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PREFACE

Over the past year, the Biden administration continued to demonstrate its prioritisation of white-collar prosecutions. This includes changes in policy and guidance, such as a renewed focus on individual accountability and voluntary self-disclosure. The administration has continued to redistribute existing resources to prosecutions of corporate crime and, for the second year in a row, announced its intentions to hire more white-collar prosecutors. Given the administration's stated focus on its corporate enforcement priorities, US and non-US corporations alike will continue to face increasing scrutiny by US authorities.

The trend towards more enforcement and harsher penalties has by no means been limited to the United States; while the US government continues to lead the movement to globalise the prosecution of corporations, a number of non-US authorities appear determined to adopt the US model. Parallel corporate investigations in several countries increasingly compound the problems for companies, as conflicting statutes, regulations, and rules of procedure and evidence make the path to compliance a treacherous one. What is more, government authorities forge their own prosecutorial alliances and share evidence or, conversely, have their own rivalries and block the export of evidence, further complicating a company's defence. These trends show no sign of abating.

As a result, corporate counsel around the world are increasingly called upon to advise their clients on the implications of criminal and regulatory investigations outside their own jurisdictions. This can be a daunting task, as the practice of criminal law – particularly corporate criminal law – is notorious for following unwritten rules and practices that cannot be gleaned from a simple review of a country's criminal code. Of course, nothing can replace the considered advice of an expert local practitioner, but a comprehensive review of corporate investigative practices around the world will find a wide and grateful readership.

The authors who have contributed to this volume are acknowledged experts in the field of corporate investigations and leaders of the Bars of their respective countries. We have attempted to distil their wisdom, experience and insight around the most common questions and concerns that corporate counsel face in guiding their clients through criminal or regulatory investigations. Under what circumstances can the corporate entity itself be charged with a crime? What are the possible penalties? Under what circumstances should a corporation voluntarily self-report potential misconduct on the part of its employees? Is it a realistic option for a corporation to defend itself at trial against a government agency? And how does a corporation manage the delicate interactions with employees whose conduct is at issue? The *International Investigations Review* answers these questions and many more, and will serve as an indispensable guide when your clients face criminal or regulatory scrutiny in a country other than your own. And while it will not qualify you to practise criminal law in a foreign country, it will highlight the major issues and critical characteristics of a given

country's legal system and will serve as an invaluable aid in engaging, advising and directing local counsel in that jurisdiction. We are proud that, in its 13th edition, this publication features three overviews and covers 14 jurisdictions.

This volume is the product of exceptional collaboration. I wish to commend and thank our publisher and all the contributors for their extraordinary gifts of time and thought. The subject matter is broad, and the issues raised are deep, and a concise synthesis of a country's legal framework and practice was challenging in each case.

Nicolas Bourtin
Sullivan & Cromwell LLP
New York
July 2023

Chapter 17

UNITED STATES

Nicolas Bourtin and Bailey Springer[1]

I INTRODUCTION

In the United States, corporations are subject to numerous, interlocking regulatory and statutory regimes, and there is no shortage of regulatory agencies empowered to take action in the event of a compliance lapse. The most prominent of these include the Department of Justice (DOJ), the Securities and Exchange Commission (SEC), the Internal Revenue Service (IRS), the Environmental Protection Agency (EPA), the Commodity Futures Trading Commission (CFTC), the US Departments of Commerce, Labor and the Treasury, the Federal Energy Regulatory Commission, the Occupational Safety and Health Administration and banking regulators such as the Federal Reserve and the New York State Department of Financial Services (DFS). Many of these agencies are empowered to commence formal investigations and enforcement proceedings on their own initiative and impose monetary sanctions or other penalties.

Still, the DOJ – charged with prosecuting corporate crimes such as money laundering, bribery and accounting, securities and tax fraud – is uniquely formidable among the agencies because of its power to indict and prosecute criminally, the threat of which has remained an important method of ensuring corporate compliance during the past two decades. For large-scale corporate investigations and prosecutions, the DOJ frequently coordinates with other federal agencies, as well as state and local authorities.

A corporation facing a criminal investigation by the DOJ or other agencies typically feels great pressure to avoid an indictment, which carries the risk of severe reputational, legal, regulatory and other 'collateral' consequences. For many companies, particularly highly regulated ones, a mere indictment – before conviction or even after acquittal – can have severe reputational effects, and disastrous consequences for a company's stock price and its ability to seek funding in the capital markets. Moreover, corporations in certain industries, such as companies that serve as government contractors for the Department of Defense or participate in the federal government's Medicaid and Medicare programmes, can face crippling suspension upon the filing of charges and mandatory exclusion from the programmes if ultimately convicted. The collateral consequences of a corporate criminal investigation and prosecution may not be reversible even if the company is vindicated on appeal. It is therefore not surprising that most companies facing criminal and regulatory investigations in the United States cooperate and frequently self-report potential wrongdoing in the hope of avoiding formal charges.

1 Nicolas Bourtin is a partner and Bailey Springer is an associate at Sullivan & Cromwell LLP.

II CONDUCT

i Self-reporting

Most federal enforcement agencies[2] have published official policies emphasising the importance of voluntary disclosure and full cooperation in an investigation, and pledging to take into account any disclosure or cooperation (or lack thereof) in determining whether to bring an enforcement action and what kind of penalties to seek. In particular, the DOJ's guidelines, announced in March 2023, clarified that the department will not seek a guilty plea where a company has voluntarily self-disclosed and remediated misconduct absent aggravating factors, clarifying a previous lack of clarity about the benefit of self-reporting and cooperation. The new guidelines apply to all components of the DOJ and built on existing self-disclosure leniency programmes. For example, since April 2016, the DOJ has had a corporate enforcement policy in the FCPA enforcement space that included the presumption that the DOJ will decline to prosecute if a company satisfies the policy's requirements for voluntary self-reporting, cooperation and timely remediation. In October 2021, the DOJ announced that eligibility for cooperation credit will require companies to provide 'all non-privilege information about individual wrongdoing,' not just information related to individuals 'substantially involved' in misconduct.[3]

Even with additional guidance from the DOJ, it is not completely clear that voluntary reporting should be the default action of every company that discovers potentially unlawful conduct within its organisation. A company must, of course, first determine whether it has a mandatory legal obligation to disclose potential wrongdoing that it discovers. For example, financial institutions may be obliged to report suspicious activity. Sarbanes–Oxley also imposes numerous compulsory reporting requirements on companies should they discover certain types of fraud and other misconduct. Because many of the regulators have information-sharing agreements or otherwise coordinate their actions, if a company decides to self-report, it may be prudent to make the disclosures to all agencies with jurisdiction.

Even without a mandatory legal obligation, a company should at the very least assess the probability of independent discovery of the potential misconduct by government authorities. The likelihood that a government agency will independently become aware of an impropriety has increased significantly in recent years as a result of the general upturn in regulatory enforcement activity, increased protection of whistle-blowers and the expansion of international cooperation.

In determining whether to self-report and to what extent to cooperate with a regulatory investigation, corporations and their employees must also bear in mind that, should they be deemed to be impeding or obstructing the investigation, they may not only face charges relating to the conduct under investigation, but also charges of obstruction of justice. These obstruction charges are typically much easier to prove than charges stemming from the underlying conduct being investigated and can carry penalties that are equally, or more, severe. For instance, in February 2018, a US subsidiary of the Netherlands-based Coöperatieve

2 Examples include the DOJ, the SEC, the EPA, the enforcement arms of the Treasury Department, Departments of Defense and Health and Human Services and the CFTC.

3 Dep't of Justice, Remarks as Prepared for Delivery: Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime (28 October 2021), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute.

Rabobank UA agreed to forfeit US$369 million and pleaded guilty to obstructing an investigation into deficiencies in the bank's anti-money laundering compliance programme conducted by the Office of the Comptroller of the Currency of the US Treasury Department.[4]

ii Internal investigations

In conjunction with disclosing potentially improper conduct to the government, a corporation will typically undertake an internal investigation. There are several important reasons for conducting such an investigation. First, a full understanding of the facts can be crucial to mounting a defence in any adversarial proceedings that might arise. Second, by learning and disclosing important information, a corporation may be more likely to receive credit for cooperation. Finally, simply as a matter of good corporate governance, it is important for the corporation to be confident that it has accurately determined whether any employees are responsible for the unlawful activity and whether adequate controls are in place to prevent any recurrence of the wrongdoing.

It is generally advisable to have counsel supervise such investigations because of the likelihood that legal questions and issues will arise, although whether it is necessary to retain an outside law firm will depend on the company's assessment of various considerations. Whether conducted by in-house or outside counsel, a significant amount of attorney–client privileged information and attorney work-product material will be generated during the course of an internal investigation. In response to criticism of prior policies encouraging the waiver of privileged information, the DOJ revised its policy in 2008 and categorically directs prosecutors not to seek a waiver of privilege. The current policy does, however, allow prosecutors to consider the extent to which the company has disclosed all relevant facts. Other agencies, such as the SEC, have published similar policies. Therefore, despite the government's assurances that waiver is not necessary to obtain credit for cooperation, a company may find that it is not possible to make a full disclosure of the relevant facts without turning over privileged materials or disclosing information obtained through privileged communications. Moreover, some courts have held that oral summaries of witness interviews offered by companies to regulators as part of their cooperation constituted a waiver of the attorney–client privilege and attorney work-product protections over interview notes and memoranda prepared by company counsel.

With respect to conducting these investigations, there are typically two primary components: (1) review and analysis of relevant documents and (2) interviews with company employees who have knowledge of the relevant facts. Generally, documents are gathered and reviewed before conducting interviews. This allows the interviewer to uncover and focus on key issues or questions discovered during the course of the document review, or to seek clarification on potentially inculpatory or troubling statements contained in those documents. At the outset of each interview, the standard practice is to notify the employee that the attorney conducting the interview is counsel to the company and not the interviewee's personal attorney and that, while the conversation is protected by attorney–client privilege, that privilege belongs to the company, which the company may waive at its sole discretion. The employee should also be informed that any information imparted during the interview may be shared with government authorities.

4 Dep't of Justice, Press Release, Rabobank NA Pleads Guilty, Agrees to Pay Over $360 Million (7 February 2018), https://www.justice.gov/opa/pr/rabobank-na-pleads-guilty-agrees-pay-over-360-million.

Unless it uncovers nothing to merit any disclosure during the course of the internal investigation, a company will typically present its findings to the government after completing the document review and interviewing process, or – for a particularly complex investigation – at the conclusion of some segment of that process. The government and counsel may then engage in dialogue regarding whether criminal or civil charges are warranted – and what kind – and how much credit to give to the company for its cooperation.

iii Whistle-blowers

The probability of a US company facing a whistle-blower complaint increased significantly with the implementation of the whistle-blower provisions of Dodd–Frank, which came into effect in 2011. The Dodd–Frank whistle-blower rules expand the already far-reaching protections for whistle-blowers created by Sarbanes–Oxley and the False Claims Act, including extending Sarbanes–Oxley whistle-blower coverage to employees of non-public subsidiaries of publicly traded companies.

Under Dodd–Frank, the SEC must award whistle-blowers who alert the SEC to certain types of wrongdoing that result in successful enforcement actions rewards of between 10 and 30 per cent of the total monetary sanctions collected by the SEC over US$1 million. On 23 September 2020, the SEC adopted an amendment that introduced, for any award of US$5 million or less, a presumption that the SEC will grant the whistle-blower the statutory maximum award. In February 2022, the SEC proposed two rule changes that would potentially increase monetary awards to whistle-blowers. The first would allow the SEC to make an award to a whistle-blower in a 'related action' otherwise covered by another alternative whistle-blower programme. This would allow a whistle-blower to collect an award from the SEC's whistle-blower programme even if the underlying action is more directly covered by an alternative whistle-blower programme. The second proposed amendment would allow the SEC to consider the dollar amount of a potential award for the limited purpose of increasing the award amount. The CFTC similarly has a whistle-blower programme established under Dodd–Frank.

The SEC continues to take aggressive action against companies perceived to be taking adverse action against whistle-blowers or attempting to frustrate or interfere with their protection and rights. For example, in 2017, the SEC fined the financial services company HomeStreet, Inc US$500,000 for attempting to uncover the identity of a whistle-blower after being contacted by the SEC in connection with an investigation and for including provisions in severance agreements with former employees causing those employees to waive severance payments if they receive a whistle-blower award.

Given this complex regulatory regime, a company must proceed with even greater caution when confronted with allegations of misconduct by a whistle-blower. Any credible tips describing potential illegal acts should be investigated promptly and thoroughly, with the assistance of outside counsel if necessary. If the company determines that the allegations have merit, it should take swift remedial action and consider self-reporting its findings to interested regulators. By no means should a company take any action that might be perceived as retaliation against the whistle-blower, as this behaviour could potentially expose the company to substantial civil or criminal liability.

III ENFORCEMENT

i Corporate liability

Because of the way in which the doctrines of corporate criminal and civil liability have evolved in the United States, prosecutors and regulatory agencies have considerable leverage over business organisations. Generally speaking, companies are liable for the actions of employees if the employees' actions are 'within the scope of their employment' and taken at least in part with 'the motive of benefiting the company'. These two qualifiers have been interpreted to place little meaningful limit on a company's potential exposure. For example, corporations have been held liable where the wrongdoing was perpetrated in violation of the company's explicit instructions. Moreover, it is irrelevant where the culpable employee falls on the corporate ladder; legally speaking, the conduct of a post room clerk is imputed to the company to the same extent as the company's CEO. Further, under the collective liability or collective scienter doctrine, a company may be liable – particularly in the civil context – if its employees, when considered in the aggregate, possessed sufficient knowledge and intent to violate the law – even if no single employee had the requisite mental state or corrupt intent. Some courts have limited the application of this doctrine in recent years. Notably, in February 2020, a US court overturned a jury conviction of a former Alstom SA executive on foreign bribery charges after finding that prosecutors had failed to prove that the executive was an 'agent' of the company's US subsidiary. Nevertheless, the doctrine can still be an attractive option for a regulator bringing, for example, a complex securities fraud case against a huge, decentralised company.

ii Penalties

Regulators have a vast arsenal of potential sanctions to impose on corporations convicted of a statutory violation. Among other potential sanctions, various regulatory statutes authorise criminal or civil fines (or both), restitution, disgorgement, criminal forfeiture, probation, and community service.[5] Further, as addressed above, the collateral consequences of a conviction can be just as damaging, potentially resulting in suspension or debarment from eligibility for government contracts, reputational harm, and a drop in the company stock price.

Corporate investigations often involve multiple regulators with overlapping jurisdiction, raising the possibility that the corporation will face substantial penalties imposed by numerous authorities for the same underlying misconduct. Responding to concerns about 'unfair duplicative penalties', informally referred to as 'piling on', in May 2018, the

5 In 2017, the SEC's ability to obtain disgorgement suffered a setback when the US Supreme Court held that a five-year statute of limitations applies to the imposition of disgorgement in SEC proceedings. In June 2020, the US Supreme Court upheld the SEC's authority to seek and obtain disgorgement for a securities law violation in civil enforcement actions but curtailed its scope so as to not exceed a wrongdoer's net profits or its awards to victims. In April 2021, the US Supreme Court held that the US Federal Trade Commission lacked statutory authority under Section 13(b) of the Federal Trade Commission Act to seek equitable monetary relief such as restitution or disgorgement.

DOJ announced a new policy encouraging coordination by the DOJ with other US and international law enforcement agencies conducting investigations of the same conduct to avoid 'disproportionate enforcement of laws by multiple authorities'.

Since the 2007–2008 financial crisis, most corporate criminal investigations have ended with the two sides entering into a DPA or NPA, although there has been a marked increase in corporate guilty pleas – often by a company's subsidiary and alongside a DPA or NPA – to resolve DOJ actions in more recent years. In an October 2021 speech, Deputy Attorney General Lisa Monaco announced that the DOJ would be reconsidering the availability of DPAs and NPAs to 'recidivist' companies. Moreover, the DOJ has increased scrutiny of potential breaches of the terms of DPAs or NPAs. For example, in March 2022, Deutsche Bank announced that it was deemed in breach of a 2021 DPA that resolved charges under the FCPA by failing to report a whistle-blower complaint alleging that it overstated environmental, social and governance (ESG) initiatives.

Previously, DPAs and NPAs were the exclusive domain of the DOJ, but the SEC has also recently adopted their use. The typical DPA provides that the agency will file formal charges, which will be stayed for a set period (usually between one and three years), after which the charges will be dismissed if the company has complied with certain obligations. These obligations typically require the company to cooperate fully with the agency's investigation and undertake remedial action. The company also normally agrees to a monetary penalty. NPAs require similar types of performance on the part of the company but do not involve the formal filing of charges with a court. In both types of agreement, because the company has admitted to the conduct at issue (which is typically set out in an agreed 'statement of facts' attached to the agreement), if a company is indicted upon breach of the agreement, conviction is almost certain.

iii Compliance programmes

Not only do DPAs typically require the implementation or improvement of compliance programmes, the existence of an effective compliance programme is also a factor that the DOJ and other regulators take into account in making their charging decisions and may lead to a reduced sentence, in some cases up to 95 per cent, under the USSC Organizational Guidelines.

In June 2020, the DOJ updated its Evaluation of Corporate Compliance Programs guidance, which 'is meant to assist prosecutors in making informed decisions as to whether, and to what extent, the corporation's compliance program was effective at the time of the offence, and is effective at the time of a charging decision or resolution, for purposes of determining the appropriate resolution'.[6] Although the evaluation of a corporate compliance programme is 'individualized', the DOJ identified three 'fundamental questions': Is the corporation's compliance programme well designed? Is the programme being applied earnestly and in good faith? In other words, is the programme adequately resourced and empowered to function effectively? Does the corporation's compliance programme work in practice?

In recent years, there has been a trend towards self-monitoring and reporting rather than the imposition of an independent monitor as a standard feature of a settlement agreement. In October 2021, Deputy Attorney General Lisa Monaco made clear that the imposition of a monitor is neither disfavoured nor exceptional: 'In recent years, some have suggested that monitors would be the exception and not the rule. To the extent that prior Justice

6 Dep't of Justice, Evaluation of Corporate Compliance Programs, https://www.justice.gov/criminal-fraud/page/file/937501/download.

Department guidance suggested that monitorships are disfavored or are the exception, I am rescinding that guidance.'[7] The DOJ's March 2023 guidelines reiterated that monitors are neither disfavoured nor favoured.

iv Prosecution of individuals

The question often arises during the course of a regulatory investigation of whether it is appropriate for a corporation to enter into a joint defence agreement with employees who are also under investigation. The DOJ's official position is that the government may not consider an arrangement of this kind in determining whether a corporation has cooperated with an investigation. However, as with the issue of waiver of privilege, the DOJ has qualified this position by noting that to the extent that such an agreement limits the company's ability to disclose relevant facts, it may adversely affect the ability of the company to obtain credit for cooperation. Moreover, because various agency policies and the USSC Organizational Guidelines encourage corporations to cooperate fully in the prosecution of employees accused of wrongdoing, in many situations the risk of a conflict of interest between the company and its employees may preclude the possibility of entering into a joint defence agreement.

Conflicts of interest are likely to arise given the DOJ's recently restated interest in individual prosecutions. In October 2015, the DOJ issued the 'Yates Memo', which calls for more focus by prosecutors on individual defendants, states that credit for cooperation by companies will henceforth be contingent on disclosing all relevant facts regarding individuals in the misconduct, and prohibits the resolution of any corporate action without a 'clear plan to resolve related individual actions'. In 2021, the DOJ again announced that individual accountability is a priority and that it was 'restoring prior guidance making clear that to be eligible for any cooperation credit, companies must provide the department with all non-privileged information about individuals involved in or responsible for the misconduct at issue'.[8]

IV INTERNATIONAL

i Extraterritorial jurisdiction

US federal agencies take an expansive view of their statutory jurisdiction and aggressively pursue foreign companies for violations of domestic law. Over the past decade, there has been an increase in the enforcement of US laws against corporate conduct that takes place largely outside the United States.

In the FCPA context, a significant number of enforcement actions – including many of the higher-value settlements – targeted foreign companies and individuals. While the FCPA applied only to issuers of stock on a US exchange when originally enacted, the statute now proscribes corrupt payments by any person, natural or otherwise, where relevant acts occur

7 Dep't of Justice, Remarks as Prepared for Delivery: Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime (28 October 2021), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute.

8 Dep't of Justice, Remarks as Prepared for Delivery: Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime (28 October 2021), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute.

'in the territory of the United States'. Regulators have at times pushed the boundaries of this language, asserting jurisdiction, for example, based on the fact that a transaction at issue was cleared through a US bank, even though no employee of the target entity took any action while physically present in the United States. Moreover, even where that minimum territorial connection is not met, the government has not hesitated to stretch traditional legal doctrines to assert jurisdiction; for example, by charging a foreign subsidiary with 'aiding and abetting' a violation by its US parent or for making an improper payment as the agent of a US company.

In 2018, a US appeals court rejected the DOJ's attempt to employ theories of conspiracy or complicity to prosecute a foreign national, Lawrence Hoskins, who neither lived nor engaged in any alleged conduct in the United States, for violating the FCPA.[9] In November 2019, in a closely watched trial, a jury convicted Hoskins of violating the 'substantive' FCPA. The judge overturned the FCPA convictions in February 2020, finding that Hoskins was not an agent of a US entity and thus lacked sufficient territorial connection to be prosecuted under the FCPA.[10] While a small number of court decisions, such as *Hoskins*, have pushed back on the regulators' most aggressive attempts to extend jurisdiction, the significant expense and risk associated with litigating an FCPA action has resulted in few FCPA cases reaching the courtroom and therefore few legal or practical constraints on the extraterritorial reach of the FCPA. The ruling in *Hoskins*, however, was incorporated into the June 2020 DOJ-SEC release of the second edition of the FCPA Resource Guide. The impact of this change remains to be seen.

ii International cooperation

Because a successful international prosecution depends on effective cross-border cooperation and access to witnesses and evidence located abroad, the government frequently enlists the assistance of foreign governments and agencies in investigations. The DOJ, for instance, has many formal and informal relationships with foreign agencies to facilitate cross-border enforcement. The 10 largest FCPA settlements with the United States were the result of cooperative efforts between US and foreign authorities.[11] For example, in January 2020, Airbus SE, a France-based aerospace company, agreed to pay approximately US$4 billion in combined penalties – a record-high penalty – to the United States, France and the United Kingdom for violations of the FCPA.

iii Local law considerations

Not all countries, however, have been as amenable to the expanding extraterritoriality of US law enforcement and enhanced cooperation among foreign authorities. Certain countries – including Mexico, Canada, some members of the European Union, and, in January 2021,

9 902 F.3d 69 (2nd Circuit 2018).

10 The judge sustained Hoskins' money laundering convictions. So, while the judge narrowed prosecutors' ability to pursue foreign nationals under the FCPA, money laundering charges served as an alternative avenue for US prosecution of extraterritorial corruption and bribery cases.

11 These are: *Odebrecht SA* (US$3.56 billion), *Goldman Sachs* (US$2.62 billion), *Airbus SE* (US$2.09 billion), *Petroleo Brasileiro SA* (US$1.79 billion), *Telefonaktiebolaget LM Ericsson* (US$1.06 billion), *Telia Company AB* (US$965.6 million), *Mobile Telesystems Pjsc* (US$850 million), *Siemens Aktiengesellschaft* (US$800 million), *VimpelCom Ltd* (US$795.3 million), and *Alstom SA* (US$772.3 million).

China – have enacted 'blocking statutes' that prohibit, or place limits on, the production of information for use in legal proceedings in a foreign country. This puts companies operating in the international arena in a difficult position, as compliance with one law may necessarily mean running afoul of another. For example, in March 2019, a US court imposed a US$50,000 per day sanction on Chinese banks for failing to comply with DOJ subpoenas, despite claims by the banks that compliance with the subpoenas would violate Chinese law.[12]

A multinational company under investigation by multiple regulators in other countries also faces innumerable complexities in dealing with varying and potentially inconsistent laws relating to the discovery of evidence and examination of witnesses. For example, data privacy laws in one country may prohibit the company from complying with a subpoena from a regulator in another, and the rights to counsel and against self-incrimination may be limited or absent under other regimes. This issue came to a head in 2017 in the form of a showdown between Microsoft Corp and the DOJ. The latter sought customer emails stored on a Microsoft server in Dublin pursuant to a warrant, and the former sought to quash the warrant on the basis, among others, that Microsoft would run afoul of foreign data privacy rules by complying. The case reached the US Supreme Court before it was dismissed in light of new legislation passed by Congress affecting the extraterritorial reach of US law enforcement requests, but the issue is likely to arise again in the near future.

V YEAR IN REVIEW

Over the course of 2022, US courts largely returned to in-person proceedings and worked to address the backlog of cases from the covid-19 pandemic. Although the overall number of criminal cases still lags behind pre-pandemic rates, the number of corporate criminal prosecutions continued to increase, and the DOJ reiterated its focus on corporate and white-collar enforcement in 2022.

On 2 March 2023, DOJ Deputy Attorney General Lisa Monaco announced new and amended DOJ guidance for prosecuting corporate crime.[13] The new guidelines expanded and clarified the Department's positions with respect to four key areas of criminal corporate enforcement: (1) voluntary self-disclosure; (2) compliance-related compensation incentives; (3) employees' use of messaging platforms and personal devices; and (4) corporate monitorships. These new guidelines emphasize proactive corporate response to misconduct and corporate cooperation with DOJ investigations. For example, under the guidelines, the DOJ will not seek a guilty plea where a company has 'voluntarily self-disclosed, cooperated and remediated the misconduct' absent aggravating factors. The guidelines further instruct prosecutors to consider the effectiveness of companies' compliance programmes, including associated compensation incentives, and oversight of employees' use of various communications and messaging platforms.

During the public remarks on 2 March 2023, Monaco also reiterated the DOJ's focus on 'holding individuals accountable'. Relatedly, the new DOJ guidelines incentivise companies to create compliance programmes that proactively monitor and, when needed, discipline

12 *In re Sealed Case*, 932 F.3d 915 (D.C. Cir. 2019).

13 Dep't of Justice, Remarks as Prepared for Delivery: Deputy Attorney General Lisa Monaco Delivers Remarks at American Bar Association National Institute on White Collar Crime (2 March 2023), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-remarks-american-bar-association-national.

individual employees through, for example, the use of internally publicised disciplinary actions or clawback programmes that allow the recoupment of compensation in the event of employee misconduct.

This focus on individuals is also visible in the DOJ's prosecutions over 2022. The Fraud Section of the Criminal Division of DOJ, responsible for investigating and prosecuting complex white-collar crimes, reported a significant uptick in individual trial convictions that outpaced even pre-pandemic numbers – 56 in 2022 versus 37 in 2019. Similarly, more than two-thirds of the US Security and Exchange Commission's (SEC) enforcement actions in fiscal year 2022 included at least one individual defendant or respondent.

This shift in focus towards individual employees may be seen on the foreign bribery front. In March 2023, former investment banker at the New York-headquartered global financial institution Goldman Sachs Group Inc was sentenced to 10 years' imprisonment after a jury in April 2022 found him guilty of conspiring to violate the Foreign Corrupt Practices Act (FCPA) as part of the 1Malaysia Development Berhad (1MDB) scandal. This followed an October 2020 US$2.9 billion deferred prosecution agreement (DPA) by Goldman Sachs and an accompanying guilty plea by its Malaysian subsidiary to conspiring to violate the FCPA as part of a coordinated resolution with authorities in the United States, the United Kingdom, Singapore and elsewhere.

Cryptocurrency schemes were another important enforcement trend. In fiscal year 2022, the DOJ Fraud Section's Market Integrity and Major Frauds Unit, which is responsible for cryptocurrency fraud cases, charged eight defendants in connection with cryptocurrency schemes that caused over US$2 billion in financial losses. Many of these cases involved individual defendants. For example, in December 2022, the US Attorney's Office for the Southern District of New York first charged Sam Bankman-Fried, the founder and former chief executive officer of FTX, a cryptocurrency exchange, with multiple charges related to the alleged misappropriation of customer funds deposited with FTX. Prosecutors brought additional charges in February 2023 over the bribery of a foreign official, bringing the total count to 13 charges in the high-profile case. The SEC has also focused heavily on the crypto asset securities space, adding 20 additional positions to its Crypto Assets and Cyber Unit in May 2022.

The DOJ also expressed interest in national security-related corporate enforcement actions this year. In October 2022, Lafarge SA and its Syrian subsidiary pleaded guilty to a criminal charge of conspiring to provide material resources for terrorism. Notably, this is the first instance in which the DOJ has brought a material support to terrorism charge against a corporate entity. The DOJ was also involved in the US government's response to the Russian invasion of Ukraine. In early 2022, the DOJ launched Task Force KleptoCapture, an inter-agency task force dedicated to enforcing sweeping sanctions, export restrictions and economic countermeasures against Russia. In February 2023, on the one-year anniversary of Russia's invasion of Ukraine, the Task Force KleptoCapture unsealed charges against a Russian national for allegedly illegally exporting US counterintelligence equipment to benefit the Russian government. The task force also coordinated the civil forfeiture of over US$75 million worth of luxury properties owned by Russian oligarch Viktor Vekselberg, which allegedly were the proceeds of sanctions violations and involved in international money laundering transactions.

VI CONCLUSIONS AND OUTLOOK

For the past two decades, corporate and civil liability in the United States has moved inexorably towards more regulation and enforcement, harsher penalties and expanding jurisdiction. This trend is likely to continue. The Biden administration has continued to reiterate its focus on corporate crimes and to ramp up corporate enforcement actions.

Traditional areas of enforcement, such as anti-corruption, financial fraud and healthcare fraud, are likely to remain the mainstays of regulatory action. Anti-corruption enforcement, in particular, may see increased scrutiny. In June 2021, the Biden administration published a National Security Memorandum identifying the fight against corruption as a core national security interest.[14] The administration's focus on sanctions targeting Russian oligarchs as a result of the 2022 Russia–Ukraine war has only sharpened this concern. The United States can also expect increased focus and resources on combating other national security threats from foreign countries, most notably China and Russia, through foreign corporate actors. A particularly important tool in this area is economic sanctions, as illustrated in the unprecedented, international and sweeping imposition of such sanctions against Russia and Russian oligarchs in response to the Russia–Ukraine war. In March 2022, the DOJ formed 'Task Force KleptoCapture' to enforce these sanctions and other economic countermeasures against corrupt Russian oligarchs.

Other areas can be expected to emerge over the next few years with increased focus. Most prominent among these is cybersecurity – encompassing issues relating to data security, privacy, hacking, cryptocurrencies and related technologies, and trade secrets – all of which present significant regulatory challenges. For example, the DOJ's Cyber-Digital Task Force, established in 2018, has called for increased inter-agency and international cooperation in enforcing virtual currency regulations. In 2021, the DOJ announced a civil cyber-fraud initiative. The SEC also formed a 'cyber unit' that has pursued a number of enforcement actions targeting the unregistered offering of cryptocurrencies, misconduct relating to abuse of financial markets through hacking, and the failure of public companies to make timely disclosures of data breaches. Similarly, in April 2021, the DOJ formed a task force to combat a proliferation of ransomware cyberattacks.

What remains as clear as ever is the necessity of maintaining a robust compliance structure to promptly detect potential wrongdoing. While total prevention is unlikely, given the innumerable ways in which a company can run afoul of the law and the sheer complexity of the various regulatory regimes, prompt detection, thorough investigation and meaningful remedial action will limit the company's exposure and maximise its chance of avoiding criminal or civil charges, or – failing that – negotiating a favourable settlement with government authorities.

14 Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest (3 June 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/03/memorandum-on-establishing-the-fight-against-corruption-as-a-core-united-states-national-security-interest/.