



# ENFORCEMENT OUTLOOK SERIES: FCPA COMPLIANCE 2022 OUTLOOK

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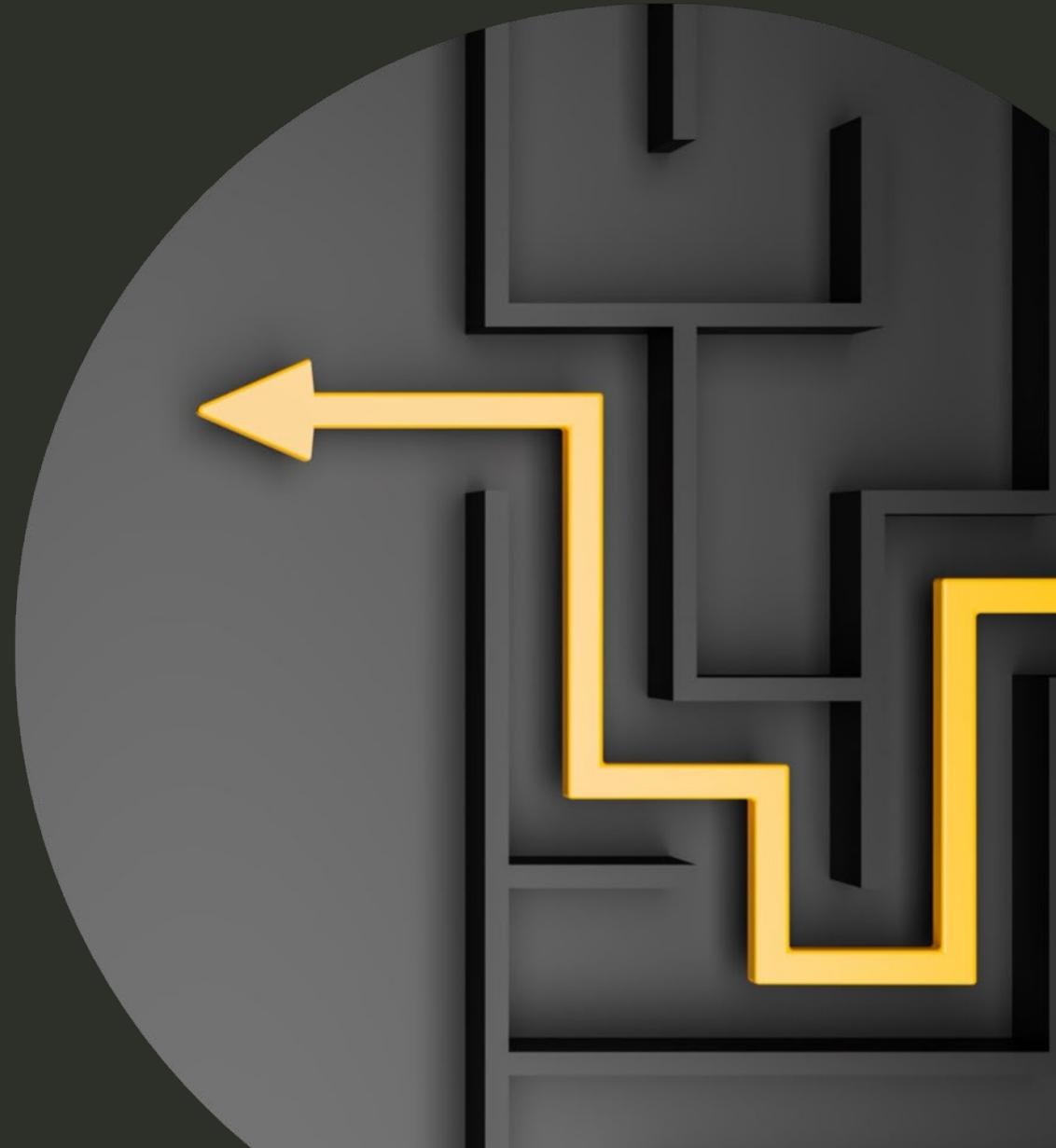
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# FCPA ENFORCEMENT: OVERVIEW

- Enforcement outlook 2022
- Key recent FCPA enforcement actions
- The role of third-party diligence in FCPA compliance
- Handling the challenges of a global investigation



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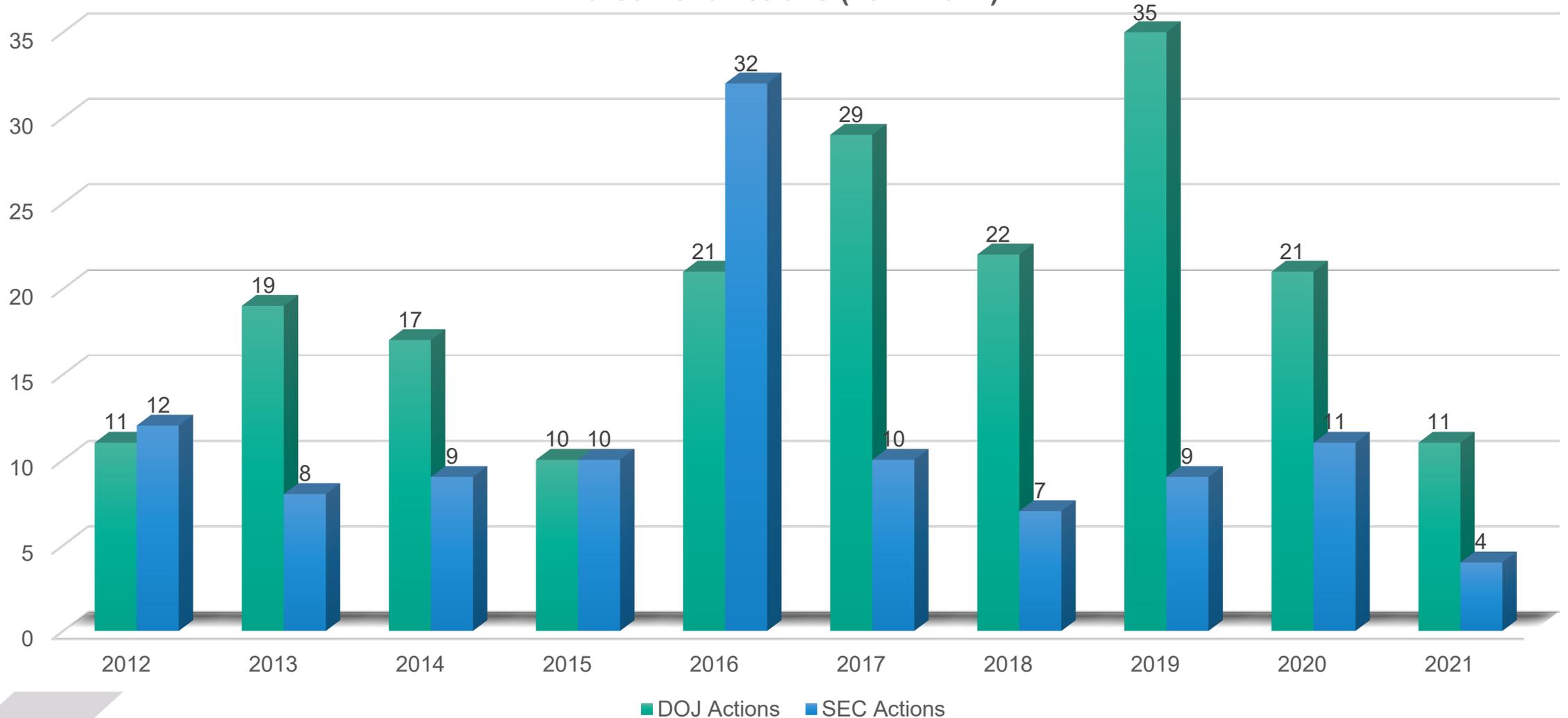
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# FCPA ENFORCEMENT: THE NUMBERS

All FCPA Enforcement Actions (2012-2021)



# FCPA ENFORCEMENT: LIFE SCIENCES

**23** life sciences companies have settled FCPA enforcement actions since 2011, with the most recent action being settled in September 2020

**7 of 10** largest pharmaceutical companies have settled or been investigated for FCPA violations since 2011

**\$1.7 billion** total fines, penalties and disgorgement have been paid out since 2011

**45** countries have been involved in the conduct

Between 2016 and 2020, U.S. enforcement agencies brought nearly **50% more** FCPA-related actions than in the preceding five years

# FCPA ENFORCEMENT: 2022 OUTLOOK

## Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest

JUNE 03, 2021 • PRESIDENTIAL ACTIONS

Section 1. Policy. Corruption corrodes public trust; hobbles effective governance; distorts markets and equitable access to services; undercuts development efforts; contributes to national fragility, extremism, and migration; and provides authoritarian leaders a means to undermine democracies worldwide. When leaders steal from their nations' citizens or oligarchs flout the rule of law, economic growth slows, inequality widens, and trust in government plummets.

- June 2021 → President Biden Identifies Anti-Corruption as a **National Security Priority**
  - a “whole of government” approach to anti-corruption enforcement
  - directs various law enforcement agencies to coordinate on enforcement actions
  - data sharing and enhanced investigative coordination

# FCPA ENFORCEMENT: 2022 OUTLOOK

- **Deputy Attorney General Lisa Monaco** – October 28, 2021:
  - noted that DOJ will be “**surging resources**” to federal prosecutors to assist with complex corporate investigations
  - referenced DOJ’s ongoing and increased use of **sophisticated data analytics** to investigate and prosecute corporate wrongdoing
  - *“Companies need to actively review their compliance programs to ensure they adequately monitor for and remediate misconduct — or else it’s going to cost them down the line.”*
  - *“[T]his is a start - and not the end - of this administration’s actions to better combat corporate crime.”*



Deputy Attorney General Lisa Monaco



# KEY RECENT FCPA ENFORCEMENT ACTIONS

- In February 2020, Cardinal Health paid **\$8.8 million** to settle books and records and internal accounting controls violations with the SEC charges
- Cardinal discovered that its recently-acquired Chinese subsidiary **used third-party marketing accounts to facilitate improper payments.**
  - marketing account was used to make **payments (including cash, luxury goods, gift cards and travel) to government HCPs and employees, disguised as “marketing payments”**
  - marketing employees disguised payments by pushing funds through third-party vendors, naming transactions with HCPs as, among other things, payments to printing companies for “production fees”
- Marketing employees were not subjected to FCPA and anti-bribery training
- Cardinal had identified the risk upon acquisition of the subsidiary, failed to properly monitor/eliminate it

- Cardinal China took various steps that the SEC took into account in charging, including:
  - **conducting an audit** of the marketing account's expenses;
  - **voluntarily disclosing** the results of its investigation to the SEC and **cooperating** with the SEC's investigation;
  - **terminating marketing accounts and employment contracts** with marketing employees;
  - **adding anti-bribery representations** and obligations to relevant contracts; and
  - limiting the use of the remaining balance of the dermocosmetic company's funds to **low-risk expenses**, such as salary payments.

# AMEC FOSTER WHEELER



- June 2021 resolution with DOJ, SEC Order, covering 2011-14 bribery scheme in Brazil
- Amec Foster Wheeler admitted to paying bribes through third party intermediaries to win a \$190 million contract to design a gas-to-chemicals complex
- Scheme started when Foster Wheeler sought to expand into Brazil
  - bribe money funneled via no-work “commissions” paid to Brazilian intermediary company
  - vendor used to broker the deal had failed Foster Wheeler’s due diligence process – but was still allowed to work “unofficially”

# AMEC FOSTER WHEELER



- Foster Wheeler acquired by Amec PLC in November 2014, *after* most of the relevant conduct. Amec then acquired by John Wood Group in 2017
- John Wood Group pays **\$177 million** in global resolution with DOJ, SEC, SFO (UK) and Brazilian authorities
- In reaching resolution, DOJ cited:
  - the “failure to voluntarily and timely disclose the conduct that triggered the investigation”
  - conduct “involved a high-level executive”
  - but credited the company’s subsequent cooperation and efforts to implement remedial measures



# THE ROLE OF THIRD-PARTY DILIGENCE IN FCPA COMPLIANCE

# THIRD PARTY DILIGENCE

## E. Third Party Management

A well-designed compliance program should apply risk-based due diligence to its third-party relationships. Although the need for, and degree of, appropriate due diligence may vary based on the size and nature of the company, transaction, and third party, prosecutors should assess the extent to which the company has an understanding of the qualifications and associations of third-party partners, including the agents, consultants, and distributors that are commonly used to conceal misconduct, such as the payment of bribes to foreign officials in international business transactions.

U.S. Department of Justice Criminal Division Evaluation of Corporate Compliance Programs (Updated June 2020)

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DOJ has identified **thorough third-party diligence** as one of the hallmarks of an “effective compliance program.”

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As the cases make clear, **lack of controls over, or visibility into, relationships with vendors, consultants and even clients or customers** increases anti-corruption risk.

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Maintaining a **robust third-party diligence process** enhances compliance, decreases risk, and may benefit the business as a whole.

# RISK ASSESSMENT

**The higher the risk associated with the third party, the greater the need for further scrutiny / due diligence**

- To assess anti-corruption risk, consider the following:
  - is the business or consultant **in a high-risk country**?
  - does the business involve a **heavily regulated industry**, or will the consultant be performing a function related to such industry?
  - will the third party have **direct dealing with government officials**?
  - does the vendor or consultant **rely heavily on sales agents or other third parties**?
  - are there “**success fees**” or other incentives to generate a certain level of sales?

# CONDUCTING REASONABLE DILIGENCE

- **Third party diligence can include:**
  - a review of **public records**;
  - requesting information on **ownership structure**;
  - requesting **list of government positions**, current or former, held by any employee or agent of the third party;
  - verifying that no government official has **an ownership or other financial or personal interest in third party**;
  - determining whether the third party has been **subject to corruption-related allegations**;
  - **reviewing accounting protocols and systems**; and
  - **reviewing anti-corruption policies** and trainings.

# RED FLAGS: A FEW EXAMPLES

**Use of shell companies, which can mask true ownership.**

**Any professional or personal ties to government officials.**

**Inability to perform contracted duties.**

**Lack of proven track record in industry or with the country at issue.**

**Unusually high compensation or unusual payment terms.**

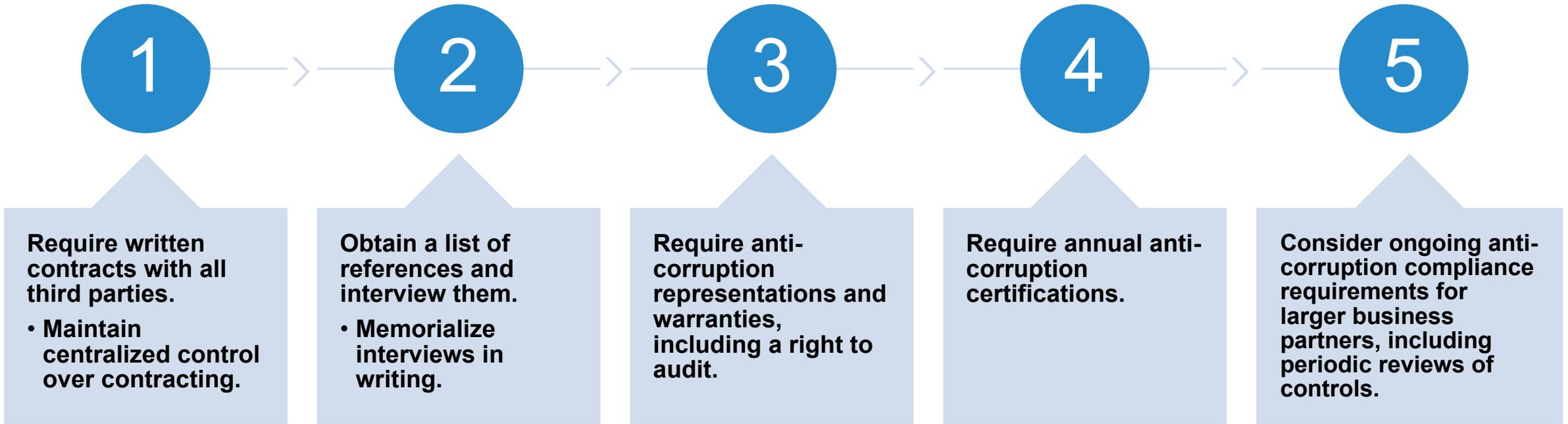
**Payments outside the country where work is performed.**

**Use of cash payments or “off-the-books” payments.**

**Lack of transparency in accounting controls or insufficient support for payments.**

**Lack of anti-corruption policies or Code of Conduct.**

# OTHER CONSIDERATIONS



# PRACTICAL CONSIDERATIONS



Know your business partners.

- Who are they?
- Why are they needed?



Consider whether there is a way to consolidate vendors.



# HANDLING THE CHALLENGES OF A GLOBAL INVESTIGATION

# CONSIDERATIONS FOR GLOBAL INVESTIGATIONS

- **When and whether to self-report**
  - self reporting is commonly expected
  - but beware - different standards may apply to the timing and scope of self-reporting to different bodies or law enforcement agencies, especially across borders
- **Privilege Considerations**
  - when will privilege apply?
  - will waiver be expected or required in order to obtain cooperation credit?

# BENEFITS OF SELF-DISCLOSURE

- There are a **variety of considerations** when deciding to self-disclose, which will depend on the circumstances. Benefits of self-disclosing can include:
  - declination;
  - amnesty;
  - DPA / NPA / CJIP; and / or
  - significantly reduced fines
- A key consideration is **when** and **to whom** to **self report**?
  - which government agency (or agencies) should receive the report, when and in what order? What if the potential misconduct spans different jurisdictions?

## 9-47.120 - FCPA Corporate Enforcement Policy

### 1. Credit for Voluntary Self-Disclosure, Full Cooperation, and Timely and Appropriate Remediation in FCPA Matters

Due to the unique issues presented in FCPA matters, including their inherently international character and other factors, the FCPA Corporate Enforcement Policy is aimed at providing additional benefits to companies based on their corporate behavior once they learn of misconduct. When a company has voluntarily self-disclosed misconduct in an FCPA matter, fully cooperated, and timely and appropriately remediated, all in accordance with the standards set forth below, there will be a presumption that the company will receive a declination absent aggravating circumstances involving the seriousness of the offense or the nature of the offender. Aggravating circumstances that may warrant a criminal resolution include, but are not limited to, involvement by executive management of the company in the misconduct; a significant profit to the company from the misconduct; pervasiveness of the misconduct within the company; and criminal recidivism.

# CONSIDERATIONS FOR SELF-DISCLOSURE

	United States	United Kingdom	France
Is self-reporting required for favorable treatment?	Most often a pre-requisite in order to benefit from a presumption of declination	Strongly encouraged but not necessary in order to obtain a DPA	1 of 3 factors in determining whether a CJIP will be offered
When are compliance programs evaluated?	Principally at the time of the charging decision or resolution	At the time of misconduct (and, to some extent, resolution)	At the time of self-report (and, to some extent, resolution)
When should the company self-report?	<i>“prompt”</i> - but not necessarily immediate; opportunity to establish preliminary facts and identify issues	<i>“within a reasonable time of the offending conduct coming to light”</i> – some opportunity for investigation	after <i>“top executives...become aware”</i> – companies <u>expected</u> to conduct internal investigation before disclosure

# PRIVILEGE CONSIDERATIONS

## United States

- Strong privilege and work product protections serve to counteract its broad discovery rules
- U.S. courts generally view privilege issues to be questions of substantive law and will engage in a choice-of-law analysis when assessing several potentially applicable laws.
- By contrast, work product is viewed as a procedural matter – the work product law of the forum will apply

## United Kingdom

- Privilege is viewed as a substantive right
- When a choice-of-law issue arises, U.K. courts generally treat it as a procedural question and apply the privilege law of the forum
- However, if considering a request under the GDPR and Data Protection Act of 2018, companies are not required to disclose any information consisting of legal professional privilege

# CONSIDERATIONS FOR COOPERATION

	United States	United Kingdom	France
Is a privilege waiver required?	Waiver <u>not</u> required or highlighted as a positive consideration	Waiver is <u>not</u> required but <u>is</u> viewed as a positive indication of co-operation	Withholding privileged material can be viewed as <u>uncooperative</u>
Is cooperation with international agencies relevant?	Highly relevant to determination of cooperation	Encouraged but unclear if it is a mitigating factor	Encouraged but French law and guidance may hinder efforts to do so

# 2022 ENFORCEMENT OUTLOOK WEBINAR SERIES: IS YOUR ORGANIZATION PREPARED?

- Hosted on the second Tuesday of each month from 12:00 - 1:00 pm ET
- Please contact Tyler Chalmers ([tchalmers@mwe.com](mailto:tchalmers@mwe.com)) to pre-register for an upcoming webinar

## UPCOMING TOPICS

APRIL 12: HEALTHCARE FRAUD

MAY: SEC ENFORCEMENT /  
SECURITIES FRAUD

JUNE: CYBER/DATA PRIVACY

JULY: FINANCIAL CRIMES

# THANK YOU / QUESTIONS?

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