

Top 10 International Anti-Corruption Developments for March 2023

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FCPA + Global Anti-Corruption Investigations + White Collar Defense Securities Enforcement and Securities Litigation

Client Alert

Designed for busy in-house counsel, compliance professionals, and anti-corruption lawyers, this newsletter summarizes some of the most important international anti-corruption law and enforcement developments from the past month, with links to primary resources. This month we ask: Which companies resolved Foreign Corrupt Practices Act (FCPA) allegations with the U.S. Department of Justice (DOJ) and U.S. Securities and Exchange Commission (SEC)? Why was cryptocurrency executive Samuel Bankman-Fried charged with violating the FCPA? How will new and revised policies from DOJ's Criminal Division impact FCPA enforcement? The answers to these questions and more are here in our March 2023 Top 10.

1. Swedish Telecom Agrees to Plead Guilty to Foreign Bribery Charges After Breaching 2019 Deferred Prosecution Agreement

On March 2, 2023, DOJ **announced** that Telefonaktiebolaget LM Ericsson (Ericsson) had agreed to plead guilty to FCPA violations after breaching a **December 2019** Deferred Prosecution Agreement (DPA). Ericsson entered into the DPA as part of a \$1.06 billion settlement with DOJ and SEC to resolve alleged FCPA violations involving China, Djibouti, Indonesia, Kuwait, and Vietnam. According to DOJ, the company violated the DPA's cooperation and disclosure provisions by failing to truthfully disclose all factual information and evidence related to the Djibouti and China schemes and failing to promptly report and disclose evidence and allegations of conduct related to potential misconduct in Iraq. DOJ alleged in the **plea agreement** that the company (1) failed to disclose until May 2021 a May 2011 email that allegedly confirmed that company executives had knowingly paid an official in Djibouti in order to obtain a telecommunications contract, (2) failed to disclose until April 2021 a February 2018 email accusing senior executives in China of engaging in improper relationships with third-party agents, as well as hard copy documents related to the alleged China scheme, and (3) failed to disclose until 2022 key details of an investigation into potential misconduct in Iraq that it had described more generally in 2019 prior to entering into the DPA. DOJ claimed that these disclosures prevented it from "bringing charges against certain individuals and taking key investigative steps."

As part of the new agreement, the company will plead guilty to the two charges originally deferred by the DPA: conspiracy to violate the FCPA's anti-bribery provisions and conspiracy to violate the FCPA's accounting provisions. The company agreed to extend its independent compliance monitor by one year and to pay an additional fine of approximately \$207 million, which is the difference between the midpoint of the U.S. Sentencing Guideline range for the offense conduct set out in the DPA and the amount that the company already paid pursuant to the DPA. The Ericsson plea agreement is significant because, among other things, DOJ almost never breaches companies for violating DPAs; indeed, in 2019, it was **reported** that DOJ had entered into approximately 560 known DPAs and non-prosecution agreements (NPAs) since 2000, but only about a dozen had resulted in breaches. Perhaps even more notably, the alleged breach here was a failure to provide complete information about past conduct that had already been disclosed to DOJ, not allegations that the company had continued to violate the law or had failed to implement a promised remedial measure or compliance requirement. This new standard for breach is sobering. (For more on the Ericsson case, see our **December 2019**, **May 2021**, **September 2021**, **June 2022**, and **December 2022** Top 10s.)

2. Pennsylvania Coal Company Receives Declination with Disgorgement for Egyptian Bribery Scheme

On March 8, 2023, DOJ issued a **declination letter** stating that it would not prosecute Corsa Coal Corporation for alleged violations of the FCPA involving bribes to Egyptian government officials. According to the letter, from late 2016 to early 2020, the company paid approximately \$4.8 million to an intermediary knowing that it would be used, at least in part, to bribe Egyptian government officials. In return, the company allegedly received contracts worth approximately

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\$143 million to supply coal to an Egyptian state-owned entity. In **November 2021**, Corsa's former Vice President and Head of International Sales, Frederick Cushmore Jr., pleaded guilty to one count of conspiracy to violate the FCPA in connection with the same alleged scheme. DOJ determined that the company was unable to fully disgorge the approximately \$32.7 million in net profits from these contracts and reduced the required disgorgement to \$1.2 million, finding that disgorgement above that amount "would substantially threaten the continued viability" of the company. In a **speech** on March 23, 2023, the Assistant Attorney General ("AAG") for DOJ's Criminal Division, Kenneth Polite, Jr., emphasized that the reduction in disgorgement was consistent with DOJ's guidance regarding a company's inability to pay criminal fines or monetary penalties. (For more on that guidance, see our **October 2019** Top 10.) The Corsa Coal declination with disgorgement was the first such resolution in 2023. (For a discussion of trends in declinations with disgorgement, see our **December 2022** Top 10.)

3. Ireland-Based Gaming and Sports Betting Company Resolves Russia FCPA Allegations with SEC

On March 6, 2023, SEC **announced** that Flutter Entertainment had agreed to pay \$4 million to settle alleged violations of the FCPA's accounting provisions related to third-party consultants in Russia. According to the SEC **order**, Flutter is the successor in interest to The Stars Group Inc., which allegedly paid approximately \$8.9 million to consultants in Russia in an effort to legalize poker in that country. Stars allegedly failed to devise and maintain sufficient internal accounting controls over its payments to the consultants and failed to consistently document those payments in its books and records. SEC noted that its decision to settle the claims was based in part on consideration of Flutter's remedial efforts and cooperation, as well as its withdrawal from the Russian market following Russia's invasion of Ukraine in early 2022. The company neither admitted nor denied the SEC findings.

4. UK- and Australia-Based Mining and Metals Company Resolves Guinea Bribery Allegations with SEC

On March 6, 2023, SEC **announced** that Rio Tinto had agreed to pay a \$15 million civil penalty to resolve alleged violations of the FCPA's accounting provisions related to a third-party consultant in Guinea. According to the SEC **order**, a consultant working for the company offered and attempted to pay a bribe of at least \$822,000 to a Guinean government official in connection with the company's successful campaign to retain mining rights in the country. The company allegedly failed to conduct adequate due diligence on the consultant and did not have a written agreement defining the scope of his services. SEC alleged that the consultant was paid \$10.5 million despite red flags that the consultant was advising a former senior Guinean government official and that the payments were not accurately reflected in the company's books and records. This resolution between Rio Tinto and SEC comes after the Second Circuit affirmed the dismissal of **scheme liability claims** against the company and two of its executives because the alleged conduct included misstatements and omissions only. SEC's investigation was assisted by DOJ, **UK's Serious Fraud Office**, and Australian authorities. The company neither admitted nor denied the SEC findings.

5. Crypto Exchange Founder Charged with Conspiring to Bribe Chinese Government Officials

On March 28, 2023, a grand jury in the Southern District of New York returned a superseding indictment against FTX founder Samuel Bankman-Fried, adding a count alleging that Bankman-Fried conspired to violate the FCPA's anti-bribery provisions by bribing Chinese government officials. FTX is a global cryptocurrency exchange that Bankman-Fried founded in 2019. According to the superseding indictment, Bankman-Fried stole billions of dollars of FTX customer deposits and used them to support the operations and investments of FTX and Alameda Research, a quantitative cryptocurrency trading firm that Bankman-Fried also founded. According to the new charge, in November 2021, Bankman-Fried directed Alameda employees to transfer approximately \$40 million in cryptocurrency to a private cryptocurrency wallet intended for the benefit of one or more Chinese government officials in order to regain access to Alameda trading accounts holding about \$1 billion in digital assets that had been frozen by Chinese law enforcement authorities as part of an investigation into an Alameda trading counterparty. After the accounts were unfrozen, Bankman-Fried allegedly authorized the transfer of tens of millions of dollars in additional cryptocurrency to complete the bribe and directed Alameda to use the unfrozen assets to fund additional Alameda trading activity. On March 30, 2023, Bankman-Fried **pleaded** not guilty to the FCPA conspiracy charge as well as four other

new charges ranging from bribery to bank fraud conspiracy added since his last not guilty plea. In total, Bankman-Fried now faces 13 criminal counts. Bankman-Fried is currently scheduled for trial in October 2023. His attorney has stated that Bankman-Fried intends to move to dismiss the FCPA charge on the ground that charges added after Bankman-Fried was extradited from the Bahamas in December 2022 violate the U.S.-Bahamas extradition treaty.

6. FCPA Sentencing Updates

- **Former Investment Banker Sentenced to 10 Years and Ordered to Forfeit \$35 Million in 1MDB Corruption Case.** On March 9, 2023, DOJ **announced** that former investment banker Roger Ng was sentenced to 10 years in prison following his **April 2022** conviction in the Eastern District of New York on FCPA and money laundering charges for his role in the scandal involving Malaysia's state-owned investment and development fund, 1Malaysia Development Berhad (1MDB). On March 24, 2023, the court **ordered** Ng to forfeit \$35.1 million, finding that prosecutors had proven that Ng had received that amount from his offense and that full forfeiture was statutorily required. (For more on the 1MDB case, see our **July 2016, August 2016, June 2017, December 2017, May 2018, June 2018, August 2018, October 2018, February 2019, May 2019, April 2020, August 2021, September 2021, December 2021, February 2022**, and **March 2022** Top 10s.)
- **Financial Manager Sentenced in Ecuadorian Police Pension Bribery Scheme.** On March 21, 2023, the Southern District of Florida unsealed **[1]** Luis Álvarez Villamar's December 2022 judgment and sentencing order **[2]** revealing a 26-month sentence beginning April 21, 2023. Álvarez agreed to plead guilty in **July 2021** to one count of conspiracy to launder the proceeds of a scheme to bribe officials at Ecuador's public police pension fund (ISSPOL) to direct the fund's investment business to companies controlled by Jorge Cherrez Miño. In **February 2022**, John Luzuriaga Aguinaga, a former risk director and investment committee member for ISSPOL, pleaded guilty to a related charge, admitting he accepted bribes from Cherrez. Luzuriaga's sentencing is set for April 2023. (For more on the ISSPOL case, see our **March 2021, July 2021**, and **February 2022** Top 10s.)

7. Television Executive and Sports Marketing Company Convicted in South America Soccer Bribery Trial

On March 9, 2023, a jury in the Eastern District of New York **convicted** the former CEO of Fox International Channels, Hernan Lopez, on one count each of wire fraud conspiracy and money laundering conspiracy, convicted Argentine sports marketing company Full Play Group SA of six similar charges, and acquitted a lower-level executive, Carlos Martinez, who headed a Fox Latin American affiliate, in connection with an alleged scheme to bribe South American soccer officials to secure lucrative broadcasting rights. The trial was the second in DOJ's FIFA corruption probe, following the **December 2017** conviction of former South American soccer bosses Juan Ángel Napout and José María Marín. (For more on this prosecution, see our **April 2020** and **January 2022** Top 10s. For more on an earlier trial involving allegations of bribery in international soccer, see our **November 2017, December 2017**, and **June 2020** Top 10s.)

8. DOJ Announces Recovery of Corruption-Related Assets Involving Nigerian Oil Contracts

On March 27, 2023, DOJ **announced** that it had recovered over \$53 million in cash and a promissory note with a principal value of \$16 million in connection with two civil cases brought under DOJ's Kleptocracy Asset Recovery Initiative. In the cases, DOJ alleges that two Nigerian businessmen conspired with others to bribe an executive at the country's state-owned oil company in a scheme to direct oil contracts to their companies. The proceeds of those contracts, totaling over \$100 million, were allegedly laundered through the United States, including through purchases of luxury real estate and a 65-meter superyacht. (For more on DOJ's efforts to recover kleptocracy proceeds from Nigeria and other countries, see, for example, our **July 2021, August 2021, October 2021, May 2022**, and **August 2022** Top 10s.)

9. DOJ Policy Changes

In March 2023, the DOJ Criminal Division issued a series of new and revised policies that will impact corporate criminal FCPA enforcement. It is critical for anyone guiding companies subject to the FCPA to understand these policies.

- **DOJ Updates Monitor Selection Policy.** On March 1, 2023, AAG Polite **issued** a revised **memorandum** on the imposition and selection of monitors for companies entering into resolutions with the Criminal Division (the "Polite Memo"). The Polite Memo both updates

and clarifies prior DOJ policy in the following areas: it (1) clarifies that monitors are not disfavored and will be used in appropriate circumstances; (2) lists additional factors for prosecutors to consider when determining whether to impose a monitor; (3) articulates DOJ's commitment to focusing on diversity and inclusion when evaluating monitor candidates; and (4) increases the period from two to three years before a monitor can be employed by, or affiliated with, the monitored entity. Although the Polite Memo does not significantly change **prior** DOJ guidance regarding the selection of monitors, the memo's revisions reflect the Division's sharper focus on whether a business organization has voluntarily disclosed wrongdoing and implemented appropriate remedial measures. (For more on the revised monitor selection policy, see our **client alert**.)

- **DOJ Launches Pilot Program on Compensation Incentives and Clawbacks.** On March 3, 2023, AAG Polite **announced** the launch of the Criminal Division's Pilot Program on **Compensation Incentives and Clawbacks** ("Pilot Program"), which became effective on March 15, 2023. Under the Pilot Program, DOJ will (1) reduce criminal fines if companies make good faith attempts to claw back compensation from employees who engaged in wrongdoing, even if those efforts are unsuccessful, and (2) require companies entering into criminal resolutions to implement compensation-related measures as part of their enhanced compliance commitments. The Pilot Program follows a **September 2022 memorandum** from Deputy Attorney General ("DAG") Lisa Monaco (the "Monaco Memo"), which, among other things, identified compensation clawbacks as a potentially effective way to deter individual misconduct and instructed the Criminal Division to develop guidance on how to reward corporations that develop and apply compensation clawback policies. (For more on the Pilot Program, see our **client alert**.)
- **DOJ Revises Its Guidance on Corporate Compliance Programs.** Also on March 3, 2023, AAG Polite announced changes to the Criminal Division's Evaluation of Corporate Compliance Programs or ECCP (the "**March 2023 ECCP**"). Last revised in **June 2020**, the March 2023 ECCP contains two major revisions: (1) new guidance regarding the use of personal devices, communications platforms, and messaging applications, including ephemeral messaging applications; and (2) expanded guidance regarding how compensation structures and consequence management can drive an effective compliance program, including the use of financial penalties such as compensation clawback provisions to disincentivize non-compliant behavior. The first revision follows the Monaco Memo's direction to the Criminal Division to "study best corporate practices regarding use of personal devices and third-party messaging platforms and incorporate the product of that effort into the next edition of its Evaluation of Corporate Compliance Programs, so that the Department can address these issues thoughtfully and consistently." (For more on the March 2023 revisions to the ECCP changes, see our **client alert**.)

10. OECD Working Group on Bribery Developments.

- **Working Group Expresses Concern over Denmark's Foreign Bribery Enforcement Efforts.** On March 3, 2023, the OECD Working Group on Bribery **announced** the results of its Phase 4 **evaluation** of Denmark's implementation of the OECD Anti-Bribery Convention. Denmark, like all parties to the Convention, is subject to a rigorous peer review process, Phase 4 of which focuses on the evaluated country's enforcement of the Convention and considers the country's particular challenges and positive achievements. According to the Working Group, "Denmark gives insufficient priority to preventing, detecting and sanctioning foreign bribery," noting that this in part "may be due to the widespread perception that domestic corruption is low in the country." (Indeed, in **January 2023**, Transparency International's Corruption Perceptions Index showed that Denmark was once again perceived to have the lowest levels of domestic corruption of 180 countries and territories surveyed.) The Working Group expressed growing concerns over the lack of resources allocated to fight foreign bribery, noting that some credible allegations, including those reported in the media, do not lead to formal investigations, or investigations are closed prematurely. The Working Group also expressed concern about the enforcement outcomes, noting that only one Danish company has been convicted of foreign bribery since 2000 and no individuals have ever been convicted. On the positive side, the Working Group noted that Denmark achieved its first foreign bribery conviction in 2019, that the country had enhanced its anti-money laundering regime and reinforced protections for whistleblowers, and that large Danish companies have robust anti-corruption compliance regimes.
- **Mauritius and Ukraine Become Participants in the OECD Working Group on Bribery.** On March 24, 2023, the OECD Council **announced** Mauritius and Ukraine will

become Participants in the Working Group with a view to facilitating their accession to the OECD Anti-Bribery Convention. As Participants, representatives from the countries will be able to attend all non-confidential meetings to observe the discussions of the members and engage in dialogue regarding their own countries' efforts to fight corruption and bribery. Accession to the Convention is a prerequisite to becoming a member of the Working Group. (For more on Ukraine's recent anti-corruption efforts, see our [February 2023](#) Top 10.)

Lauren Gonzalez, a Law Clerk in our New York office, contributed to the writing of this alert.

[1] *USA v. Alvarez Villamar*, No. 1:21-cr-20308, ECF No. 81 (S.D. Fla. March 21, 2023).

[2] *USA v. Alvarez Villamar*, No. 1:21-cr-20308, ECF No. 71 (S.D. Fla. Dec. 22, 2022).

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