

**Davis Polk**

# **FCPA Update: Recent anti-corruption developments and the year ahead**

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February 28, 2023

# Introductions



**Greg D. Andres, Partner**

Greg is co-head of our White Collar Defense & Investigations practice and one of *Benchmark Litigation's* "Top 100 Trial Lawyers." He focuses on white collar defense, congressional investigations, complex civil litigation and crisis management. In forums including federal and state court, mediation and arbitration, Greg represents financial institutions, hedge funds, private equity firms and companies in multiple industries.

As a member of Special Counsel Robert Mueller's team in 2017-2019, Greg was the lead trial lawyer in the successful prosecution of Paul Manafort. Earlier, he was a federal prosecutor and a Deputy Assistant Attorney General in the Criminal Division of the Department of Justice and the Chief of the Criminal Division in the U.S. Attorney's Office for the EDNY. As DOJ, Greg supervised the Department's FCPA practice nationwide.



**Uzo Asonye, Partner**

Uzo is a partner in Davis Polk's White Collar Defense & Investigations group, practicing in Washington, D.C. He has spent more than a decade prosecuting complex financial crimes and public corruption. He advises companies and individuals in connection with government, grand jury and internal investigations, and represents clients in criminal and civil trials. He has deep experience in matters involving insider trading, market manipulation, public corruption and other areas of financial fraud. He was previously the Acting Chief of the Financial Crimes and Public Corruption Unit in the U.S. Attorney's Office for the Eastern District of Virginia. Uzo served as a member of Special Counsel Robert Mueller's team in the successful prosecution of Paul Manafort.



**Daniel S. Kahn, Partner**

Dan represents clients in criminal and regulatory investigations and in civil and criminal trials. A former prosecutor, he served for 11 years in senior roles at the Department of Justice.

The *Wall Street Journal* described Dan as DOJ's "most recognizable expert on the Foreign Corrupt Practices Act." At DOJ, Dan was acting Deputy Assistant Attorney General of the Criminal Division and, earlier, head of the Fraud Section and FCPA Unit. He supervised matters involving FCPA violations, money laundering and sanctions violations, and fraud related to digital currency, fintechs, commodities, securities, healthcare and procurement.

Dan represents clients in internal investigations and government investigations, including corruption, healthcare fraud, securities fraud, commodities fraud, and compliance matters.



**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 and Overview

## 1. Updated guidance

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- Significant year for DOJ guidance between DAG memo and CEP update

## 3. Individual enforcement

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- Important (and rare) decisions from circuit courts defining the scope of the FCPA

## 2. Corporate enforcement

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- Slight uptick in corporate enforcements from 2021 to 2022
- Continued emphasis on international coordination
- Major DOJ trial victories

## 4. What to Watch in 2023

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- More guidance on clawbacks, messaging
- More proactive use of data analytics to drive enforcement

# Policy and Guidance Developments

01

# DOJ Policy Updates

September 2022 memo and remarks by Deputy Attorney General Lisa Monaco

## Key themes

- Heightened expectations for cooperation
- Harsher treatment of repeat offenders
- Voluntary disclosure policies across DOJ
- Monitoring the monitors
- Compliance, compliance, compliance
  - Use of personal devices, messaging apps
  - Financial incentives for compliance
  - Avoidance of non-disparagement clauses to curb whistleblowers



U.S. Department of Justice  
Office of the Deputy Attorney General

The Deputy Attorney General Washington, D.C. 20530  
September 15, 2022

MEMORANDUM FOR ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION  
PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL,  
CIVIL DIVISION  
ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION  
ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND  
NATURAL RESOURCES DIVISION  
DEPUTY ASSISTANT ATTORNEY GENERAL, TAX  
DIVISION  
ASSISTANT ATTORNEY GENERAL, NATIONAL SECURITY  
DIVISION  
DIRECTOR, FEDERAL BUREAU OF INVESTIGATION  
DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES  
ATTORNEYS  
ALL UNITED STATES ATTORNEYS

FROM: THE DEPUTY ATTORNEY GENERAL *Lisa Monaco*

SUBJECT: Further Revisions to Corporate Criminal Enforcement Policies  
Following Discussions with Corporate Crime Advisory Group

# DOJ Policy Updates

Updates to Corporate Enforcement Policy



**Kenneth A. Polite, Jr.**  
Assistant Attorney General

## Key themes

- The Corporate Enforcement Policy (CEP) now formally applies to all corporate cases in the Criminal Division
- Declination possible even if there are aggravating circumstances if corporations meet the following requirements:
  - Voluntary disclosure is immediate;
  - Company maintained an effective controls program that identified the misconduct at the time it occurred;
  - Company provided “extraordinary” cooperation and undertook extraordinary remediation
- Increased fine/penalty discount for voluntary disclosure (now 50-75% reduction)
- Increased fine/penalty discount for full cooperation and remediation (now 50%)

# DOJ Policy Updates

## New USAO Self-Disclosure Policy

### How USAO Policy Differs from Criminal Division CEP

- Presumption against guilty plea (USAO policy) versus presumption in favor of declination (Criminal Division CEP)
- Aggravating factors are different. Unlike the CEP, USAO policy does not list recidivism as an aggravating factor
- No specific provisions to provide “cooperation and remediation” credit in absence of voluntary disclosure

#### 9-47.120 – Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy

This policy—previously known as the FCPA Corporate Enforcement Policy—applies to all FCPA cases nationwide and all other corporate criminal matters handled by the Criminal Division.

1. Criteria for a Presumption of a Declination for Voluntary Self-Disclosure, Full Cooperation, and Timely and Appropriate Remediation in Criminal Division Corporate Matters

In the years since the creation of the FCPA Corporate Enforcement Policy, the Criminal Division has observed that transparency concerning benefits that a company may obtain as a result of voluntary self-disclosure of misconduct can create important incentives for corporate behavior. The Criminal Division handles unique and complex corporate matters involving conduct that spans

Accordingly, the Criminal Division as of January 2023, which provides, misconduct to the Criminal Division, in accordance with the standards set will receive a declination absent ense or the nature of the offender.

required to pay all disgorgement, at issue. Where another authority department will apply, in appropriate Corporate Resolution Penalties in from the Same Misconduct, Justice



#### United States Attorneys' Offices Voluntary Self-Disclosure Policy

##### INTRODUCTION

The Deputy Attorney General's September 15, 2022 memorandum, "Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group," instructed that each component of the Department of Justice (the "Department") that prosecutes corporate crime should review its policies on corporate voluntary self-disclosure and, if there is no formal written policy to incentivize self-disclosure, it must draft and publicly share such a policy.

The Attorney General's Advisory Committee (AGAC) requested that the White Collar Fraud Subcommittee of the AGAC, under the leadership of U.S. Attorney for the Eastern District of New York Breon Peace (Chair), recommend relevant policies and procedures for consideration. The below policy was prepared by a Corporate Criminal Enforcement Policy Working Group comprised of U.S. Attorneys from geographically diverse districts, including U.S. Attorney Peace, as well as U.S. Attorney for the Northern District of California Stephanie Hinds, U.S. Attorney for the District of Connecticut Vanessa Avery, U.S. Attorney for the District of Hawaii Clare Connors, U.S. Attorney for the District of New Jersey Philip Sellinger, U.S. Attorney for the Eastern District of North Carolina Michael F. Easley, Jr., U.S. Attorney for the Eastern District of Virginia Jessica Aber, and U.S. Attorney for the Western District of Virginia Christopher Kavanaugh. Mandy Riedel, White Collar Crimes Coordinator for the Executive Office for U.S. Attorneys, also participated in the development of this policy.

# Policy Update Takeaways

## Application of the policy

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- Revised CEP now formally **applies to all corporate cases** in the Criminal Division

## “Aggravating circumstances”

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- “**Immediate**” voluntary self-disclosure
- “**Extraordinary** cooperation . . . and remediation”

## Discounts off Guidelines range

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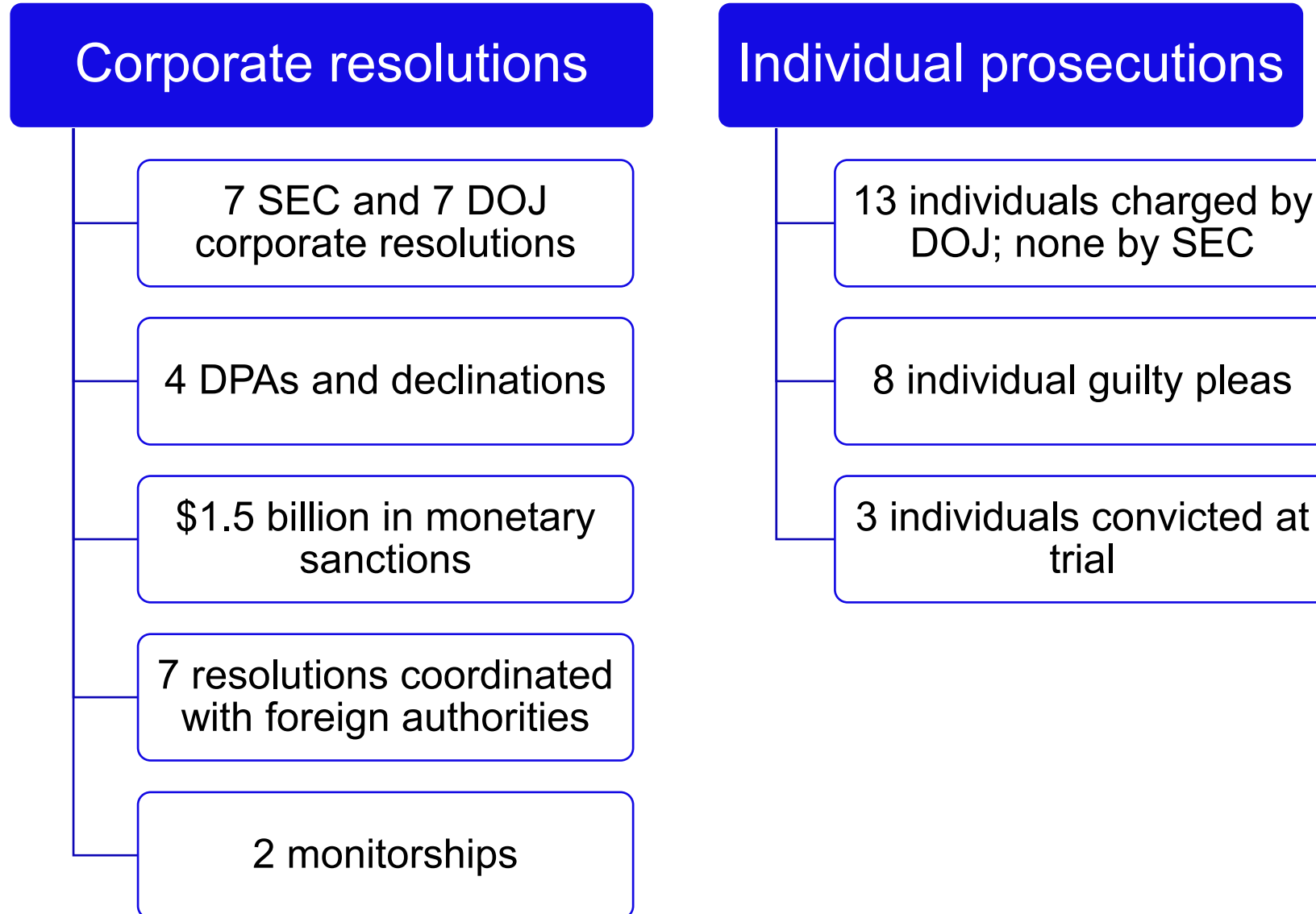
- Greater discounts now theoretically available under certain, limited circumstances











# Trends from Notable DOJ and SEC Enforcement Actions

02

# Overview of Enforcement in 2022










# 2022 Corporate Enforcement Actions Snapshot

Company	Prior Resolution/s	Resolution Details
		<ul style="list-style-type: none"> <li>— SEC cease-and-desist order</li> <li>— South Korea (HQ), Vietnam</li> <li>— \$3.5 million penalty to SEC, \$2.8 million disgorgement</li> </ul>
		<ul style="list-style-type: none"> <li>— DOJ declination of prosecution with a disgorgement order</li> <li>— United Kingdom (HQ), Ecuador</li> <li>— \$29 million disgorgement (credited against payment to U.K. SFO)</li> <li>— Declination cited: employee termination; separation from involved third-party</li> </ul>
		<ul style="list-style-type: none"> <li>— DPA, 2-year monitorship</li> <li>— US (HQ), Brazil, Mexico, Argentina</li> <li>— \$52.5 million penalty to DOJ, \$28 million disgorgement</li> </ul>
		<ul style="list-style-type: none"> <li>— Parent company guilty plea, 3-year monitorship</li> <li>— Switzerland (HQ), Brazil, DRC, Nigeria, and other countries</li> <li>— \$428 million penalty to DOJ, \$272 million forfeiture (FCPA only); \$91 million offset for payments to CFTC</li> </ul>
		<ul style="list-style-type: none"> <li>— SEC cease-and-desist order</li> <li>— Luxembourg (HQ), Brazil</li> <li>— \$25 million penalty to SEC, \$53 million disgorgement</li> </ul>
		<ul style="list-style-type: none"> <li>— SEC cease-and-desist order; DOJ 3-year DPA</li> <li>— Brazil (HQ)</li> <li>— DOJ and SEC waived payment of all but \$24.5 million and \$17 million (inability to make full payment)</li> </ul>

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

# 2022 Corporate Enforcement Actions Snapshot

Company	Prior Resolution/s	Resolution Details
		<ul style="list-style-type: none"> <li>— SEC cease-and-desist order</li> <li>— US (HQ), India, Turkey, UAE</li> <li>— \$23 million in penalty and disgorgement to SEC</li> </ul>
	 	<ul style="list-style-type: none"> <li>— DPA and cease-and-desist order</li> <li>— Switzerland (HQ), South Africa</li> <li>— \$315 million DOJ penalty; \$75 million SEC penalty; and \$74 million SEC disgorgement</li> </ul>
		<ul style="list-style-type: none"> <li>— DPA and cease-and-desist order</li> <li>— US (HQ), Algeria, Brazil</li> <li>— \$79 million to DOJ, \$105 million disgorgement to DOJ; \$80 million disgorgement to SEC</li> </ul>
		<ul style="list-style-type: none"> <li>— DOJ declination of prosecution and disgorgement order</li> <li>— France (HQ), China</li> <li>— \$17 million disgorgement</li> <li>— Declination cited: employee termination, prompt post-acquisition diligence</li> </ul>

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

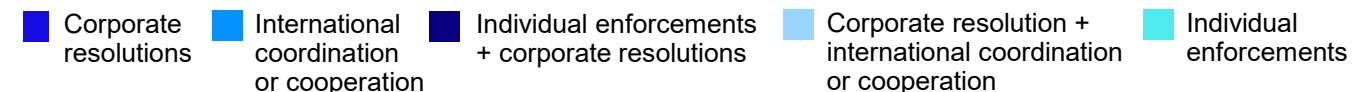
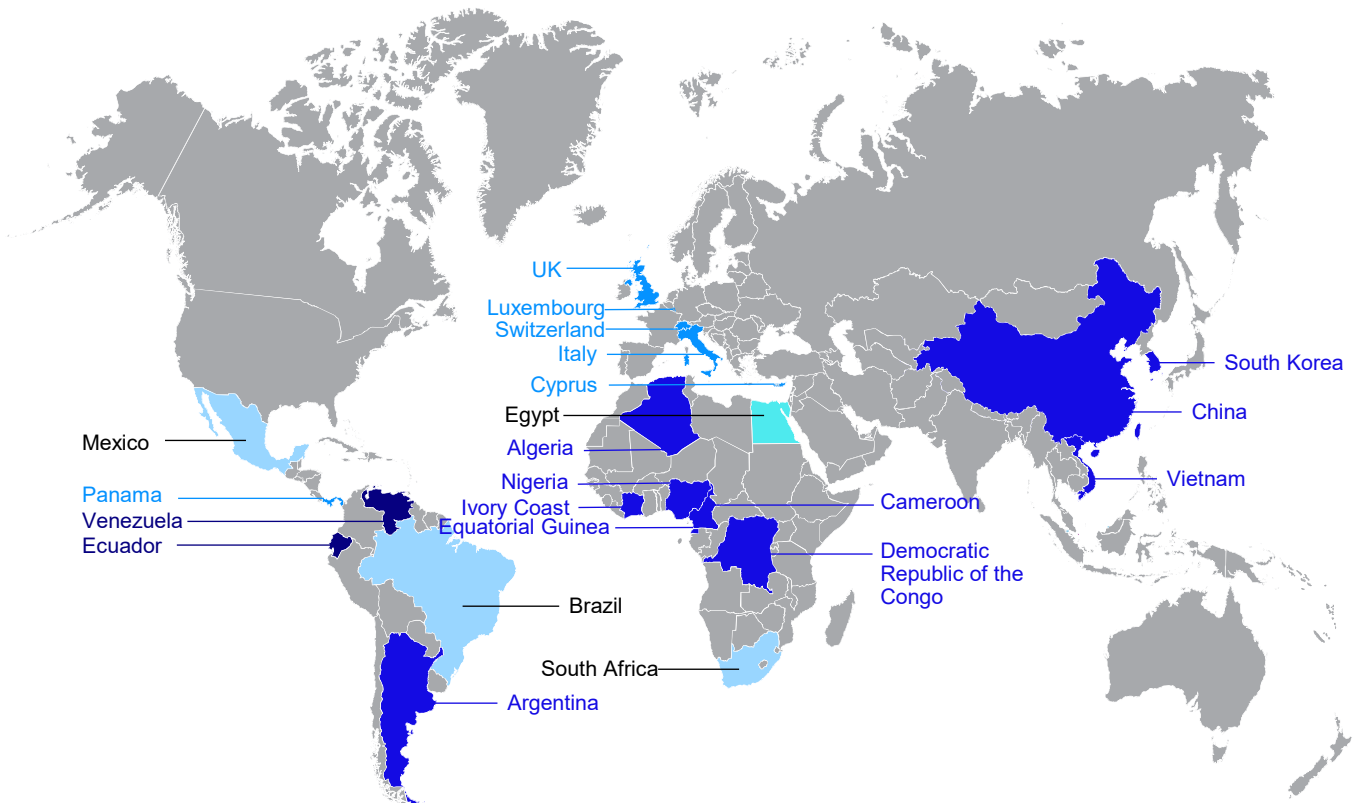
# 2022 Corporate Enforcement Actions Snapshot

## Notable bribery methods

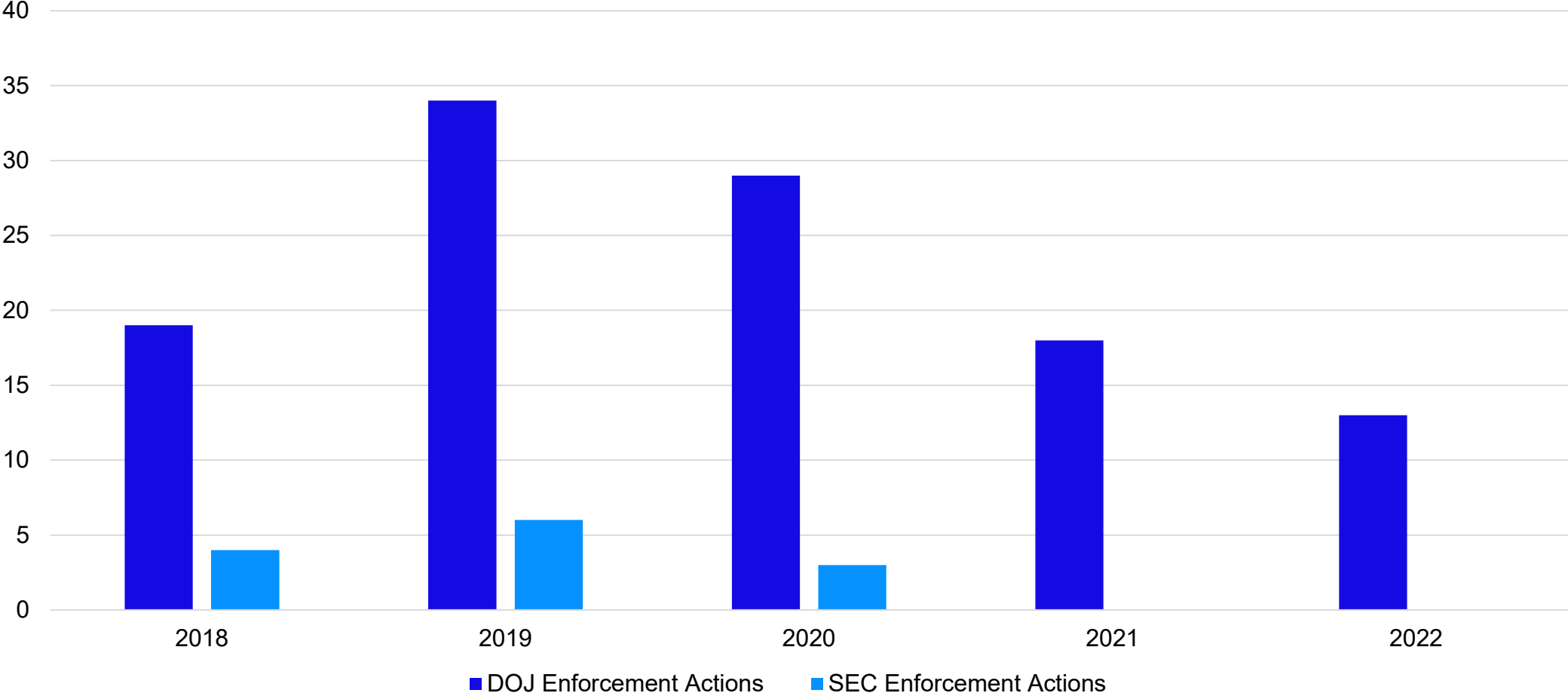
- Sham third-party contracts and negotiations
- Overpayments for crude oil
- “Cash Desks”
- Funneling money through a lawyer
- Campaign contributions
- Entertainment expenses
- False third-party vendor invoices
- Slush fund from converted gift cards

## International coordination

- Old partnerships: Brazil, France, UK, Switzerland
- Newer partnerships: South Africa, Luxembourg, Italy, Mexico, Panama, Cyprus



# Individual Enforcement Actions Snapshot



# Individual Enforcement Trends

## — Fewer new individual actions

- DOJ again emphasized that individual accountability remains top priority, but DOJ individual enforcement actions fell for third straight year. SEC brought no individual enforcement actions

## — Follow-on individual charges from LatAm investigations

- DOJ pursued individual charges related to PetroEcuador, Odebrecht, and PDVSA

## — Ubiquity of money laundering charges

- Every defendant charged with money laundering charges; only ~30% with FCPA charges

## — Internal Accounting Controls

- First time a charge by the FCPA Unit of conspiring to circumvent an employer's accounting controls has ever gone to a jury
- Conviction affirmed government's recent broad usage of internal accounting controls provisions

## — Privilege over Internal Investigations

- Company waived privilege over internal investigation materials when voluntarily sharing with DOJ – even those used only to prepare presentations

# Rare Circuit Court Decisions in FCPA Cases

## — *Hoskins*

- **Second Circuit:** Affirmed district court's reversal of jury conviction on FCPA counts in 2-1 decision, and affirmed conviction on money laundering grounds
  - Applied common law definition of agency
  - Found American subsidiary did not have sufficient control over Hoskins for him to be considered an "agent"
- **Takeaway:** Higher bar for government to meet before bringing FCPA charges using agency theory

## — *Rafoi and Murta*

- **Fifth Circuit:** Reversed district court, ruled it had jurisdiction under both FCPA and money laundering statutes
  - Whether extraterritorial acts constituted an FCPA violation went to merits of the case, not subject matter jurisdiction
  - Left open whether defendants not enumerated in the FCPA could be liable under FCPA conspiracy theory (i.e. whether the Fifth Circuit agrees with *Hoskins*)
  - Money laundering statute did not require any activity to physically occur in United States
- **Takeaway:** Unlikely to have significant impact on FCPA cases moving forward, but keeps open possibility of circuit split on *Hoskins* conspiracy issue



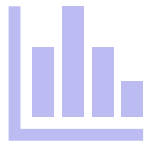
# What to Watch in 2023

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# What to Watch in 2023



Continued increase in number of enforcement actions



Increased use of data to identify new cases



New guidance's implementation may provide clarity regarding undefined terms



Expected guidance on clawbacks and messaging, and potentially more

# What can companies do?

## Takeaways

- Effective compliance programs and controls continue to be a company's best defense
- Re-evaluate self-disclosure analysis and cooperation requirements in light of new guidance
- Conduct prompt post-acquisition due diligence
- Look for forthcoming guidance on clawbacks and messaging

# Thank you!

For more information, please visit our FCPA webpage.

<https://www.davispolk.com/white-collar-defense-investigations/anti-corruption-fcpa>

# Appendix

# 2022 DOJ & SEC FCPA resolution tracker

Corporate FCPA resolutions from 01/01/2022 through 12/31/2022

	Target	Enforcer	Resolution*	Alleged FCPA violation	Industry	Geography	Allegations
2/15	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
3/18	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
4/20	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
5/24	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
6/2	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
9/27	Oracle Corporation	SEC	\$23 million (cease-and-desist order)	<ul style="list-style-type: none"> <li>Anti-bribery</li> <li>Books and Records</li> <li>Internal Controls</li> </ul>	Software	India Turkey UAE	Used discount schemes and sham marketing reimbursements to fund slush funds to pay direct bribes and provide benefits to foreign officials.
12/3	ABB Ltd.	DOJ & SEC	DOJ: \$72.5 million (DPA) SEC: \$75 million (cease-and-desist)	<ul style="list-style-type: none"> <li>Anti-bribery</li> <li>Books and Records</li> <li>Internal Controls</li> </ul>	Technology	South Africa	Paid bribes to executives at a state owned energy company in South Africa
12/19	Honeywell International Inc.	DOJ & SEC	DOJ: \$184 million (DPA) SEC: \$80 million (cease-and-desist)	<ul style="list-style-type: none"> <li>Anti-bribery</li> <li>Books and Records</li> <li>Internal Controls</li> </ul>	Manufacturing	Algeria Brazil	Paid bribes to obtain business from state-owned oil companies in each country
12/21	Safran S.A.	DOJ	\$17 million (declination and disgorgement order)	<ul style="list-style-type: none"> <li>Anti-bribery</li> </ul>	Manufacturing	China	Subsidiaries bribed Chinese government officials prior to Safran's acquisition of the subsidiaries

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