Diligent

Anti-Bribery and Anti-Corruption (ABAC) Global Enforcement Update

Executive Summary

While a noticeable uptick in sanctions activity dominated the headlines in 2022 — owing, in large measure, to the ongoing incursion of the Russian Federation into Ukraine — global governments have also been relentless in their pursuit of malign actors involved in criminal activity, including but not limited to, international corruption and bribery. Foremost among these jurisdictions is the United States, where enforcement of the Foreign Corrupt Practices Act ("FCPA") has been relatively consistent and yielded several high-profile settlements implicating malfeasance in multiple countries. 2022 has also witnessed significant cross-jurisdictional action against institutions and individuals involved in corrupt activity, with the United Kingdom's Serious Fraud Office ("SFO") imposing stiff financial sanctions on a number of criminally complicit organizations.

This update is meant to provide a **holistic overview** of the most pertinent anti-bribery and corruption ("ABAC") developments that have occurred through the third quarter of 2022. It is, of course, impossible to discuss every ABAC-related development in the context of a single white paper. Accordingly, we discuss only the most relevant enforcement actions, legislative and regulatory developments, and multilateral agreements for the benefit of legal professionals and compliance practitioners alike.

FCPA Enforcement in 2022

Under U.S. law, the enforcement of the FCPA — the primary legal mechanism employed by the federal government to charge institutions and individuals with the bribery of foreign governmental officials — remained steady, but subdued in contrast with other recent years.

According to **information** published by Stanford University's FCPA Clearinghouse, the total number of FCPA-related enforcement actions brought by the U.S. Department of Justice ("DOJ") and/or U.S. Securities and Exchange Commission ("SEC") through the third quarter of 2022 remained far below the ten-year average for comparable periods, and significantly below the ten-year average overall. While enforcement activity has increased marginally when compared with the same time period last year, the total number of enforcement actions is roughly comparable to 2015, when eighteen enforcement actions were announced through quarter 3. In short, while FCPA enforcement activity has remained steady, 2022 has not seen the breadth or scope of FCPA-enforcement activity that characterized the 2016 through 2020 timeframe.

It would be a mistake, however, to suggest that the lack of recent enforcement activity is evidence that the DOJ and SEC have relegated FCPA investigations to the periphery. As the same FCPA Clearinghouse report indicates, U.S. authorities are currently involved in investigations of at least **thirty-two** separate entity groups for potential FCPA violations. Thus, the lack of recent enforcement activity may, in fact, be attributable to the complex nature of ongoing investigations rather than a shift in enforcement authority priorities.

Since the beginning of 2022, the DOJ and SEC have announced a number of sizable settlements with organizations implicated in FCPA violations. These include the following:

Glencore plc

On May 24, 2022, in the most consequential FCPA-related enforcement action of the year, the DOJ announced the tentative settlement of an enforcement action involving Switzerland-based Glencore plc ("Glencore"), a worldwide commodity trading and mining company whose stock is publicly traded on the OTC market in the United States. According to a plea agreement reached with the U.S. Attorney's Office for the Southern District of New York, Glencore pled guilty to a single-count criminal information charging the organization with conspiracy to violate the FCPA. According to documents filed in the case, Glencore's guilty plea came as a result of widespread misconduct arising from its dealings with government officials in Nigeria, Cameroon, Ivory Coast, Equatorial Guinea, Brazil, Venezuela and the Democratic Republic of the Congo. From at least 2007 through 2018, Glencore conceded that it utilized various employees and third-party agents to knowingly and willfully provide more than $100 million in corrupt payments and other things of value to foreign officials with the aim of securing an "improper advantage" over its competitors in both obtaining and retaining business.

The actions of Glencore's UK-based subsidiaries in Nigeria underscore the demonstrably illicit nature of its activities involving foreign government officials. There, Glencore admitted that it routinely utilized its connections with intermediary companies to facilitate the bribery of officials connected to the Nigerian National Petroleum Corporation ("NNPC") — an instrumentality of the Nigerian government. The purpose of these bribes was to induce NNPC officials to enter into contracts with Glencore for the purchase of crude oil and other refined petroleum products. In total, Glencore paid approximately $52 million in fees to intermediaries it knew would be used to influence Nigerian government officials. Most egregiously, such payments were orchestrated with the full knowledge and explicit approval of multiple Glencore executives, who concealed their misconduct by using code words to refer to illegal payments.

As a result of its systemic misconduct in Nigeria and elsewhere, Glencore agreed to the payment of $428,521,173 in the form of a criminal fine. It further consented to the forfeiture of $272,185,792 in ill-gotten proceeds. Conspicuously, Glencore failed to qualify for full cooperation credit, based on a reluctance to cooperate fully with the DOJ's ongoing investigation, its delay in producing material evidence, and its failure to timely remediate with respect to the discipline of employees directly involved in the underlying misconduct. Additionally, while the government acknowledged that Glencore had implemented some remedial measures, it

insisted on the appointment of an independent compliance monitor for an initial term of three years to oversee the adoption of internal controls designed to prevent and detect similar misconduct in the future.

Stericycle, Inc.

In a widely publicized dual enforcement action announced in April 2022, Illinois-based waste management company Stericycle, Inc. ("Stericycle") settled both an administrative proceeding initiated by the SEC, and a criminal case initiated by the DOJ stemming from its misconduct in Latin America. According to a two-count **criminal information** filed in the United States District Court for the Southern District of Florida, from at least 2011 to 2016, Stericycle knowingly and willfully conspired with others to pay approximately $10.5 million in bribes to government officials in Brazil, Mexico and Argentina to obtain and retain business and secure other improper commercial advantages. Specifically, the information alleges that a certain Latin America executive — known only as "LATAM Executive 1" — directed a scheme by which Stericycle employees made payments in cash to government officials utilizing third-party intermediaries. In Brazil, for instance, the information alleges that cash payments were routinely authorized by LATAM Executive 1 and others within the Stericycle corporate hierarchy for the benefit of foreign officials connected with at least twenty-five local and regional government agencies and instrumentalities. The object of the bribery scheme was to receive "payment priority" on certain invoices issued in connection with government agency contracts. Similar misconduct occurred in Mexico and Argentina.

Under the terms of a three-year **deferred prosecution agreement** ("DPA") reached with the DOJ, Stericycle accepted criminal responsibility for engaging in a conspiracy to violate both the anti-bribery and books and records provisions of the FCPA. It further agreed to pay a criminal monetary penalty of $52.5 million. In a parallel enforcement proceeding initiated by the SEC, Stericycle **agreed** to pay an additional $28 million in the form of disgorgement and prejudgment interest arising from its misconduct. As part of the administrative settlement with the SEC, Stericycle also agreed to retain the services of an independent compliance monitor for a period of not less than two years. During that period, Stericycle is obligated to cooperate with the compliance monitor to implement policies, procedures, practices, internal controls, recordkeeping and financial reporting processes consistent with U.S. anti-bribery and corruption laws.

Tenaris S.A.

In June 2022, the SEC also announced an administrative settlement with Tenaris S.A. ("Tenaris"), a Luxembourg-based manufacturer and distributor of steel pipe products over allegations that it violated the FCPA when it bribed Brazilian officials connected to Petrobras, the state-owned oil company of Brazil. According to **documents** released by the SEC in connection with the settlement, beginning in 2008, Tenaris utilized a Brazilian subsidiary known as Confab Industrial S.A. ("Confab") to enlist the services of a third party intermediary that exerted influence over Petrobras in the context of a planned international tender process. Specifically, the SEC alleged that the intermediary in question convinced a Brazilian official to forgo an international tender involving the acquisition of pipes and tubes, thereby ensuring that Confab — the only domestic provider of those products — would continue to receive government business. In exchange, the Brazilian official received approximately 0.5% of Confab's revenue arising from sales made to Petrobras. Tellingly, proceeds from this arrangement were deposited into a Uruguayan bank account for the benefit of the Brazilian official, and sham contracts were created to disguise the transactions as legitimate.

Under the terms of a settlement reached with the SEC, Tenaris agreed to pay disgorgement of $42,842,497 plus prejudgment interest in the amount of $10,257,841, and a civil monetary penalty in the amount of $25,000,000. In addition, Tenaris stipulated that it would report on the status of its anti-corruption remediation efforts on a periodic basis over a two-year period to the SEC. Among other things, Tenaris is required to furnish the SEC with updates concerning the implementation of policies, procedures, practices and internal controls that are designed to detect and deter future misconduct.

Oracle Corporation

On September 27, 2022, the SEC also announced a settlement with Oracle Corporation ("Oracle") — a multinational information technology conglomerate based in Austin, Texas — over allegations that it improperly

utilized product discounts and marketing reimbursement payments to direct bribes to foreign government officials in India, Turkey and the United Arab Emirates. According to a **cease and desist order** issued by the SEC, the underlying misconduct occurred from approximately 2014 through 2019, and exploited weaknesses in Oracle's use of an indirect sales model to distribute its product. While the SEC noted that Oracle often employed indirect sales for a variety of legitimate purposes (including to satisfy payment terms or meet local law requirements), it also relied on that method to create secret slush funds used to bribe foreign government officials.

With respect to discounts in particular, the SEC noted that Oracle subsidiary employees frequently exploited a loophole in its discount authorization process to concoct what appeared to be legitimate business justifications for significant departures from normal pricing arrangements. While official Oracle policy dictated that product discounts be supported by documentary evidence, no such evidence was required in a significant number of cases. As a result, Oracle subsidiary employees conspired with its network of value-added distributors and resellers to create slush funds that were ultimately used to bribe and influence foreign officials, with such distributors and resellers entitled to retain a portion of any excess deal margin. In a similar vein, employees at Oracle subsidiaries leveraged a deficiency in its marketing reimbursement policy to create purchase order requests under a certain threshold that were designed to siphon funds for utilization in connection with its bribery scheme. Because Oracle policy did not require corroborating documentation for marketing reimbursement requests under $5,000, its subsidiaries were able to compensate its resellers and distributors for marketing expenses regardless of whether those expenses were actually incurred. Notably, this deficiency enabled Oracle subsidiary employees in Turkey to open purchase orders for the reimbursement of sham distributor and reseller marketing expenses totaling approximately $115,200.

Under the terms of the settlement agreement reached with the SEC, Oracle stipulated to the payment of $7,114,376.44 in disgorgement, plus $791,040.20 in prejudgment interest and a civil monetary penalty of $15,000,000, for total financial sanctions of nearly $23 million.

DOJ Updates Corporate Criminal Enforcement Policies

In addition to FCPA enforcement activity, in mid-September 2022, the DOJ announced additional **modifications** to its Corporate Criminal Enforcement Policies ("Corporate Enforcement Policies") based on feedback received from the Corporate Crime Advisory Group ("CCAG"). Established in October 2021, CCAG includes a broad cross-section of individuals and entities with significant expertise in ethics and compliance, white collar prosecution and defense, and corporate policy. Among other things, the new Corporate Enforcement Policies provide additional direction to prosecutors on a litany of topics related to individual accountability, corporate responsibility, independent compliance monitorships and criminal enforcement transparency.

With respect to individual accountability specifically, the Corporate Enforcement Policies emphasize the need for **timely disclosure of all non-privileged facts and information** pertaining to individuals involved in corporate misconduct. As the DOJ makes clear, the prompt disclosure of this information is imperative for organizations seeking to qualify for full cooperation credit. Thus, while corporations may have become accustomed to making more selective disclosures in the past — ostensibly as a means of preserving leverage with federal prosecutors — moving forward, organizations that strategically withhold critical information risk jeopardizing their entitlement to prosecutorial leniency altogether. Additionally, the Corporate Enforcement Policies now require prosecutors to complete investigations into individuals — and seek appropriate criminal charges — prior to, or simultaneous with, the entry of any corporate resolution. Prosecutors seeking to resolve a corporate case prior to completing an investigation into individuals must now obtain approval from either the supervising United States Attorney or Assistant Attorney General of the DOJ division responsible for overseeing the investigation.

The new Corporate Enforcement Policies also underscore the importance of **voluntary self-disclosures** by corporations that uncover evidence of malfeasance. In this vein, the updated Corporate Enforcement Policies direct all DOJ components to promulgate written policies and procedures incentivizing such self-disclosures to the extent such policies do not exist. In the absence of aggravating factors, the Corporate Enforcement Policies further direct that DOJ divisions are not to seek guilty pleas from corporations that voluntarily and timely self-disclose, cooperate fully with the DOJ's investigation and remediate the criminal conduct at issue. Notably, the Corporate Enforcement Policies further stipulate that the DOJ will not seek an independent compliance monitorship for cooperating corporations if, at the time of the resolution, the organization has implemented and tested an "effective compliance program."

In the context of independent compliance monitorships, the DOJ reiterates its commitment to evaluating each corporate criminal case in context — abandoning what many considered to be a general presumption against requiring monitorships overall. To that end, the Corporate Enforcement Policies instruct prosecutors to consider a myriad of factors when ascertaining whether a monitorship might be appropriate as part of an overall resolution. Among the more critical factors prosecutors are obliged to consider is whether at the time of the resolution "the corporation has implemented an effective compliance program and sufficient internal controls to detect and prevent similar misconduct in the future," and whether the criminal conduct at issue "involved the exploitation of an inadequate compliance program or system of internal controls." In selecting monitors, the Corporate Enforcement Policies direct prosecutors to employ a process that is both consistent and transparent. DOJ divisions are accordingly required to delegate such decisions to ad hoc committees within the office where the investigation originated to avoid the appearance of favoritism or other improprieties. In addition, the Office of the Deputy Attorney General is required to approve all monitor selections, except in cases where the monitor is court-appointed.

Finally, the Corporate Enforcement Policies restate the DOJ's overall commitment to transparency in corporate criminal enforcement actions. To maximize the practical utility of corporate resolutions, the DOJ commits itself to publishing an agreed upon statement of facts outlining the criminal conduct that forms the basis of each settlement, along with a statement of considerations that explains the DOJ's rationale for approving certain accommodations. "Absent exceptional circumstances," each corporate criminal resolution will also be published to the DOJ's website to maximize public visibility.

ABAC Developments Abroad

While the extraterritorial reach of the FCPA makes it a popular focus of ABAC discussions, it would be a mistake to ignore developments in other jurisdictions that, in recent years, **have prioritized international cooperation** in corporate criminal enforcement activities.

Chief among these jurisdictions is the **United Kingdom**, where in early November 2022, the Serious Fraud Office ("SFO") **announced** a separate resolution with Glencore Energy UK Limited ("Glencore UK") implicating the activities of its London-based Africa trading desk. Initiated in 2019, an SFO investigation uncovered a trail of text messages, large cash withdrawals and concealed payments that collectively evinced a scheme by Glencore UK to gain preferential access to oil in exchange for corrupt payments. In total, it is estimated that Glencore UK paid nearly $29 million in bribes to secure access to oil in the west African markets of Cameroon, Equatorial Guinea, Ivory Coast, Nigeria and South Sudan. As a result of its actions, Glencore UK pled guilty to seven counts of violating the Bribery Act (2010) in both committing bribery and failing to prevent such bribery from occurring as a culpable commercial organization. On November 3, 2022, Southwark Crown Court **imposed a fine** of £280,965,092.95 (roughly $400 million) on Glencore UK, finding, among other things, that the extended duration of the corruption at issue in the case, combined with the artifices used to conceal the misconduct, justified a substantial criminal penalty.

On the policy front, the UK Parliament advanced new legislation aimed at expanding the SFO's current investigative reach. On October 13, 2022, the House of Commons conducted its **second reading** of the draft Economic Crime and Corporate Transparency Bill — a measure that, if adopted, would significantly expand SFO's ability to engage in pre-investigative work relative to compelling individuals and companies to provide information where "reasonable grounds" exist to conclude that any financial crime (serious or complex fraud, bribery or corruption) has occurred. Current law artificially constrains the ability of the SFO to conduct investigative work related to suspected cases of international bribery and corruption only. By expanding the ability of the SFO to engage in pre-investigative activity related to fraud, it is hoped that the Government's ability to combat economic crime in all of its various forms will be enhanced.

In Latin America, throughout 2022, **Brazil** continued to dominate the headlines for corrupt activity often highlighted in cases brought under the auspices of the FCPA. Among other entities, state-owned Petrobras and privately-owned GOL Linhas Aéreas Intelligentes ("GOL") were directly implicated in bribery and corruption schemes where Petrobras seems to have been the recipient of bribes and GOL a willing donor. In the summer of 2022, an **annual anti-corruption ranking** generated by the Americas Society/Council of Americas ("AS/COA") found that Brazil had fallen four places in a holistic evaluation of Latin American countries' capacity to fight corruption to the tenth position overall. According to the AS/COA report, Brazil's precipitous decline is largely attributable to outgoing President Jair Bolsonaro's efforts to consolidate power over bodies investigating cases of alleged corruption in an effort to protect political allies.

In the Asia-Pacific region, in July 2022, Transparency International ("TI") **called** upon leaders of Pacific Island nations to dedicate themselves more fully to the implementation of measures designed to reduce the prevalence of corruption in the region. Highlighting findings from a 2021 Corruption Perceptions Index ("CPI") report that revealed that more than three in five people surveyed believe that government corruption is a problem, TI called upon the leaders of Pacific Island nations to: (1) strengthen political accountability by requiring all high-level government officials to publicly disclose income and assets; (2) increase transparency in the relationship between government and business by monitoring companies' involvement in political campaigns and policy making; (3) reduce opportunities for bribery by investing in "clear and uncomplicated systems" for accessing public services; and (4) adopt and enforce basic right to information and whistleblower protection laws.

ABAC Predictions for 2023 and Beyond

Volatile geopolitical circumstances again overshadowed ABAC activity through the third quarter of 2022. As the Russian invasion of Ukraine shows no signs of relenting, government attention and resources have been focused on the implementation and enforcement of sanctions regulations. As the DOJ itself announced earlier this year, sanctions enforcement remains a top national security priority, and several cases have been initiated against the most egregious violators. We anticipate this trend will continue for the foreseeable future.

Globally, we anticipate overall ABAC enforcement activity to remain steady. FCPA activity, while diminished in comparison with the frenzied pace of more recent years, is likely to remain largely unaffected by the DOJ's sanctions focus, as the Biden Administration has designated the fight against international corruption as another core national security priority. In this vein, we expect to see more coordination among international partners in combating corruption, and additional FCPA settlements that serve as the precursor for foreign prosecutions. A notable feature of FCPA settlements through the third quarter of 2022 is a relentless emphasis by the DOJ on returning disgorged profits to the countries from which they originated.

As always, we encourage organizations to use ABAC enforcement cases as learning opportunities in line with DOJ guidance that underscores the importance of continuous compliance program improvement. The Glencore, Stericycle and Tenaris settlements are notable for involving third party intermediaries, long considered a major risk factor for organizations conducting business with foreign governments. To the extent corporations with significant government exposure lack a robust third-party due diligence and ongoing monitoring program, these settlements should precipitate aggressive, coordinated remedial action aimed at implementing appropriate internal controls. As the settlement with Oracle establishes, however, the mere adoption of ABAC controls is insufficient to prevent legal violations from occurring. Accordingly, an organization's ABAC controls — as with all internal controls more broadly — should be tested for potential weaknesses and deficiencies and modified or replaced when evidence establishes that such vulnerabilities can be exploited to facilitate illegal activity.

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