



One Firm Worldwide®



## WHITE PAPER

February 2023

### FCPA 2022 Year In Review

Foreign Corrupt Practices Act (“FCPA”) enforcement has yet to rebound from the immediate pre-pandemic period. In 2022, DOJ and SEC resolved eight corporate FCPA matters for \$878 million, including four resolutions coordinated with foreign regulators. DOJ also announced seven indictments and pleas under the FCPA, and SEC announced no individual FCPA enforcement actions. The drop in FCPA enforcement statistics is likely temporary. The Biden administration continues to prioritize anticorruption enforcement, announcing several major changes to corporate criminal enforcement policies and corporate compliance programs, signaling a more aggressive posture toward corporate and individual FCPA enforcement.

This *White Paper* reviews 2022 FCPA enforcement and describes what lies ahead.

## TABLE OF CONTENTS

<b>THERE WERE FIVE KEY HIGHLIGHTS FROM FCPA ENFORCEMENT IN 2022</b> .....	1
<b>CONTINUED SLOWDOWN IN CORPORATE AND INDIVIDUAL FCPA ENFORCEMENT</b> .....	1
DOJ and SEC Resolved Eight Corporate FCPA Cases and Collected \$878 Million in Fines and Penalties in 2022 .....	2
Individual FCPA Enforcement Also Lagged .....	2
Anticorruption Enforcement Against Individuals Continued Under Related Laws .....	3
<b>COVID-19 CONTINUED TO IMPACT FCPA ENFORCEMENT</b> .....	3
Continued Impact of the COVID-19 Pandemic on FCPA Enforcement .....	3
Permanent Enforcement Leadership Have Taken Steps to Centralize Decision-Making .....	4
<b>DOJ ANNOUNCED MAJOR CHANGES TO CORPORATE CRIMINAL ENFORCEMENT POLICIES</b> .....	4
Deputy Attorney General Announced Enforcement Policy Changes in September 2022 .....	4
Criminal Division Announced Revised Corporate Enforcement Policy in January 2023 .....	5
<b>THREE 2022 MULTI-JURISDICTIONAL CORPORATE SETTLEMENTS HIGHLIGHT INTERNATIONAL COOPERATION AND COORDINATION WITH BRAZIL</b> .....	7
<b>DOJ ANNOUNCED POLICY CHANGES CONCERNING ITS EVALUATION OF CORPORATE COMPLIANCE PROGRAMS AND STANDARDS FOR IMPOSING INDEPENDENT COMPLIANCE MONITORS</b> .....	8
Overview .....	8
Compensation Systems .....	8
Non-Disparagement Agreements .....	8
Personal Devices and Third-Party Messaging Platforms .....	9
Imposition of Corporate Monitors .....	9
CEO and CCO Compliance Program Certifications at the End of a Corporate FCPA Resolution Agreement .....	9
Additional DOJ Personnel with Compliance Backgrounds .....	9
<b>KEY TAKEAWAYS</b> .....	10
<b>AUTHORS</b> .....	10
<b>ADDITIONAL CONTACTS</b> .....	11
United States .....	11
Europe .....	12
Middle East and Africa .....	12
Asia and Australia .....	13
Latin America .....	13

## THERE WERE FIVE KEY HIGHLIGHTS FROM FCPA ENFORCEMENT IN 2022

1

In 2021, DOJ leadership announced that a “surge” in corporate and individual white-collar enforcement is coming. In 2022, however, corporate FCPA enforcement lagged in terms of publicly announced new cases and resolutions. Last year, DOJ and SEC resolved a total of eight corporate FCPA cases, totaling \$878 million in penalties, disgorgement, and interest, when considering credits and offsets in related foreign enforcement actions and ability to pay. While this is double the figures from 2021, it is far below recent pre-pandemic levels of enforcement. Individual FCPA enforcement also lagged in 2022. Amid statements that DOJ’s “number one priority is individual accountability,” DOJ announced only seven indictments and pleas under the FCPA, and SEC resolved no FCPA actions with individuals for the second year in a row.

2

Several factors explain the downturn in FCPA enforcement statistics. First and foremost, the COVID-19 pandemic has continued to limit the ability of prosecutors, law enforcement agencies, and SEC enforcement attorneys to complete their FCPA investigations. Second, DOJ and SEC leadership have announced more centralized enforcement decision-making, which has the tendency to slow resolutions. Moving forward, we do not anticipate that the decrease in 2021 and 2022 is a trend. We think cases will likely rebound in the coming years, especially given the backlog of publicly announced DOJ and/or SEC FCPA investigations in the pipeline.

3

Meanwhile, DOJ 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. Most significantly, in January 2023, the DOJ Criminal Division announced a stringent path for companies with what DOJ considers “aggravating circumstances” to receive a declination of prosecution and an increase in fine discounts for companies that meet certain rigorous requirements.

4

DOJ and SEC coordinated four major corporate FCPA resolutions with enforcement authorities outside the United States, including three resolutions with Brazil. These settlements demonstrate the continuing development of anticorruption enforcement throughout other regions of the world and the trend toward greater coordination among multiple sovereigns in investigating and resolving cross-border corruption cases.

5

DOJ announced policy changes concerning its evaluation of corporate compliance programs and placed prosecutors with compliance backgrounds into key enforcement posts. These steps intend to further DOJ’s goal of elevating standards for corporate compliance programs.

---

## CONTINUED SLOWDOWN IN CORPORATE AND INDIVIDUAL FCPA ENFORCEMENT

In 2021, new DOJ leadership announced that a “surge” in corporate and individual white-collar enforcement was coming. However, the number of corporate FCPA enforcement actions last year lagged recent pre-pandemic enforcement levels. While 2022 enforcement rebounded from 2021, the number of corporate FCPA enforcement actions and the total dollar value of settlements were lower in 2022 in comparison to every single year before the pandemic between 2008 and 2019. DOJ and SEC officials attributed the decline in enforcement to the

impact of the COVID-19 pandemic, which has restricted travel outside of the United States, and the cyclical nature of FCPA cases, which often take several years to resolve, rather than a shift in enforcement policy. Indeed, DOJ and SEC officials predicted “a lot more” enforcement activity in 2023 and 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. This is particularly significant given the backlog of existing FCPA cases. At the end of 2022, more than 100 companies had publicly disclosed open DOJ and/or SEC FCPA-related investigations.

## DOJ and SEC Resolved Eight Corporate FCPA Cases and Collected \$878 Million in Fines and Penalties in 2022

In 2022, DOJ and SEC resolved a total of eight corporate FCPA cases, totaling \$878 million in penalties, disgorgement, and interest, when considering credits and offsets in related foreign enforcement actions and, in certain cases, inability to pay.

Global anticorruption enforcement actions, including coordinated FCPA resolutions with regulators outside the United States, totaled \$1.23 billion in fines and penalties, a sharp drop from the record-breaking \$9.1 billion collected globally in 2020, but double the \$619 million collected in 2021.

**FIGURE 1: Total Fines and Penalties Collected in FCPA Corporate Actions and in Actions Involving a Coordinated Global Anticorruption Resolution, 2018–2022**

Corporate Actions	2018		2019		2020		2021		2022	
	#	U.S.\$	#	U.S.\$	#	U.S.\$	#	U.S.\$	#	U.S.\$
DOJ/SEC Total	16	\$1.03B	14	\$2.65B	12	\$2.78B	4	\$259.0M	8	\$877.9M
Non-U.S. Total (Involving a Coordinated Non-U.S. Resolution)	2	\$1.91B	2	\$0.37B	4	\$6.31B	2	\$359.6M	4	\$348.0M
<b>Global Total</b>		<b>\$2.94B</b>		<b>\$3.02B</b>		<b>\$9.09B</b>		<b>\$618.6M</b>		<b>\$1.23B</b>
<b>Resolving Authorities</b>	Brazil France U.S.		Brazil U.S.		Brazil France Hong Kong Singapore UK U.S.		Brazil Switz. UK U.S.		Brazil Germany South Africa Switz. UK U.S.	

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

DOJ issued declinations to two companies pursuant to the prior iteration of DOJ’s Corporate Enforcement Policy, known as the FCPA Corporate Enforcement Policy. This marks a return to the declination level from 2019, which also saw two declinations, after only one declination was issued in 2020 and none in 2021. To date, 16 declinations have been issued under this policy, which creates a presumption of a declination if a company, absent “aggravating factors,” voluntarily self-discloses potential misconduct to DOJ, fully cooperates, and fully remediates. Notably, the only two corporations in 2022 to receive full credit for voluntary and timely self-disclosure under the FCPA Corporate Enforcement Policy also received the two declinations.

### Individual FCPA Enforcement Also Lagged

While DOJ and SEC officials continued to emphasize individual accountability and push for more individual prosecutions, individual FCPA enforcement also dropped. In 2022, DOJ announced a total of seven FCPA indictments and guilty pleas

involving individuals, while SEC announced zero FCPA individual actions. This continues a trend of a drop in individual FCPA enforcement since the onset of the pandemic. In 2020, DOJ announced 15 pleas and indictments, and SEC announced one individual resolution. In 2019, DOJ announced 25 and SEC six.

Following no FCPA-related trials since the onset of the pandemic in the United States in 2020 and through 2021, DOJ convicted a former investment banker in connection with a massive bribery and money-laundering scheme in April 2022. A federal jury in Brooklyn, New York, convicted Ng Chong Hwa (known as “Roger Ng”) a former managing director of a global investment bank, of conspiracy to violate the FCPA by paying bribes to government officials in Malaysia and Abu Dhabi, conspiring to violate the FCPA by circumventing the internal accounting controls of the bank, and conspiring to launder billions of dollars embezzled from 1Malaysia Development Berhad (“1MDB”).

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.

**FIGURE 2: DOJ and SEC Individual FCPA Enforcement Actions, 2018–2022**

Type of Action	2018	2019	2020	2021	2022
Indictments	13	16	7	6	6
Pleas	6	9	8	3	1
DOJ – Total	19	25	15	9	7
SEC – Total	4	6	1	0	0

### Anticorruption Enforcement Against Individuals Continued Under Related Laws

DOJ anticorruption enforcement actions under related statutes and enforcement regimes continued in 2022.

**Anti-Money Laundering Statutes.** DOJ continued to prosecute individuals involved in bribery schemes under anti-money laundering laws in two scenarios: (i) foreign officials who allegedly received corrupt payments, while the alleged bribe-payers were charged under the FCPA; and (ii) individuals whose conduct could warrant FCPA charges but who were charged with money-laundering violations. Under the first scenario, for example, DOJ charged the former Comptroller General of Ecuador in March for allegedly engaging in a scheme to launder money through the U.S. financial system to conceal an Ecuadorian bribery scheme. Under the second scenario, for example, DOJ charged two individuals with conspiracy to commit money laundering in connection with a bribery scheme to obtain contracts with subsidiaries of Venezuela’s state-owned oil company PDVSA. While the criminal complaint contained facts that could support a charge under the FCPA’s anti-bribery provisions, DOJ did not, at least initially, charge the individuals under the FCPA.

**OFAC Sanctions Under the Global Magnitsky Act.** The United States continues to impose sanctions to discourage “the transfer or the facilitation of the transfer of the proceeds of corruption” under a 2017 presidential executive order issued pursuant to the Global Magnitsky Act of 2016. In December 2022, the

Office of Foreign Assets Control (“OFAC”) issued sanctions pursuant to this order against more than 40 individuals and entities tied to corruption or serious human-rights abuses. These actions represent the second most expansive use of the 2017 executive order to date and underscore the Biden administration’s commitment to use sanctions as a tool to combat foreign corruption. The sanctions were announced in the lead-up to Human Rights Day and International Anticorruption Day.

**FinCEN Advisory Regarding Kleptocracy and Foreign Public Corruption.** In April 2022, the Financial Crimes Enforcement Network (“FinCEN”) issued an advisory on kleptocracy and foreign public officials, directing financial institutions to take measures to detect proceeds of foreign public corruption. This advisory followed FinCEN’s March 2022 announcement that it had launched the Kleptocracy Asset Recovery Awards Program, which offers bounties for information leading to the seizure, restraint, or forfeiture of assets related to foreign government corruption. The awards program may lead to more anticorruption enforcement actions sourced through FinCEN’s program.

### COVID-19 CONTINUED TO IMPACT FCPA ENFORCEMENT

The lack of rebound in FCPA enforcement statistics to historical levels is likely the result of a few factors, most notably the impact of the COVID-19 pandemic.

#### Continued Impact of the COVID-19 Pandemic on FCPA Enforcement

DOJ and SEC officials acknowledged that the COVID-19 pandemic continues to impact their ability to conduct and resolve FCPA investigations, coordinate with their foreign counterparts, and meet with company counsel. The pandemic has also impacted the ability for companies to conduct in-person investigations, including interviews of non-U.S. individuals. For individual enforcement, the impact is even greater. The pandemic has impacted the empaneling of grand juries and access to courts, which has led to fewer criminal indictments and subpoenas and delayed sentencing hearings and other court proceedings. Since FCPA cases tend to last several years, the long-term impact of the pandemic on enforcement may take a few more years to understand.

## Permanent Enforcement Leadership Have Taken Steps to Centralize Decision-Making

Following high turnover, DOJ installed new enforcement leadership over the past couple of years. These new leaders have signaled an increased and more-aggressive posture toward corporate and individual FCPA enforcement. The new leadership has also signaled more centralized enforcement decision-making, which has the tendency to slow enforcement. For example, in September 2022, Deputy Attorney General Lisa Monaco stated that prosecutors must seek criminal charges against individuals prior to, or simultaneously with, entering a resolution with the corporation. For investigations of individuals that will continue after a corporate resolution, the Deputy Attorney General now requires prosecutors to seek approval from the supervising U.S. Attorney or Assistant Attorney General for the corporate resolution; such approvals will require a plan to complete the individual investigations. An approval request memorandum must contain “a discussion of all potentially culpable individuals, a description of the current status of the investigation regarding their conduct and the investigative work that remains to be done, and an investigative plan to bring the matter to resolution prior to the end of any statute of limitations period.” This requirement has likely impacted the ability to close out ongoing FCPA investigations.

## DOJ ANNOUNCED MAJOR CHANGES TO CORPORATE CRIMINAL ENFORCEMENT POLICIES

The Biden administration continued to emphasize aggressive enforcement of white-collar crime against both companies and individuals. In September, the Deputy Attorney General announced several initiatives that have the potential to change the FCPA enforcement landscape.

### Deputy Attorney General Announced Enforcement Policy Changes in September 2022

As part of the broader Biden-administration initiative to strengthen DOJ’s approach to corporate and individual white-collar enforcement, in September 2022, Deputy Attorney General Monaco issued a memorandum (the “Monaco Memorandum” or the “Memorandum”) setting forth immediate revisions to DOJ policies related to how prosecutors should handle corporate criminal cases and steps to ensure greater consistency across DOJ’s enforcement components. These pronouncements are the result of a yearlong review by DOJ’s

Corporate Crime Advisory Group and are intended to further the Biden administration’s goal of prioritizing white-collar criminal enforcement of companies and individuals. The policies set forth in the Memorandum have been incorporated into the Justice Manual. The announcement supplements preexisting guidelines and previous policy changes announced by the Deputy Attorney General in October 2021.

These changes signal an even more aggressive approach by DOJ to corporate and individual enforcement.

- **Voluntary Self-Disclosure.** Certain components of DOJ, such as the FCPA Unit, have previously implemented policies providing significant incentives for companies that voluntarily self-disclose criminal conduct. The Monaco Memorandum directed each DOJ component that prosecutes corporate crime to adopt and publicly share a policy that incentivizes voluntary self-disclosure, to the extent the divisions have not already implemented such a policy. These policies should require that, absent aggravating factors, DOJ will not seek a guilty plea where a company has voluntarily self-disclosed the conduct, fully cooperated with DOJ, and appropriately remediated the misconduct. Moreover, the policies should state that DOJ will not impose an independent compliance monitor if a company voluntarily self-discloses the conduct—provided that the company has an effective compliance program that has been implemented and tested by the time of the DOJ resolution. In January 2023, the Criminal Division adopted a revised Corporate Enforcement Policy to further encourage voluntary self-disclosures, which is discussed in the next section.
- **Cooperation Credit** In her September 2022 remarks, the Deputy Attorney General reiterated that individual accountability is DOJ’s “number one priority.” She added that DOJ is committed to “do more and move faster” on prosecuting individuals. Thus, the new enforcement guidelines direct prosecutors to bring individual prosecutions more quickly and to push cooperating companies to come forward with evidence regarding individual culpability “swiftly and without delay.” To be eligible for cooperation credit under the new policy, companies must timely disclose such information to DOJ. Beyond emphasizing the importance of disclosing individual misconduct, the Monaco Memorandum also notes that where foreign law places restrictions on the production of documents located overseas, the company bears the burden of identifying the restrictions or reasonable

alternatives to providing the requested evidence. While this was already a requirement under the FCPA Corporate Enforcement Policy, it now applies to all companies under DOJ investigation.

- **History of Misconduct.** Finally, the Monaco Memorandum makes clear that DOJ disfavors successive non-prosecution agreements (“NPA”) or deferred prosecution agreements (“DPA”) for repeat corporate offenders, also referred to as recidivists. Thus, DOJ prosecutors must now seek approval from the Deputy Attorney General to enter into such resolutions with a company that received an NPA or DPA in the past. The Monaco Memorandum also discusses how prosecutors should treat a company’s criminal history, including how certain prior offenses are different from others.

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

### **Criminal Division Announced Revised Corporate Enforcement Policy in January 2023**

On January 17, 2023, Assistant Attorney General (“AAG”) for the Criminal Division Kenneth A. Polite announced significant revisions to the Criminal Division’s Corporate Enforcement Policy, which is codified in Section 9-47.120 of the Justice Manual. The Corporate Enforcement Policy is an outgrowth of the Criminal Division’s existing FCPA Corporate Enforcement Policy, which outlines the Division’s approach in FCPA cases involving companies that self-disclose wrongdoing and cooperate with investigations. The FCPA Corporate Enforcement Policy adopted in 2017 created a presumption that, absent any “aggravating factors,” DOJ will decline to take any enforcement action against companies if they: (i) voluntarily self-disclose criminal conduct to DOJ; (ii) fully cooperate with DOJ’s investigation; and (iii) take timely and appropriate remediation steps. “Aggravating factors” include, but are not limited to, “involvement by executive management of the company in the misconduct, significant profit to the company from the misconduct, or pervasive or egregious misconduct.”

The Policy revisions increase the incentives available to companies that voluntarily self-disclose potential misconduct to the Criminal Division, cooperate with any resulting investigation, and effectively remediate. However, the requirements for companies to receive full credit under the new Corporate Enforcement Policy are stringent, and prosecutors retain significant discretion to determine the form and size of any eventual resolution with DOJ.

Like the previous FCPA Corporate Enforcement Policy, if there are no “aggravating factors” present, a company can qualify for a presumption of a declination if the company voluntarily self-disclosed the misconduct, fully cooperated, and timely and appropriately remediated. Under the revised Corporate Enforcement Policy, this option is available not only for FCPA cases, but for all cases handled by the Criminal Division.

Moving forward, under the revised Corporate Enforcement Policy, a company that voluntarily self-discloses corporate criminal conduct with “aggravating factors” may nevertheless qualify for a declination of prosecution if the company demonstrates it has met three requirements:

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

While these changes are intended to provide an enhanced incentive for companies to self-disclose misconduct and cooperate, it remains to be seen whether they will have this effect in practice. To qualify for a declination with “aggravating factors” under the revised Corporate Enforcement Policy, a company’s self-disclosure must be “immediate,” its cooperation “extraordinary,” and its existing compliance program and internal controls “effective.” What qualifies as truly extraordinary cooperation will vary depending on each case and will

be subject to prosecutorial discretion, but the AAG provided a number of examples and “note[d] some concepts—immediacy, consistency, degree, and impact—that apply to cooperation by both individuals and corporations . . . [and] will help to inform [DOJ’s] approach to assessing what is ‘extraordinary’ cooperation” under the revised Corporate Enforcement Policy. It remains to be seen how DOJ will distinguish extraordinary cooperation from full cooperation in practice.

Even if a company does not meet the requirements for a declination, the revised Corporate Enforcement Policy provides significant potential benefits for companies that voluntarily

self-disclose misconduct, fully cooperate, and timely and appropriately remediate. In such cases, the AAG announced that the Criminal Division generally will not require a guilty plea and will apply a fine reduction of between 50% and 75% off the low end of the applicable U.S. Sentencing Guidelines (“U.S.S.G.”) penalty range—up from a previous maximum reduction of 50%. The AAG emphasized that in all cases, prosecutors have discretion to determine the starting point within the Guidelines range—including in cases where the company has a history of prior misconduct. In such cases, the reduction generally will not be from the low end of the range.

**FIGURE 3: The FCPA Corporate Enforcement Policy vs. the Corporate Enforcement Policy**

	<b>FCPA Corporate Enforcement Policy (Nov. 2017–Jan. 2023)</b>	<b>Corporate Enforcement Policy (Jan. 2023–Present)</b>
Scope	<ul style="list-style-type: none"> <li>Applied to all nationwide FCPA cases</li> </ul>	<ul style="list-style-type: none"> <li>Applies to nationwide FCPA cases and all matters handled by the Criminal Division</li> </ul>
Voluntary Self-Report, Full Cooperation, and Remediation and One or More “Aggravating Factors”	<ul style="list-style-type: none"> <li>No presumption of declination</li> </ul>	<ul style="list-style-type: none"> <li>DOJ may determine that a declination is appropriate if the company demonstrates it:               <ul style="list-style-type: none"> <li>Made an “immediate” voluntary self-disclosure to DOJ;</li> <li>Had an effective compliance program and system of internal accounting controls at the time of misconduct that detected the suspected wrongdoing;</li> <li>Provided “extraordinary” cooperation; and</li> <li>Undertook “extraordinary” remediation</li> </ul> </li> </ul>
Voluntary Self-Report, Full Cooperation, and Remediation and No “Aggravating Factors”	<ul style="list-style-type: none"> <li>Presumption of declination</li> <li>In the event presumption of declination is overcome, 50% off the low end of the U.S.S.G. fine range</li> <li>Generally will not require a corporate monitor if the company had implemented an effective compliance program</li> </ul>	<ul style="list-style-type: none"> <li>Presumption of declination</li> <li>In the event presumption of declination is overcome, 50%–75% off the low end of the U.S.S.G. fine range</li> <li>Generally will not require a corporate monitor if the company had implemented an effective compliance program</li> </ul>
Full Cooperation and Remediation but No Voluntary Self-Report (With or Without “Aggravating Factors”)	<ul style="list-style-type: none"> <li>Up to 25% off the low end of the U.S.S.G. fine range (except in the case of a criminal recidivist)</li> </ul>	<ul style="list-style-type: none"> <li>Up to 50% off the low end of the U.S.S.G. fine range (except in the case of a criminal recidivist)</li> </ul>



As indicated above, the revised Corporate Enforcement Policy also provides incentives for companies that do not voluntarily self-disclose misconduct but nevertheless fully cooperate and timely and appropriately remediate. In such cases, the Criminal Division will recommend up to a 50% reduction off the low end of the Guidelines fine range—twice the maximum amount of 25% available under the previous version of the Policy. As in self-disclosure cases, where a company has a history of prior wrongdoing, the reduction will likely not be off the low end of the range.

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

### **THREE 2022 MULTIJURISDICTIONAL CORPORATE SETTLEMENTS HIGHLIGHT INTERNATIONAL COOPERATION AND COORDINATION WITH BRAZIL**

DOJ and SEC continue to prioritize coordination with other U.S. regulators and foreign authorities to investigate and prosecute corruption. In 2022, DOJ and SEC coordinated four major corporate FCPA resolutions with enforcement authorities in Brazil, Germany, Switzerland, the United Kingdom, and, for the first

time, South Africa. In each resolution, DOJ and SEC coordinated their investigations and resolutions and credited fines and penalties paid to the other countries. These settlements demonstrate the continuing development of anticorruption enforcement in jurisdictions outside of the United States and the trend toward greater coordination among multiple sovereigns in investigating and resolving cross-border corruption cases.

The increasing coordination among countries in the investigation and prosecution of corruption heightens the risk for multinational corporations and for their personnel of being targeted by criminal investigative authorities, perhaps across multiple jurisdictions. Just in the past six years, DOJ and 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.

Brazil continues to be a focus of anticorruption enforcement for U.S. and Brazilian authorities. DOJ, SEC, and Brazilian authorities continue to cooperate with each other to prosecute corruption violations, a relationship that deepened during investigations related to Brazil's *Operação Lava Jato* ("Operation Car Wash") investigation, which began in 2014 and ended in 2021. Indeed, five of the top 10 largest global anticorruption resolutions in history have involved coordinated resolutions between U.S. and Brazilian authorities. In October 2022, an assistant chief in the FCPA Unit of DOJ's Fraud Section applauded the coordination between the United States and Brazil: "the relationship between U.S. authorities and Brazilian authorities in the corruption space is truly remarkable ... [and] a model not only for Latin America but the world."

**FIGURE 4: Coordinated FCPA Resolutions with U.S. and Brazil Authorities, 2022**

Company	Date	DOJ	SEC	DOJ/ SEC Total	Brazil	Global Total
Honeywell UOP/Honeywell International Inc. (U.S.: Oil & Gas)	Dec. 19	\$39.6	\$42.4	\$82	\$38.7	\$120.7
Stericycle, Inc. (U.S.: Medical Waste)	Apr. 20	\$35.0	\$24.0	\$59.0	\$3.3	\$62.3
GOL Linhas Aéreas Inteligentes S.A. (Brazil: Aviation)	Sept. 15	\$15.3	\$22.8	\$38.1	\$3.4	\$41.5

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

#### Overview

DOJ announced revised guidance on how it plans to assess whether a company has an effective compliance program. The Monaco Memorandum reiterated that all DOJ prosecutors must evaluate the adequacy of a company’s compliance program—both at the time of the offense and the charging decision—when determining the terms of a resolution. In addition, the Monaco Memorandum directs prosecutors to assess certain “metrics” when evaluating a company’s compliance program, including: whether the company employs compensation structures that promote compliance; whether the company uses non-disclosure or non-disparagement agreements to inhibit public disclosure of criminal conduct; and whether the company has implemented effective policies and procedures governing the use of personal electronic devices and third-party messaging platforms. DOJ also announced: (i) revised guidance on the issuance of corporate compliance monitors; (ii) a new requirement that the chief executive officer (“CEO”) and chief compliance officer (“CCO”) must certify the effectiveness of the compliance program at the end of the term of an FCPA, NPA, or DPA; and (iii) the hiring of additional enforcement personnel with corporate compliance backgrounds. Taken together, these updates signal DOJ’s emphasis on incentivizing companies to adopt effective corporate compliance programs.

#### Compensation Systems

In assessing whether a company’s compensation system promotes compliant behavior, the Monaco Memorandum directs that DOJ prosecutors also consider whether penalties—such as compensation clawback provisions—can be levied against current or former employees, executives, or directors whose direct or supervisory actions or omissions contributed to criminal conduct. Moreover, according to the Memorandum, DOJ prosecutors should evaluate whether these measures are imposed in practice. Indeed, in September 2022, Principal Associate Deputy Attorney General Marshall Miller noted that “compensation clawback policies matter, and those policies should be deployed regularly. A paper policy not acted upon will not move the needle—it is really no better than having no policy at all.” According to DOJ’s guidance, compensation systems should allow for retroactive discipline, including partial escrowing and clawback measures, which have been noted in the remedial section of various DOJ resolutions in recent years. As also specified in the Memorandum, prosecutors should assess whether there are affirmative incentives for compliance-promoting behavior.

#### Non-Disparagement Agreements

DOJ prosecutors are directed to consider whether a corporation uses or has used non-disclosure or non-disparagement provisions in compensation agreements, severance agreements, or other financial arrangements to inhibit the public disclosure of criminal misconduct by the corporation or its employees.

### **Personal Devices and Third-Party Messaging Platforms**

DOJ prosecutors are also directed to consider whether a company has implemented effective policies and procedures governing the use of personal devices and third-party messaging platforms, including ephemeral and encrypted messaging applications (e.g., WhatsApp and WeChat), to ensure that business-related electronic data and communications are preserved. The Memorandum explains that a company should be able to provide the government with all work-related communications, texts, messaging, and data contained on personal or company-issued phones, tablets, or other devices used by employees for business purposes. The Principal Associate Deputy Attorney General elaborated on this point in his September 2022 remarks, noting that, “companies need to prevent circumvention of compliance protocols through off-system activity, preserve all key data and communications and have the capability to promptly produce that information for government investigations.” Recognizing the broad sweep of this new policy, the Deputy Attorney General has asked the Criminal Division to study best corporate practices regarding use of personal devices and third-party messaging platforms and to incorporate that analysis into the next edition of its Evaluation of Corporate Compliance Programs guidance. The Criminal Division stated it plans to publish this guidance in 2023.

### **Imposition of Corporate Monitors**

Building on prior guidance issued by the Criminal Division, the Monaco Memorandum contains further guidelines intended to promote consistency, predictability, and transparency across DOJ with respect to the imposition and selection of independent corporate monitors. The Memorandum instructs each DOJ component involved in corporate criminal resolutions that does not already have a public monitor selection process to develop and publish its own process by the end of the year or follow the selection process previously developed by the Criminal Division.

The Memorandum also describes: (i) several factors prosecutors should consider in determining whether an independent compliance monitor is needed in particular cases; (ii) the process prosecutors should follow in selecting such monitors; and (iii) how prosecutors should supervise monitors. As to whether a monitor is needed in a particular case, relevant factors include whether the company voluntarily

self-disclosed the underlying misconduct, implemented an effective compliance program that has been adequately tested at the time of the resolution, or took adequate investigative or remedial measures to address the underlying conduct. The Memorandum provides that a monitor should be selected pursuant to a publicly documented selection process in keeping with DOJ’s commitment to diversity and inclusion. The monitor’s responsibilities and scope of authority should be well-defined and recorded in writing, and a clear workplan should be agreed upon between the monitor and the corporation. The Memorandum also makes clear that DOJ will be “monitoring the monitors,” requiring that prosecutors receive regular updates about the status of the monitorship and any issues presented.

### **CEO and CCO Compliance Program Certifications at the End of a Corporate FCPA Resolution Agreement**

In June 2022, a DOJ Fraud Section assistant chief stated that CCOs and CEOs will most likely be required to certify the effectiveness of their corporate compliance programs in every DOJ corporate resolution going forward. DOJ has long required that the CEO and the chief financial officer certify that they have met their obligations to disclose allegations or evidence of FCPA violations during the term of their corporate resolution. With this new requirement, which first appeared in a DOJ FCPA resolution from March 2022, the CEO and the CCO must now certify at the end of the agreement that the company has met its corporate compliance obligations and that the company’s compliance program is reasonably designed to detect and prevent future violations. DOJ stated that its intent in this regard is to incentivize companies to consider whether their compliance programs are appropriately resourced and well-designed. Nonetheless, the new policy raises potential concerns about the personal liability of CEOs and CCOs in the event of subsequent disputes over the accuracy of such certifications, particularly for potential disagreements between companies and DOJ over whether a program was “reasonably designed.”

### **Additional DOJ Personnel with Compliance Backgrounds**

In June 2022, the DOJ Fraud Section also ramped up the Corporate Enforcement Compliance and Policy unit, previously known as the Strategy, Policy, and Training unit, which DOJ recently reformulated to more accurately reflect its focus on compliance. This unit plans to hire individuals with more

relevant compliance experience, including people with in-house compliance backgrounds. DOJ renamed the unit as part of its broader shift to integrate compliance and enforcement into its strategy to tackle corruption.

## KEY TAKEAWAYS

Given that DOJ and 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 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.

In addition, given DOJ's increased focus on "immediate" voluntary self-disclosure, companies that become aware of potential FCPA issues should immediately evaluate those issues, including by seeking guidance from experienced outside counsel as appropriate, to make prompt and informed determinations as to whether self-disclosure may be warranted, among other important considerations.

## AUTHORS

### Hank Bond Walther

Washington  
+1.202.879.3432  
[hwalth@jonesday.com](mailto:hwalth@jonesday.com)

### Theodore T. Chung

Chicago  
+1.312.269.4234  
[tchung@jonesday.com](mailto:tchung@jonesday.com)

### Karen P. Hewitt

San Diego  
+1.858.314.1119  
[kphewitt@jonesday.com](mailto:kphewitt@jonesday.com)

### Samir Kaushik

Dallas  
+1.214.969.5092  
[skaushik@jonesday.com](mailto:skaushik@jonesday.com)

### Henry Klehm III

New York  
+1.212.326.3706  
[hklehm@jonesday.com](mailto:hklehm@jonesday.com)

### James P. Loonam

New York  
+1.212.326.3808  
[jloonam@jonesday.com](mailto:jloonam@jonesday.com)

### Cristina Pérez Soto

Miami  
+1.305.714.9733  
[cperezsoto@jonesday.com](mailto:cperezsoto@jonesday.com)

### Brian C. Rabbitt

Washington  
+1.202.879.3866  
[brabbitt@jonesday.com](mailto:brabbitt@jonesday.com)

### Alexander J. Wilson

New York  
+1.212.326.8390  
[alexanderwilson@jonesday.com](mailto:alexanderwilson@jonesday.com)

*Special thanks to [Quinton B. Lowe](#) and [William J. Snyder](#) for their assistance with this White Paper.*

## ADDITIONAL CONTACTS

### United States

**Bethany K. Biesenthal**

Chicago

+1.312.269.4303

[bbiesenthal@jonesday.com](mailto:bbiesenthal@jonesday.com)

**Scott W. Brady**

Pittsburgh

+1.412.394.7233

[sbrady@jonesday.com](mailto:sbrady@jonesday.com)

**James Burnham**

Washington

+1.202.874.5429

[jburnham@jonesday.com](mailto:jburnham@jonesday.com)

**Toni-Ann Citera**

New York

+1.212.326.3454

[tcitera@jonesday.com](mailto:tcitera@jonesday.com)

**Stephen Cowen**

Detroit

+1.313.230.7954

[scowen@jonesday.com](mailto:scowen@jonesday.com)

**Roman E. Darmer**

Irvine

+1.949.553.7581

[rdarmer@jonesday.com](mailto:rdarmer@jonesday.com)

**Richard H. Deane Jr.**

Atlanta

+1.404.581.8502

[rhdeane@jonesday.com](mailto:rhdeane@jonesday.com)

**David J. DiMeglio**

Los Angeles

+1.213.243.2551

[djdimeglio@jonesday.com](mailto:djdimeglio@jonesday.com)

**Meir Feder**

New York

+1.212.326.7870

[mfeder@jonesday.com](mailto:mfeder@jonesday.com)

**W. Anders Folk**

Minneapolis

+1.612.271.8923

[afolk@jonesday.com](mailto:afolk@jonesday.com)

**Shirlethia V. Franklin**

Washington

+1.202.879.3892

[sfranklin@jonesday.com](mailto:sfranklin@jonesday.com)

**Louis P. Gabel**

Detroit

+1.313.230.7955

[lpgabel@jonesday.com](mailto:lpgabel@jonesday.com)

**Fahad A. Habib**

San Francisco

+1.415.875.5761

[fahabib@jonesday.com](mailto:fahabib@jonesday.com)

**Barbara Mack Harding**

Washington

+1.202.879.4681

[bharding@jonesday.com](mailto:bharding@jonesday.com)

**Justin E. Herdman**

Cleveland

+1.216.586.7113

[jherdman@jonesday.com](mailto:jherdman@jonesday.com)

**Brian Hershman**

Los Angeles

+1.213.243.2445

[bhershman@jonesday.com](mailto:bhershman@jonesday.com)

**Adam Hollingsworth**

Cleveland

+1.216.586.7235

[ahollingsworth@jonesday.com](mailto:ahollingsworth@jonesday.com)

**Kathy Keneally**

New York

+1.212.326.3402

[kkeneally@jonesday.com](mailto:kkeneally@jonesday.com)

**James T. Kitchen**

Pittsburgh

+1.412.394.7272

[jkitchen@jonesday.com](mailto:jkitchen@jonesday.com)

**Leigh A. Krahenbuhl**

Chicago

+1.312.269.1524

[lkrahenbuhl@jonesday.com](mailto:lkrahenbuhl@jonesday.com)

**Andrew E. Lelling**

Boston

+1.617.449.6856

[alelling@jonesday.com](mailto:alelling@jonesday.com)

**Sarah L. Levine**

Washington

+1.202.879.3883

[slevine@jonesday.com](mailto:slevine@jonesday.com)

**Rebecca C. Martin**

New York

+1.212.326.3410

[rccmartin@jonesday.com](mailto:rccmartin@jonesday.com)

**Jordan M. Matthews**

Chicago

+1.312.269.4169

[jmatthews@jonesday.com](mailto:jmatthews@jonesday.com)

**Shireen Matthews**

San Diego  
+1.858.314.1184  
[shireenmatthews@jonesday.com](mailto:shireenmatthews@jonesday.com)

**David Peavler**

Dallas/Washington  
+1.214.969.3685 / +1.202.879.3499  
[dpeavler@jonesday.com](mailto:dpeavler@jonesday.com)

**Lisa M. Ropple**

Boston  
+1.617.449.6955  
[lropple@jonesday.com](mailto:lropple@jonesday.com)

**Rasha Gerges Shields**

Los Angeles  
+1.213.243.2719  
[rgergesshields@jonesday.com](mailto:rgergesshields@jonesday.com)

**Stephen G. Sozio**

Cleveland  
+1.216.586.7201  
[sgsozio@jonesday.com](mailto:sgsozio@jonesday.com)

**Jason S. Varnado**

Houston  
+1.832.239.3694  
[jvarnado@jonesday.com](mailto:jvarnado@jonesday.com)

**Europe****Bénédicte Graulle**

Paris  
+33.1.56.59.46.75  
[bgraulle@jonesday.com](mailto:bgraulle@jonesday.com)

**Sion Richards**

London  
+44.20.7039.5139  
[srichards@jonesday.com](mailto:srichards@jonesday.com)

**Middle East and Africa****Sheila L. Shadmand**

Dubai  
+971.4.709.8408  
[slshadmand@jonesday.com](mailto:slshadmand@jonesday.com)

**Joan E. McKown**

Washington  
1.202.879.3647  
[jmckown@jonesday.com](mailto:jmckown@jonesday.com)

**Mary Ellen Powers**

Washington  
+1.202.879.3870  
[mepowers@jonesday.com](mailto:mepowers@jonesday.com)

**Yaakov M. Roth**

Washington  
+1.202.879.7658  
[yroth@jonesday.com](mailto:yroth@jonesday.com)

**Erin Sindberg Porter**

Minneapolis  
+1.612.217.8926  
[esindbergporter@jonesday.com](mailto:esindbergporter@jonesday.com)

**Neal J. Stephens**

Silicon Valley  
+1.650.687.4135  
[nstephens@jonesday.com](mailto:nstephens@jonesday.com)

**Brittany N. Wilhelm**

Cleveland  
+1.216.586.7063  
[bwilhelm@jonesday.com](mailto:bwilhelm@jonesday.com)

**Glyn Powell**

London  
+44.20.7039.5212  
[gpowell@jonesday.com](mailto:gpowell@jonesday.com)

**Paloma Valor**

Madrid  
+34.91.520.3903  
[pvalor@jonesday.com](mailto:pvalor@jonesday.com)

**Heather Martin**

Dubai  
+971.4.709.8484  
[hmartin@jonesday.com](mailto:hmartin@jonesday.com)

**Cheryl L. O'Connor**

Irvine  
+1.949.553.7505  
[coconnor@jonesday.com](mailto:coconnor@jonesday.com)

**Jeff Rabkin**

San Francisco/Silicon Valley  
+1.415.875.5850 / +1.650.739.3954  
[jrabkin@jonesday.com](mailto:jrabkin@jonesday.com)

**Ronald W. Sharpe**

Washington  
+1.202.879.3618  
[rsharpe@jonesday.com](mailto:rsharpe@jonesday.com)

**Evan P. Singer**

Dallas  
+1.214.969.5021  
[epsinger@jonesday.com](mailto:epsinger@jonesday.com)

**Edward Patrick Swan Jr.**

San Diego  
+1.858.703.3132  
[pswan@jonesday.com](mailto:pswan@jonesday.com)

**Kristin K. Zinsmaster**

Minneapolis  
+1.612.217.8861  
[kzinsmaster@jonesday.com](mailto:kzinsmaster@jonesday.com)

**Thomas Preute**

Düsseldorf  
+49.211.5406.5569  
[tpreute@jonesday.com](mailto:tpreute@jonesday.com)

**Rick van 't Hullenaar**

Amsterdam  
+31.20.305.4223  
[rvanthullenaar@jonesday.com](mailto:rvanthullenaar@jonesday.com)

## Asia and Australia

### Stephen J. DeCosse

Tokyo

+81.3.6800.1819

[sdecosse@jonesday.com](mailto:sdecosse@jonesday.com)

### Steven W. Fleming

Sydney

+61.2.8272.0538

[sfleming@jonesday.com](mailto:sfleming@jonesday.com)

### Lillian He

Shanghai

+86.21.2201.8034

[lhe@jonesday.com](mailto:lhe@jonesday.com)

### Jerry C. Ling

San Francisco/Shanghai

+1.415.875.5890 / +86.21.2201.8000

[jling@jonesday.com](mailto:jling@jonesday.com)

### Hirimitsu Miyakawa

Tokyo

+81.3.6800.1828

[hmiyakawa@jonesday.com](mailto:hmiyakawa@jonesday.com)

### Daniel Moloney

Melbourne

+61.3.9101.6828

[dmoloney@jonesday.com](mailto:dmoloney@jonesday.com)

### Zachary Sharpe

Singapore

+65.6233.5506

[zsharp@jonesday.com](mailto:zsharp@jonesday.com)

### Peter J. Wang

Hong Kong/Shanghai

+852.3189.7211 / +86.21.2201.8040

[pjwang@jonesday.com](mailto:pjwang@jonesday.com)

### Simon M. Yu

Taipei

+886.2.7712.3230

[siyu@jonesday.com](mailto:siyu@jonesday.com)

## Latin America

### Luis Riesgo

São Paulo

+55.11.3018.3939

[lriesgo@jonesday.com](mailto:lriesgo@jonesday.com)

### Guillermo E. Larrea

Mexico City

+52.55.3000.4064

[glarrea@jonesday.com](mailto:glarrea@jonesday.com)

### Fernando F. Pastore

São Paulo

+55.11.3018.3941

[fpastore@jonesday.com](mailto:fpastore@jonesday.com)

Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our website at [www.jonesday.com](http://www.jonesday.com). The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.