratificacion-como-titular-de-la-uif>.

71. "Fiscalía General de la República y Unidad de Inteligencia Financiera firmaron acuerdo de colaboración" ["The Attorney General's Office and the Financial Intelligence Unit Signed a Collaboration Agreement"], Infobae (Jan. 18, 2022), <https://www.infobae.com/america/mexico/2022/01/18/fiscalia-general-de-la-republica-y-unidad-de-inteligencia-financiera-firmaron-acuerdo-de-colaboracion>.

72. See Will Fitzgibbon, "U.S. lawmakers call for crackdown on financial 'enablers' after Pandora Papers," Int'l Consortium of Investigative Journalists (Oct. 7, 2021), <https://www.icij.org/investigations/pandora-papers/us-lawmakers-call-for-crackdown-on-financial-enablers-after-pandora-papers>.

73. Brenda Medina, "Chilean president avoids removal after senate impeachment vote sparked by Pandora Papers," ICIJ (Nov. 16, 2021), <https://www.icij.org/investigations/pandora-papers/chilean-president-avoids-removal-after-senate-impeachment-vote-sparked-by-pandora-papers>.

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general election, where leftist candidate Gabriel Boric emerged victorious. Boric is a prominent figure in Chile's protests against inequality and corruption.<sup>74</sup>

- **Colombia:** In July, the Colombian government issued Decree 830, which expanded the definition of "Politically Exposed Persons" – individuals in specific high-influence and senior public sector roles who are obligated to disclose information related to their work activities – to better address corrupt conduct by government officials, among other offenses.<sup>75</sup> In December, the Legislature passed Bill 369, the "Anti-Corruption Bill." This Bill has been touted as a means of strengthening Colombia's anti-corruption enforcement mechanisms, including through a new sanctions regime and mandatory transparency and business ethics programs.<sup>76</sup> Even so, the Bill has come under international scrutiny for its inclusion of an article that threatens press freedom through increased penalties for criminal defamation.<sup>77</sup>
- **Costa Rica:** Several corruption scandals made headlines in Costa Rica in 2021. The largest, *Cochinilla*, has led to date to the indictment of over 25 current and former government officials and 50 private citizens involved in alleged bribery related to public infrastructure contracts. Another alleged bribery scandal around public infrastructure bids, *Diamante*, has implicated the mayors of six Costa Rican cities.<sup>78</sup>
- **Dominican Republic:** In December, audits by the Dominican Chamber of Accounts revealed irregularities in six state institutions totaling \$757.9 billion USD, including unjustified emergency designations and purchases lacking proper documentation. These audits were part of a continuing effort to investigate and prosecute allegations stemming from the *Pulpo* case, a large anti-corruption investigation implicating former President Danilo Medina's brother and other former government officials.<sup>79</sup>

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74. "Leftist Gabriel Boric to Become Chile's youngest ever [resident]," BBC News (Dec. 20, 2021), <https://www.bbc.com/news/world-latin-america-59715941>.

75. Decree 830/21, Republic of Colombia (July 26, 2021), <https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=167367>.

76. "'¡Se les acabó el derroche a los corruptos!': Vicepresidenta- Canciller celebra aprobación de Proyecto de Ley Anticorrupción" ["The Waste is Over for the Corrupt!': Vice President-Chancellor Celebrates Approval of Anti-Corruption Bill"] Republic of Colombia (Dec. 16, 2021), <http://www.secretariatransparencia.gov.co/prensa/se-les-acabo-el-derroche-a-los-corruptos-vicepresidenta-canciller-celebra-aprobacion-de-proyecto-de-ley-anticorrupcion>.

77. "Colombian legislature passes anti-corruption bill that threatens press freedom," Committee to Protect Journalists (Dec. 10, 2021), <https://cpj.org/2021/12/colombian-legislature-passes-anti-corruption-bill-that-threatens-press-freedom>.

78. Johel Solano, "8 puntos claves para entender el caso 'Diamante'" ["8 Key Points to Understand the 'Diamante' Case"], CR Hoy (Nov. 15, 2021), <https://www.crhoy.com/nacionales/8-puntos-claves-para-entender-el-caso-diamante>.

79. "A US\$757.9M hole in Dominican Republic Octopus case," Dominican Today (Dec. 6, 2021), <https://dominantoday.com/dr/uncategorized/2021/12/06/a-us757-9m-hole-in-dominican-republic-octopus-case>.



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- **El Salvador:** In May, Attorney General Raul Melara and all five magistrates of the Constitutional Court were replaced with supporters of President Nayib Bukele.<sup>80</sup> At the time of his replacement, Melara had been investigating members of President Bukele's administration for alleged corruption related to COVID-19 funds.<sup>81</sup> Soon after, the individuals formerly under scrutiny were given immunity, and the Anti-Corruption Unit Chief at the Attorney General's office resigned.<sup>82</sup>
- **Guatemala:** In July, Attorney General Maria Consuelo Porras dismissed top anti-corruption prosecutor Juan Francisco Sandoval.<sup>83</sup> Sandoval's termination is suspected to be politically motivated, as he had been investigating alleged bribery involving Guatemalan President Alejandro Giammattei.<sup>84</sup>
- **Honduras:** In November, leftist opposition candidate Xiomara Castro was elected as Honduras's new president.<sup>85</sup> This marks the end of the National Party's twelve-year run in office, which was marred by multiple fraud, corruption, and drug-related scandals.<sup>86</sup> Outgoing President Juan Orlando Hernandez is currently under investigation by U.S. prosecutors for alleged corruption and drug trafficking.<sup>87</sup>

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80. "El Salvador: Dismissal of Constitutional Chamber and Attorney General seriously undermines the rule of law - Bachelet," U.N. Office of the High Commissioner for Human Rights (May 4, 2021), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27053&LangID=E>.
81. Carlos Martínez, Gabriela Cáceres & Óscar Martínez, "Criminal Investigation Found the Bukele Administration Hid Evidence of Negotiations With Gangs," *El Faro* (Aug. 23, 2021), [https://elfaro.net/en/202108/el\\_salvador/25670/Criminal-Investigation-Found-the-Bukele-Administration-Hid-Evidence-of-Negotiations-with-Gangs.htm](https://elfaro.net/en/202108/el_salvador/25670/Criminal-Investigation-Found-the-Bukele-Administration-Hid-Evidence-of-Negotiations-with-Gangs.htm).
82. "El Salvador: Legislature Deepens Democratic Backsliding," Human Rights Watch (Nov. 1, 2021), <https://www.hrw.org/news/2021/11/01/el-salvador-legislature-deepens-democratic-backsliding>.
83. Sofia Menchu, "Guatemala attorney general fires leading anti-corruption prosecutor," Reuters (July 24, 2021), <https://www.reuters.com/world/americas/guatemala-attorney-general-fires-leading-anti-corruption-prosecutor-2021-07-24>.
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87. José de Córdoba, "U.S. Prosecutors Investigate Honduras President for Taking Drug-Related Bribes," *Wall Street Journal* (Feb. 8, 2021), <https://www.wsj.com/articles/u-s-prosecutors-investigate-honduras-president-for-taking-drug-related-bribes-11612840848>.

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- **Peru:** President Pedro Castillo survived an impeachment vote in 2021, following allegations of corruption by him and his staff.<sup>88</sup> Most notably, former Minister of Defense and presidential Chief of Staff Bruno Pacheco was the subject of a high-profile corruption investigation in which \$20,000 USD was found stashed in a bathroom at the Presidential Palace.<sup>89</sup> And in December, authorities detained eleven individuals as part of an effort to dismantle a large corruption scheme known as *Los Gestores* (The Managers), involving alleged bribery between federal officials and regional authorities.<sup>90</sup> The scheme may implicate up to \$250 million USD worth of local infrastructure projects.<sup>91</sup>

Furthermore, U.S. initiatives may impact significantly future anti-corruption enforcement in Latin America, given the Biden Administration's announcement of corruption-fighting policies for the region and particular focus on Central America's Northern Triangle.<sup>92</sup> The creation of a Joint Task Force Alpha and an Anticorruption Task Force – both aimed at addressing corruption in the Northern Triangle through FCPA enforcement<sup>93</sup> – may highlight gaps in domestic anti-corruption efforts. An increase in U.S. anti-corruption activities in the Northern Triangle may lead also to increased intergovernmental cooperation and the creation of further joint enforcement schemes in the region.

*This month's issue of FCPA Update was prepared by partners Kara Brockmeyer, Andrew J. Ceresney, Mark Johnson, Andrew M. Levine, David A. O'Neil, Winston M. Paes, Karolos Seeger, Jane Shvets, and Bruce E. Yannett, counsel Erich O. Grosz, Philip Rohlik, and Douglas S. Zolkind, international counsel Alexandre Bisch and Dr. Friedrich Popp, associates Clara Correa, Aisling Cowell, Matthew French, Fanny Gauthier, Andreas A. Glimenakis, Martha Hirst, Madelaine J. Horn, Thomas Jenkins, Carolina Kupferman, Andrew Lee, Daniel J. Marcus, José Jesús Martínez III, Lorena Rodriguez, Jennifer Romero, and Caroline H. Wallace, and legal consultant Eva Yue Niu. Biographies and contact information are available at [www.debevoise.com](http://www.debevoise.com).*

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**Debevoise & Plimpton LLP**

919 Third Avenue  
New York, New York 10022  
+1 212 909 6000  
www.debevoise.com

**Washington, D.C.**  
+1 202 383 8000

**San Francisco**  
+1 415 738 5700

**London**  
+44 20 7786 9000

**Paris**  
+33 1 40 73 12 12

**Frankfurt**  
+49 69 2097 5000

**Moscow**  
+7 495 956 3858

**Hong Kong**  
+852 2160 9800

**Shanghai**  
+86 21 5047 1800

**Luxembourg**  
+352 27 33 54 00

**Bruce E. Yannett**  
Co-Editor-in-Chief  
+1 212 909 6495  
beyannett@debevoise.com

**Andrew J. Ceresney**  
Co-Editor-in-Chief  
+1 212 909 6947  
aceresney@debevoise.com

**David A. O'Neil**  
Co-Editor-in-Chief  
+1 202 383 8040  
daoneil@debevoise.com

**Karolos Seeger**  
Co-Editor-in-Chief  
+44 20 7786 9042  
kseeger@debevoise.com

**Erich O. Grosz**  
Co-Executive Editor  
+1 212 909 6808  
eogrosz@debevoise.com

**Douglas S. Zolkind**  
Co-Executive Editor  
+1 212 909 6804  
dzolkind@debevoise.com

**Kara Brockmeyer**  
Co-Editor-in-Chief  
+1 202 383 8120  
kbrockmeyer@debevoise.com

**Andrew M. Levine**  
Co-Editor-in-Chief  
+1 212 909 6069  
amlevine@debevoise.com

**Winston M. Paes**  
Co-Editor-in-Chief  
+1 212 909 6896  
wmpaes@debevoise.com

**Jane Shvets**  
Co-Editor-in-Chief  
+44 20 7786 9163  
jshvets@debevoise.com

**Philip Rohlik**  
Co-Executive Editor  
+852 2160 9856  
prohlik@debevoise.com

**Andreas A. Glimenakis**  
Associate Editor  
+1 202 383 8138  
aaglimen@debevoise.com

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