

**Davis Polk**

# **2022 mid-year review: Anti-corruption trends and other corporate enforcement issues**

CLE credit available

July 20, 2022

# Introductions



**Greg D. Andres, Partner**

Greg is co-head of Davis Polk's White Collar Defense & Investigations group, represents companies in a range of FCPA matters and has secured a variety of favorable results for clients, including recent declinations from both the DOJ and SEC. From 2017 to 2019, Greg served as a member of Special Counsel Robert Mueller's team, where he served as the lead trial lawyer in the prosecution of Paul Manafort. He previously served as Deputy Assistant Attorney General in the Criminal Division at the Department of Justice, where he supervised the FCPA Unit, and before that as the Chief of the Criminal Division at the U.S. Attorney's Office in the Eastern District of New York.



**Martine Beamon, Partner**

Martine is co-head of Davis Polk's White Collar Defense & Investigations group and is a former federal prosecutor who represents individuals, boards and companies in their most critical situations. She is widely recognized for her white collar work, having secured declinations for her clients in numerous FCPA matters. Martine has a Band 1 ranking from *Chambers USA*, where clients call her a "phenomenal lawyer" whose "strategic abilities . . . are off the charts."



**Daniel S. Kahn, Partner**

Dan is a partner in Davis Polk's White Collar Defense & Investigations Group, practicing in the Washington DC office. He rejoined the firm in October 2021 after 11 years serving in senior roles at the Department of Justice spanning three administrations, most notably as the Chief of the FCPA Unit, acting Chief of the Fraud Section and acting Deputy Assistant Attorney General over the Fraud Section and Appellate Section.



**Fiona Moran, Partner**

Fiona is a partner in Davis Polk's White Collar Defense & Investigations Group, practicing in the Washington DC office. Her matters have involved allegations of FCPA violations, False Claims Act violations, insider trading, money laundering, antitrust and other financial crimes. Her clients have included major financial institutions, regulated entities, public companies, senior executives and former government officials. The National Law Journal named Fiona one of its "D.C. Rising Stars" for 2021.

# Agenda

- 01 Introductions
- 02 Refresher on 2021
- 03 Corporate Enforcement Snapshot
- 04 Focus on Compliance
  - Common Issues
  - Remediation
  - CCO Certification Requirement
  - Monitorships
- 05 Case Law Developments
- 06 Whistleblower Policies
- 07 “Sanctions is the new FCPA”

# Refresh on 2021: Trends and Expectations

**Continued Focus on Compliance**

**Continued Focus on Third Parties**

**DOJ Policy Changes**

**Internal Accounting Controls**

**Use of Data**

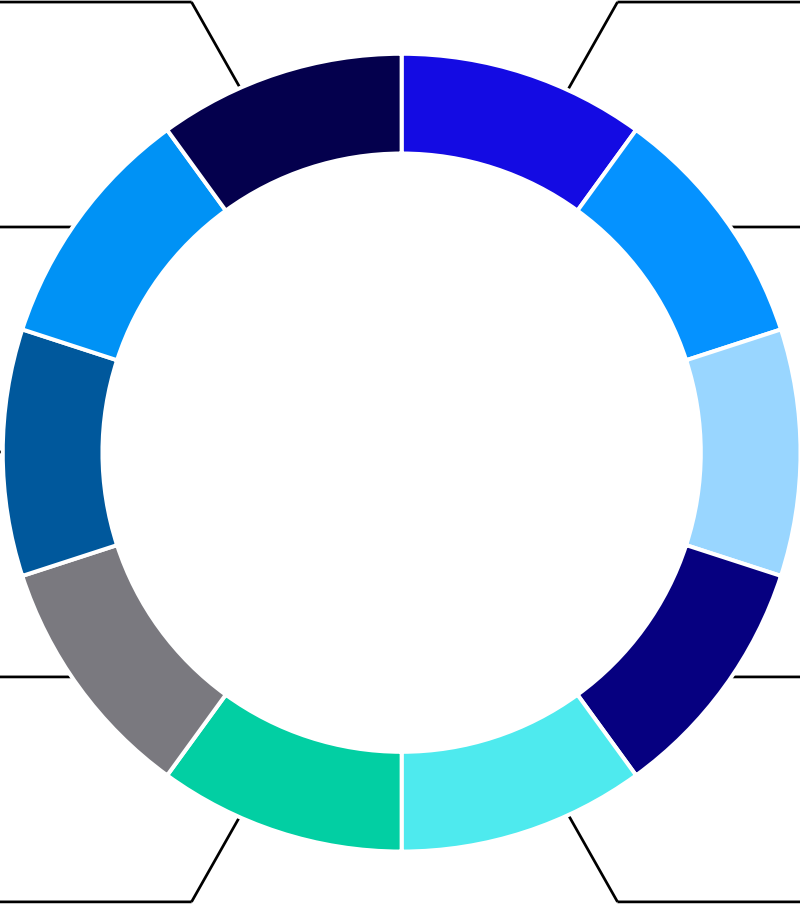
**Whistleblower Programs**

**Expansive Use of Statutes**

**International Coordination**

**Individual Accountability**

**Successor Liability**



# 1H 2022 corporate enforcement actions snapshot

 GLENCORE

- Parent company guilty plea, 3-year monitorship
- Switzerland (HQ), Brazil, DRC, Nigeria, and other countries
- \$428 million penalty to DOJ, \$272 million forfeiture (FCPA only); \$91 million offset for payments to CFTC

 Stericycle®

- DPA, 2-year monitorship
- US (HQ), Brazil, Mexico, Argentina
- \$52.5 million penalty to DOJ, \$28 million disgorgement

 Tenaris

- Cease-and-desist order
- Luxembourg (HQ), Brazil
- \$25 million penalty to SEC, \$53 million disgorgement

 kt

- Cease-and-desist order
- South Korea (HQ), Vietnam
- \$3.5 million penalty to SEC, \$2.8 million disgorgement

 JLT

- Declination of prosecution with disgorgement order
- United Kingdom (HQ), Ecuador
- \$29 million to U.K. SFO

\*Data reflects U.S. resolutions (not reflecting offsetting payments to foreign authorities)

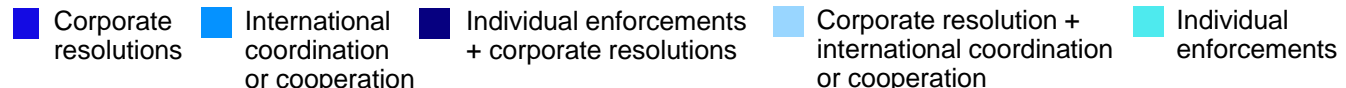
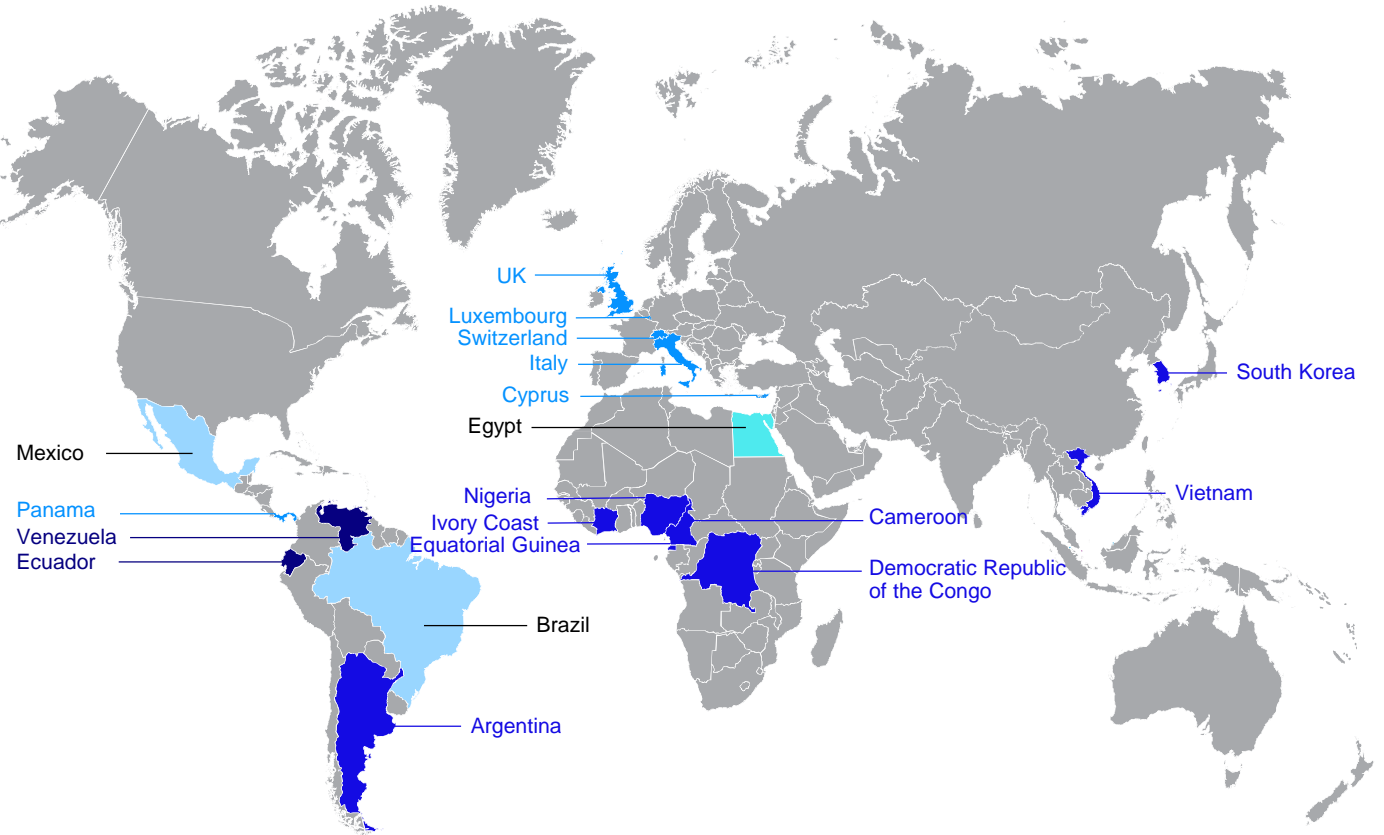
# 1H 2022 corporate enforcement actions snapshot

## Notable bribery methods

- Sham third-party contracts
- Overpayments for crude oil
- “Cash Desks”
- Funneling money through a lawyer
- Campaign contributions
- Entertainment expenses
- False third-party vendor invoices
- Slush fund from converted gift cards

## International coordination and cooperation

- Old partnerships: Brazil and the UK
- Newer partnerships: Switzerland, Luxembourg, Italy, Mexico, Panama, Cyprus



# Focus on Compliance – Issues

Third-Party Diligence & Monitoring

Compliance Resourcing

Red Flags & Known Issues

Centralization of Compliance & Accounting

Rapid Expansion in High Risk Areas

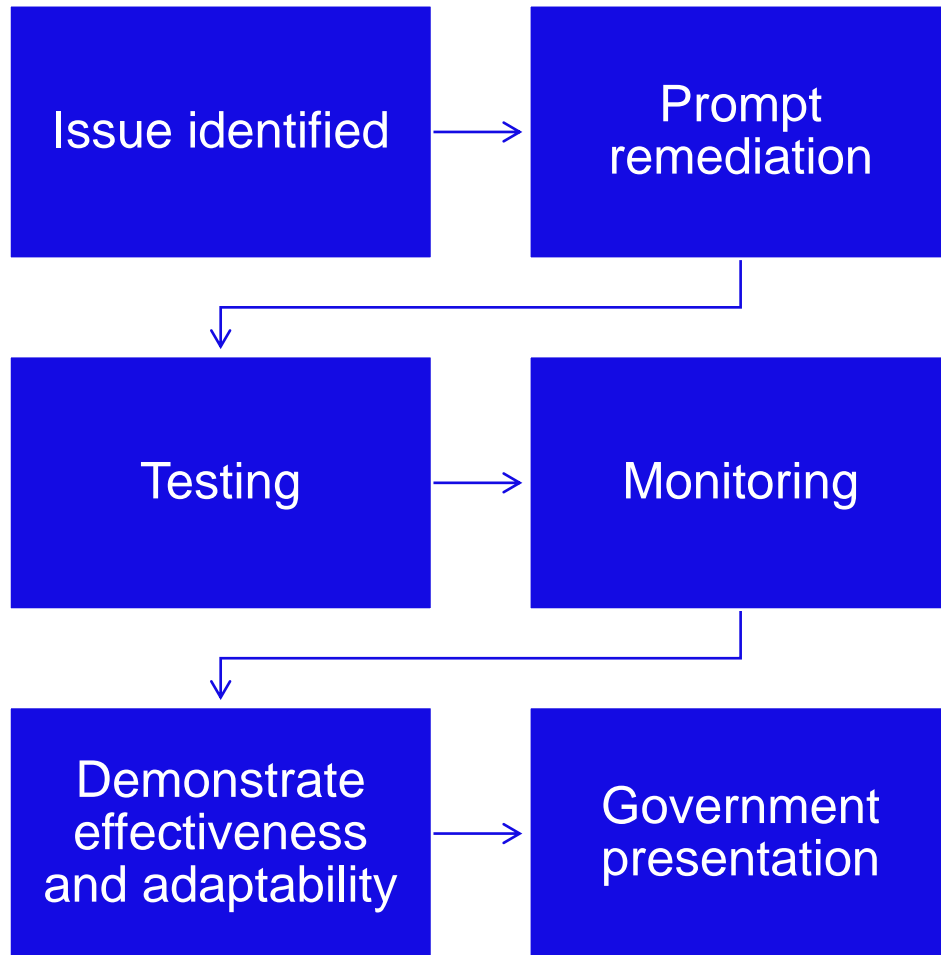
# Focus on Compliance – Remediation

## – Increasing focus on compliance

- Monitors
  - 3 years (*Glencore*); 2 years (*Stericycle*)
  - Timing of remediation & testing
- Cooperation Credit
  - Centralization of compliance function
  - Third parties
  - Data analytics
  - Increased compliance headcount
- CCO Certification Requirement (*Glencore*)
  - “Empower” CCOs, but also risks



# Focus on Compliance



“Because certain of the Defendant’s compliance enhancements are new and have not been fully implemented or tested to demonstrate that they would prevent and detect similar misconduct in the future, the imposition of a Monitor is necessary...”

Plea Agreement, *U.S. v. Glencore International A.G.*

# Focus on Compliance – Monitorships



“[W]e can expect to see the Department imposing independent corporate monitors whenever it is appropriate in order to satisfy our prosecutors that a company is living up to its compliance and disclosure obligations under a non-trial resolution.”

Assistant Attorney General  
Kenneth A. Polite, Jr.  
(Criminal Division), March 25, 2022

- Mitigating Risk of a Monitorship
  - Simple existence of compliance program no longer enough
  - Adaptation is key: enforcement agencies criticized Glencore and Stericycle compliance programs for missing numerous red flags
  - Ensuring compliance program is fully implemented and tested
  - Demonstrate a culture of compliance
- Even full cooperation and voluntary disclosure may not be enough to avoid a monitor

# Declination – *Jardine Lloyd Thompson Holdings Ltd.*

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**Voluntary self-disclosure of the misconduct**

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**Full and proactive cooperation in this matter**

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**Disgorgement of full amount of ill-gotten gains**

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**Timely and full remediation**

- Separation from executive and third party
- Enhancement of anti-corruption training and compliance program

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**Nature and seriousness of the offense**

- Four individuals sentenced

## DOJ's 2021 announcement:

“**Corporate recidivism** undermines the purpose of pretrial diversion, which is after all to give a break to corporations in exchange for their promise to fix what ails them, as well as to recognize a company’s cooperation.”

Deputy Attorney General Lisa Monaco

October 2021

## SEC on the Tenaris resolution:

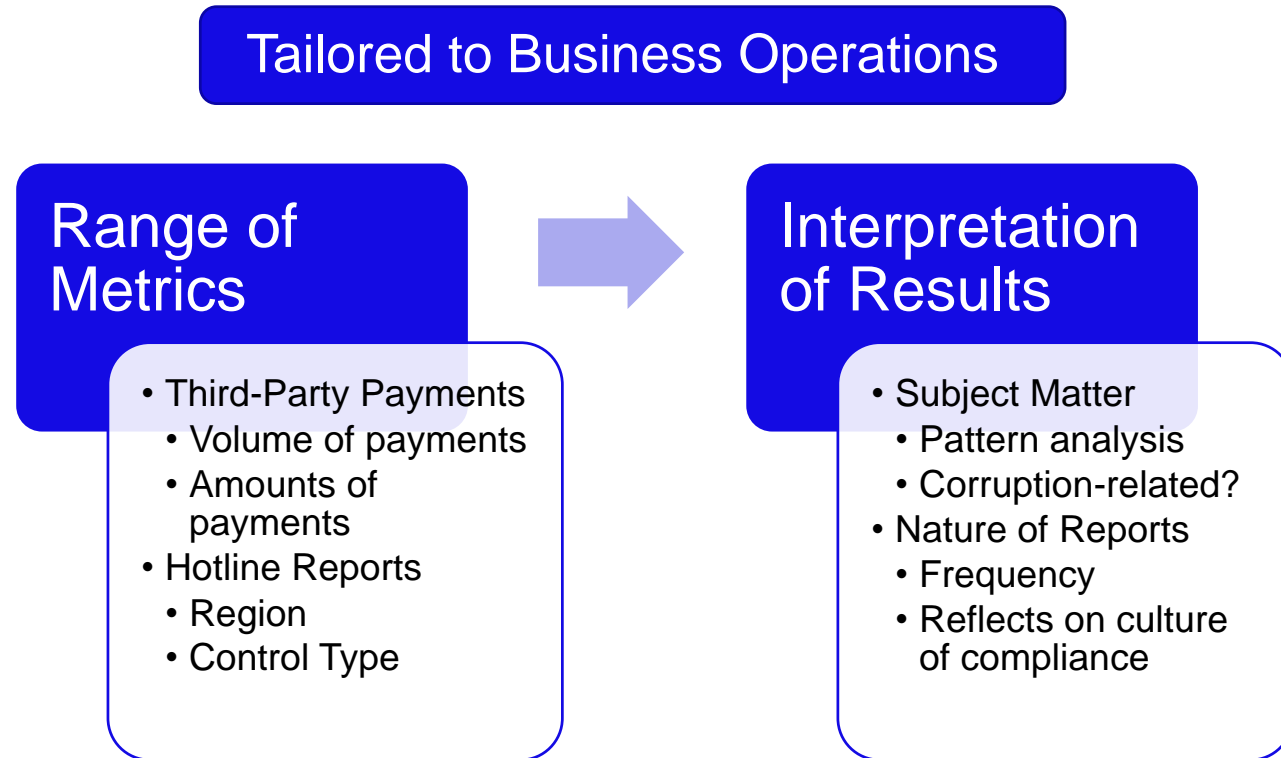
“This is **not the first time** Tenaris has been involved in a corruption scheme. In 2011, the company entered into a[n] [NPA] with the [DOJ] and a [DPA] with the SEC as a result of alleged bribes the company paid to obtain business from a state-owned entity in Uzbekistan.”

– SEC Press Release, June 2022

# Data analytics

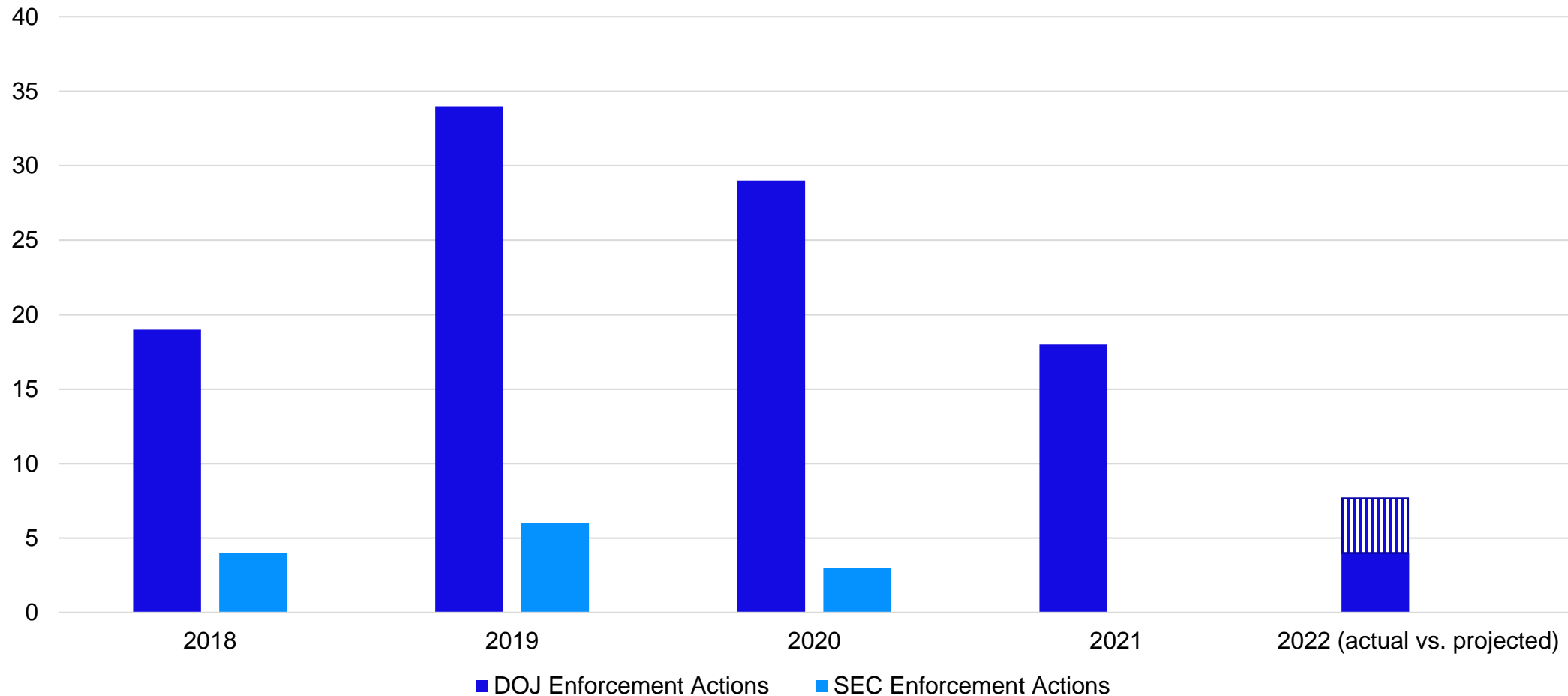
## — Plan Around Data

- Plan ahead for use of data in testing & monitoring
- Build data analytics history
  - Shows improvement
  - Demonstrates accountability
  - Expected in government presentations



# Individual Enforcement Actions Snapshot

## New Actions Filed



# Individual Case Developments



## — ***Internal Accounting Controls***

- First time a charge of conspiring to violate the FCPA by circumventing an employer's accounting controls has ever gone to a jury
- Affirmed government's recent broad usage of internal accounting controls provisions

## — ***Privilege over Internal Investigations***

- Court ruled that company waived privilege over internal investigation materials when voluntarily sharing with DOJ – even those used only to prepare presentations
- October 2022 trial date

## — ***Limits on Extraterritorial Application of FCPA***

- *U.S. v. Paulo J.D.C. Casquero-Murta* – dismissed this month on same analysis as *U.S. v. Rafoi Bleuler*
- Government has appealed *Rafoi Bleuler*

## — ***U.S. v. Baptiste***

- New exculpatory evidence surfaced in June 2022
- Charges dismissed days before July 2022 re-trial for defendants in Haitian bribery case

# Whistleblower Programs



“[I]f adopted, the[se changes] would help ensure that whistleblowers are both incentivized and appropriately rewarded for their efforts in reporting potential violations of the law to the Commission.”

SEC Chairman Gary  
Gensler  
February 10, 2022



- First Proposed Amendment
  - Would allow SEC to make awards for related actions otherwise covered by alternative whistleblower program
    - Comparability
    - Whistleblower Choice
    - Offset Approach
    - Topping Off Approach
- Second Proposed Amendment
  - Would grant SEC authority to consider dollar amount only for purpose of increasing it



# Sanctions are the new FCPA



THE UNITED STATES  
DEPARTMENT *of* JUSTICE

“The growth of sanctions enforcement follows the path that the FCPA traveled before it.”

DAG Lisa Monaco  
June 16, 2022

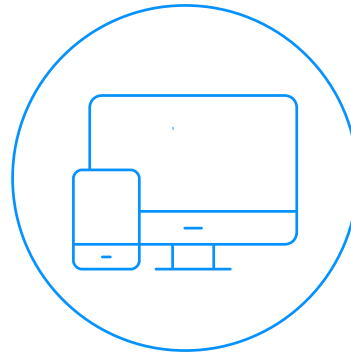


- What does this mean for FCPA enforcement?
  - No reduction in scrutiny
  - Applies to expanding number of industries
  - Multilateral enforcement regime
  - Credit for voluntary disclosure
- Growth of FCPA enforcement 2010-2020 creates standard for future of Sanctions enforcement

# Thank you!

**For more information, please visit our FCPA webpage:**

<https://www.davispolk.com/practices/litigation/anticorruption-and-fcpa/>



# Appendix

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# 1H 2022 DOJ & SEC FCPA resolution tracker

July 2022

# 2022 DOJ & SEC FCPA resolution tracker

Corporate FCPA resolutions from 01/01/2022 through 06/30/2022

	Target	Enforcer	Resolution*	Alleged FCPA violation	Industry	Geography	Allegations
02/17/2022	KT Corporation	SEC	\$6.3M (cease-and-desist order)	<ul style="list-style-type: none"> <li>Books and Records</li> <li>Internal Controls</li> </ul>	Telecom	South Korea, Vietnam	Used slush funds to bribe government officials in South Korea, paid organizations at the request of Korean government officials, and provided money to third parties connected to Vietnamese government officials to obtain contracts
03/18/2022	Jardine Lloyd Thompson Group Holdings Ltd.	DOJ	\$29M to U.K. SFO (declination and disgorgement order)	<ul style="list-style-type: none"> <li>Anti-bribery</li> </ul>	Insurance	Ecuador	Paid a third-party intermediary to bribe Ecuadorian government officials to obtain contracts with an Ecuadorian-owned and controlled surety company
04/20/2022	Stericycle, Inc.	DOJ & SEC	DOJ: \$52.5M (DPA) SEC: \$28M (cease-and-desist order)	<ul style="list-style-type: none"> <li>Anti-bribery</li> <li>Books and Records</li> <li>Internal Controls</li> </ul>	Waste Management	Brazil, Mexico, Argentina	Offered and paid bribes via employees and agents to, and for the benefit of, foreign officials to obtain and retain business and other advantages
05/24/2022	Glencore International A.G.	DOJ & CFTC	DOJ: \$700M (guilty plea); \$91 million offset for payments to CFTC	<ul style="list-style-type: none"> <li>Conspiracy to violate FCPA</li> <li>Anti-bribery</li> </ul>	Commodities and Mining	Nigeria, Cameroon, Ivory Coast, Equatorial Guinea, Brazil, Venezuela, DRC	Conspired for over a decade to pay third-party intermediaries with intent to pay bribes to officials in several countries
06/02/2022	Tenaris S.A.	SEC	\$78M (cease-and-desist order)	<ul style="list-style-type: none"> <li>Anti-bribery</li> <li>Books and Records</li> <li>Internal Controls</li> </ul>	Manufacturing	Brazil	Bribed a Brazilian government official via employees and agents to obtain and retain business from SOE

\*Resolution figures do not reflect amounts credited to other state and federal agencies or international regulators.