

Top 10 International Anti-Corruption Developments for February 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: Why did a U.S. appellate court reinstate foreign bribery and money laundering charges against two Swiss wealth managers? How often are corporate defendants ordered to pay restitution to victims of Foreign Corrupt Practices Act (FCPA) violations? Why did the European Parliament call for the creation of an independent ethics body that would investigate its members? The answers to these questions and more are here in our February 2023 Top 10 list.

1. U.S. Appellate Court Revives FCPA and Money Laundering Charges against Swiss Wealth Managers Who Laundered Venezuela Bribe Money

On February 28, 2023, the United States Court of Appeals for the Fifth Circuit reversed and remanded a district court order dismissing FCPA and money laundering charges against Daisy Rafoi-Bleuler and Paulo Casquero-Murta, two employees of Swiss wealth management companies who allegedly helped a number of individuals launder bribes to officials of Venezuela's national oil company, *Petróleos de Venezuela, S.A. (PDVSA)*, by opening offshore bank accounts and taking other steps designed to conceal the nature of the bribe payments. In **November 2021** and **July 2022**, Southern District of Texas Judge Kenneth Hoyt granted motions to dismiss filed by Rafoi and Murta, respectively, holding, among other things, that there was no subject matter jurisdiction over their conduct because Rafoi and Murta acted exclusively or (in Murta's case) almost exclusively outside of the United States, that the indictment did not establish that the defendants were "agents" of a domestic concern for purposes of 15 U.S.C. § 78dd-2, and that the term "agent" was unconstitutionally vague. The Department of Justice (DOJ) filed notices of appeal, which we predicted would likely prevail. (See our **November 2021** Top 10 and our **Law360 article**.)

The Fifth Circuit indeed reversed. Regarding the jurisdictional issues, the Fifth Circuit held that, "because extraterritoriality concerns the merits of the case, not the court's power to hear it, the district court erred in concluding that it lacked subject-matter jurisdiction over these counts." Moreover, the court held that the text of the relevant money laundering statute, 18 U.S.C. § 1956, "demonstrates Congress's clear and specific intent for the statute to apply extraterritorially in a case like this, where a foreign citizen engages in money-laundering activity in part in the United States." Contrary to the district court's opinion, "[t]here is no physical-presence requirement." As to the territorial jurisdiction issue, the court held that the indictment provided sufficient notice to Murta that he was being charged as a person who acted while in the territory of the United States under 15 U.S.C. § 78dd-3. The court rejected Murta's argument that due process prevented such a charge from being premised on a single trip to Miami on the grounds that Murta allegedly knew that bribe money would be transmitted through the United States and had fair warning that he could be prosecuted for "[i]nternational-bribery schemes and money laundering" since such activities "are condemned universally by law-abiding nations."

Regarding the agency issues, the court held that the indictment provided sufficient notice to both defendants that they were being charged as "agents of a domestic concern" under 15 U.S.C. § 78dd-2, and that the term "agent" is not unconstitutionally vague, especially in light of the indictment's allegations that Rafoi and Murta were directed by others to "set up 'a complex web of bank accounts through which to conduct the financial transactions in connection with the scheme and to conceal the nature and ownership of the proceeds.'" The court declined, however, to address DOJ's contention that Rafoi and Murta could be held liable for conspiring to violate the FCPA even if they were not agents. In asking the Fifth Circuit to consider this issue, DOJ took dead aim at the Second Circuit's **August 2018** opinion in *United States v. Hoskins*, which held that DOJ could not bring a conspiracy charge against a non-U.S. citizen acting outside the United

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States, unless it proved that the defendant was an “agent” of a domestic concern. But because the district court did not base its dismissal on *Hoskins*, the Fifth Circuit held that it was not required, and so declined, to address DOJ’s argument at this stage of the proceedings. According to the court, “[i]t is proper, then, for the district court to decide these conspiracy-related issues in the first instance” on remand. (This is not the first time DOJ has asked a court to reject *Hoskins*. In **June 2019**, DOJ successfully convinced a judge in the Northern District of Illinois to do so, but that decision has not made its way to an appellate court.)

The Rafoi decision adds to the relatively small—but growing (see our **September 2018**, **December 2018**, and **August 2019** Top 10s and our discussion of the development of FCPA case law in [this article](#), for more examples)—FCPA jurisprudence.

2. DOJ Implements New Voluntary Self-Disclosure Policy for All U.S. Attorney’s Offices

On February 22, 2023, the U.S. Attorneys for the Southern and Eastern Districts of New York **announced** a new **Voluntary Self-Disclosure (VSD) Policy** for all 94 U.S. Attorney’s Offices across the United States and its territories. According to the press release, the goal of the policy is to “standardize how [voluntary self-disclosures] are defined and credited by U.S. Attorney’s Offices nationwide,” “incentivize companies to maintain effective compliance programs . . . and cooperate fully with the government in corporate criminal investigations,” and provide “transparency and predictability to companies and the defense bar concerning the concrete benefits” for voluntarily self-disclosing misconduct, fully cooperating, and timely and appropriately remediating. The VSD policy is an outgrowth of **Deputy Attorney General Lisa Monaco’s instruction** that all DOJ components implement a policy to “ensure that a corporation benefits from its decision to come forward to the Department and voluntarily self-disclose misconduct, through resolution under more favorable terms than if the government had learned of the misconduct through other means.” Under the VSD policy, when a company has self-disclosed, fully cooperated, and timely remediated and no aggravating factors are present, there is a presumption that the U.S. Attorney’s Office will not seek a guilty plea, and the company will receive at least a 50% reduction off the low end of the U.S. Sentencing Guidelines fine range. If the company also demonstrates that it has implemented and tested an effective compliance program, no monitor will be required as part of any resolution. As discussed in our recent **client alert**, the potential benefits available under the VSD Policy are similar, but not exactly the same, as the potential benefits available under the DOJ Criminal Division’s **Corporate Enforcement Policy** (CEP), which applies to the Fraud Section’s FCPA Unit. Thus, there is an open question as to which policy will apply—the VSD Policy or the CEP—when, as is common, the FCPA Unit teams up with a U.S. Attorney’s Office to resolve a corporate FCPA matter. Given that the Fraud Section has **exclusive jurisdiction** to bring criminal FCPA cases, experience suggests that the CEP will apply in such cases, but this will be something to track over time, as it could impact the arguments defense counsel will make when advocating for a more favorable resolution.

3. Swiss Commodities Trader Sentenced for Global Bribery Scheme

On February 28, 2023, in the Southern District of New York, Glencore Plc was **ordered** to pay approximately \$700 million following its **May 2022** guilty plea to one count of conspiracy to violate the FCPA’s anti-bribery provisions. The monetary penalty consists of a \$428.5 million fine and \$272.2 million in criminal forfeiture. According to the **plea agreement** and court documents, the company, acting through its employees and agents, engaged in a scheme for over a decade to pay more than \$100 million to third-party intermediaries, intending that a significant portion of that amount would be used to pay bribes to officials in Brazil, Cameroon, the Democratic Republic of Congo (DRC), Equatorial Guinea, Ivory Coast, Nigeria, and Venezuela in order to gain business advantages such as obtaining favorable terms from national oil companies and reducing liabilities related to government audits. The company was also **ordered** to pay \$29.6 in restitution to the founders of a company that provided healthcare-related services to Glencore-related mining companies in the DRC and was forced to shut down after Glencore allegedly terminated its contract and then bribed a DRC official to dismiss a lawsuit brought by the healthcare company. Restitution is rarely imposed in FCPA cases, making the restitution award here notable. (See, for example, the discussion of restitution awards in FCPA cases in our **July 2020** Top 10.)

4. Oil and Gas Executives Charged in Connection with Brazil Bribery and Money Laundering Scheme

On February 17, 2023, DOJ **announced** the unsealing of an indictment in the District of Connecticut charging a Connecticut-based senior oil and gas trader, Glenn Oztemel, and a Brazil-based oil and gas broker and agent, Eduardo Innecco, with conspiracy to violate the FCPA, conspiracy to commit money laundering, three counts of violating the FCPA, and two counts of money laundering in connection with an alleged scheme to bribe Brazilian officials to help two trading companies secure contracts from Brazil's national oil company, Petróleo Brasileiro, S.A (Petrobras). According to DOJ, between 2010 and 2018, Oztemel and Innecco caused the trading companies to pay bribes, disguised as consulting payments, in exchange for confidential information regarding Petrobras' fuel oil business. DOJ further alleged that Oztemel and Innecco used coded language (such as "breakfast") to refer to the bribes and communicated using personal email accounts, fictitious names, and encrypted messaging applications—once again demonstrating DOJ's concern that such applications are being used in furtherance of illegal conduct. (For more on DOJ's concern, see our **March 2019** and **September 2022** Top 10s. And for practical guidance on what companies should do about messaging apps, see our **client alert**.) According to media **reports**, one of the trading companies was Connecticut-based Freepoint Commodities. Oztemel, who was arrested on February 15, 2023, and Innecco, who is still at large, face up to five years in prison for each of the FCPA conspiracy and substantive charges, and up to 20 years for each of the money laundering conspiracy and substantive charges.

5. Former Mexican Official Who Allegedly Took Bribes from Drug Cartel Convicted in U.S. Court

On February 21, 2023, Mexico's former Secretary of Public Security, Genaro García Luna, was **convicted** by a jury in the Eastern District of New York on five counts, including continuing criminal enterprise and conspiracy to distribute cocaine in the United States. At trial, prosecutors introduced evidence showing that García Luna accepted millions of dollars in bribes from the Sinaloa drug cartel, once run by Joaquín "El Chapo" Guzmán. García Luna was head of Mexico's Federal Investigation Agency from 2001 to 2005, and the country's Secretary of Public Security from 2006 to 2012. As Secretary, García Luna controlled Mexico's Federal Police Force and worked closely with U.S. counter-narcotics and intelligence agencies to **crack down on cartels**. But according to prosecutors, García Luna at the same time was assisting the Sinaloa cartel by facilitating safe passage for drug shipments, providing the cartel with sensitive law enforcement information, and helping attack rival cartels. García Luna faces 20 years to life imprisonment at sentencing. Mexican President Andrés Manuel López Obrador, who in **May 2020** urged the United States to investigate U.S. law enforcement and intelligence agencies who dealt with García Luna, **reacted favorably** to the verdict and expressed his hope that García Luna would try to earn a sentencing reduction by cooperating against former Mexican presidents Vicente Fox and Felipe Calderon, under whom he served. López Obrador had a decidedly different reaction when former Mexican General Salvador Cienfuegos, who led the crackdown on cartels from 2012 to 2018, was arrested in the United States in October 2020 for allegedly aiding the H-2 cartel in exchange for bribes. In reaction to Cienfuegos' arrest, Mexico announced that Mexican officials accused of corruption would no longer be prosecuted in the United States and reportedly threatened to expel DEA agents from the country. Prosecutors in the Eastern District of New York dismissed the charges against Cienfuegos in **November 2020**.

6. DOJ Releases Final FCPA Statistics for 2022

On February 15, 2023, the DOJ Criminal Division's **Fraud Section** released its annual **"Year in Review,"** summarizing the Fraud Section's accomplishments in 2022. According to the report, of the 280 individuals against whom the Fraud Section brought or announced charges in 2022, 22 were charged with FCPA-related crimes. Eighteen of the 342 individuals convicted by the Fraud Section in 2022 were convicted of FCPA-related charges, 15 by guilty plea and three at trial. Five of the Section's seven corporate resolutions involved the FCPA, resulting in \$1.36 billion in total global monetary penalties and \$606.5 million in total U.S. criminal monetary amounts. In addition, the Fraud Section issued two FCPA declinations under the CEP, resulting in approximately \$46.2 million in disgorgement.

7. The U.S. and UK Target Corruption in Bulgaria

On February 10, 2023, U.S. Secretary of State Antony Blinken **stated** that the United States, in coordination with the United Kingdom, is taking action to counter systemic corruption in Bulgaria by **designating** five former Bulgarian government officials and five companies "for corrupt acts that resulted in illicit personal gain, undermined the country's democratic

institutions, and perpetuated its corrosive dependence on Russian energy sources.” According to Blinken, three of the five former Bulgarian government officials—former energy minister Rumen Stoyanov Ovcharov, former nuclear power executive Aleksandar Hristov Nikolov, and former nuclear power executive and member of parliament (MP) Ivan Kirov Genov—were designated “for a series of illicit dealings and the exchange of bribes related to energy contracts that robbed the Government and people of Bulgaria of hundreds of millions of dollars.” Blinken stated that former pro-Russian MP Nikolay Simeonov Malinov bribed a judge to permit him to travel to Russia despite a travel ban imposed following his indictment for espionage and that former finance minister Vladislav Ivanov Goranov used his position to facilitate bribery in exchange for favorable legislation. The designated entities—Inter Trade 2021 EOOD, MS Konsult 2016 EOOD, the Russophiles National Movement, Russophiles for the Revival of the Fatherland, and Trilemma Consulting Ltd EOOD—were owned or controlled by either Malinov or Goranov. The United States and UK also **announced** sanctions on several top Bulgarian politicians, **including** eight Bulgarian politicians who have served as members of Parliament and held top government jobs, and one judge for corruption. The UK also designated three Bulgarian nationals because of corruption: oligarch and former MP Delyan Slavhev Peevski, former national security official Ilko Dimitrov Zhelyazkov, and oligarch Vasil Kroumov Bozhkov. The individuals received travel bans and asset freezes as part of the UK’s global anti-corruption sanctions regime. Blinken noted that the coordinated actions support the U.S. Strategy on Countering Corruption, which was released in **December 2021**.

8. Ukraine Begins Anti-Corruption Initiative

On February 1, 2023, Ukrainian authorities started carrying out anti-corruption searches that target politicians, civil servants, and oligarchs. The Ukrainian Security Service (SBU) **said** that the raids were part of an effort to combat what it describes as “the internal enemy” of the country. Among those targeted in these efforts is the acting head of the Kyiv tax authority, who was allegedly part of a scheme to overlook approximately \$1.2 billion in unpaid taxes; the former management of Ukraine’s largest oil extraction and refinery firms for misappropriating approximately \$1.1 billion; and the former head of the Ministry of Defense for spending approximately \$2.7 million on inadequate bulletproof vests. Anti-corruption reforms are a **key requirement** for Ukraine’s potential membership in the EU. Earlier this year, President Volodymyr Zelenskiy pledged to work on new reforms that will make the country “more human, transparent and effective.” Zelenskiy **said** he would “change as much as necessary to ensure that people do not abuse power” within his government.

9. Former Ecuadorian President to Face Bribery Charges Over Chinese-Built Hydroelectric Plant

On February 22, 2023, Ecuador’s Attorney General, Diana Salazar, **announced** that she will file charges against former President Lenin Moreno and three dozen others related to allegations of corruption around the Coca Codo Sinclair hydroelectric project between 2009 and 2018. According to the Attorney General, the co-conspirators received approximately \$76 million in bribes, roughly equivalent to 4% of the value of the construction contract, from the Chinese state company, Sinohydro, which was responsible for constructing the project. The investigation began following a March 2019 media report regarding suspicious business activities by one of Moreno’s brothers and eventually led to international cooperation requests to a dozen countries, including Belize, China, Panama, Spain, Switzerland, and the United States. On February 23, 2023, the National Court of Justice (CNJ) accepted Attorney General Salazar’s request and set the hearing to formulate charges against the 37 defendants for March 2, 2023. After the hearing, the tax investigation will begin, and it will last 90 days. Moreno has denied any wrongdoing.

10. European Parliament Resolves to Establish Independent Ethics Body as “Qatargate” Investigation Expands

On February 16, 2023, the European Parliament adopted a **resolution on the establishment of an independent European Union (EU) ethics body**. The resolution urges the European Commission, the EU’s executive branch, which is responsible for proposing and enforcing European legislation, to submit by the end of March 2023 a proposal to establish an independent ethics body for the Parliament and the Commission that is open to the participation of all institutions and agencies of the EU. Among other things, the resolution recommends that the new ethics body have “the right to start investigations on its own and to conduct-on-the spot and records-based investigations using the information that it has collected or that it has received from third parties”; “the possibility to check the veracity of declarations of financial interests

and assets”; and “the possibility to engage in cooperation and information exchange with relevant EU bodies such as the European Anti-Fraud Office, the European Public Prosecutor’s Office, the European Ombudsman and the European Court of Auditors.” According to the resolution, such a body is necessary for a number of reasons, including the “recent corruption revelations [which] have rightly increased public and political scrutiny of the current standards and practices within Parliament and other institutions.” This is a reference to recent allegations that Members of the European Parliament (MEPs) accepted bribes in exchange for legislative support for Qatar and Morocco, which the resolution calls “Qatargate.” The Belgian Federal Public Prosecutor’s Office is investigating the allegations and has **charged** four people—former MEP Pier Antonio Panzeri (Italy), MEP Eva Kaili (Greece), MEP assistant Francisco Giorgi (Italy), and NGO head Niccolo Figa-Talamanca—with bribery, money laundering, and membership in a criminal organization. On February 2, 2023, the Parliament **announced** that it had decided to lift the immunity of MEPs Andrea Cozzolino (Italy) and Marc Tarabella (Belgium) in connection with the Belgian investigation. In **January 2023**, European Parliament President Roberta Metsola proposed a 14-point anti-corruption reform plan in reaction to the bribery allegations.

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