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FCPA ENFORCEMENT TRENDS: INCREASED RISK PROFILE AND CONSIDERATIONS FOR CORPORATE GATEKEEPERS

In this article, the authors discuss and document SEC/DOJ enforcement trends pertinent to the FCPA space, including renewed focus on the role of corporate "gatekeepers." Next, they consider recent actions involving the alleged intentional circumvention of internal controls. Finally, they discuss practice tips and takeaways in light of these developments.

By Anita Bandy and Christopher Herlihy *

While the U.S. Department of Justice and the U.S. Securities and Exchange Commission have made their intention to pursue more aggressive prosecutions of corporate wrongdoing no secret, their actions to date reflect that individual corporate "gatekeepers" such as compliance officers and in-house counsel may be subject to additional risk management responsibilities and come under more scrutiny in connection with government actions, particularly in the area of the Foreign Corrupt Practices Act ("FCPA"). In the context of this increased risk profile, public companies and their in-house gatekeepers should redouble their efforts to implement an effective system of internal controls that expressly anticipates and safeguards the company from controls lapses that could more easily be exploited by the actions of an employee, agent, or executive who seeks to circumvent them.

SEC / DOJ ENFORCEMENT TRENDS

Although FCPA enforcement activity was markedly down in 2021 and has continued to lag somewhat during the first half of 2022, there is reason to believe that these numbers will steadily start to rebound. Recently, the agencies announced FCPA-related resolutions in April,[1]

[1] Press Release 2022-65, SEC, *SEC Charges Stericycle with Bribery Schemes in Latin America* (Apr. 20, 2022), *available at* https://www.sec.gov/news/press-release/2022-65; Press Release 22-401, U.S. Dep't of Justice, *Stericycle Agrees to Pay Over $84 Million in Coordinated Foreign Bribery Resolution* (Apr. 20, 2022), *available at* https://www.justice.gov/opa/pr/stericycle-agrees-pay-over-84-million-coordinated-foreign-bribery-resolution.

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May,[2] and June;[3] moreover, in March, DOJ published the first declination letter under its FCPA self-disclosure regime since August 2020.[4]

More broadly, SEC and DOJ have signaled a more aggressive enforcement regime for corporate wrongdoing. To cite just a few examples, SEC Enforcement Director Gurbir Grewal suggested shortly after his 2021 appointment that the Commission would be less inclined to agree to "neither admit nor deny" resolutions, particularly in cases where a party has a compliance or recidivist history with the SEC.[5] In that speech, Grewal also noted the SEC's emphasis on holding corporate gatekeepers accountable, and reiterated the importance of forward-looking undertakings as a "prophylactic too[l]" at the SEC's disposal.

DOJ officials have revitalized the role of independent compliance monitors in DOJ resolutions, with Deputy Attorney General ("DAG") Lisa Monaco expressly stating that there is no default presumption against the imposition of a monitor in connection with a negotiated resolution.[6] Notably, DOJ FCPA resolutions earlier in the tenure of this administration featured the imposition of corporate compliance monitors,[7] but the most recent resolution did not include a monitorship based on, among other factors, the company redesigning its entire anti-corruption compliance program and hiring a new compliance officer.[8] Both SEC and DOJ have also articulated a more stringent standard for companies seeking cooperation credit. For example, DAG Monaco announced a return to the "Yates memorandum" approach requiring that companies seeking cooperation credit provide the DOJ with information regarding all individuals involved in the misconduct at issue, in contrast to the policy under the Trump administration that required information only as to individuals "substantially involved" therein.[9] And U.S. FCPA enforcement continues to operate amidst the backdrop of the Biden Administration's broader anti-corruption initiative, which — among other things — counts enhanced FCPA enforcement and greater domestic and international collaboration among its objectives.[10]

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[2] Press Release 22-54, DOJ, *Glencore Entered Guilty Pleas to Foreign Bribery and Market Manipulation Schemes* (May 24, 2022), *available at* https://www.justice.gov/opa/pr/glencore-entered-guilty-pleas-foreign-bribery-and-market-manipulation-schemes.

[3] Press Release 2022-98, SEC, *SEC Charges Global Steel Pipe Manufacturer with Violating Foreign Corrupt Practices Act* (June 2, 2022), *available at* https://www.sec.gov/news/press-release/2022-98.

[4] Declination Letter, DOJ, *In re Jardine Lloyd Thompson Grp. Holdings Ltd.* (Mar. 22, 2022), *available at* https://www.justice.gov/criminal-fraud/file/1486266/download.

[5] Gurbir S. Grewal, Speech, SEC, *Remarks at SEC Speaks 2021* (Oct. 13, 2021), *available at* https://www.sec.gov/news/speech/grewal-sec-speaks-101321.

[6] Lisa O. Monaco, Speech, DOJ, *Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th Nat'l Institute on White Collar Crime* (Oct. 28, 2021), *available at*

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https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute.

[7] Stericycle Inc. Press Releases, *supra* note 1; Glencore Int'l AG Press Release, *supra* note 2.

[8] Press Release 22-978, *DOJ, GOL Linhas Aereas Inteligentes S.A. Will Pay Over $41 Million in Resolution of Foreign Bribery Investigations in the United States and Brazil* (Sept. 15, 2022), *available at* https://www.justice.gov/opa/pr/gol-linhas-reas-inteligentes-sa-will-pay-over-41-million-resolution-foreign-bribery.

[9] Lisa O. Monaco, Oct. 28, 2021 Speech, *supra* note 6. In a November 2021 speech, SEC Chair Gary Gensler referenced that this and other changes announced by DAG Monaco were "broadly consistent with [his] view on how to handle corporate offenders." Gary Gensler, Speech, SEC, *Prepared Remarks at the Securities Enforcement Forum* (Nov. 4, 2021), *available at* https://www.sec.gov/news/ speech/gensler-securities-enforcement-forum-20211104.

[10] *United States Strategy on Countering Corruption* (Dec. 2021), *available at* https://www.whitehouse.gov/wp-content/

RENEWED FOCUS ON "GATEKEEPERS"

Among these developing trends, DOJ has emphasized the significant role of corporate gatekeepers — such as compliance officers and other officers — in implementing strong controls over financial reporting and maintaining a robust compliance culture. In a pair of March 2022 speeches, Assistant Attorney General ("AAG") Kenneth Polite, Jr. emphasized the significance of an entity's compliance program in connection with DOJ investigations and resolutions, and in particular announced a new departmental policy that elevates the role of compliance officers in that context.[11] AAG Polite made clear not only that compliance programs must be properly resourced and supported, but also that compliance officers should be individually featured within the corporate structure (measured, for example, by whether compliance officers "have adequate access to engagement with the business, management, and the board of directors").[12] Moreover, AAG Polite expressed DOJ's interest in hearing directly from compliance officers during the investigative process, and emphasized the rigor with which DOJ will review a company's compliance framework and any improvements thereto.

While these actions may very well empower CCOs and other gatekeepers with additional resources and responsibilities, they also increase their risk profile and open them up to greater individual scrutiny and regulatory risk in connection with SEC and DOJ corporate resolutions. Specifically, in remarks earlier this year, AAG Polite announced that for all DOJ corporate resolutions, including guilty pleas, deferred prosecution agreements, and non-prosecution agreements, he had "asked [his] team to consider requiring both the Chief Executive Officer and the Chief Compliance Officer to certify at the end of the term of the agreement that the company's compliance program is reasonably designed and implemented to detect and prevent violations of the law . . . and is functioning effectively."[13] AAG Polite further noted that DOJ would require "additional certification language" as part of certain resolutions, and that for companies required to annually self-report as to the state of their compliance programs, DOJ would "consider requiring the CEO and the CCO to certify that all compliance reports submitted during the term of the resolution are true, accurate, and complete."[14]

The settlement documents in the DOJ's recent resolution with a commodity trading and mining company include CEO and CCO certification requirements. The company pled guilty to one count of conspiracy to commit violations of the FCPA, and the plea agreement included the imposition of a three-year compliance monitor.[15] The Plea Agreement requires the company's CEO and Head of Compliance to certify to DOJ at the end of the monitorship period that the company has implemented a compliance program that both satisfies the minimum requirements outlined in the plea and is "reasonably designed to detect and prevent" FCPA violations.[16] And this approach does not appear to be an outlier. Another DOJ official in the Department's Corporate Enforcement, Compliance & Policy Unit recently stated that CCO certifications are likely to be part of every resolution moving forward.[17]

DOJ officials have consistently emphasized that the certification policy is not punitive, but rather aims to empower compliance officers. For example, AAG Polite has stated that these steps are meant to "ensur[e] that Chief Compliance Officers receive all relevant compliance-related information and can voice any concerns they may have prior to certification," and are "intended to empower our compliance professionals to have the data, access, and voice within the organization to ensure you, and us, that your company has an ethical-

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uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf.

[11] Kenneth A. Polite, Jr., Speech, DOJ, *Assistant Attorney General Kenneth A. Polite Jr. Delivers Remarks at ACAMS 2022 Hollywood Conference* (Mar. 22, 2022), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-acams-2022-hollywood; Kenneth A. Polite, Jr., Speech, DOJ, *Assistant Attorney General Kenneth A. Polite Jr. Delivers Remarks at NYU Law's Program on Corporate Compliance and Enforcement (PCCE*) (Mar. 25, 2022), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-nyu-law-s-program-corporate.

[12] Kenneth A. Polite, Jr., Mar. 25, 2022 Speech, *supra* note 11.

[13] Kenneth A. Polite, Jr., Mar. 22, 2022 Speech, *supra* note 11.

[14] *Id.*

[15] Plea Agreement, *United States v. Glencore Int'l A.G.*, Criminal No. 22-cr-297 (S.D.N.Y. May 24, 2022), *available at* https://www.justice.gov/criminal/file/1508266/download.

[16] *Id.* at 9 & H-1.

[17] Al Barbarino, *DOJ Official Confirms CCO Certs. Are New Settlement Staple*, Law360 (June 22, 2022), *available at* https://www.law360.com/cybersecurity-privacy/articles/1504734/doj-official-confirms-cco-certs-are-new-settlement-staple.

and compliance-focused environment."[18] Such messaging runs parallel to AAG Polite's broader statements regarding the role of corporate compliance programs in DOJ's enforcement approach, in which he has frequently drawn upon his past experience as a CCO and expressed an understanding of the challenges they face.

Despite this framing, the new certification policy potentially subjects CCOs to a significant level of individual scrutiny, especially given DOJ's indication that such certifications will be a staple of enforcement resolutions going forward. The policy raises a host of questions regarding how these certifications will be interpreted, including language that the company has implemented a compliance program reasonably designed to detect and prevent violations of the FCPA. And although DOJ officials have thus far downplayed the potential for associated individual liability, similar questions nevertheless remain as to how the certifications might be enforced against certifying compliance officers should a company be deemed to have fallen short of its obligations. These risks appear even more formidable, given other statements made by DOJ officials who have promised harsher treatment of companies that fail to abide by their negotiated resolutions.[19]

For its part, the SEC has established its own emphasis on policing the conduct of "gatekeepers." The SEC has in the past implemented similar types of gatekeeper-certification requirements in response to alleged misconduct involving audit firms.[20] And more generally, it is notable that the two SEC-only FCPA actions announced this year have both featured two-year compliance self-reporting undertakings, adherence to which must be certified by the company.[21]

Similarly, in October 2021, the SEC imposed a number of conditions on an investment bank, including a requirement that the bank submit annual certifications signed by its CEO and CCO, in connection with the SEC's grant of a Section 9(c) waiver under the Investment Company Act of 1940. The waiver arose from a multi-jurisdictional settlement with the SEC and DOJ involving FCPA and anti-fraud violations in the SEC action and a guilty plea by the bank's U.K.-based subsidiary in the DOJ action; the DOJ action triggered a Section 9(a) disqualification for the subsidiary and its affiliates from serving as an investment adviser.[22] The conditional waiver granted by the SEC required the bank's CCO to submit a series of annual certifications attesting to, among other things, the bank's adherence to its deferred prosecution agreement with DOJ and the subsidiary's adherence to the guilty plea.[23] The broad nature of the certification caused SEC Commissioner Hester Peirce to issue a statement in which she suggested that the "troubling" terms "increase[d] CCO anxiety over heightened personal liability" and noted broader concerns regarding "undue pressures on CCOs."[24]

The potential for SEC to more closely evaluate the conduct of individual "gatekeepers" extends to attorneys as well. In March 2022, former SEC Commissioner Allison Herren Lee urged the Commission to "fulfill[] Congress's mandate" under the Sarbanes-Oxley Act "to adopt minimum standards of professional conduct for attorneys appearing and practicing before the Commission in the representation of issuers."[25] Former

[18] Kenneth A. Polite, Jr., Mar. 25, 2022 Speech, *supra* note 11.

[19] *See, e.g.*, Lisa O. Monaco, Oct. 28, 2021 Speech, *supra* note 6.

[20] For example, in September 2019, the SEC announced settled charges with an audit firm and one of the company's former partners, alleging improper professional conduct and violations of the auditor independence rules. As part of the settlement, the company agreed to undertake a series of reports, including certifications by its Regulatory Risk and Quality Control Leader and Partner Responsible for Independence as to the sufficiency of its updated policies and procedures. *In re PricewaterhouseCoopers LLP*, Rel. No. 87052 (2019).

[21] *In re KT Corp.*, Rel. No. 94279 (2022); *In re Tenaris S.A.*, Rel. No. 95030 (2022).

[22] Press Release 2021-213, SEC, *Credit Suisse to Pay Nearly $475 Million to U.S. and U.K. Authorities to Resolve Charges in Connection with Mozambican Bond Offerings* (Oct. 19, 2021), *available at* https://www.sec.gov/news/press-release/2021-213; Press Release 21-1024, U.S. Dep't of Justice, *Credit Suisse Resolves Fraudulent Mozambique Loan Case in $547 Million Coordinated Global Resolution* (Oct. 19, 2021), *available at* https://www.justice.gov/opa/pr/credit-suisse-resolves-fraudulent-mozambique-loan-case-547-million-coordinated-global.

[23] *Credit Suisse Asset Mgmt., LLC, et al.; Notice of Application and Temporary Order*, 86 Fed. Reg. 58965 (Oct. 25, 2021), *available at* https://www.govinfo.gov/content/pkg/FR-2021-10-25/pdf/2021-23166.pdf.

[24] Hester M. Peirce, Statement, SEC, *In the Matter of Credit Suisse* (Oct. 20, 2021), *available at* https://www.sec.gov/news/public-statement/peirce-statement-credit-suisse-102021.

[25] Allison Herren Lee, Speech, SEC, *Send Lawyers, Guns & Money: (Over-) Zealous Representation by Corporate Lawyers, Remarks at PLI's Corporate Governance — A Master Class*

Commissioner Lee highlighted the unique gatekeeping role that securities lawyers play (particularly with respect to corporate disclosures), and emphasized the harm resulting from their failures in that duty, including "insulating" individual corporate actors responsible for misconduct and thus "hams[tringing]" the Commission's ability to charge individuals.[26] In the course of her discussion, former Commissioner Lee noted that in the context of attorney discipline, SEC has generally limited its use of Rule 102(e) of the Commission's Rules of Practice "to impose follow-on bars after attorneys have been found to violate substantive provisions of the securities laws," despite the broader authority provided by the Rule to suspend or bar attorneys whose behavior falls below "generally recognized norms of professional conduct."[27] In addition, in suggesting potential standards for attorney conduct, former Commissioner Lee drew in part from standards applicable to auditors (for example, instituting a firm-level system of quality control). Enforcement Director Grewal has also more broadly recognized the role of attorneys as gatekeepers, and he noted in one of his first public speeches that "gatekeepers will remain a significant focus for the Enforcement Division."[28] More recently, Enforcement Director Grewal addressed the conduct of defense lawyers, warning against tactics designed to delay or obfuscate investigations.[29]

Former Commissioner Lee's speech signals an increased focus by the SEC on lawyer conduct, including as to actions that are not necessarily fraudulent or intentional. The SEC, in fact, recently brought charges against a New Jersey software company and several individual executives in connection with allegations that the company engaged in improper accounting and misrepresented its financial statements.[30] Notably, in addition to executives charged with intentional fraud, the SEC brought settled charges against the company's former General Counsel in connection with allegations that he misled the company's outside auditors.[31] In a rare step, the SEC's order imposed an 18-month suspension on the former General Counsel from appearing or practicing before the Commission pursuant to Rule of Practice 102(e)(3), despite the fact that the attorney was charged neither with fraudulent nor intentional conduct. The SEC's action in the context of former Commissioner Lee's broader call for greater attorney accountability signals that the Division of Enforcement will continue to focus on the conduct of in-house attorneys in the context of financial accounting and disclosures, as well as internal controls over financial reporting investigations. It also suggests that the SEC may seek to obtain relief under its Rule 102(e) authority against in-house lawyers who have compliance functions for conduct that is negligence-based or otherwise falls below the standard of intentional culpability.

Although these developments have yet to take full shape — particularly in the case of DOJ's compliance certification policy — it is clear that increasing gatekeeper accountability is front-of-mind for both DOJ and SEC. Given this increased risk profile, corporate in-house counsel and CCOs with FCPA compliance responsibilities should be vigilant in ensuring that the compliance programs they oversee, and internal controls they help design and enforce, are reasonably designed to guard against FCPA violations from all angles.

INTENTIONAL CIRCUMVENTION OF INTERNAL CONTROLS

In so doing, gatekeepers should be particularly mindful of the need to identify and remediate potential gaps or weaknesses in the company's controls that could be exploited by individual employees or executives. In recent years, SEC and DOJ have continued to pursue controls charges both against corporations (alleging deficiencies in internal controls) and individual executives or employees (alleging intentional circumvention of the entity's controls) in connection with alleged bribery or corruption schemes. Arguably, there is tension present in such an enforcement theory: either the entity's controls were insufficiently rigorous such that they could be exploited by individual conduct, or an individual's conduct was so intentional that it would have evaded even a robust controls system. However — as recent cases demonstrate — the agencies

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2022 (Mar. 4, 2022), *available at* https://www.sec.gov/news/speech/lee-remarks-pli-corporate-governance-030422.

[26] *Id.*

[27] *Id.*

[28] Gurbir S. Grewal, Oct. 13, 2021 Speech, *supra* note 5.

[29] Gurbir S. Grewal, Speech, SEC, *Remarks at Securities Enforcement Forum West 2022* (May 12, 2022), *available at* https://www.sec.gov/news/speech/grewal-remarks-securities-enforcement-forum-west-051222.

[30] Press Release 2022-101, SEC, *SEC Charges New Jersey Software Company & Senior Employees with Accounting-Related Misconduct* (June 7, 2022), *available at* https://www.sec.gov/news/press-release/2022-101; *In re Synchronoss Techs., Inc.*, Rel. No. 95049 (2022).

[31] *In re Ronald Prague, Esq.*, Rel. No. 95055 (2022).

appear more likely to pursue such "dual" enforcement in the face of this theoretical tension where they assert that the company's control deficiencies helped to facilitate the deliberate circumvention by its executives, employees, or agents, or allowed the circumvention to go undetected.

Section 13(b)(2)(B) of the Exchange Act requires issuers to "devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances" that the execution of transactions and access to assets occurs "in accordance with management's general or specific authorization," and further that the company's transactions and assets are properly recorded.[32] The provisions do not specify a particular set of controls that a company or institution must implement, but instead place the onus on an entity to design and implement a structure that takes into account the nature of, and specific risks associated with, its business and further "is appropriate to [its] particular needs and circumstances."[33] On the other end of the spectrum, Section 13(b)(5) of the Exchange Act prohibits an individual from "knowingly circumvent[ing] or knowingly fail[ing] to implement a system of internal accounting controls or knowingly falsify[ing] any book, record, or account described" in Section 13(b)(2).[34]

Despite the tension between these provisions, SEC and DOJ have advanced both theories in recent FCPA-related actions. One recent example arose in October 2020, when the SEC and DOJ announced a global resolution against an investment bank in connection with allegations that former senior bankers engaged with a third-party intermediary to pay bribes to foreign officials in Malaysia and Abu Dhabi. The charging documents against the bank acknowledged intentional steps that were purportedly taken by the executives to circumvent the bank's controls functions (for example, falsely stating during the transaction review process that the third-party intermediary was not involved in the relevant deals).[35] Relatedly, two bankers either pled guilty to, or were found guilty of, charges of conspiracy to commit violations of the FCPA.[36] The government's publicly filed charging documents against the bank alleged deficiencies in its internal controls despite the apparently intentional attempts to circumvent them. For example, the documents alleged that the bank's compliance functions insufficiently followed up regarding the role of the third-party intermediary at issue, particularly in light of allegations that the bank had previously rejected attempts by the executives to take on that individual as a client.[37]

Similarly, in October 2021, three former bankers at a different investment bank's European subsidiary were charged with conspiracy to violate the internal controls provisions of the FCPA in connection with their role in financial offerings that allegedly involved the payment of bribes to Mozambican officials.[38] Ultimately, the

[32] 15 U.S.C. § 78m(b)(2)(B). Stated more simply by the DOJ and SEC's FCPA Resource Guide, "Internal controls over financial reporting are the processes used by companies to provide reasonable assurances regarding the reliability of financial reporting and the preparation of financial statements." *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, DOJ & SEC, at 40 (2d ed. July 2020), *available at* https://www.justice.gov/criminal-fraud/file/1292051/download.

[33] FCPA Resource Guide, *supra* note 32; *see also Evaluation of Corporate Compliance Programs*, U.S. Dep't of Justice (June 2020), *available at* https://www.justice.gov/criminal-fraud/page/file/937501/download.

[34] 15 U.S.C. § 78m(b)(5).

[35] In connection with the resolution, the bank agreed to settled charges with the SEC in connection with alleged violations of the anti-bribery, internal controls, and books and records provisions of the FCPA, as well as a DPA with DOJ in connection with one count of conspiracy to commit violations of the FCPA. *In re Goldman Sachs Grp., Inc.*, Rel. No. 90243 (2020); Deferred Prosecution Agreement, *United States v. The Goldman Sachs Grp., Inc.*, Cr. No. 20-437 (MKB) (E.D.N.Y. Oct. 22, 2020), *available at* https://www.justice.gov/criminal-fraud/file/1329926/download. In addition, a Malaysian subsidiary of the bank pled guilty to a one-count criminal information charging it with conspiracy to violate the FCPA. Plea Agreement, *United States v. Goldman Sachs (Malaysia) Sdn. Bhd.*, Cr. No. 2438 (MKB) (E.D.N.Y. Oct. 22, 2020), *available at* https://www.justice.gov/criminal-fraud/file/1329901/download.

[36] Press Release 2019-260, SEC, *SEC Charges Former Goldman Sachs Executive with FCPA Violations* (Dec. 16, 2019), *available at* https://www.sec.gov/news/press-release/2019-260; Press Release 18-1429, DOJ (Nov. 1, 2018), *available at* https://www.justice.gov/opa/pr/malaysian-financier-low-taek-jho-also-known-jho-low-and-former-banker-ng-chong-hwa-also-known; Press Release 22-349, U.S. Dep't of Justice, *Former Goldman Sachs Investment Banker Convicted in Massive Bribery and Money Laundering Scheme* (Apr. 8, 2022), *available at* https://www.justice.gov/opa/pr/former-goldman-sachs-investment-banker-convicted-massive-bribery-and-money-laundering-scheme.

[37] Goldman Sachs charging documents, *supra* note 36.

[38] Press Release, DOJ, *Three Former Mozambican Gov't Officials and Five Business Executives Indicted in Alleged $2 Billion*

individual bankers pled guilty to criminal charges.[39] The government alleged that the individual offenders took intentional steps to conceal their conduct from others and evade the bank's controls structure.[40] The charging papers against the bank also included allegations that those controls were insufficient in the face of this intentional misconduct; for example, they alleged that the bank's procedures reflected an inadequate appreciation of the bribery risks associated with the deal, and that the transactions proceeded despite concerns that were raised during third-party diligence.[41] Thus, in the face of allegedly intentional attempts to circumvent an entity's controls structure by an individual, SEC and DOJ appear likely to scrutinize the design and operation of corporate controls in the face of that conduct, especially to evaluate whether any controls were left unchecked, or known risks that were not fully addressed, arguably contributed to the exploitation.

At the same time, however, companies and financial institutions have received credit from the DOJ and SEC where there is evidence that the entity's control systems operated appropriately in the face of intentional misconduct. For example, in another recent FCPA-related matter, the SEC alleged that a former executive of a subsidiary of the investment bank charged in the aforementioned October 2020 action was associated with efforts to pay bribes to Ghanaian government officials in connection with a power plant contract for a Turkish entity. The SEC charged the former executive with violating the FCPA's anti-bribery provisions; the respondent, without admitting or denying the allegations, ultimately consented to the entry of a final judgment permanently enjoining him from violating that provision and ordering disgorgement.[42] The bank, however, was not charged in connection with the matter. In addition to listing out the various ways in which the executive purportedly attempted to circumvent the bank's controls (including by violating a series of relevant policies), the SEC's Complaint alleged that the bank's legal, compliance, and finance personnel demonstrated continued skepticism and diligence regarding the deal and parties involved, instituted additional due diligence in light of reputational and other concerns identified with the project, and ultimately terminated the deal when it did not receive sufficient answers regarding the same.[43]

PRACTICE TIPS AND TAKEAWAYS

Culture of Compliance: SEC and DOJ officials have emphasized that entities that have demonstrated a proactive financial and cultural commitment to compliance will be viewed more favorably in the face of potential misconduct.[44] Companies that are viewed to have an intact compliance culture are better positioned to argue for lesser penalties, less stringent undertakings, and prosecutorial discretion on charges in the face of purportedly intentional attempts to circumvent controls. DOJ officials have stated that even beyond the implementation of targeted and risk-sensitive policies and procedures, the department will seek indications that

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Fraud and Money Laundering Scheme that Victimized U.S. Investors (Mar. 7, 2019), *available at* https://www.justice.gov/usao-edny/pr/three-former-mozambican-government-officials-and-five-business-executives-indicted; *see also* Credit Suisse Group AG DOJ Press Releases, *supra* note 22.

[39] One individual pled guilty to conspiracy to commit wire fraud; the other two individuals pled guilty to conspiracy to commit money laundering. Credit Suisse Group AG DOJ Press Releases, *supra* note 22.

[40] Indictment, *United States v. Boustani et al.*, Case 1:18-cr-00861-WFK (E.D.N.Y. Dec. 19, 2018), *available at* https://www.justice.gov/usao-edny/press-release/file/1141841/download.

[41] *In re Credit Suisse Grp. AG*, Rel. No. 93382 (2021); Deferred Prosecution Agreement, *United States v. Credit Suisse Grp. AG*, Cr. No. 21-521 (WFK) (E.D.N.Y. Oct. 19, 2021), *available at* https://www.justice.gov/opa/press-release/file/1444991/download. As mentioned earlier in this article, in connection with the resolution, the bank's European subsidiary entered a guilty plea to a one-count criminal information charging it with conspiracy to commit wire fraud. Plea Agreement, *United States v. Credit Suisse Securities (Europe) Ltd.*, Case 1:21-cr-00520-WFK (E.D.N.Y. Oct. 19, 2021), *available at* https://www.justice.gov/opa/press-release/file/1444996/download.

[42] Complaint, *SEC v. Asante K. Berko*, Case No. 1:20-cv-01789 (E.D.N.Y. Apr. 13, 2020), *available at* https://www.sec.gov/litigation/complaints/2020/comp-pr2020-88.pdf; Final Judgment as to Defendant Asante Berko, *SEC v. Asante K. Berko*, Case No. 1:20-cv-01789 (E.D.N.Y. June 23, 2021), *available at* https://www.sec.gov/litigation/litreleases/2021/judgment25121.pdf.

[43] Complaint, *SEC v. Asante K. Berko*, *supra* note 42.

[44] *See, e.g.*, Gurbir S. Grewal, Speech, SEC, *PLI Broker/Dealer Regulation and Enforcement 2021* (Oct. 6, 2021), *available at* https://www.sec.gov/news/speech/grewal-pli-broker-dealer-regulation-and-enforcement-100621; *John Carlin on Stepping Up DOJ Corporate Enforcement*, Global Investigations Review (Oct. 11, 2021), *available at* https://globalinvestigationsreview.com/news-and-features/in-house/2020/article/john-carlin-stepping-doj-corporate-enforcement.

compliance personnel are included in the larger fabric of the organization (taking into account, for example, whether compliance officers have access to important information, engage with the company's board and management, and retain visibility into high-level transactions).[45]

Evidence of a strong "tone-from-the-top" from management, as well as consistent implementation and application of the controls that are in place, can further support evidence of a robust culture in the face of allegedly intentional wrongdoing. Relatedly, forward-looking investment in compliance may better position companies and gatekeepers to root out or identify misconduct, or to supply evidence of the compliance "successes" about which DOJ has also expressed an interest in the context of its evaluations. Examples of the latter identified by AAG Polite include "the discipline of poor behavior, the rewarding of positive behavior, the transactions that were rejected due to compliance risk, positive trends in whistleblower reporting, and the partnerships that have developed between compliance officers and the business."[46]

Testing and Data Analytics: In considering whether and how to resolve such matters, DOJ and SEC will focus on the relevant internal controls over financial reporting, as well as the company's remedial efforts and whether the compliance structure has been tested and evaluated over a sufficient period of time to provide comfort as to their effectiveness.[47] Comprehensive and continuous testing not only of financial controls, but also of "training, communications, and compliance culture . . . set [companies] apart."[48] Pressure-testing controls from all angles may help to identify any weak spots in an otherwise strong and reasonable set of controls, and avoid the situation in which that weakness is intentionally exploited and thus cited in support of an internal controls charge against the company.

DOJ has also made clear its expectation that companies and financial institutions leverage data analytics to design and evaluate their controls in the specific context of the business risks they face.[49] In the face of this messaging, companies should consider ways that they can upgrade existing testing systems to incorporate such strategies. Data analytics, for example, could identify aberrational behaviors, expenses, or transactions; ensure representative sample testing of transactions and invoices; compare financial results to industry peers in an attempt to identify results that may be out of step and reflective of a compliance weakness; highlight and flag risk indicators present in particular transactions; or streamline the entity's internal audits and investigations. Implementing an up-to-date set of controls could bear fruit in the face of an investigation in a number of ways — for both companies and their legal and compliance gatekeepers. For example, it could reduce the likelihood that a monitor or robust self-reporting requirement is imposed — in its recent resolution with a waste management company, DOJ referenced the company's significant remedial efforts and compliance improvements, but nevertheless imposed a monitor in part because those improvements had not yet been fully tested or implemented.[50] Moreover, employing these technologies could facilitate the entity's ability to identify FCPA violations and violators more promptly, and place companies and financial institutions in a better position to seek credit for self-reporting and remediation under the SEC's "Seaboard" cooperation factors, as well as the DOJ's criminal fine assessment. DOJ FCPA declination letters have on multiple occasions referenced the impact of the entity's prompt identification and disclosure in facilitating DOJ's investigation of those individuals as a contributing factor to its decision not to prosecute those companies, despite alleged misconduct undertaken by members of the company's management.[51]

[45] *See, e.g.*, June 22, 2022 Law360 article, *supra* note 17.

[46] Kenneth A. Polite, Jr., Mar. 25, 2022 Speech, *supra* note 11.

[47] *See, e.g., id.* ("We look at whether the company is continuously testing the effectiveness of its compliance program, and improving and updating the program to ensure that it is sustainable and adapting to changing risks.").

[48] *Id.*

[49] *See, e.g.*, John Carlin, Oct. 5, 2021 Speech, *supra* note 44 ("[I]t's going to be the expectation here when evaluating compliance programmes that corporations are using the same type of analytics to look for and predict misconduct.)"; Kenneth A. Polite, Jr., Mar. 25, 2022 Speech, *supra* note 11 ("[W]e urge corporations to consider what data analytic tools they can use to monitor compliance with laws and policies within their operations.").

[50] Deferred Prosecution Agreement, *United States v. Stericycle, Inc.*, Case No. 22-CR-20156-KMM (S.D. Fl. Apr. 18, 2022), *available at* https://www.justice.gov/opa/press-release/file/1496416/download. The SEC's resolution with the company also featured the imposition of a compliance monitor. *In re Stericycle, Inc.*, Rel. No. 94760 (2022).

[51] *See, e.g.*, Declination Letter, DOJ, *In re Cognizant Tech. Solutions Corp.* (Feb. 13, 2019), *available at* https://www.justice.gov/criminal-fraud/file/1132666/download

Keeping in Mind Weak Controls That Can Be Intentionally Circumvented: Entities should particularly assess the extent to which their internal controls over financial reporting are susceptible to intentional exploitation, either through design or ineffective implementation. Among other things, companies should be vigilant in creating robust due diligence procedures governing the use of foreign third parties; consistently utilizing and operationalizing those procedures thoroughly; and taking into account the specific business risks when red flags are identified. In addition, compliance gatekeepers should review business processes and controls regarding the actions of high-level corporate executives, ensuring that there remain lines of oversight.

Companies should anticipate that there could be attempts to use personal or non-approved communications channels to circumvent anti-corruption controls, as both DOJ and SEC have referenced the growing complexities implicated by the increased use of personal devices to conduct business.[52] And although it is clear that mere "check-the-box" compliance efforts are no substitute for a diligent and multifaceted system of accounting and anti-bribery controls in the eyes of the government, a financial institution's ability to refer to repeated, up-to-date trainings and FCPA compliance reminders of an executive charged with violations of the FCPA was referenced in SEC and DOJ's 2012 releases announcing the actions against the executive (which also stated that the agencies would not be pursuing related enforcement against the bank).[53]

CCO Certifications: Given DOJ's indication that CCO certifications are set to become a more regular part of its resolutions, an entity should, as discussed above, take serious forward-looking steps to emphasize compliance programs and reduce the likelihood that it — and its CCO — becomes subject to these certifications. Compliance and legal teams should take the initiative to request more financial or staffing resources if they feel it is necessary to address business risks. Although the extent to which these certifications will vary in scope is still unclear, where one may be required, a company should push for language in the undertakings that is tied to the alleged misconduct and reduces ambiguity or subjective interpretation regarding the scope of the undertakings subject to the certification by the CCO. Gatekeepers for companies that find themselves subject to the DOJ certification requirement should also be sure to maintain an open line of communication with the agency throughout the reporting period. Special considerations for compliance officers for corporations that operate in numerous international jurisdictions — which arguably makes the certification a tougher task — include operationalizing sub-certifications internally from those the compliance chief relies on and redoubling efforts to ensure that the company's compliance program is responsive to the specific laws and risks inherent in each jurisdiction. ■

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(declining criminal prosecution under FCPA corporate enforcement factors despite the alleged involvement of "certain members of senior management", and highlighting that the company's prompt voluntary disclosure allowed DOJ "to conduct an independent investigation and identify individuals with culpability for the corporation's malfeasance").

See also Administrative Proceeding File No. 3-17535, SEC, *SEC Charges Former Information Technology Executive with FCPA Violations; Former Employer Not Charged Due to Cooperation with SEC* (Sept. 12, 2016), *available at* https://www.sec.gov/litigation/ admin/2016/34-78825-s.pdf (in which SEC announced settled FCPA charges against the CEO of a company's Chinese subsidiary; the SEC determined not to bring charges against the company in the face of the executive's intentional conduct, noting in particular that due to the company's prompt post-acquisition measures (including implementation of a compliance hotline), the company discovered the misconduct within months of the acquisition and self-reported it, reflecting robust "efforts at self-policing").

[52] *See, e.g.*, Gurbir S. Grewal, Oct. 6, 2021 Speech, *supra* note 44 ("You need to be actively thinking about and addressing the many compliance issues raised by the increased use of personal devices [and] new communications channels . . ."); June 22, 2022 Law360 article, *supra* note 17.

[53] Press Release 2012-78, SEC, *SEC Charges Former Morgan Stanley Executive with FCPA Violations and Investment Advisor Fraud* (Apr. 25, 2012), *available at* https://www.sec.gov/news/press-release/2012-2012-78htm; Press Release 12-534, U.S. Dep't of Justice, *Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA* (Apr. 25, 2012), *available at* https://www.justice.gov/opa/pr/former-morgan-stanley-managing-director-pleads-guilty-role-evading-internal-controls-required.