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WHITE PAPER

January 2022

FCPA 2021 Year In Review

The Biden administration took office in January 2021, announcing aggressive and sweeping anticorruption initiatives to tackle corruption around the world, labeling corruption a national security priority, and signaling a “surge” in corporate and individual enforcement. But the debilitating COVID-19 pandemic, coupled with the turnover in DOJ and SEC leadership, led to the lowest corporate Foreign Corrupt Practices Act (“FCPA”) enforcement figures in the past 15 years. Nevertheless, the Biden administration’s enforcement priorities began to take shape. Last year, the Deputy Attorney General announced enforcement policy revisions, and DOJ and SEC officials signaled a more aggressive posture toward corporate and individual FCPA enforcement. Meanwhile, the DOJ and the SEC continued to coordinate FCPA resolutions with their foreign counterparts, and the SEC made two sizeable awards to FCPA whistleblowers.

This *White Paper* reviews 2021 FCPA enforcement and describes what lies ahead.

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There were six key highlights from FCPA enforcement in 2021.

1. The ongoing COVID-19 pandemic, which has made it difficult for the DOJ and the SEC to conduct investigations outside the United States, coupled with the turnover in DOJ and SEC leadership, led to the lowest corporate FCPA enforcement figures in the past 15 years. In 2021, the DOJ and the SEC resolved a total of four corporate FCPA cases totaling \$259 million in penalties, disgorgement, and interest, when taking into account credits and offsets in related foreign enforcement actions. The number of FCPA enforcement actions against individuals also decreased dramatically in 2021.
2. The Biden administration is making anticorruption efforts a centerpiece of its agenda, elevating it to a national security interest due to geopolitical reasons, not merely a domestic enforcement priority. While it is too early to determine how the administration's heightened focus on anticorruption will impact FCPA enforcement, in late 2021, the Office of Foreign Assets Control rolled out a high-profile week-long series of sanctions against more than 80 individuals and entities under the Global Magnitsky Act, which authorizes the United States to impose sanctions on any foreign person or entity determined to be engaging in serious human rights abuse or corruption.
3. New DOJ leadership announced that a "surge" in corporate and individual white collar enforcement is coming. The DOJ also announced important revisions to policies relating to its charging decisions, qualification for cooperation credit, penalties for recidivists, and the use of monitorships in corporate criminal resolutions. Meanwhile, as with many new administrations, the DOJ and the SEC appointed new enforcement leadership who are signaling a more aggressive posture toward corporate and individual enforcement. In this regard, the new Deputy Attorney General has assumed a greatly enhanced role in deciding corporate enforcement actions.
4. The DOJ and the SEC coordinated two corporate FCPA resolutions with authorities in Brazil, Switzerland, and the United Kingdom, showcasing the continuing development of anticorruption enforcement in jurisdictions outside of the United States and trend toward greater coordination among multiple sovereigns in investigating and resolving cross-border corruption cases.
5. The SEC whistleblower program awarded more than \$500 million in the SEC's Fiscal Year 2021, including two sizeable awards to FCPA whistleblowers. Given these incentives, the number of whistleblower claims brought to the SEC surged by approximately 77% compared to Fiscal Year 2020. To date, the SEC has awarded more than \$1.2 billion in whistleblower awards to over 200 whistleblowers.
6. A federal court rejected the DOJ's application of the term "agency" in an indictment against a Switzerland asset manager, the SEC continues to charge companies under the FCPA's internal controls provision in non-FCPA cases, and the OECD issued an updated anti-bribery recommendation to its member countries.

SLOWDOWN IN CORPORATE AND INDIVIDUAL FCPA ENFORCEMENT IN 2021

While the DOJ's and the SEC's corporate FCPA enforcement activity was at a 15-year low in 2021, as measured by enforcement statistics, this appears to be a result of circumstance rather than a change in policy or any diminishment in enforcement appetite. As explained in this *White Paper*, the ongoing COVID-19 pandemic, which has made it particularly difficult for the DOJ and the SEC to conduct investigations outside the United States, coupled with the high turnover in DOJ and SEC leadership, led to this enforcement decline. The statements and policy pronouncements by Biden administration officials, including the elevation of anticorruption enforcement as a national security interest and the administration's focus on prosecuting individuals, demonstrate that the administration does not intend to retreat from the recent record levels of FCPA enforcement. Therefore, we do not anticipate that the decrease in enforcement activity in 2021 will continue through 2022, unless the pandemic continues to limit overseas investigations.

DOJ and SEC Resolved Three Corporate FCPA Cases and Collected \$259 Million in Fines and Penalties in 2021

The number of corporate FCPA enforcement actions declined significantly in 2021. Last year, the DOJ and the SEC resolved a total of four corporate FCPA cases totaling \$259 million in penalties, disgorgement, and interest, when taking into account credits and offsets in related foreign enforcement actions. The Biden administration brought three of the four

actions after it took over on January 20. The number of corporate FCPA enforcement actions and the total dollar value of settlements were lower in 2021 than every single year between 2008 and 2020.

Global anticorruption enforcement actions involving coordinated FCPA resolutions totaled \$619 million in fines and penalties, a sharp drop from the record-breaking \$9.1 billion collected globally in 2020. Both coordinated resolutions are discussed below.

Figure 1: Total Fines and Penalties Collected in FCPA Corporate Actions and in Actions Involving a Coordinated Global Anticorruption Resolution, 2017–2021

Corporate Actions	2017		2018		2019		2020		2021	
	#	US\$	#	US\$	#	US\$	#	US\$	#	US\$
DOJ/SEC Total	11	\$1.13B	16	\$1.03B	14	\$2.65B	12	\$2.78B	4	\$259.0M
Non-U.S. Total (Involving a Coordinated Non-U.S. Resolution)	3	\$1.39B	2	\$1.91B	2	\$0.37B	4	\$6.31B	2	\$359.6M
Global Total		\$2.52B		\$2.94B		\$3.02B		\$9.09B		\$618.6M
Resolving Authorities	Brazil Netherlands Sweden UK U.S.		Brazil France U.S.		Brazil U.S.		Brazil France Hong Kong Singapore UK U.S.		Brazil Switz. UK U.S.	

As in 2020, the DOJ and the SEC imposed no FCPA corporate monitors in 2021. This is illustrative of an overall trend toward fewer FCPA monitors in DOJ and SEC corporate resolutions. During the 2000s, the DOJ imposed monitors in approximately 50% of FCPA corporate cases. Since 2010, that rate

has dropped to approximately 25%. Indeed, there are now only three active FCPA monitorships. As explained below, DOJ and SEC officials' recent statements suggest that the Biden administration may renew an emphasis on the use of monitorships.

Figure 2: Corporate FCPA Resolutions, 2021

	Company	Date	DOJ (US\$M)	SEC (US\$M)	DOJ/SEC Total (US\$M)	Global (US\$M)*
1.	Deutsche Bank AG (Germany: Financial Services)	Jan. 8	\$79.6	\$43.3	\$122.9	
2.	Amec Foster Wheeler Ltd. (United Kingdom: Engineering)	June 25	\$7.7	\$10.1	\$17.8	\$177.0
3.	WPP Plc (United Kingdom: Advertising)	Sep. 24		\$19.2	\$19.2	
4.	Credit Suisse Group AG (Switzerland: Financial Services)	Oct. 19		\$99.1	\$99.1	\$299.8
	Total		\$87.3	\$171.7	\$259.0	\$618.5

*Involving a Coordinated Non-U.S. Resolution.

Individual FCPA Enforcement Also Decreased

Individual FCPA enforcement also dropped. In 2021, the DOJ announced a total of nine FCPA indictments and guilty pleas involving individuals, while the SEC announced zero FCPA individual actions. This is a decline from the 2019 and 2020 statistics for individual actions—25 for the DOJ and six for the SEC in 2019, and 15 for the DOJ and one for the SEC in 2020.

In addition, two individuals who previously pled guilty to FCPA charges were sentenced. A federal court sentenced an Ecuadorian businessman to 35 months in prison for bribing public officials in Ecuador, and another federal court sentenced the former CEO of a petrochemical company to 20 months in prison for participating in a scheme to bribe Brazilian officials. There were no FCPA-related trials in 2021.

Figure 3: DOJ and SEC Individual FCPA Enforcement Actions, 2017–2021

Type of Action	2017	2018	2019	2020	2021
Indictments	4	13	16	7	6
Pleas	11	6	9	8	3
DOJ – Total	15	19	25	15	9
SEC – Total	7	4	6	1	0

Anticorruption Enforcement Against Individuals Continued Under Related Statutes

DOJ anticorruption enforcement actions under related statutes continued in 2021.

Anti-Money Laundering Statutes. The DOJ continued to charge individuals involved in bribery schemes under the United States’ anti-money laundering laws. In this regard, there are two typical scenarios. First, since foreign-official bribe recipients are not subject to the FCPA, the DOJ can charge foreign officials who allegedly received corrupt payments with violating federal anti-money laundering laws, while charging the alleged bribe-payers under the FCPA. For example, in October, the DOJ charged five officials for their alleged roles in laundering the proceeds of a bribery scheme to obtain and retain inflated contracts through a Venezuelan state-owned and state-controlled food and medicine distribution program meant for the people of Venezuela. Second, as it has done in a handful of actions, the DOJ can allege facts in charging documents that could amount to an FCPA violation but charge the individual with an anti-money laundering violation only. For example, in 2021, the DOJ charged four individuals with conspiracy to commit money laundering in connection with a bribery scheme to secure a tear gas contract in Bolivia. While the criminal complaint contains facts that could support a charge under the FCPA’s anti-bribery provisions, the DOJ did not, at least initially, charge the individuals under the FCPA.

OFAC Sanctions Under the Global Magnitsky Act. Under a 2017 presidential executive order issued pursuant to the Global Magnitsky Act of 2016, the United States can impose sanctions to discourage “the transfer or the facilitation of the transfer of the proceeds of corruption.” In December, the Office of Foreign Asset Control (“OFAC”) issued sanctions pursuant to the Global Magnitsky Act against more than 80 individuals and entities tied to corruption or serious human rights abuses. These actions represent the most expansive use of the 2017 executive order to date. The significant number of designations underscores the Biden administration’s commitment to use sanctions as a tool to thwart foreign corruption.

The sanctions were announced in the lead-up to the Summit for Democracy, a virtual summit that the Biden administration hosted in December for 275 leaders from government, civil society, and the private sector to discuss an agenda for democratic renewal. At the conference, the Secretary of the Treasury highlighted the new steps the United States is taking to combat corruption, including through legislation and regulations, imposing sanctions, and establishing new United States Agency for International Development (“USAID”) and State Department programs. The State Department separately announced the establishment of a new State Department Coordinator on Global Anticorruption Issues, as well as an additional \$10 million in financial support for the Global Anti-Corruption Consortium. After the conference, leaders from

100 countries announced a wide range of commitments and pledges in support of democratic renewal centered on the Summit's three themes of strengthening democracy and defending against authoritarianism, fighting corruption, and promoting respect for human rights.

Several Factors That Explain the Downturn in FCPA Enforcement

Several factors accounted for the downturn in corporate and individual FCPA enforcement statistics at the start of the Biden administration. Importantly, DOJ and SEC leadership emphasized that any perceived slowdown in enforcement statistics is not the result of decreased resources or willingness of the agencies to pursue FCPA-related offenses. Indeed, they commented that their FCPA units are busy investigating cases and continue to receive information about alleged FCPA violations from whistleblowers, witnesses, companies making voluntary disclosures, and foreign enforcement authorities.

Impact of the COVID-19 Pandemic on Corporate and Individual Enforcement. The pandemic continued to impact the DOJ's and the SEC's abilities to conduct and resolve FCPA investigations. While DOJ and SEC FCPA officials noted their agencies have adapted to conducting investigations virtually, they acknowledged the pandemic's continued impact on conducting investigations, coordinating with their foreign counterparts, and meeting with defense counsel. The pandemic has also curtailed access to courts, the empanelling of grand juries, and in-person access to witnesses—particularly non-U.S. individuals. This has led to fewer criminal indictments or court-ordered subpoenas and delays in sentencing hearings and other court proceedings.

The ultimate impact of COVID-19 on FCPA enforcement investigations will become clearer over the coming years, as FCPA cases typically require several years to investigate and resolve.

Push to Resolve FCPA Cases Before the End of the Trump Administration. Similar to the spike in FCPA enforcement at the tail end of the Obama administration, there was likely a push to resolve several ongoing FCPA enforcement actions before the end of the Trump administration and the departure of Trump administration enforcement leadership and personnel. The enforcement statistics described above likely reflect, in part, a desire on the part of U.S. authorities and companies involved to avoid the uncertainty associated with the new administration.

Changes in FCPA Enforcement Leadership. Following high turnover, the DOJ and the SEC installed new enforcement leadership. The new leaders have signaled an increased and more aggressive posture toward corporate and individual FCPA enforcement and announced key policy and personnel decisions.

Here are the key changes at the DOJ under new Attorney General Merrick Garland:

- In April, the Senate confirmed Lisa Monaco as Deputy Attorney General. As part of the broader Biden administration initiative to strengthen the DOJ's approach to corporate and individual white-collar enforcement, in October, the Deputy Attorney General announced immediate changes to DOJ enforcement policies, which are described below. Among those changes is that the new Deputy Attorney General has taken on a greatly enhanced role in deciding corporate enforcement actions.
- In July, the Senate confirmed Kenneth Polite to lead the Criminal Division as the Assistant Attorney General for the Criminal Division. Polite recently announced that the Criminal Division is increasing resources by adding more prosecutors, expanding the work of the DOJ's compliance specialists, and proactively identifying potential misconduct using data analytics.
- The Fraud Section, which houses the DOJ's FCPA Unit, is under new temporary leadership. In June, Fraud Section Chief Rob Zink departed the DOJ for private practice. The DOJ selected Joseph Beemsterboer, previously the Principal Deputy Chief of the Fraud Section, as Acting Chief of the Fraud Section.
- In August, the DOJ selected David Last as Chief of its 30-attorney FCPA Unit. Last had been heading the unit in an acting capacity since his predecessor left for private practice in April. Last originally joined the FCPA Unit in 2016, after serving as an Assistant U.S. Attorney in the District of Columbia. In 2021, several prosecutors in the FCPA Unit left for private practice, with replacements coming in from private practice or from within the DOJ.
- In February, the DOJ hired Lauren Kootman to serve as a Compliance Specialist in the strategy unit of the Fraud Section. Kootman has several years of private sector compliance experience. The DOJ's first compliance consultant departed in 2017.

The SEC also made changes in enforcement leadership under the new chair, Gary Gensler. In June, the SEC appointed Gurbir Grewal as the new Director of the Division of Enforcement. Grewal was previously the New Jersey Attorney General. Charles Cain continues to lead the SEC's 40-attorney FCPA Unit, a role that he has occupied since 2017. Meanwhile, Tracy Price is the Deputy Chief of the FCPA Unit, a role that she has also held since 2017.

With new permanent DOJ and SEC enforcement leadership only recently installed, combined with their recent policy pronouncements, the total impact of the Biden administration on FCPA enforcement has yet to be realized. This is particularly significant given the backlog of existing cases. At the end of 2021, more than 100 companies had publicly disclosed open DOJ and/or SEC FCPA-related investigations.

DOJ AND SEC OFFICIALS HAVE SIGNALLED A RENEWED FOCUS ON FCPA ENFORCEMENT AGAINST COMPANIES AND INDIVIDUALS

The Biden administration has made clear that it intends to aggressively pursue corporate and individual FCPA enforcement through a variety of measures. In October, Principal Associate Deputy Attorney General John Carlin announced that the DOJ has "started to redouble the [DOJ's] commitment to white-collar enforcement." In December, the Assistant Attorney General for the Criminal Division emphasized that prosecuting corporate crime remains a top priority and that the pipeline of FCPA cases remains strong despite the impact of the COVID-19 pandemic.

In 2021, the Biden administration announced several anticorruption initiatives that have the potential to change the FCPA enforcement landscape.

Biden Administration Elevated Anticorruption as a National Security Interest and Issued a Geopolitical Strategy on Countering Corruption

In June, President Biden issued a National Security Memorandum ("NSM"), which declared that anticorruption enforcement efforts are "a core United States national security interest." The memorandum called for more resources, legislation, and interagency and cross-border coordination to significantly bolster U.S. anticorruption enforcement. The NSM followed the Biden administration's March Interim National Security Strategic Guidance, which warned that China, Russia, and other authoritarian states "weaponize corruption" to weaken democracy and the rule of law. In December, upon completion of an interagency review, the Biden administration released a document titled "United States Strategy on Countering Corruption" ("Strategy") explaining the administration's "whole-of-government approach to elevating the fight against corruption."

The Strategy outlines the Biden administration's comprehensive, five-pillar approach to countering corruption and declares the administration's intention to continue to "vigorously enforce the [FCPA] and other statutory and regulatory regimes via criminal and civil enforcement actions." The five pillars of the Strategy are as follows (and are explained in more detail in Figure 4 below):

- Pillar 1: Modernizing, Coordinating, and Resourcing U.S. Government Efforts to Better Fight Corruption;
- Pillar 2: Curbing Illicit Finance;
- Pillar 3: Holding Corrupt Actors Accountable;
- Pillar 4: Preserving and Strengthening the Multilateral Anti-Corruption Architecture; and
- Pillar 5: Improving Diplomatic Engagement and Leveraging Foreign Assistance Resources to Advance Policy Objectives.

Figure 4: Summary of the Biden Administration's Five-Pillar Strategy to Counter Corruption (as described by the associated White House Fact Sheet)

	Strategy Pillar	Description
1	Modernizing, Coordinating, and Resourcing U.S. Government Efforts to Fight Corruption	<ul style="list-style-type: none"> • Better understand the transnational dimensions of corruption. • Elevate anticorruption work as a cross-cutting priority across the federal government, including through the Departments of State, Treasury, and Commerce, and USAID. • Increase law enforcement resources and bolster information-sharing between the intelligence community and law enforcement.
2	Curbing Illicit Finance	<ul style="list-style-type: none"> • Issue beneficial ownership transparency regulations that help identify bad actors hiding behind opaque corporate structures. • Enact regulations to reveal when real estate is used to hide ill-gotten cash or to launder criminal proceeds. • Work with Congress and within existing regulations to make it harder for financial system gatekeepers to evade scrutiny. • Work with partner countries to strengthen their anti-money laundering regimes to bring greater transparency to the international financial system.
3	Holding Corrupt Actors Accountable	<ul style="list-style-type: none"> • Elevate diplomatic and development efforts to support, defend, and protect civil society and media actors, including investigative journalists who expose corruption. • Launch initiative to engage partner countries on detecting and disrupting foreign bribery. • Establish a kleptocracy asset recovery rewards program to enhance the U.S. Government's ability to identify and recover stolen assets linked to foreign government corruption that are held at U.S. financial institutions. • Work with the private sector to encourage the adoption and enforcement of anticorruption compliance programs by U.S. and international companies.
4	Preserving and Strengthening the Multilateral Anticorruption Architecture	<ul style="list-style-type: none"> • Work with the G7 and G20 to implement strong transparency and anticorruption measures across ministerial tracks. • Build and expand security institutions to target corruption in finance, acquisition, and human resources functions. • Reinvigorate U.S. participation across a number of initiatives, including the Open Government Partnership and Extractive Industries Transparency Initiative.
5	Improving Diplomatic Engagement and Leveraging Foreign Assistance Resources to Achieve Anticorruption Policy Goals	<ul style="list-style-type: none"> • Elevate anticorruption as a diplomatic priority. • Review and reevaluate criteria for government-to-government assistance, including around transparency and accountability. • Expand anticorruption-focused U.S. assistance, and monitor the efficacy of this assistance. • Build additional flexibility into anticorruption initiatives and broader assistance efforts to respond to unexpected situations worldwide. • Bolster public-sector anticorruption capacity and support, including to independent audit and oversight institutions.

The Strategy marks the United States' continued focus on combatting corruption through a variety of means, including more interagency and cross-border coordination. With the Strategy, the Biden administration is seeking to bolster anticorruption efforts domestically and internationally on an unprecedented level by enlisting a broad array of agencies. While we have already seen an increase in Global Magnitsky Act designations, time will tell whether this shift in strategy will lead to a corresponding increase in FCPA enforcement.

Biden Administration Adopted a Central America Anticorruption Initiative

The Biden administration announced several initiatives to counter corruption in Central America as part of the administration's goal to address the root causes of migration to the United States.

Under the 2020 United States–Northern Triangle Enhanced Engagement Act, Congress authorized sanctions against “foreign persons determined to be involved in a significant act of corruption in a Northern Triangle” country of Guatemala, El Salvador, and Honduras. In July, the State Department released a list of 55 senior current and former government officials and individuals from these countries who the State Department has determined engaged in corrupt activity, obstructed investigations into acts of corruption, or undermined democratic processes or institutions. They are now prohibited from entering the United States and may face sanctions. The State Department stated that it will continue to review the individuals listed in the report and consider all available tools to deter and disrupt corrupt, undemocratic activity in El Salvador, Guatemala, and Honduras.

Separately, the DOJ created an Anticorruption Task Force focused on the Northern Triangle with representatives from the FCPA Unit and other Criminal Division groups. In October, the DOJ announced a hotline to help its Anticorruption Task Force address corruption in the Northern Triangle. Taken together, these initiatives signal the United States' focus on combatting corruption in this region.

Deputy Attorney General Memorandum Announced Policy Changes

As part of the broader Biden administration initiative to strengthen the DOJ's approach to corporate and individual white-collar enforcement, in October, Deputy Attorney General Monaco issued a memorandum setting forth immediate revisions to existing DOJ policy related to charging decisions, qualification for cooperation credit, and use of monitorships in corporate criminal resolutions. The memorandum implements many of the corporate enforcement goals outlined by senior DOJ officials in recent speeches. The revisions will be incorporated into DOJ's policy manual (referred to as the Justice Manual) and apply to all pending and future DOJ investigations.

As described in Figure 5 on the next page, the memorandum implements three key policy changes related to: (1) consideration of a company's entire criminal, civil, and regulatory history when making charging decisions; (2) a requirement that a company must disclose relevant nonprivileged information about all individuals to qualify for cooperation credit; and (3) the imposition of corporate monitors. In certain respects, these policy changes represent a return to policies previously in place at the DOJ.

Figure 5: Summary of the Policy Changes in the Deputy Attorney General's October 2021 Memorandum

	Policy Initiative	Description
1	Consideration of a Company's Entire Criminal, Civil, and Regulatory History When Making Charging and Resolution Decisions	<ul style="list-style-type: none"> DOJ prosecutors <i>must</i> consider the company's <i>full</i> domestic and foreign criminal, civil, and regulatory record when making resolution and charging decisions. DOJ guidance previously in effect stated that prosecutors <i>may</i> consider a corporation's history of <i>similar</i> conduct. The memorandum does not explain how a prosecutor is to weigh prior unrelated misconduct, but it indicates that additional guidance will be provided in revisions to the Justice Manual.
2	Mandatory Disclosure of Relevant Nonprivileged Information About All Individuals to Qualify for Cooperation Credit	<ul style="list-style-type: none"> For a company to receive any consideration for cooperation credit, it must disclose to the DOJ "all relevant [nonprivileged] facts about individual misconduct, regardless of their position, status or seniority." Previously, DOJ guidance implemented in 2018 required cooperating companies to disclose information related to only those individuals "substantially involved" in the misconduct to qualify for any cooperation credit. The new guidance returns the DOJ to its pre-2018 approach, under which the DOJ had long required that a company disclose all relevant, nonprivileged facts in order to receive full cooperation credit. For cooperating companies, this standard may increase the costs and resources required to cooperate with the DOJ policy as compared to the past several years, due to the need to identify, analyze, and disclose more nonprivileged information.
3	Imposition of Corporate Monitors When Appropriate	<ul style="list-style-type: none"> Under the Deputy Attorney General's new guidance, DOJ prosecutors are supposed to determine whether a monitor is appropriate based on the "facts and circumstances of each case." Prosecutors are to consider imposing a monitorship if a company's compliance program and controls are untested, ineffective, inadequately resourced, or not fully implemented at the time of the corporate resolution. This replaces the DOJ's immediate prior guidance, which acknowledged that monitors can be an effective tool but instructed prosecutors that "the imposition of a monitor will not be necessary in many corporate criminal resolutions." The new guidance reflects a return to guidance similar to the DOJ's approach to monitorships prior to 2018. This guidance is yet another reminder that a company's compliance program should be tested, effective, adequately resourced, fully implemented, and periodically updated.

The new policies—paired with a renewed effort to prosecute individuals and an increased focus on addressing corruption and corporate crime—have the potential to further complicate the already difficult processes for companies to conduct internal investigations and interact with the DOJ to resolve corporate cases.

DOJ Announced Other Changes and Additional Resources Focused on White-Collar Enforcement

In her memorandum, Deputy Attorney General Monaco also announced the creation of a "Corporate Crime Advisory Group" with a "broad mandate" to analyze the DOJ's approach to various enforcement topics, including benchmarks to measure cooperation credit, the appropriateness of non-prosecution agreements ("NPAs") and deferred prosecution agreements ("DPAs") to resolve cases with companies that are repeat offenders, the selection of monitors, and how the DOJ can

invest in new technologies. Indeed, the DOJ is also refining its use of data analytics and developing new investigative tools (e.g., artificial intelligence) to identify and prosecute corporate criminal conduct. In connection with this announcement, the DOJ indicated it will seek stiffer punishment for companies that violate the terms of an operative NPA or DPA; indeed, two companies announced last year that the DOJ believes they breached their respective agreements.

In addition to the changes announced in the Memorandum, the Federal Bureau of Investigation ("FBI") recently added a permanent squad of agents to support the Fraud Section of the DOJ's Criminal Division. This group will assist with the prosecution of FCPA, financial fraud, and health care fraud cases. Deputy Attorney General Monaco remarked that "this team model has a proven track record and is one [the DOJ has] used in numerous high-profile cases."

Taken together, these policy pronouncements and increased resources are a strong indicator that the DOJ will increase corporate and individual FCPA enforcement.

SEC Announced “Aggressive” Enforcement Policy Changes

In October, the SEC Director of Enforcement stated “aggressive use” of various remedies were on the horizon for the SEC. Notably, he stated the SEC plans to return to a policy requiring companies to admit wrongdoing to settle certain enforcement actions. The Director of Enforcement announced the SEC will require admissions in cases “where heightened accountability and acceptance of responsibility are in the public interest.” The Deputy Director of Enforcement later said that the Enforcement Division would seek admissions in cases involving egregious misconduct, obstruction of the SEC’s investigation, and harm to a significant number of investors. This is not the first time the SEC has signaled a shift away from its “no-admit, no-deny” policy. Under the Obama administration, the SEC attempted to require more frequent admissions of wrongdoing. Ultimately, however, it required admissions only when the company entered into a parallel DOJ resolution.

Other aggressive remedies the SEC may seek, particularly for “recidivist” companies and individuals, include:

- Larger penalties both in settlement negotiations and, if necessary, in litigation.
- Barring individuals from serving as officers or directors of public companies in cases involving *scienter*-based violations, even when they have not previously held these roles.
- Use of independent compliance consultants to review policies and procedures and to determine improvements that can prevent future misconduct, and including undertakings that are tailored to address the underlying violations and affect future compliance, which can include limiting the activities, functions, or operations of a company.
- Companies that ignored subpoenas, litigation hold notices, or used ephemeral technology to allow messages to disappear may also face consequences for spoliation of evidence.

While the impact of these statements on FCPA enforcement has yet to be seen, they signal the SEC’s posture toward increased and more aggressive corporate and individual enforcement.

TWO 2021 MULTI-JURISDICTIONAL CORPORATE SETTLEMENTS HIGHLIGHT INTERNATIONAL COOPERATION AND COORDINATION

The DOJ and the SEC continue to prioritize coordination with other U.S. regulators and foreign authorities to investigate and prosecute corruption. In 2021, the DOJ and the SEC entered into two global anticorruption resolutions that were coordinated with authorities in Brazil, Switzerland, and the United Kingdom. In both resolutions, the DOJ and the SEC coordinated their investigations and resolutions and credited fines and penalties paid to the other countries.

As the first resolution demonstrates, Brazil continues to be at the forefront of international anticorruption enforcement. The DOJ, the SEC, and Brazilian authorities continue to cooperate with one another to investigate several major corruption cases, including investigations of corrupt conduct involving *Petróleo Brasileiro S.A. (“Petrobras”)*, Brazil’s state-owned oil and gas company. Since 2010, Brazil ranks as the second-most referenced location for misconduct alleged in FCPA enforcement actions.

The increasing coordination among countries in the investigation and prosecution of corporate crime heightens the risk for multinational corporations and their personnel of being targeted by criminal investigative authorities, perhaps across multiple jurisdictions. Just in the past six years, the DOJ and the SEC have publicly acknowledged the assistance of regulators from more than 55 countries and territories in connection with dozens of FCPA enforcement actions. This unprecedented level of cross-border anticorruption enforcement coordination is expected to continue under the Biden administration.

UK’s Amec Foster Wheeler Paid \$18 Million in Penalties to DOJ and SEC, Part of a More than \$177 Million Global Resolution with U.S., Brazil, and UK Authorities

In June, Amec Foster Wheeler Limited, a subsidiary of UK-based global engineering company John Wood Group plc acquired in 2017, agreed to a \$177 million global resolution with the DOJ, the SEC, the UK Serious Fraud Office (“SFO”), and authorities in Brazil to resolve bribery charges related to improper payments through third-party agents to officials at Brazil’s Petrobras to win a \$190 million contract. Amec Foster

allowed one of its agents to continue working for the company after it failed an initial round of diligence. The SFO separately found that Amec Foster used third parties to pay millions of dollars' worth of bribes to government officials in Nigeria, Saudi Arabia, Malaysia, and India to obtain lucrative contracts.

The DOJ and the SEC coordinated their investigations and resolutions with the SFO and Brazil and provided credit for penalties paid to them. After taking into account offsets and credits, the global resolution consisted of:

- A \$7.7 million payment to the DOJ, after allowing a credit of \$4.6 million for penalties paid to the SFO and \$6.1 million paid to Brazil, to resolve the DOJ's charge that Amec Foster conspired to violate the FCPA.

- \$10.1 million in disgorgement and interest to the SEC, with similar credits to amounts paid to the SFO and Brazil, to resolve the SEC's findings that Amec Foster violated the FCPA's anti-bribery, internal controls, and books and records provisions.
- \$142 million to the SFO.
- \$6.1 million to three Brazilian authorities—the Ministério Público Federal ("MPF"), the Controladoria-Geral da União ("CGU"), and the Advogado-Geral da União ("AGU").

Amec Foster agreed to make the payments over a period of four years.

Figure 6: Amec Foster Wheeler Global Resolution, June 2021

	Country	Agency	Resolution	US\$M Fine (after crediting and offsets)	Resolution Referenced Conduct In
1	U.S.	DOJ	Three-year DPA	\$7.7M	Brazil
2	U.S.	SEC	Administrative cease and desist order	\$10.1M	Brazil
3	UK	SFO	Three-year DPA	\$142M	Brazil, Nigeria, Saudi Arabia, Malaysia, and India
4	Brazil	MPF, CGU, AGU	18-month corporate leniency agreement	\$17.2M	Brazil
	Total			\$177.0M	

In determining not to impose an independent compliance monitor, the DOJ considered Amec Foster's remedial measures and the state of Amec Foster's and its parent company's compliance program. While the parent company was not charged as a defendant in the case, it agreed to certain terms and obligations of the DPA, including continuing to undertake a review of its internal accounting controls, policies, and procedures regarding FCPA compliance.

Switzerland's Credit Suisse Paid \$475 Million in Penalties to U.S., Swiss, and UK Authorities

In October, the SEC announced that Switzerland-based Credit Suisse Group AG agreed to pay \$100 million (among other penalties to other agencies) to resolve the SEC's findings that Credit Suisse violated the FCPA's internal controls and books and records provisions. According to the SEC's findings, Credit Suisse raised funds for an \$850 million loan to finance a tuna fishing

project in Mozambique. The bank raised the funds for state-owned entities in Mozambique, knowing they were newly formed, had no prior operations, and were created to funnel kickbacks to bankers and bribers to Mozambican government officials. As part of those transactions, the SEC found that Credit Suisse fraudulently misled investors by hiding the underlying corruption. Credit Suisse did not admit or deny the SEC's findings.

On the same day, the DOJ entered into a parallel resolution with Credit Suisse and a European subsidiary Credit Suisse Securities (Europe) Limited ("CSSEL") to resolve charges that Credit Suisse conspired to commit wire fraud by defrauding U.S. and international investors in connection with the \$850 million loan. Credit Suisse entered into a DPA with the DOJ and CSSEL, which financed one of the bond offerings, and pleaded guilty in the U.S. District Court for the Eastern District of New York to a one-count criminal information charging it with conspiracy to

commit wire fraud. After taking into account credits and offsets, Credit Suisse agreed to pay \$175.6 million to resolve the DOJ's charges. Previously, three former CSSEL executives pleaded guilty to conspiracy charges. Notably, the DOJ resolutions did not include FCPA charges against Credit Suisse or CSSEL.

Credit Suisse simultaneously entered into agreements with the UK Financial Conduct Authority ("FCA") to resolve FCA findings that it failed to maintain adequate anti-financial crime policies and Switzerland's Financial Market Supervisory Authority ("FINMA") related to Credit Suisse's corporate governance failures. Credit Suisse agreed to pay the FCA a \$200.7 million fine. In total, Credit Suisse agreed to pay more than \$475 million in penalties.

Under the agreement with FINMA, Credit Suisse agreed to enhanced compliance and self-reporting, including allowing an independent third party to monitor the bank's transactions, risk management, and internal control systems, as well as its existing credit transactions with financially weak and corruption-prone states and companies, to prevent and detect similar conduct in the future. In determining that Credit Suisse would not be subject to a monitor, the DOJ and the SEC noted the company's remediation and the current state of its compliance program.

Figure 7: Credit Suisse Global Resolution, October 2021

	Country	Agency	Charges	US\$M Fine (after crediting)
1	U.S.	SEC	FCPA (internal accounting controls and books and records provisions)	\$99.1M
2	U.S.	DOJ	Conspiracy to commit wire fraud (<i>not an FCPA resolution</i>)	\$175.6M
3	UK	FCA	Failure to maintain adequate anti-financial crime policies	\$200.7M (also agreed to forgive \$200 million of debt owed by the Republic of Mozambique)
4	Swiss	FINMA	Corporate governance failings	N/A (agreed to independent monitor and enhanced compliance and reporting requirements)
Total				\$475.4M

SEC WHISTLEBLOWER PROGRAM AWARDS MORE THAN \$1.2 BILLION IN AWARDS SINCE INCEPTION

In 2021, the SEC's whistleblower program reached \$1.2 billion in total awards to 236 individuals since issuing its first award in 2012. Whistleblowers who provide the SEC with original, timely, and credible information leading to a successful enforcement action are eligible to receive an award that can range from 10% to 30% of the money collected if monetary sanctions exceed \$1 million.

In addition to the accelerated number and size of awards to whistleblowers—more than \$530 million was awarded to more than 100 individuals in the SEC's fiscal year 2021, which ended on September 30—several recent awards underscore the SEC's pro-whistleblower stance. For example, the SEC awarded a record-breaking \$110 million to a whistleblower who submitted

information after the SEC Staff had already opened an investigation and became aware of potential misconduct at a company.

The SEC announced two sizeable awards in connection with recent FCPA resolutions in 2021. To date, there have been five known awards for a tip that led to a corporate FCPA resolution.

- In May, the SEC announced an award of more than \$28 million to a whistleblower whose tip led the SEC and the DOJ to reach a combined \$281 million FCPA settlement with a U.S.-based manufacturer of electronic systems for aircraft. This is the 10th-largest award in the SEC whistleblower program's history. In 2018, the manufacturer resolved all FCPA-related charges in a settlement with the SEC that included \$143 million in disgorgement and interest and a DPA with the DOJ that included a separate \$138 million penalty.

- In August, the SEC awarded \$3.5 million to an unnamed whistleblower who provided information that helped it bring an FCPA case against a U.S.-based networking technology company. The company paid \$11.7 million to resolve civil charges that its Russian and Chinese subsidiaries caused FCPA violations.

Given these incentives, the number of whistleblower claims brought to the SEC has increased. In the SEC's fiscal year 2021 alone, whistleblower claims to the SEC surged by approximately 77% compared to the prior fiscal year.

Figure 8: Number of Whistleblower Tips to the SEC's Whistleblower Program, SEC FY2017–FY2021

	FY2017	FY2018	FY2019	FY2020	FY2021
Number of Whistleblower Tips	4,484	5,282	5,212	6,911	12,200
Number of FCPA Tips	210	202	200	208	258

In May, the Acting Director of SEC Enforcement stated that the uptick in reports was the result of continued remote work and the SEC's publicity of the program. Part of the increase in tips has also been attributed to the increase in the plaintiffs' lawyers offering to represent whistleblowers based on a success fee. Plaintiffs' counsel actively recruit employees at companies in targeted industries and high-risk jurisdictions, often through social media, to become whistleblowers. Based on public reports, several successful SEC FCPA whistleblowers were represented by counsel.

sufficient facts that she acted as an agent of PDVSA-US, a domestic concern. Despite DOJ allegations that Rafoi-Bleuler had agreed to set up bank accounts for PDVSA and transfer funds for it, the court held that evidence that PDVSA-US controlled Rafoi-Bleuler's actions, thus creating an agency relationship, was missing. Relatedly, the court dismissed the DOJ's money laundering charges because the DOJ did not allege that she was a U.S. citizen or that conduct in furtherance of the scheme occurred in the United States. The DOJ appealed the district court's ruling.

RECENT LEGAL DEVELOPMENTS AFFECTING DOJ AND SEC FCPA ENFORCEMENT

DOJ Plans to Appeal Texas Federal Court Ruling That It Lacked Jurisdiction Over an Alleged Agent of a Domestic Concern

A recent federal decision limited the DOJ's assertion of FCPA agency-based jurisdiction over a non-U.S. individual. In November, a Southern District of Texas federal judge granted the motion to dismiss FCPA and money laundering charges against Daisy Rafoi-Bleuler, a Swiss citizen and former Switzerland asset manager. The DOJ alleged she participated in a scheme to bribe officials at Petróleos de Venezuela, S.A. ("PDVSA"), Venezuela's state oil company. Since Rafoi-Bleuler is not a U.S. citizen and the DOJ did not allege that she took an act to violate the FCPA while inside the United States, the FCPA would apply to her conduct only if she were acting as the officer, director, employee, or agent of a domestic concern within the meaning of the FCPA. The court dismissed the DOJ's FCPA charges because the indictment did not allege

SEC Continues to Pursue Non-FCPA Internal Controls Cases

In 2020, the SEC brought internal controls charges in a non-FCPA case for the first time. In 2021, the SEC charged two additional companies with internal controls charges in non-FCPA cases. These actions represent an expansion of the law by the SEC and provide an important avenue out of an investigation for something other than fraud for the issuer. In 2020, two SEC commissioners said in a dissent that this represents an "unduly broad" view of the FCPA's internal controls provision. It remains to be seen whether this matter represents a shift in SEC enforcement toward a more expansive view of the FCPA's internal controls provision.

OECD Issued Updated Anticorruption Enforcement Recommendations

In November, the Organisation for Economic Cooperation and Development ("OECD") adopted the OECD Working Group on Bribery's 2021 Recommendation for Further Combating Bribery of Public Officials International Business Transactions. This recommendation updates the 2009 Anti-Bribery Recommendation

with additional suggestions for countries to prevent, detect, and investigate anticorruption matters. Among other items, the 2021 Recommendation:

- Includes new sections on the demand side of foreign bribery (i.e., foreign officials demanding bribes), sanctions, non-trial resolutions (e.g., NPAs and DPAs), international cooperation, whistleblower protections, incentives for compliance programs, and data protection.
- Broadens the scope of existing recommendations on investigations and enforcement, awareness raising, training, and public procurement.
- Updates the Good Practice Guidance for companies on internal controls, ethics, and compliance programs or measures for preventing and detecting foreign bribery.

The Recommendation reflects the OECD Working Group on Bribery's commitment to disseminate best practices to its signatory countries and may lead to further development of non-U.S. anticorruption enforcement regimes.

GIVEN THE BIDEN ADMINISTRATION'S FCPA ENFORCEMENT PRIORITIES, COMPANIES SHOULD ENSURE THEIR ANTICORRUPTION COMPLIANCE PROGRAMS ARE APPROPRIATELY DESIGNED AND EFFECTIVELY OPERATING

Whether the Biden administration's enforcement priorities and policy pronouncements will lead to an increase in corporate and individual FCPA enforcement activity remains to be seen. But the DOJ's and the SEC's planned "surge" in corporate and individual FCPA enforcement and continued coordination with their foreign counterparts will undoubtedly result in the DOJ and the SEC paying more attention to corporate activity related to corruption and the conduct of individual corporate employees and agents, and it will likely lead to an increase in FCPA enforcement, unless the COVID-19 pandemic continues to impact FCPA investigations.

Given that the DOJ and the SEC give every indication that the agencies fully intend to increase FCPA enforcement, companies are well advised to understand and timely adapt to the current enforcement environment and the risks it presents. Companies can prepare for potential ramped-up FCPA enforcement by ensuring that their compliance policies, procedures, and other internal controls are appropriately designed and effectively operate to prevent, detect, investigate, and remediate any potential issues as they arise. Companies should also ensure that their risk-assessment process, policies, internal investigation procedures, data preservation protocols, monitoring tools, and employee discipline procedures are up to date and continuously improving. In so doing, companies should, of course, also account for other domestic and international regulatory requirements and standards, including legal provisions relating to triggers, if any, for FCPA liability and official guidance relating to the implementation and updating of corporate compliance programs.

Effective anticorruption compliance and ethics programs can help companies avoid enforcement actions in the first place, and can mitigate the exposure to penalties and other consequences of an enforcement action, such as a monitor, in the event one is pursued.

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Special thanks to Jules H. Cantor, Robert F. Hart, Abron Hester, Stephanie A. Starek, and Brittany N. Wilhelm for their assistance with this White Paper.

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