



# Implementing the OECD Anti-Bribery Convention



## **Phase 4 Two-Year Follow-Up Report: United States**

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This report, submitted by the United States, provides information on the progress made by the United States in implementing the recommendations of its Phase 4 report. The OECD Working Group on Bribery's summary and conclusions to the report were adopted on 12 October 2022.

The Phase 4 report evaluated and made recommendations on the United States' implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. The Phase 4 report was adopted by the OECD Working Group on Bribery on 16 October 2020.

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# Summary and Conclusions

## Summary of main findings<sup>1</sup>

1. In October 2022, the United States presented its two-year written follow-up report to the OECD Working Group on Bribery (“Working Group” or “WGB”), outlining the steps taken to implement the nine recommendations and to address the follow-up issues contained in its October 2020 [Phase 4 report](#). Based on the United States’ follow-up report, the Working Group concludes that of the nine Phase 4 recommendations, five are fully implemented, three are partially implemented, and one is not implemented.
2. The Working Group’s conclusions concerning the United States’ implementation of the Working Group’s Phase 4 recommendations are based on the United States’ Phase 4 written-follow up report, which can be found immediately after this Summary.

## Enforcement since Phase 4

3. Since the adoption of the Phase 4 report in October 2020, the U.S. Department of Justice (DOJ) and the U.S. Securities and Exchange Commission (SEC) have continued to bring sizeable enforcement actions against legal persons, thus confirming their leading enforcement role within the Working Group on Bribery. The DOJ in particular has also brought a number of enforcement actions against natural persons for supply-side foreign bribery and related offences covered by the OECD Anti-Bribery Convention as well as demand-side offences by foreign public officials and their enablers when they launder the bribes.
4. Specifically, the DOJ has resolved supply-side FCPA enforcement actions in relation to at least 11 legal persons in 9 foreign bribery schemes. Among the 11 legal persons, the DOJ resolved the matters through 1 CEP declination, 6 Deferred Prosecution Agreements (DPAs), and 4 plea agreements. Through these enforcement actions, the companies agreed to pay at least \$4.7 billion in monetary penalties, which includes fines, forfeiture, and restitution. Pursuant to the terms of these agreements, the DOJ agreed to credit payments that the companies had made or were expected to make with other law enforcement authorities based on the same misconduct. If the companies adhered to the conditions to receive this credit – typically, to conclude the other related enforcement resolutions and make the payment required under those resolutions within a fixed period of time – the DOJ agreed that the companies would ultimately pay the United States approximately \$2.04 billion in criminal penalties. The DOJ credited enforcement actions brought by both domestic authorities (e.g. SEC and the U.S. Commodity Futures Trading Commission) and foreign authorities from various jurisdictions (e.g. Brazil, Hong Kong, Singapore, Switzerland, and the United Kingdom).

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<sup>1</sup> The evaluation team for this Phase 4 two-year written follow-up evaluation of the United States was composed of lead examiners from **Argentina** (Ms. Sedení Irigoyen, Legal Adviser, Anticorruption Office; and Mr. Leandro Verteramo, Secretary of Embassy, Ministry of Foreign Affairs) and **the United Kingdom** (Raymond Emson, Associate General Counsel, Serious Fraud Office; and Cath Rylance, Economic and Regulatory Diplomacy, Foreign, Commonwealth and Development Office) as well as members of the **OECD Anti-Corruption Division** (Ms. Sandrine Hannedouche-Leric, Evaluation Coordinator and Senior Legal Analyst; and Mr. Brooks Hickman, Legal Analyst). See Phase 4 Procedures, paras 54-62 on the role of Lead Examiners and the Secretariat in the context of two-year written follow-up reports.

5. For its part, the SEC brought at least 13 enforcement actions in relation to 10 schemes. The enforcement actions concerned 10 legal persons and 3 natural persons. All 10 resolutions with the legal persons were through settlements reached through an SEC administrative cease and desist proceeding. Through the resulting Cease and Desist Orders, the SEC imposed over \$1.3 billion in total civil or administrative penalties (including disgorgement, interest, and penalties). According to those Orders, the companies agreed to pay \$708.4 million to the SEC after the SEC credited payments that would be due to other authorities (e.g. Brazil, Switzerland, and the United Kingdom).

6. There have also been developments in enforcement proceedings against natural persons. Most notably, in April 2022, the DOJ secured the conviction at trial of a defendant implicated in the 1MDB scheme. This followed a prior plea agreement by a Goldman Sachs employee as well as a DPA with Goldman Sachs and a plea agreement with one of its subsidiaries. In a separate FCPA matter involving bribery allegations concerning Haiti, the DOJ announced in June 2022 that it was filing to dismiss all charges against two defendants who had been convicted in 2019 at trial in the first instance.<sup>2</sup> When preparing for a re-trial after the original convictions were set aside on the grounds of ineffective assistance of counsel, the prosecution team learned that the investigators had discovered some potentially exculpatory evidence that had not been previously shared with the prosecution team or the defence. Once the prosecution team learned of the material, it immediately provided it to the defence and filed a motion to have the charges dropped with prejudice. In addition, in July 2022 the U.S. Court of Appeals for the Fourth Circuit upheld the 2019 FCPA trial conviction of a U.S. citizen for foreign bribery. In a separate case, in August 2022, the Second Circuit reversed the foreign bribery conviction of a foreign national because there was insufficient evidence that the foreign national was an agent of the U.S. subsidiary involved in the corruption scheme. Finally, since Phase 4, the DOJ also has commenced enforcement actions against 47 natural persons involved in either the supply or demand side of foreign bribery, and it reports that 34 of these proceedings have resulted in convictions to date.

### Implementation of the Phase 4 recommendations

7. Overall, the follow-up report highlights that the United States has taken various steps towards implementing the majority of the Working Group's recommendations on ways to further enhance the transparency and efficiency of its enforcement approach and tools, which have kept the United States at the forefront of the fight against foreign bribery.

8. The Working Group made several recommendations for U.S. authorities to consider measures to address various policy issues. Though the U.S. authorities initially did not provide sufficient information explaining how they had considered these recommendations, the authorities ultimately provided more context in dialogue with the lead examiners. As a result, most of these recommendations have been implemented.

9. The SEC Division of Enforcement reported that it considered whether to consolidate and publicise its long-standing guidance to harmonise it with the DOJ's more recently developed approach. Whilst the SEC reported that it had considered whether to revise its existing enforcement policies for fostering cooperation by natural and legal persons specifically for foreign bribery, it concluded that it would not issue additional policies at this time but intends to further consider the matter (**recommendation 2a**). Additionally, the U.S. authorities report that, after consideration, they have decided not to encourage U.S. officials to refer to the debarment lists of international financial institutions (IFIs) when evaluating whether an entity is presently trustworthy. They maintain that referring to IFI debarment lists could raise due process concerns because the U.S. officials would not have access to the underlying records held by the IFIs. Whilst it is unclear why public contracting authorities could not address the due process concerns by simply asking the companies for additional details when conducting due diligence, the U.S. authorities confirmed that they seriously considered the recommendation after the Phase 4 evaluation (**recommendation 3b**).

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<sup>2</sup> Department of Justice, U.S. Attorney's Office for the District of Massachusetts, [Statement from United States Attorney Rachael S. Rollins on the Motion to Dismiss in United States v. Baptiste](#) (27 June 2022).

10. The Working Group also made several recommendations that only required measures to the extent possible or feasible within the U.S. system. In light of the Working Group's recommendation that the U.S. authorities provide aggregated data on detection sources in foreign bribery matters to the extent permissible, the DOJ provided the Working Group with its aggregated summary. The SEC maintained that sharing such information about its smaller number of enforcement actions would potentially risk compromising the confidentiality of certain sources, such as whistleblowers. As the SEC confirmed that its mix of detection sources is largely similar to the DOJ's aggregate summary, this recommendation can be deemed implemented (**recommendation 1a**). The U.S. authorities also explored whether it would be possible to record data on when debarment occurs in connection with foreign bribery cases in order to improve oversight over the impact such measures have on combating foreign bribery. The Interagency Suspension and Debarment Committee, however, reported that it previously tried to track the reasons for debarment decisions but the resulting system was unworkable (**recommendation 3a**). As to whether and when an extension is granted in respect of a DPA with a legal person, the DOJ has made it a regular practice to publish such information. The SEC did not report any steps in this regard as it has not concluded a DPA in an FCPA matter since 2015. Given the circumstances, the Working Group deemed this recommendation to be implemented but converted it to a follow-up issue (**recommendation 2d**).

11. The Working Group also recommended that the DOJ continue evaluating the effectiveness of the Corporate Enforcement Policy (CEP) for encouraging voluntary disclosures as well as its deterrent effect. The DOJ reports that it continually assesses the CEP's effectiveness in its internal policy deliberations, including through the DOJ's Corporate Crime Advisory Group, but cannot be expected to undertake an analytical study against public benchmarks. Recognising that the CEP is still a relatively new policy, the Working Group will continue to follow up on the effectiveness of the CEP in terms of self-disclosure and deterrence as practice develops to ensure that its application remains consistent with Article 3 of the OECD Anti-Bribery Convention (**recommendation 2b**).

12. A small number of initiatives remain to be completed. For instance, although the United States House of Representatives adopted a bill in July 2022 that, reportedly, would provide new authorities to regulate certain gatekeepers in respect of money laundering, the Senate has so far not yet adopted its own bill. This encouraging development follows the White House's 2021 U.S. Strategy on Countering Corruption call for working with Congress to expand new authorities where necessary. However, until legislation applying appropriate AML obligations to lawyers, accountants, and trust or company service providers is adopted and enters into force, this recommendation will remain not implemented in line with WGB practice (**recommendation 1b**). The United States has also made progress in addressing corporate recidivism in the FCPA context. The DOJ, in particular, has recently developed internal guidance specifically addressing corporate recidivism among other elements in its corporate enforcement approach. For its part, the SEC reports that it considers recidivism as a factor when sanctioning FCPA misconduct since Phase 4. Whilst these are all positive steps, the Working Group considers that the SEC could more fully explain to the public the impact that recidivism has in its enforcement actions, particularly on the sanctions imposed (**recommendation 2c**).

13. With regard to whistleblower protections, after considering how to enhance protections for those who report violations by non-issuers, the DOJ acknowledges that congressional legislation may be required to ensure that all whistleblowers who report to law enforcement are protected. The U.S. authorities, however, did not enhance guidance since Phase 4 about the limits of protections for those who report foreign bribery allegations concerning non-issuers (**recommendation 1c**).

#### Regarding the detection of foreign bribery:

- ◆ **Recommendation 1a – Fully implemented.** In Phase 4, the DOJ and the SEC could not provide precise information on their detection sources to the WGB for a combination of legal, policy, and practical reasons. The WGB recommended that the U.S. law enforcement authorities should continue to maintain data on their detection sources in foreign bribery matters and provide to the WGB, to the extent possible, an aggregated summary of detection sources concerning credible allegations involving legal persons and resulting enforcement actions. Both the DOJ and the SEC now report that they maintain sufficient data on detection sources and that such data could be set out, at least for themselves, in a readily accessible format. The DOJ keeps track of its detection sources and was able to provide the WGB with a breakdown of those sources concerning legal



persons on an aggregate basis both for allegations leading to investigations and for concluded cases resulting in sanctions or other dispositions. The SEC maintained, however, that it could not provide any information on detection sources, even in an aggregated form, because it takes a conservative interpretation of its domestic statutory and regulatory framework to minimise the risk of disclosure of its sources, particularly whistleblowers. As the DOJ and SEC agreed that their detection sources are largely similar, the Working Group accepted the DOJ's aggregated summary as implementing this recommendation for both law enforcement agencies.

- ◆ **Recommendation 1b** – *Not implemented*. Consistent with the U.S. Treasury's 2020 National Strategy for Combatting Terrorist and Other Illicit Financing findings that better AML regulations were needed for certain gatekeepers, the WGB recommended in Phase 4 that the United States apply appropriate AML obligations to lawyers, accountants, and trust or company service providers. Since then, White House's 2021 U.S. Strategy for Countering Corruption has called for legislative reforms to better regulate financial system gatekeepers, including the gatekeepers the WGB identified in this recommendation. In July 2022, the House of Representatives adopted the draft ENABLERS Act, which, reportedly, would provide new authorities to regulate at least certain gatekeepers. Despite these positive developments, which the U.S. delegation reports has already raised awareness in the private sector about this issue, this recommendation will remain not implemented until the AML reporting obligations of the gatekeepers are enhanced.
- ◆ **Recommendation 1c** – *Partially implemented*. In Phase 4, the WGB identified as a good practice the robust framework of protections and incentives for whistleblowers who report FCPA violations by issuers to the SEC. At the same time, it observed that whistleblowers either who report only to the DOJ or whose reports do not concern FCPA violations by issuers would have only limited protections if any. It thus recommended that the United States (1) consider how it can enhance protections for whistleblowers who report violations by non-issuers and (2) enhance guidance about the variations in protections depending on the agency to which a whistleblower makes a report. The DOJ reports that it has closely considered how further protections can be given to those who report FCPA violations by non-issuers, but it recognises that legislative reforms may be required. In terms of guidance, the SEC has made certain updates to its webpage applicable to SEC whistleblowers to explain how amendments, in light of a 2018 Supreme Court decision, have *narrowed* the category of whistleblowers qualified for protection under the anti-retaliation provisions to those who have made their report "in writing" to the SEC before the relation occurs. The U.S. authorities did not, however, explain if, or how, they have considered providing additional (i.e., enhanced) guidance since Phase 4 which would set out the different protections that exist depending on whether a report is made to the DOJ, the SEC, or both, in order to help potential whistleblowers to make an informed choice within the existing framework.

#### Regarding the investigation and prosecution of foreign bribery:

- ◆ **Recommendation 2a** – *Fully implemented*. In Phase 4, the WGB invited the SEC to consider whether to consolidate its long-standing enforcement policies for fostering cooperation by natural and legal persons specifically for foreign bribery in light of the DOJ's introduction of the Corporate Enforcement Policy. In discussions with the lead examiners, the SEC explained that its Division of Enforcement considered the matter and decided it was not necessary to change its existing guidance at this time, but noted it would be giving additional consideration to this matter going forward. Based on this additional context, this recommendation can be considered implemented under the circumstances.
- ◆ **Recommendation 2b** – *Fully implemented (converted to follow-up issue)*. In Phase 4, the DOJ had recently adopted the Corporate Enforcement Policy (CEP), which seeks to encourage companies to voluntarily disclose foreign bribery violations, cooperate with the investigation, and remediate in exchange for reduced sanctions. The WGB recommended that the DOJ continue to evaluate the effectiveness of the CEP in encouraging voluntary disclosures as well as its deterrent effect. The DOJ reports that in the course of its work it continually assesses the CEP's effectiveness during internal deliberations and discussions, including through the DOJ's Corporate Crime Advisory Group, which was created in October 2021. According to the DOJ, the CEP has led to additional voluntary reports by companies and fostered cooperation and remediation. The DOJ reports observing that companies have enhanced their compliance programmes, which it attributes in part to

companies' desire to receive remediation credit under the CEP. The DOJ argued that this may have a deterrent effect.

- ◆ **Recommendation 2c – Partially implemented.** Regarding corporate recidivism, the WGB recommended that the United States address the issue both through appropriate sanctions and by raising awareness of the impact that recidivism has on the choice of available resolutions in FCPA matters. In October 2021 and September 2022, the DOJ's Deputy Attorney General, Lisa Monaco, issued new guidance, which is publicly available, to enhance DOJ corporate criminal enforcement. On recidivism specifically, the guidance instructs prosecutors to consider all prior wrongdoing – whether criminal or non-criminal – by the company itself and related corporate entities both when (i) making charging decisions, which could indirectly affect the sanctions imposed, and (ii) determining the appropriate form of enforcement resolution. It is not yet clear, and probably too early to determine, what effect this new guidance has had on the DOJ's FCPA enforcement in practice. For its part, the SEC does not appear to have developed any new policies concerning the impact that corporate recidivism would have on sanctions or the form of resolution pursued in FCPA enforcement actions. The SEC observes, instead, that in one case since Phase 4, it has issued appropriate sanctions involving a corporate recidivist, and raised awareness by highlighting the recidivist status in both the Order and Press Release. Specifically, in June 2022, the SEC sanctioned Tenaris for FCPA anti-bribery, books and records, and internal controls violations through an administrative cease and desist proceeding and noted that it had previously been subject to a DPA in a prior FCPA matter. The resulting Cease and Desist Order imposed \$78 million in fines, disgorgement, and interest on the company, recognising that it had previously been sanctioned in 2011 for an unrelated FCPA violation. The 2011 resolution was notably the SEC's first use of a DPA, which it used as part of its cooperation policy in light of Tenaris's self-reporting, cooperation, and remediation. The 2022 Order indicates that Tenaris cooperated with the investigation, but it does not appear that Tenaris self-reported. Additionally, the Order does not specifically explain the impact that recidivism had on the choice of sanctions or the form of the resolution.<sup>3</sup> In contrast, the SEC sanctioned Deutsche Bank for FCPA violations in 2019 and 2021 using Cease and Desist Orders on both occasions. The 2021 Order does not expressly reference the fact that Deutsche Bank had previously been sanctioned by the SEC for FCPA violations. In summary, although it is clear that the U.S. authorities have demonstrated some positive steps, in the round those steps do not fully address the WGB's focus on the impact that recidivism has on the level of sanctions or the choice of resolution.
- ◆ **Recommendation 2d – Fully implemented (converted to follow-up issue).** Whilst recognising that U.S. enforcement agencies had provided a considerable degree of transparency in publishing their FCPA enforcement actions online, the WGB recommended in Phase 4 that they also publicise when a DPA or a Non-Prosecution Agreement (NPA) with a legal person in FCPA matters is extended or completed. It also recommended that, for DPAs, the authorities explain the reasons for any extension. The DOJ reports that for all DPAs since October 2020, the entry for the enforcement actions on its website includes not only the initial DPA but also related court filings, including the motion to dismiss once the DPA term comes to an end, the court's dismissal order, and any filings related to the extension. The relevant filings contain the reasons for any extension. The SEC's position is that it has not concluded any DPAs since 2015, so it has not had an opportunity to report the conclusion of a DPA or explained the basis for an extension. Whilst deeming this recommendation implemented, the Working Group will follow-up on how the SEC addresses this recommendation in future cases involving DPAs.

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<sup>3</sup> The Order explains that the bribery scheme sanctioned in June 2022 involved an agreement whereby a Tenaris subsidiary would give the foreign public official 0.5% of contract revenues (SEC Order). In re Tenaris S.A. (2 June 2022), para. 10). Ultimately, the official received USD 10.4 million, which would imply that the revenues amounted to, or at least were expected to be, over USD 2 billion. (Order, para. 16). The fine was ultimately set at USD 25 million in light of Tenaris's cooperation (Order. Section IV(D)).



### Regarding sanctions and other measures for legal persons:

- ◆ **Recommendation 3a** – *Partially implemented*. The WGB recommended that the United States collect data, to the extent possible within its system, on debarment in foreign bribery cases to improve the monitoring of the impact of such measures. The United States reports that its centralised procurement and non-procurement debarment database – System for Award Management – does not record the reasons for discretionary suspensions or debarments. During the preparatory meeting, the U.S. delegation explained that an older system tried to track the grounds for debarment but ultimately proved unworkable. The United States maintains, therefore, that recording foreign bribery offences is not feasible under its system, especially as they may be pursued under multiple U.S. criminal laws. As in Phase 4, individual agencies, such as the Export-Import Bank may track the reasons for their debarments. The United States also recalls that its debarment system is not intended to serve any punitive function, and therefore its purpose is not to monitor the impact of such measures, but rather to ensure that the government conducts business with parties who are “presently responsible”. The Working Group acknowledges the United States’ position and accepts that there are current obstacles within its system which has prevented meaningful progress in collecting data on debarment for foreign bribery. The Working Group nevertheless believes that further consideration of possible alternative ways of collecting data on debarment decisions based on foreign bribery could be beneficial, including for the purpose of identifying parties who are “presently responsible”.
- ◆ **Recommendation 3b** – *Fully implemented*. The WGB also recommended that the U.S. authorities consider using the debarment lists of international financial institutions (IFIs) as an additional source of information when evaluating whether an entity is trustworthy. The Interagency Suspension and Debarment Committee (ISDC) considered this issue when it first received the Phase 4 report published in November 2020. Reportedly, the ISDC determined that because IFIs are not required to share evidence with U.S. agencies, it would be inconsistent with principles of due process under U.S. laws and regulations to make a debarment decision based on a previous IFI debarment decision without access to the evidentiary record on which the IFI relied. The Working Group nonetheless queries whether the fact that an IFI has debarred an entity could, although not dispositive, still provide a reasonable basis for an authority to conduct further due diligence or even request more information from the entities concerned consistent with due process considerations. Whilst the Working Group still maintains that considering IFI debarment lists is useful for identifying red flags that might prompt additional due diligence, the U.S. authorities did consider this recommendation. Thus, the recommendation is fully implemented.

### Dissemination of the Phase 4 Report

The United States reports that the U.S. Departments of Commerce and State together with the DOJ and the SEC issued a joint press release on their respective websites regarding the issuance of the United States’ Phase 4 Report. They also publicised (and continue to publicise) the Phase 4 report in remarks in various public forums, panels, and events. In addition, the DOJ Fraud Section featured the Phase 4 report in its 2020 and 2021 Year in Review publications. The Department of Commerce also disseminates the report internally, including as part of its Foreign Corrupt Practices Act trainings for new International Trade Administration staff, including the U.S. and Foreign Commercial Service. The Department of State has a link to the OECD Working Group on Bribery on its public internet page, highlighting U.S. engagement and the WGB’s peer review process to monitor compliance with the OECD Anti-Bribery Convention. Department of State officials have also disseminated the OECD WGB website link to anti-corruption stakeholders within the Department to highlight the Phase 4 report’s conclusions.

### Conclusions of the Working Group on Bribery

Based on these findings, the Working Group concludes that of the nine Phase 4 recommendations, the United States fully implemented five recommendations (1a, 2a, 2b, 2d, and 3b), partially implemented three recommendations (1c, 2c, and 3a), and did not implement one recommendation (1b). The Working Group converted recommendations 2b and 2d into a follow-up issue.

# Phase 4 Two-Year Written Follow-Up Report by the United States

**Name of country:** UNITED STATES

**Date of approval of Phase 4 evaluation report:** 16 October 2020

**Date of information:** 15 July 2022

## PART I: RECOMMENDATIONS FOR ACTION

*Regarding Part I, responses to the first question should reflect the current situation in your country, not any future or desired situation or a situation based on conditions which have not yet been met. For each recommendation, separate space has been allocated for describing future situations or policy intentions.*

### Background information:

In October 2020, the Working Group on Bribery (WGB) adopted its Phase 4 evaluation report on the United States' implementation and enforcement of the OECD Anti-Bribery Convention and related instruments, including the 2009 Recommendation.

Based on the findings in this report, the Working Group commended the United States' good practices and positive achievements, made recommendations and identified issues for follow-up.

The WGB decided that "The United States will submit a written report to the Working Group in two years (i.e. in October 2022) on its implementation of all recommendations as well as detailed information on its foreign bribery enforcement and developments related to follow-up issues".

## Recommendations regarding detection of foreign bribery

### Recommendation 1(a):

1. Regarding the **detection** of foreign bribery, the Working Group recommends that the United States:
  - a. Continues to maintain sufficient data concerning its detection sources and, to the extent permissible, report in an aggregated summary to the Working Group the breakdown of the sources of detection both for allegations leading to the investigation of a legal person for foreign bribery and for concluded cases resulting in sanctions or other dispositions against those legal persons. [2009 Recommendation, I. and III. iv.]

### Action taken as of the date of the follow-up report to implement this recommendation:

Since October 2020, the U.S. Department of Justice (DOJ) has maintained sufficient data concerning detection sources.

During that time period, for allegations leading to the investigation of a legal person for foreign bribery, the DOJ Foreign Corrupt Practices Act (FCPA) Unit reports the following approximate breakdown of detection sources: 25% from self-reports; 30% from whistleblowers; 10% from media reports; 10% from civil or foreign authority referrals; and 25% from other law enforcement activity.

During that time period, for concluded cases resulting in sanctions or other dispositions against legal persons for foreign bribery, the DOJ FCPA Unit reports the following approximate breakdown of detection sources: 10% from self-reports; 40% from whistleblowers; 20% from media reports; 20% from civil or foreign authority referrals; and 10% from other law enforcement activity.

Since October 2020, the U.S. Securities & Exchange Commission (SEC) has maintained sufficient data concerning detections sources; however, due to statutory protections, the SEC cannot provide specific information related to sources of detection.

**If no action has been taken to implement recommendation 1(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

### Recommendation 1(b):

1. Regarding the **detection** of foreign bribery, the Working Group recommends that the United States:
  - b. Continues enhancing its AML reporting framework by applying appropriate AML/CFT obligations to lawyers, accountants and trust and company service providers related to foreign bribery. [Article 7 of the Convention; 2009 Recommendation III. i.]

### Action taken as of the date of the follow-up report to implement this recommendation:

In May 2022 the U.S. Department of the Treasury adopted a [National Strategy for Combatting Terrorist and Other Illicit Financing](#) that, among other things, focuses on ways that the United States' AML/CFT framework can “stay ahead of evolving threats, vulnerabilities, and risks and adapt to structural and technological changes in financial services and financial crime.” That Strategy complements the December 2021 [U.S. Strategy on Countering Corruption](#) released by the White House which calls for, among other things, “effectively collecting beneficial ownership information on those who control anonymous shell companies;” “increasing transparency in real estate transactions;” “prescribing minimum

reporting standards for investment advisers and other types of equity funds;” and “using existing authorities, and working with Congress to expand authorities, where necessary, to make sure that key gatekeepers to the financial system—including lawyers, accountants, and trust and company service providers—cannot evade scrutiny.” Additionally, pursuant to the Anti-Money Laundering Act of 2020 (AMLA), and as outlined in the National Strategy for Combatting Terrorist and Other Illicit Financing and the U.S. Strategy on Countering Corruption, the U.S. Department of the Treasury is also evaluating the extent to which market participants and dealers in high-value goods, such as art and antiquities, among other goods, warrant additional AML/CFT requirements.

Specifically, with respect to AML/CFT obligations for lawyers, accountants, and trust and company service providers, the U.S. Strategy on Countering Corruption notes that U.S. law enforcement has increased its focus on their role as facilitators. However, it is challenging to prove that facilitators have the “intent and knowledge” that they were working with illicit funds or bad actors, or that they should have known that were doing so. The United States has publicly committed to considering additional authorities that would clarify AML/CFT obligations for lawyers, accountants, and trust and company service providers, including working with the Congress as necessary to secure additional authorities. President Biden has directed Executive Branch departments and agencies to consider ways to increase penalties on those who facilitate corruption and money laundering, including by working with states to levy professional sanctions. The United States has also publicly stated that it will consider increasing its engagement with key gatekeepers on this topic including, as appropriate, with respect to information and other data sharing.

**If no action has been taken to implement recommendation 1(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 1(c):**

1. Regarding the **detection** of foreign bribery, the Working Group recommends that the United States:
  - c. Considers how it can enhance protections for whistleblowers who report suspected acts of foreign bribery by non-issuers and enhance guidance about the protections available to whistleblowers who report suspected acts of foreign bribery depending on the competent enforcement agency to which they report. [2009 Recommendation IX. iii.]

**Action taken as of the date of the follow-up report to implement this recommendation:**

DOJ has considered and will continue to consider the most effective manner in which to enhance protections for whistleblowers. Congressional legislation may be required to enhance protections for whistleblowers who report foreign bribery by non-issuers. DOJ and SEC provide guidance about the protections available to whistleblowers who report suspected acts of foreign bribery. *See e.g.*, DOJ/SEC FCPA Resource Guide, Second Edition, Ch. 8. The SEC also provides additional guidance on the SEC’s webpage regarding protections against whistleblower retaliation: <https://www.sec.gov/whistleblower/retaliation>.

**If no action has been taken to implement recommendation 1(c), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendations regarding enforcement of the foreign bribery offence**

**Recommendation 2 (a):**

2. Regarding the **investigation and prosecution** of foreign bribery, the Working Group recommends that the United States:

a. With a view to further harmonising the approach to fighting foreign bribery of the leading US law enforcement agencies, considers having the SEC consolidate and publicise its policy and guidance on how it enforces the FCPA. [2009 Recommendation, V]

**Action taken as of the date of the follow-up report to implement this recommendation:**

The SEC staff considered this Recommendation. All SEC guidance related to FCPA enforcement is in the FCPA Resource Guide, on the SEC's FCPA spotlight page (<https://www.sec.gov/spotlight/foreign-corrupt-practices-act.shtml>), and on the SEC's Division of Enforcement webpage (<https://www.sec.gov/page/enforcement-section-landing>).

**If no action has been taken to implement recommendation 2(a) please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 2 (b):**

2. Regarding the **investigation and prosecution** of foreign bribery, the Working Group recommends that the United States:

b. As part of its periodic review of its approach to enforcement provided under the 2009 Recommendation, continues to evaluate the effectiveness of the Corporate Enforcement Policy and in particular assess its effectiveness in terms of encouraging self-disclosure and of its deterrent effect on foreign bribery. [2009 Recommendation, V]

**Action taken as of the date of the follow-up report to implement this recommendation:**

The DOJ continually assesses the Corporate Enforcement Policy (CEP) and whether any changes would increase the effectiveness of the Policy. The Policy has continued to achieve its desired results in FCPA matters (e.g., additional voluntary self-disclosures, higher quality of cooperation and remediation, and additional transparency and guidance for prosecutors and corporations). In addition, we have seen improvements to the anti-corruption compliance programs of companies that can likely be attributed in part to the credit we provide companies for timely and appropriate remediation under the Policy.

**If no action has been taken to implement recommendation 2(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 2 (c):**

2. Regarding the **investigation and prosecution** of foreign bribery, the Working Group recommends that the United States:

c. Continues to address recidivism through appropriate sanctions and raise awareness of the impact of recidivism on the choice of resolution in FCPA matters. [Article 3(1) of the Convention; 2009 Recommendation, V]

**Action taken as of the date of the follow-up report to implement this recommendation:**

On October 28, 2021, the DOJ's Deputy Attorney General, Lisa Monaco, announced various actions DOJ will be taking with respect to corporate criminal enforcement. One of the issues Deputy Attorney General Monaco focused on was how a company's prior misconduct affects DOJ decisions regarding the appropriate corporate resolution. On the same date, Deputy Attorney General Monaco issued a memorandum entitled "Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies" (<https://www.justice.gov/dag/page/file/1445106/download>).

In her speech, Deputy Attorney General Monaco made clear that all prior misconduct needs to be evaluated when it comes to decisions about the proper resolution with a company, whether or not that misconduct is similar to the conduct at issue in a particular investigation. She indicated "that record of misconduct speaks directly to a company's overall commitment to compliance programs and the appropriate culture to disincentivize criminal activity." She stated that, going forward, prosecutors will be directed to consider the full criminal, civil, and regulatory record of any company when deciding what resolution is appropriate for a company that is the subject or target of a criminal investigation.

Deputy Attorney General Monaco stated "prosecutors can and should consider the full range of prior misconduct, not just a narrower subset of similar misconduct — for instance, only the past FCPA investigations in an FCPA case, or only the tax offenses in a Tax Division matter. A prosecutor in the FCPA unit needs to take a department-wide view of misconduct: Has this company run afoul of the Tax Division, the Environment and Natural Resources Division, the money laundering sections, the U.S. Attorney's Offices, and so on? He or she also needs to weigh what has happened outside the department — whether this company was prosecuted by another country or state, or whether this company has a history of running afoul of regulators. Some prior instances of misconduct may ultimately prove to have less significance, but prosecutors need to start by assuming all prior misconduct is potentially relevant."

The accompanying DOJ memorandum similarly states that "A corporation's record of past misconduct—including violations of criminal laws, civil laws, or regulatory rules—may be indicative of whether the company lacks the appropriate internal controls and corporate culture to disincentivize criminal activity, and whether any proposed remediation or compliance programs, if implemented, will succeed. Prosecutors must therefore take a holistic approach when considering a company's characteristics, including its history of corporate misconduct, without limiting their consideration to whether past misconduct is similar to the instant offense."

The memorandum goes on to state that "when making determinations about criminal charges and resolutions for a corporate target, prosecutors are directed to consider all misconduct by the corporation discovered during any prior domestic or foreign criminal, civil, or regulatory enforcement actions against it, including any such actions against the target company's parent, divisions, affiliates, subsidiaries, and other entities within the corporate family. Some prior instances of misconduct may ultimately prove less significant, but prosecutors must start from the position that all prior misconduct is potentially relevant."

Should additional guidance or modifications to the Justice Manual be issued with respect to recidivism, we will provide a copy to the Working Group.



The SEC continues to address recidivism of foreign bribery violations through appropriate sanctions. On June 2, 2022, a Luxembourg-based global manufacturer and supplier of steel pipe products, Tenaris, agreed to pay more than \$78 million to resolve charges that it violated the anti-bribery, books and records, and internal accounting controls provisions of the FCPA in connection with a bribery scheme involving its Brazilian subsidiary. This is the second action against Tenaris. In 2011, the company entered into a Deferred Prosecution Agreement with the SEC as a result of alleged bribes the company paid to obtain business from a state-owned entity in Uzbekistan. To raise awareness, the press release and SEC Order are publicly available on the SEC's website: <https://www.sec.gov/news/press-release/2022-98>.

**If no action has been taken to implement recommendation 2(c), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 2 (d):**

2. Regarding the **investigation and prosecution** of foreign bribery, the Working Group recommends that the United States:

c. Ensures that, going forward: (i) the law enforcement agencies make publicly available whether a Non-Prosecution Agreement or a Deferred Prosecution Agreement with a legal person in an FCPA matter has been extended or completed; and (ii) when extending a Deferred Prosecution Agreement with a legal person in an FCPA matter, that they make public in an easily accessible manner the grounds for extension, including when such extension is decided to allow a company to complete its monitorship. [2009 Recommendation, III.i]

**Action taken as of the date of the follow-up report to implement this recommendation:**

The DOJ FCPA Unit's website includes information related to DOJ enforcement actions (organized both chronologically and alphabetically) and can be found at <https://www.justice.gov/criminal-fraud/enforcement-actions>. For all Deferred Prosecution Agreements extended or concluded since October 2020, the website entry for the particular matter includes the related court filing, such as the motion to dismiss, the court's dismissal order, or the filing related to the extension. For all Non-Prosecution Agreements, the website entry for the particular matter notes the date that the Non-Prosecution Agreement was concluded and, if applicable, any extension.

**If no action has been taken to implement recommendation 2(c), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendations regarding the liability of, and engagement with, legal persons**

**Recommendation 3(a):**

3. Regarding **sanctions** and other measures for legal persons, the Working Group recommends that the United States:

a. Collects data, to the extent possible within in its system, on debarment in foreign bribery cases to improve the monitoring of the impact of such measures. [Article 3.4 of the Convention, 2009 Recommendation III. i., iv., and vii.; and XI. i.]

**Action taken as of the date of the follow-up report to implement this recommendation:**

The government-wide non-procurement debarment and suspension regulations expressly prohibit using suspension and debarment for the purposes of punishing parties, which includes using suspension and debarment as a deterrent to others. Although all exclusions are available on the System for Award Management database (SAM), the database does not list the specific reasons for suspension or debarment. The United States Interagency Suspension and Debarment Committee (ISDC) does not specifically report data on debarments in foreign bribery cases. As noted in the United States' Phase 4 responses, the regulations also require government agencies to only conduct business with responsible parties. (*See* 2 C.F.R. Part 180, which is implemented by each agencies' regulations. For procurements, the provision is listed under the Federal Acquisition Regulations at 48 C.F.R. Subpart 9.4.). Concomitantly, the same provision requires that agencies exclude parties that are not "presently responsible," a determination that may be brought into question where there is an accusation of bribery, among any number of possible reasons. Data on debarment in foreign bribery cases may therefore be collected on a case-by-case basis as appropriate. For example, the Export-Import Bank of the United States (EXIM) keeps a list of individuals and companies that it debars, and keeps track of reasons for debarring them, although so far it has not debarred for foreign bribery.

**If no action has been taken to implement recommendation 3(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 3(b):**

3. Regarding **sanctions** and other measures for legal persons, the Working Group recommends that the United States:

b. Considers encouraging public contracting authorities and those responsible for granting arms export licences to implement reviews of debarment lists of multilateral financial institutions as an additional source in determining whether an entity is trustworthy [2009 Recommendation III. i., iv., and vii.; and XI. i.]

**Action taken as of the date of the follow-up report to implement this recommendation:**

All U.S. government agencies have the authority to suspend or debar parties from participating in U.S. federal government programs, including public procurement and non-procurement transactions, such as export credits. Debarment can be based on any act showing a lack of integrity, and the relevant regulations expressly include bribery within its reach. The Interagency Suspension and Debarment Committee (ISDC) encourages and assists federal agencies in entering cooperative efforts to pool resources and achieve operational efficiencies in the government-wide suspension and debarment system. Although the ISDC has reviewed whether suspending and debarring officials should consider debarment lists of multilateral financial institutions when determining whether an entity is presently responsible, it has not done so as a result of due process concerns and the inability to meet evidentiary standards arising from the unavailability of the administrative records underlying the determinations of institutions that are not part of the United States government.

EXIM requires certifications to confirm that parties are not on multilateral debarment lists. More

specifically, EXIM's Exporter's Certificate and various applications for EXIM transactions require certifications that the signing entity (and, in some cases, the principals of such entity) are not on the debarment lists of a number of multilateral development banks, including the World Bank, Inter-American Development Bank, Asian Development Bank, and European Bank for Reconstruction and Development.

The U.S. Department of State's Directorate of Defense Trade Controls screens applications for export authorization for defense articles and services controlled by the International Traffic in Arms Regulations (ITAR) against an internal watchlist. It is considering whether it would be appropriate to add debarment actions by multilateral financial institutions to the sources used to populate this list.

**If no action has been taken to implement recommendation 3(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

### Requested information regarding enforcement

#### **WGB request to provide detailed information on foreign bribery enforcement:**

In Phase 4, the WGB decided that "The United States will submit (...) detailed information on its foreign bribery enforcement" (see para. 3 of the Conclusion, p. 111).

#### **Please include a summary of the U.S. foreign bribery enforcement record since the Phase 4 evaluation:**

Since October 2020, the United States has continued to enforce the FCPA, leading to significant results. Since that time, the DOJ's FCPA Unit has resolved ten corporate enforcement actions that resulted in companies agreeing to global monetary penalties and fines of approximately \$4.8 billion. Most of the corporate resolutions listed below were coordinated with foreign authorities, pursuant to which the DOJ credited significant funds otherwise due to the United States against payments the companies made to resolve parallel cases by foreign authorities.

Specifically, these corporate resolutions include:

- October 2020: J&F Investimentos S.A. (Guilty Plea relating to bribery in Brazil). Total global monetary amount: \$283.4M
- October 2020: Goldman Sachs (DPA and Subsidiary Guilty Plea relating to bribery in Malaysia and UAE). Total global monetary amount: \$2.92B
- October 2020: Beam Suntory Inc. (DPA relating to bribery in India). Total global monetary amount: \$19.6M
- December 2020: Vitol S.A. (DPA relating to bribery in Brazil, Ecuador, Mexico). Total global monetary amount: \$145M
- January 2021: Deutsche Bank AG (DPA relating to account violations in multiple countries). Total global monetary amount: \$130.4M
- June 2021: Amec Foster Wheeler Energy Limited (DPA relating to bribery in Brazil). Total global monetary amount: \$43.1M
- October 2021: Credit Suisse Group AG (DPA and Subsidiary Guilty Plea for wire fraud relating to corrupt maritime loan in Mozambique). Total global monetary amount: \$475M

- March 2022: Jardine Lloyd Thompson Group Holdings (CEP declination relating to bribery in Ecuador). Total disgorgement: \$29M
- April 2022: Stericycle Inc. (DPA relating to bribery in Brazil, Argentina, Mexico). Total global monetary amount: \$84.2M
- June 2022: Glencore AG International (Guilty Plea relating to bribery in numerous countries). Total global monetary amount: \$700M

In addition, the DOJ has continued its focus on prosecuting individuals involved in foreign bribery, leading, since October 2020, to publicly announced charges against 47 persons and publicly announced convictions of 34 persons. Among these convictions is the recent trial guilty verdict of Roger Ng, who had been charged with FCPA and money laundering offenses relating to the above-cited Goldman Sachs resolution. A full list of DOJ FCPA individual and corporate enforcement actions (organized both chronologically and alphabetically) can be found at <https://www.justice.gov/criminal-fraud/enforcement-actions>.

Since October 2020, the SEC has continued to enforce the FCPA, leading to significant results. Since that time, the SEC's FCPA Unit has resolved 9 corporate enforcement actions against 10 corporations and 2 individuals, resulting in the companies agreeing to pay a monetary amount including disgorgement plus interest and penalties of approximately \$1.3 billion.

Specifically, these corporate resolutions include:

- October 2020: J&F Investimentos S.A., JBS S.A, Joesley Batista, and Wesley Batista (Violations of the books and records and internal accounting controls provisions of the FCPA). Total SEC monetary amount: \$28M
- October 2020: Goldman Sachs (Violations of the anti-bribery, books and records, and internal accounting controls provisions of the FCPA in connection with the 1Malaysia Development Berhad (1MDB) bribe scheme). Total SEC monetary amount: \$1B
- January 2021: Deutsche Bank AG (Violations of the books and records and internal accounting controls provisions of the FCPA in connection with improper payments to intermediaries in China, the UAE, Italy and Saudi Arabia). Total SEC monetary amount: \$43M
- June 2021: Asante Berko (Violations of the anti-bribery provisions of the FCPA by orchestrating a bribery scheme to help a client to win a government contract to build and operate an electrical power plant in the Republic of Ghana). The final judgement was issued in June 2021 however the case was filed in April 2020. Total SEC monetary amount: \$328K
- June 2021: Amec Foster Wheeler Energy Limited (Violations of the anti-bribery, books and records, and internal accounting controls provisions of the FCPA in connection with a scheme to obtain an oil and gas engineering and design contract from the Brazilian state-owned oil company, Petroleo Brasileiro S.A.). Total SEC monetary amount: \$23M
- September 2021: WWP plc (Violations of the anti-bribery, books and records, and internal accounting controls provisions of the FCPA in connection with violations at its subsidiaries in India, Brazil, China, and Peru). Total SEC monetary amount: \$19M
- October 2021: Credit Suisse Group AG (Violations of the anti-fraud provisions of the federal securities laws and the books and records and internal accounting controls provisions of the FCPA in connection with its role in three financial transactions on behalf of Mozambican state-owned entities). Total SEC monetary amount: \$99M
- February 2022: KT Corporation (Violations of the books and records and internal accounting controls provisions of the FCPA in connection with improper payments for the benefit of government officials in Korea and Vietnam). Total SEC monetary amount: \$6M
- April 2022: Stericycle Inc. (Violations of the anti-bribery, books and records, and internal accounting controls provisions of the FCPA in connection with violations at its subsidiaries in Argentina, Brazil, and Mexico). Total SEC monetary amount: \$28M

- June 2022: Tenaris S.A. (Violations of the anti-bribery, books and records, and internal accounting controls provisions of the FCPA in connection with a bribery scheme involving its Brazilian subsidiary). Total SEC monetary amount: \$78M

A full list of SEC FCPA individual and corporate enforcement actions (organized chronologically) can be found at: <https://www.sec.gov/enforce/sec-enforcement-actions-fcpa-cases>.

## PART II: ISSUES FOR FOLLOW-UP BY THE WORKING GROUP

*Regarding Part II and as per the procedures agreed by the Working Group in December 2019, countries are invited to provide information with regard to any follow-up issue identified below where there have been relevant developments since the Phase 4 report. Please also note that the Secretariat and the lead examiners may also identify follow-up issues for which it specifically requires information from the evaluated country.*

4. The Working Group will follow up on the issues below as case law, practice, and legislation develops:

### Issue for follow-up:

a. Whether conspiracy to bribe a foreign public official is an offence to the same extent as conspiracy to bribe a domestic public official, even when the conspirator seeking to bribe the foreign official could not be held directly liable for foreign bribery;

**With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:**

There is continuing case law development on the scope of liability for conspiracy and aiding and abetting FCPA violations of certain non-U.S. persons. The DOJ is currently in active litigation regarding this issue resulting from an order in November 2021 by a district court in the Southern District of Texas that dismissed, inter alia, FCPA charges brought against a Swiss asset manager (*United States v. Rafoi-Bleuler*, Case No. 4:17-CR-0514-7, Dkt. No. 255 (Nov. 10, 2021)). The district court's order held, among other things, that Rafoi-Bleuler could not be liable for FCPA conspiracy and aiding and abetting for jurisdictional reasons, following a prior decision by the Second Circuit in 2018 in *United States v. Hoskins*, No. 16-1010 (2d Cir. 2018). The DOJ has appealed the order in *Rafoi-Bleuler* and filed briefing papers with the U.S. Court of Appeals for the Fifth Circuit; that appeal is currently pending.

More recently, in July 2022, the same judge who dismissed the charges in the *Rafoi-Bleuler* case also issued an order dismissing charges against another defendant, Paulo Jorge Da Costa Casqueiro Murta, including a charge that he conspired to violate the FCPA and aided and abetted FCPA violations. The district court's order dismissing the charges relies on the same reasoning as in the *Rafoi-Bleuler* case. The DOJ has moved to stay the dismissal and is considering appeal of the order.

**Issue for follow-up:**

b. Whether U.S. courts develop a common approach to how complicity in foreign bribery, including aiding and abetting liability, is applied to defendants not directly subject to the FCPA anti-bribery provisions;

**With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:**

Please note the answer above referring to the decisions by a court in the Southern District of Texas in the *Rafoi-Bleuler* case and the *Murta* case. Relying largely on the *Hoskins* decision, the court dismissed the allegations concerning conspiracy and aiding and abetting for the same reasons. As noted, the DOJ has appealed the *Rafoi-Bleuler* ruling to the Fifth Circuit.

**Issue for follow-up:**

c. How complicity in FCPA violations, including aiding and abetting, is applied when foreign nationals or companies engage in wrongful conduct while outside the United States;

**With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:**

The DOJ's FCPA Unit routinely has alleged conspirator and aiding and abetting liability in connection with FCPA violations. Such charges are common in white collar criminal prosecutions and, in general, long-established principles of liability. However, in the context of the FCPA, the 2018 decision by the Second Circuit in the *Hoskins* case, and much more recently, district court orders in the Southern District of Texas, have addressed challenges to the use of conspirator and aiding and abetting liability for foreign persons accused of violating these statutes. As noted above, the DOJ has appealed and filed briefings in the *Rafoi-Bleuler* case in the Fifth Circuit.

**Issue for follow-up:**

d. How US FCPA enforcement is affected as new agencies join the fight against foreign bribery;

**With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:**

The fight against foreign corruption remains a serious policy goal of the U.S. government. In December 2021, the White House released a strategy document to curb corruption following the issuance of a memorandum in June 2021 that declared the fight against corruption a core national security interest and outlined a multi-faceted approach to combat this problem. In the context of foreign bribery enforcement, the DOJ and SEC have long used the FCPA as a statutory tool to hold certain actors—both companies and individuals—accountable for foreign bribery. In addition, the DOJ has also used money laundering laws to pursue those involved in corrupt dealings, including foreign public officials. More recently, the U.S. Commodity Futures Trading Commission (CFTC) has also joined the fight against foreign bribery and has resolved, in parallel with the DOJ, two corporate matters (*Vitol* in 2020 and *Glencore* in 2022).



In sum, the strong interest and commitment by the U.S. government in combatting corruption, the continued strong enforcement efforts by the DOJ and the SEC, and the entry into foreign bribery enforcement by the CFTC, underscore the importance of this issue.

**Issue for follow-up:**

e. The impact of the Supreme Court ruling to ensure that the United States' capacity to recover ill-gotten gains from foreign bribery remains possible, in line with Article 3 of the Convention;

**With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:**

Since the decision in *Liu v. SEC* in June 2020, the SEC has continued to obtain disgorgement as a relief in FCPA cases. Please see the webpage on SEC FCPA Enforcement Actions for more information: <https://www.sec.gov/enforce/sec-enforcement-actions-fcpa-cases>.

**Issue for follow-up:**

f. How the United States facilitates access by law enforcement of beneficial ownership information in a timely manner for foreign bribery investigations;

**With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:**

On January 1, 2021, Congress enacted the National Defense Authorization Act (NDAA), which included significant reforms to the U.S. anti-money laundering regime. The NDAA included the Anti-Money Laundering Act of 2020 (AML Act) and, within the AML Act, the Corporate Transparency Act (CTA).

The CTA establishes uniform beneficial ownership reporting requirements for corporations, limited liability companies, and other similar entities formed or registered to do business in the United States. These reports must be filed with the Financial Crimes Enforcement Network (FinCEN), which is part of the U.S. Department of the Treasury. FinCEN must maintain the information collected in a confidential, secure, and non-public database and must also issue rules governing access to the database. However, the CTA expressly provides for law enforcement access to this information, subject to certain conditions and protocols governing access. Critically, this new authority will facilitate U.S. law enforcement's ability to timely access beneficial ownership information relating to, among other matters, foreign bribery investigations.

On December 8, 2021, FinCEN released a Notice of Proposed Rulemaking (NPRM) to implement the beneficial ownership reporting provisions of the CTA. Generally, the proposed rule would apply to corporations, limited liability companies, and other entities created by filing formation documents with a secretary of state or similar office of a state or Indian tribe. Furthermore, the rule is intended to apply equally to companies formed under the law of a foreign country that is registered to do business in any state or tribal jurisdiction.

The NPRM would require both domestic and foreign reporting companies to submit to FinCEN a report containing the beneficial owner of the entity, as well as key identifying information on the individual. These reports are required to include the name, date of birth, current address, and unique identification numbers, e.g., passport or driver’s license number, of any beneficial owner. FinCEN also has proposed an option that would allow companies to apply for and obtain a “FinCEN identifier” in lieu of providing personal information. Once the NPRM becomes effective, domestic and foreign reporting entities created or registered to do business in the United States prior to the final regulation will have one year from the effective date of the regulation to file initial reporting to FinCEN. Entities that are created or registered on or after the effective date will have 14 days from the date they are created or registered to file their initial report. Further, companies will have a 30-day deadline to file updated reports if any information changes on individuals reported.

Consistent with the existing Customer Due Diligence Rule (CDD Rule), the NPRM describes beneficial owners as individuals who directly or indirectly exercise substantial control over a reporting company or who own or control at least 25 percent of the entity’s ownership interest. The NPRM includes definitions for substantial control—which include acting as a senior officer and having substantial influence over key matters of import to the reporting company—as well as for ownership interest. As with the CDD Rule, the CTA exempts certain individuals and entities from the reporting requirements that are already heavily regulated, such as banks and insurance providers, as well as publicly traded companies subject to SEC reporting. The NPRM does not propose adding any additional exemptions.

The CTA includes substantial civil and criminal penalties for willful failure to report, willfully providing false or fraudulent information, and for unauthorized disclosure or use of the reporting information. Penalties for reporting violations can be as high as \$10,000 or 2 years in prison, or both, and penalties for unauthorized disclosure or use violations can be up to \$250,000 or 5 years in prison, or both. The NPRM clarifies that those subject to penalties for reporting violations include both those who are directly and indirectly involved with the submission of the report to FinCEN.

FinCEN has announced that the current NPRM is one of three rulemakings planned to implement the CTA. FinCEN will engage in additional rulemakings to (1) establish rules for who may access beneficial ownership information, for what purposes, and what safeguards will be required to ensure that the information is secured and protected; and (2) revise FinCEN’s CDD Rule following the promulgation of the beneficial ownership information reporting final rule.

**Issue for follow-up:**

g. The United States’ practice of updating the FCPA Resource Guide, to ensure that it continues to consolidate guidance emanating from various sources, including new policies, case law developments and, as relevant, anonymised lessons learned from monitorships or other compliance enhancement efforts flowing from FCPA resolutions.

**With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:**

The DOJ and SEC issued the First Edition of the FCPA Resource Guide in November 2012, and issued a Second Edition of the Guide in July 2020. As indicated in our Phase 4 responses, there is no set framework or schedule for updating or revising the Guide, but it is periodically updated to include recent developments in the law relating to FCPA enforcement.

### PART III: DISSEMINATION OF EVALUATION REPORT

**Please describe the efforts taken to publicise and disseminate the Phase 4 evaluation report:**

On November 17, 2020, the U.S. Departments of State, Justice, and Commerce, and the U.S. Securities & Exchange Commission issued a joint press release on their respective websites regarding the issuance of the United States' Phase 4 Report. *See, e.g.*, <https://www.justice.gov/opa/pr/oecd-working-group-bribery-issues-report-commending-united-states-maintaining-leading-role>. The press release contained links to the Report and to relevant pages of the Working Group on Bribery's website. A link to the Report is maintained on the DOJ Fraud Section's website (<https://www.justice.gov/criminal-fraud/file/1337591/download>). In addition, the Report was prominently featured in the DOJ Fraud Section's 2020 Year in Review publication (<https://www.justice.gov/criminal-fraud/file/1370171/download>), which is broadly disseminated. DOJ representatives often reference the Report and the work of the Working Group on Bribery when making presentations.

Additionally, officials from the U.S. Departments of State, Justice, and Commerce, and the U.S. Securities & Exchange Commission have and continue to publicize the Phase 4 Report in remarks in various public-facing forums, panels, and events. For example, on International Anticorruption Day in 2020, an Assistant Chief Counsel at the Department of Commerce participated on a panel with the Chair of the Working Group regarding the U.S. Phase 4 Report. The Department of Commerce, Office of the Chief Counsel for International Commerce, also disseminates the report internally, including through a reference and link to the report in its Foreign Corrupt Practices Act trainings for new International Trade Administration staff, including the U.S. and Foreign Commercial Service.

The Department of State's Office of Macroeconomic Affairs (OMA) has a link to the OECD Working Group on Bribery on its public internet page, highlighting U.S. engagement and the Group's peer review process to monitor compliance with the Anti-Bribery Convention. More specifically, OMA's intranet page highlights the Phase 4 Report and provides additional relevant background. When appropriate, Department of State officials add references to the Working Group on Bribery and the Phase 4 Report in relevant remarks and speeches. Department of State officials have also disseminated the OECD WGB website link to anti-corruption stakeholders across offices and bureaus in the Department to highlight the conclusions of the Phase 4 Report. The Phase 4 Report is a useful tool to reference when discussing the tough peer-review monitoring system in place and the importance of the Anti-Bribery Convention writ large.

[www.oecd.org/corruption/anti-bribery](http://www.oecd.org/corruption/anti-bribery)

