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End of the *Hoskins* Saga: Implications for the Future

The tale of Lawrence Hoskins's FCPA woes has finally concluded. On August 12, 2022, the Second Circuit held that his rendering of support services (even if significant) did not constitute an agency relationship absent a showing of control under the common law definition of the word "agent" under the FCPA ("*Hoskins II*"). Earlier this month, DOJ allowed the deadline to file for *en banc* review of the Second Circuit's recent decision to pass, ending this litigation that began almost a decade ago. With the passing of this deadline, DOJ has waived its opportunity to challenge, at least in the Second Circuit, a narrow interpretation of agency that may limit the government's ability to charge foreign nationals in the future.

As we have noted many times before, the U.S. government's expansive FCPA theories are tested only rarely in court. The pair of appellate decisions from the *Hoskins* litigation therefore constitute much needed jurisprudence regarding DOJ's

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ability to pursue foreign participants in a bribery scheme. Although DOJ's decision not to appeal does not end the debate about the anti-bribery provisions' application to foreign nationals, the *Hoskins* decisions provide an authoritative interpretation on those provisions' scope. The decisions therefore will need to be considered by both DOJ and those it investigates going forward. Notably, FCPA Unit Chief David Last recently stated publicly that, while he disagreed with the Second Circuit's holding, and DOJ always takes such decisions into account, the FCPA Unit will continue to charge cases where it believes it can prove beyond a reasonable doubt each and every element of a crime.[1]

With the final chapter in Hoskins's U.S. judicial odyssey completed, we consider below the possible practical effect of the decisions and present key considerations for companies and their counsel, both in responding to FCPA investigations and in designing their FCPA compliance programs going forward.

Looking Back at *Hoskins*

Hoskins is a UK citizen who worked for the UK subsidiary of Alstom S.A., a French multinational, in the UK subsidiary's Paris office. From 2002 to 2009, Alstom's U.S. subsidiary, Alstom Power, Inc. ("API") and several other individuals, including *Hoskins* and two local consultants, allegedly took part in a scheme to bribe Indonesian officials who in turn would help API land a $118 million contract to build a power plant in Indonesia.[2] According to DOJ, *Hoskins* was responsible for selecting the two consultants and authorizing payments to those consultants, who then passed the funds along to the Indonesian officials.[3]

DOJ originally charged *Hoskins* with both conspiring with API and others to violate the FCPA, and with violating the FCPA directly as an agent of API, a domestic concern. In 2015, the trial court dismissed the conspiracy charge to the extent the government relied upon it to establish FCPA jurisdiction independent of the agency theory. The Second Circuit affirmed in 2018 ("*Hoskins I*") on the grounds that DOJ could not bring FCPA charges against a foreign national on a theory of complicity or conspirator liability if that foreign national was outside the

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1. David Last, Chief, FCPA Unit of U.S. DOJ, Morning Keynote Address at International White Collar Crime Symposium 2022 hosted by N.Y. City Bar Association and International Bar Association (Nov. 29, 2022), https://www.nycbar.org/cle-offerings/36497-2.
2. DOJ settled with Alstom and several of its subsidiaries in 2014. In addition to these entities, DOJ brought charges against several individuals allegedly involved in the scheme, all of whom, with the exception of Hoskins, settled. *See* Plea Agreement, *United States v. Frederic Pierucci*, Case No. 3:12-cr-238-JBA (filed July 29, 2013), https://www.justice.gov/criminal-fraud/case/united-states-v-frederic-pierucci-court-docket-number-12-cr-238-jba; Plea Agreement, *United States v. William Pomponi*, Case No. 3:12-cr-238-JBA (filed July 17, 2013), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/ 2014/07/23/pomponi-plea-agreement.pdf; Plea Agreement, *United States v. David Rothschild*, Case No. 3:12-cr-00223 (WWE) (filed Nov. 2, 2012), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2013/04/22/rothschild-guilty-plea.pdf.
3. Third Superseding Indictment ¶ 8, *United States v. Hoskins*, No. 3:12-cr-238-JBA (D. Conn. Apr. 15, 2015).

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statutory definition of persons who could be charged with a substantive offense (*i.e.*, issuers, domestic concerns, persons present in the territory of the United States, and "any officer, director, employee, or agent of [the same] or any stockholder thereof acting on behalf [of the same]").[4]

Unable to proceed under a theory of complicity or conspiracy liability, DOJ relied on the assertion that *Hoskins* fell within the statute as an "agent" of a domestic concern[5] (i.e., API). Although DOJ alleged that *Hoskins* was very much involved directly in the bribery scheme originating at API, a divided Second Circuit panel applied the common law definition of agency and found that rendering support services (even if significant) did not constitute agency under the FCPA, absent the common law requirement of control. *Hoskins* was, however, convicted of money laundering, a conviction not disturbed on appeal.

"In the future, absent conspiracy and subject to the common law definition of agency, DOJ may find it challenging to convict foreign non-issuer business partners or employees thereof outside the United States on FCPA charges, even, as was the case with *Hoskins*, where the partner is a member of the same corporate family."

The Potential Effects of *Hoskins* on FCPA Investigations

Taken together, *Hoskins I* and *Hoskins II* suggest limitations on DOJ's ability to bring charges against certain foreign individuals and non-issuer entities involved in foreign bribery, at least in the Second Circuit (one of DOJ's most used jurisdictions for FCPA cases).[6] We address below further considerations arising from the *Hoskins* decisions for entities, such as issuers and domestic concerns, that would normally cooperate with DOJ investigations.

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4. *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018). *See also* Kara Brockmeyer, Colby A. Smith, Bruce E. Yannett, et al., "Second Circuit FCPA Application to Some Foreign Participants in Bribery," FCPA Update, Vol. 10, No. 1 (Aug. 2018), https://www.debevoise.com/insights/publications/2018/08/20180830-fcpa-update-august-2018.

5. 15 U.S.C. §78dd-2.

6. See Andrew M. Levine, Winston M. Paes, Philip Rohlik et al., "Revisiting *Hoskins*: Second Circuit Holds Foreign Non-Issuers not Present in the United States are not Subject to the FCPA Absent Common Law Agency Relationship," FCPA Update, Vol. 14, No. 1 (Aug. 2022) https://www.debevoise.com/insights/publications/2022/08/fcpa-update-august-2022.

   For additional insight into the *Hoskins* case at its various stages, *see* Kara Brockmeyer, Andrew M. Levine, Andreas A. Glimenakis, and Katherine R. Seifert, "District Courts Address Significant Aspects of Criminal Liability under the FCPA," FCPA Update, Vol. 11, No. 8 (Mar. 2020), https://www.debevoise.com/insights/publications/2020/03/fcpa-update-march-2020; *see also* Kara Brockmeyer, Andrew J. Ceresney, Andrew M. Levine, et al., "The Year 2019 in Review: A Record-Breaking Year of Anti-Corruption Enforcement," FCPA Update, Vol. 11, No. 6 (Jan. 2020), https://www.debevoise.com/insights/publications/2020/01/fcpa-update-january-2020, at 22.

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Prosecution of Foreign Nationals

Most FCPA cases involve individuals acting outside of the United States, and, more often than not, those individuals are not U.S. citizens. DOJ previously has used both the conspiracy and agency theories to pursue a number of foreign non-issuers. For example, in the Bonny Island cases that arose from bribes paid by a consortium consisting of both U.S. companies and foreign non-issuers, DOJ charged two non-U.S. companies that were not U.S. issuers with conspiracy to violate the FCPA.[7] In addition, DOJ charged two UK citizens with conspiracy to violate the FCPA, among other charges – charges they settled after losing their extradition fight. One of them, Wojciech Chodan, was a UK national and employee of the UK subsidiary several levels down from the U.S. issuer.[8] The similarities between Chodan and Hoskins that can be gleaned from the filings are notable. Chodan was also the employee of a foreign subsidiary, and it is unclear if the domestic concern controlled his employment – though the plea agreement does note that Chodan reported directly to the domestic concern's CEO. If Chodan were prosecuted in the Second Circuit today, he might fare much better if DOJ could not easily establish whether the domestic concern exercised sufficient control.

The Monaco Memo includes a section on "Foreign Prosecutions of Individuals Responsible for Corporate Crime." This section notes the important role foreign prosecutions of foreign individuals plays in deterring cross-border crime. It then instructs U.S. prosecutors to consider how effective the foreign prosecution is likely to be when making their own charging determinations, and adds that prosecutors should neither delay filing nor be deterred from bringing "appropriate charges" just because an individual is located abroad.[9] The Monaco Memo was released only a month after the *Hoskins II* decision, but does not address the possibility that an individual may be involved in a corporate crime while not violating U.S. law individually.

The Monaco Memo does make clear that prosecutors should take a variety of factors into account in relation potential foreign individuals when considering whether to bring charges, that is to say at the end of an investigation. Although not referred to in the Monaco Memo, the potential applicability of *Hoskins* may be

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7. DOJ entered into a DPA with a Japanese construction company based on an information alleging participation in a conspiracy to violate the FCPA, and entered into a DPA with a Japanese trading company under an agency theory. *See* U.S. Dep't of Justice, "JGC Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a $218.8 Million Criminal Penalty," Press Rel. 11-431 (Apr. 6, 2011), https://www.justice.gov/opa/pr/jgc-corporation-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-2188; United States Dept. of Justice, "Marubeni Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a $54.6 Million Criminal Penalty," Press Rel 12-060 (Jan. 17, 2012), https://www.justice.gov/opa/pr/marubeni-corporation-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-546.

8. *See* Plea Agreement, United States v. Wojciech Chodan, Case No. 4:09-cr-00098 (filed Dec. 6, 2010), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/12-06-10chodan-plea.pdf.

9. Monaco Memo at 4.

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one such factor and therefore may not become more relevant until later in an investigation, by which time DOJ will have gathered evidence that can be relevant not only to FCPA charges, to which *Hoskins* would be relevant, but often money laundering and other related charges.

Prosecutions of Foreign Non-Issuers

In the future, absent conspiracy and subject to the common law definition of agency, DOJ may find it challenging to convict foreign non-issuer business partners or employees thereof outside the United States on FCPA charges, even, as was the case with *Hoskins*, where the partner is a member of the same corporate family.

It will be interesting to see how DOJ responds to the *Hoskins* challenges in the future and whether it avoids the Second Circuit in certain cases where it seeks to charge a foreign national as an agent of an issuer or domestic concern, or decides to forgo prosecution of those individuals altogether, particularly if the local jurisdiction takes appropriate action.

In the investigative stage, *Hoskins* is more likely to be relevant to foreign individuals and foreign entities without significant exposure to the U.S. market. This is particularly true for foreign joint ventures and joint venture partners (and their employees) who will be more difficult to hold liable as agents under the common law definition. Individuals and entities in that position (and their advisors) will have to consider the risk that cooperating will make it more likely that DOJ discover jurisdictionally relevant facts along with the reality that cooperating entails significant expense.

However, that risk should be weighed against the fact that, despite the Monaco Memo and its predecessors, FCPA cases (as opposed to money laundering cases) against foreign individuals and smaller non-issuers remain relatively rare in the context of corporate FCPA enforcement and failure to cooperate likely will entail the consequences in terms of future access to the United States. To the extent individuals and entities choose to cooperate, *Hoskins* may provide arguments to limit the scope of an investigation, obtain assurances regarding testimony, or strengthen arguments about the value of their cooperation.

Perhaps most importantly, as noted above, DOJ has other, sometimes more flexible laws at its disposal to address corruption, including anti-money laundering offenses. Those laws that have helped DOJ to prosecute foreign officials who received the bribes and, to the extent that money flows through the U.S. banking system, will allow DOJ to reach foreign nationals and entities that provide support to issuers or domestic concerns who violate the FCPA.

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Cooperating Companies

The *Hoskins* decisions are unlikely to alter DOJ's investigations involving cooperating companies. DOJ has reiterated the need for cooperating companies to produce information related to individuals involved in bribery schemes, most recently in Deputy Attorney General Lisa Monaco guidance (the "Monaco Memo").[10] *Hoskins* was specifically the type of person that the DOJ was interested in, and the fact-specific nature of the agency inquiry under the *Hoskins* cases may make it more likely that DOJ will ask cooperating companies to provide detailed information about potential agents at the start of a case.

Hoskins arguably also could be relevant to companies in negotiating the scope of an investigation. Cooperating companies have limited resources and will need to prioritize the allocation of those resources. DOJ's requirement that companies seeking cooperation credit disclose *all* relevant facts related to *all* individuals involved in wrongdoing, does not change this imperative, especially in complex cases. It therefore may be possible for a cooperating company to argue to DOJ that it should limit or de-prioritize an investigation into some third-party potential agents. But such arguments likely will be rare, as in most cases cooperating companies have an incentive to demonstrate the relatively greater culpability of third parties.

Foreign Proceedings and Compliance Programs

While the practical effects of *Hoskins* are unlikely to alter significantly the dynamics of FCPA corporate enforcement, they should provide greater incentive for DOJ to decline challenging prosecutions where – as the Monaco Memo notes – there is appropriate foreign prosecution.

Foreign prosecutions play an increasingly important role in holding individuals accountable. As the DOJ's foreign counterparts around the work increase their enforcement of anti-corruption laws, they lessen the need for DOJ to police the world. Individual accountability and deterrence can exist even where appropriate charges are not available in the United States. Moreover, while cooperation and coordination with foreign regulators have become common in FCPA cases, foreign prosecutions (and the associated deterrent effect) can take place even in jurisdictions that do not cooperate with the United States.

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10. Memo from the Deputy Attorney General (Lisa O. Monaco), "Further Revisions to Corporate Criminal Enforcement Policies Follow Discussions with Corporate Crime Advisory Group" at 3 (Sept. 15, 2022), https://www.justice.gov/dag/page/file/1535286/download. *See also* Kara Brockmeyer, Andrew M. Levine, Winston M. Paes, et al., "Biden Administration Doubles Down on Corporate Criminal Enforcement," FCPA Update, Vol. 14, No. 2 (Sept. 2022) https://www.debevoise.com/insights/publications/2022/09/fcpa-update-september-2022.

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More broadly, the Monaco Memo reiterates that DOJ increasingly expects corporations to monitor carefully their own conduct. As such, the DOJ expects corporations under its jurisdictions to impose consequences for FCPA-related and similar non-compliant behavior, even where DOJ itself could not bring charges. Relatedly, even if the government cannot directly hold individuals accountable, in many cases it can encourage their employers to ensure there are consequences for bad behavior. Earlier guidance also underscores that DOJ expects companies to screen carefully their third parties, putting those parties with poor reputations at a competitive disadvantage even if, under *Hoskins*, they remain beyond FCPA jurisdiction.

How much deterrent effect these types of compliance measures have in practice is debatable, but the *Hoskins* cases along with the Monaco Memo make it more likely that DOJ will strictly police compliance programs in making charging and leniency decisions. Foreign individuals and entities already were more likely to face adverse civil, employment, and reputational consequences for alleged misbehavior than the risk of prosecution in the United States. *Hoskins* did not significantly alter that fact.

Conclusion

The *Hoskins* matter is a relatively rare loss for DOJ on an FCPA case and an even rarer check on DOJ's expansive use of conspiracy and agency theory to reach foreign nationals. DOJ pursued FCPA charges against *Hoskins* for nearly a decade, expending substantial resources in doing so. Notably, the agency issue addressed in *Hoskins II* (and the conspiracy issue addressed in *Hoskins I*) are still subject to ongoing litigation in other circuits, including the Fifth Circuit's consideration of an appeal by Swiss banker Daisy Rafoi-Bleuler, who the government alleged acted as an agent of PDVSA and its U.S. subsidiary in connection with a bribery and money laundering scheme.[11] Even with the Rafoi case pending, the outcome of the *Hoskins* case may impact DOJ's consideration of which cases to pursue and how doggedly to pursue individuals in foreign jurisdictions without clear ties to the United States.

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11. *United States v. Rafoi-Bleuler*, No. 21-20658 (5th Cir. 2022).

SEC Enforcement Division's Year-End Results Provide Insight into Record-Breaking Year and Evolving Enforcement Agenda

On November 15, 2022, the U.S. Securities and Exchange Commission's Division of Enforcement (the "Division") announced its enforcement results for fiscal year 2022 ("FY 2022").[1] While there was only a modest increase in the overall number of enforcement actions brought by the agency, 6.5% over fiscal year 2021 ("FY 2021"), monetary sanctions increased sharply, to a record $6.4 billion, a 67% increase over FY 2021.

The actions highlighted by the SEC in its press release continue to provide valuable insights into evolving trends and areas of continued enforcement focus. Digital assets remained in the spotlight in FY 2022, while the focus on Special Purpose Acquisition Companies ("SPACs") in FY 2021 has been replaced by a growing trend of actions involving recordkeeping violations, environmental, social, and governance ("ESG") issues, cybersecurity, and private funds.

The results for this second year under the Biden administration, and the first full fiscal year under Chair Gary Gensler, return to near pre-COVID-19 pandemic levels, although the number of actions continues to be relatively low overall by recent historical standards.

FY 2022 Statistics

The SEC brought 462 new stand-alone enforcement actions in FY 2022, a 6.5% increase over FY 2021. New actions remain below pre-pandemic levels, but there have been increases of similar magnitude for two years in a row, potentially signaling a return to Obama-era enforcement levels. The numbers of "follow-on" administrative proceedings and actions against issuers who were delinquent in making required filings with the SEC, as well as total actions, have all increased for the first time in three years.

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1. Press Release, SEC Announces Enforcement Results for FY22 (Nov. 15, 2022), https://www.sec.gov/news/press-release/2022-206.

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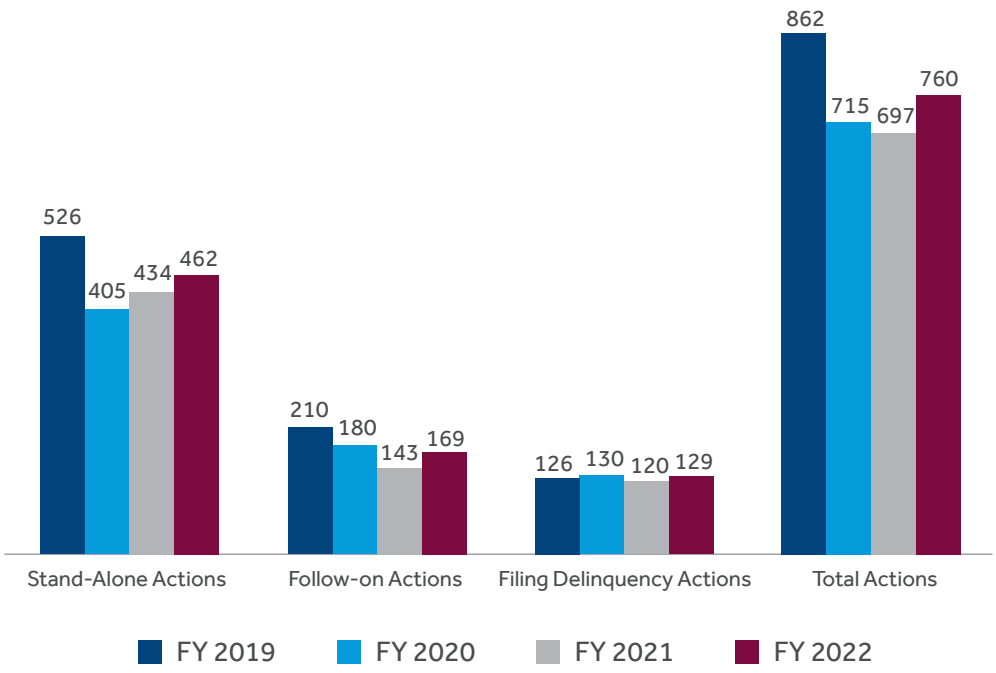
SEC Enforcement by the Numbers



Three types of actions continued to constitute the majority of stand-alone actions brought during FY 2022:

- Investment adviser and investment company matters (26% of the total);
- Securities offering matters (23% of the total); and
- Issuer reporting/accounting and auditing matters (16% of the total).

There were, however, some significant year-over-year increases involving several types of actions, including issuer reporting/accounting and auditing matters (43% increase), insider trading (54% increase), and broker-dealer matters (28% increase). On the other hand, securities offering matters decreased 34% year-over-year, likely reflecting the reduced focus on retail fraud as compared to the Clayton administration. There were six FCPA matters brought in FY 2022, which continued to trend lower than recent averages.

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Standalone Enforcement Actions by Primary Classification

Primary Classification	FY 2019		FY 2020		FY 2021		FY 2022	
Investment Adviser / Investment Co.	36%	191	21%	87	28%	120	26%	119
Broker-Dealer	7%	38	10%	40	8%	36	10%	46
Securities Offering	21%	108	32%	130	33%	142	23%	106
Issuer Reporting / Audit & Accounting	17%	92	15%	62	12%	53	16%	76
Market Manipulation	6%	30	5%	22	6%	26	7%	32
Insider Trading	6%	30	8%	33	6%	28	9%	43
FCPA	3%	18	2%	10	1%	5	1%	6
Public Finance Abuse	3%	14	3%	12	3%	12	4%	19
SRO / Exchange	1%	3	0%	0	0%	1	0%	1
NRSRO	0%	0	1%	3	0%	2	0%	1
Transfer Agent	0%	1	0%	1	0%	2	2%	7
Miscellaneous	0%	1	1%	5	2%	7	1%	6

"The results for this second year under the Biden administration, and the first full year under Chair Gary Gensler, return to near pre-COVID-19 pandemic levels, although the number of actions continues to be relatively low overall by recent historical standards."

The increased level of activity in insider trading and issuer reporting/accounting and auditing matters aligns with some of the recent high-profile cases brought by the SEC, including the first-ever insider trading case involving cryptocurrencies,[2] an insider trading case charging a former member of Congress,[3] and the largest-ever penalty imposed by the SEC against an accounting firm.[4]

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2. *See* Debevoise FinTech Blog, New DOJ and SEC Insider Trading Actions Fail to Clarify Issue of Digital Assets as Securities (Aug. 3, 2022), https://www.debevoisefintechblog.com/2022/08/03/new-doj-and-sec-insider-trading-actions-fail-to-clarify-issue-of-digital-assets-as-securities/.
3. *See* Debevoise Insider Trading Disclosure Update, Vol. 8, Issue 1 (Sept. 29, 2022), https://www.debevoise.com/insights/publications/2022/09/insider-trading-disclosure-update-volume-8.
4. Press Release, Ernst & Young to Pay $100 Million Penalty for Employees Cheating on CPA Ethics Exams and Misleading Investigation (June 28, 2022), https://www.sec.gov/news/press-release/2022-114.

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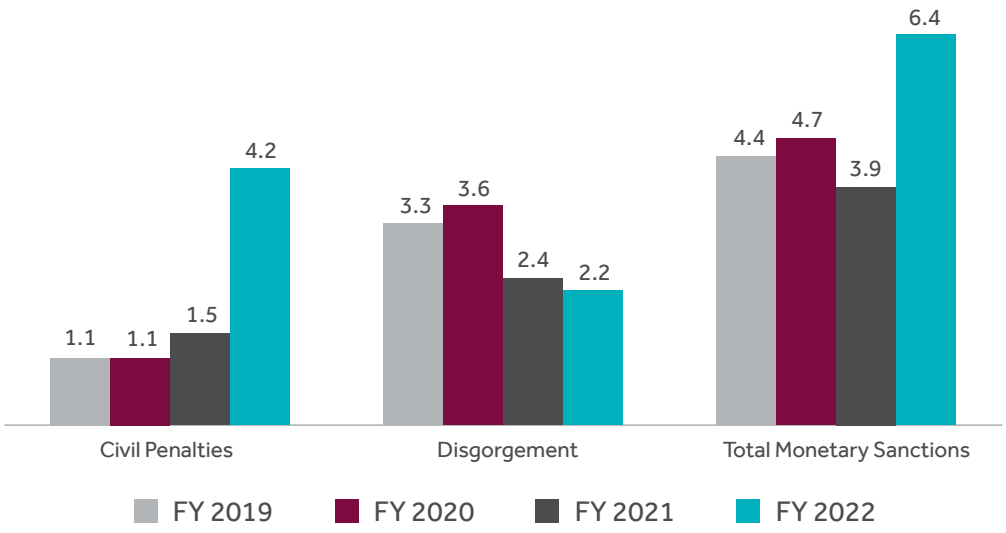
The Division's Trial Unit conducted 15 trials during FY 2022, a high for the last ten years. The Commission won favorable verdicts in 12 of those cases, a record suggesting that the Commission can be beaten at trial in certain cases.

Largest Penalty Total by Far in SEC History

Although the total number of actions increased only modestly, the Commission imposed a record $6.4 billion in monetary sanctions in FY 2022, the most in the SEC's history, including $4.2 billion in penalties and $2.2 billion in disgorgement. As shown below, while disgorgement continued to decline, penalties increased almost threefold from FY 2021, setting another record for the Commission. Indeed, FY 2022 marks the first time in SEC history that penalties exceeded the amount of disgorgement imposed.

Breakdown of Monetary Sanctions Imposed by the SEC (in billion USD)



This marked increase in penalties and total monetary sanctions underscores the SEC's willingness to use "every tool in [its] toolkit," including "penalties that have a deterrent effect and are viewed as more than the cost of doing business."[5] Perhaps in recognition of this, Enforcement Director Gurbir Grewal noted that the SEC may not break monetary relief records each year, because the Division expects "behaviors to change. [It] expects compliance."[6]

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5. Press Release, SEC Announces Enforcement Results for FY22 (Nov. 15, 2022), https://www.sec.gov/news/press-release/2022-206.
6. *Id.*

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In addition, the SEC's press release highlighted that in several actions, the Commission "recalibrated" penalties and combined them with prophylactic remedies, such as retention of independent compliance consultants and admissions, to "deter future misconduct and enhance public accountability[.]"

While the total value of monetary sanctions imposed is significant, it must be noted that approximately $1.1 billion of the $4.2 billion total came in a single investigative sweep relating to recordkeeping violations at multiple Wall Street firms, with the resulting 11 settlements filed together during the last week of the agency's fiscal year.[7]

Focus Areas

As noted above, the SEC's press release highlighted the Commission's actions targeting broker-dealer (and one investment adviser) recordkeeping violations involving "off channel" business communications, as well as actions related to digital assets, ESG, cybersecurity, and private funds. For reasons discussed below, we expect to see continued activity in these areas in the new fiscal year.

Recordkeeping Violations by Regulated Entities

Recordkeeping violations received significant attention during FY 2022, primarily due to high-profile actions against many of the largest Wall Street firms following an investigative sweep relating to the preservation and supervision of business-related communications on personal devices.[8] The SEC's FY 2022 announcement specifically called out actions against 16 broker-dealers and one investment adviser for "widespread and longstanding failures to maintain and preserve work-related text message communications conducted on employees' personal devices." The Commission imposed a $125 million penalty against one broker-dealer in December 2021,[9] and during the last week of FY 2022 announced charges against 16 other prominent Wall Street firms, imposing combined penalties of more than $1.1 billion for similar recordkeeping violations.[10] In each case, the respondents admitted to the violations and agreed to "undertakings designed to remediate past failures and prevent future misconduct." We expect continued enforcement attention in this area as companies increasingly integrate evolving technology into

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7. Press Release, SEC Charges 16 Wall Street Firms with Widespread Recordkeeping Failures (Sept. 27, 2022), https://www.sec.gov/news/press-release/2022-174.
8. *See* Chris Prentice, SEC scrutiny into Wall Street communications shifts to investment funds – sources, Reuters (Oct. 11, 2022), https://www.reuters.com/business/sec-scrutiny-into-wall-street-communications-widens-investment-funds-sources-2022-10-11/.
9. Press Release, JPMorgan Admits to Widespread Recordkeeping Failures and Agrees to Pay $125 Million Penalty to Resolve SEC Charges (Dec. 17, 2021), https://www.sec.gov/news/press-release/2021-262.
10. Press Release, SEC Charges 16 Wall Street Firms with Widespread Recordkeeping Failures (Sept. 27, 2022), https://www.sec.gov/news/press-release/2022-174.

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their communications in light of the remote work environment. Indeed, several large asset management firms recently disclosed that they are responding to another wave of SEC requests relating to electronic communications.[11]

Digital Assets

In May 2022, the SEC announced an addition of 20 positions to its Crypto Assets and Cyber Unit, which nearly doubled the unit's size.[12] Notably, crypto assets have continued to garner significant enforcement attention in FY 2022. In February, the Commission settled an administrative proceeding against BlockFi, a cryptocurrency trading and lending platform, finding that BlockFi sold unregistered securities and failed to register as an investment company.[13] Recent enforcement actions in the crypto area also included proceedings against several individuals responsible for a blockchain-based pyramid scheme,[14] and the Commission's first insider trading case involving digital assets against Ishan Wahi and his associates, which was accompanied by a parallel criminal case by the Department of Justice.[15]

ESG

In parallel with multiple recent proposed rules addressing ESG concerns, the Commission brought several ESG-related actions in FY 2022. For example, the Commission imposed a $1.5 million penalty against BNY Mellon Investment Advisor, Inc. for ESG-related misstatements regarding investment quality review for mutual funds.[16] The SEC also brought enforcement actions against Vale S.A., one of the world's largest iron ore producers for ESG misstatements,[17] and Wahed Invest, LLC, a robo-adviser,[18] for failing to adopt and implement adequate policies and procedures to monitor its ESG strategy. The press release for the year-end results

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11. *See* Chris Prentice, SEC scrutiny into Wall Street communications shifts to investment funds – sources, Reuters (Oct. 11, 2022), https://www.reuters.com/business/sec-scrutiny-into-wall-street-communications-widens-investment-funds-sources-2022-10-11/.
12. Press Release, SEC Nearly Doubles Size of Enforcement's Crypto Assets and Cyber Unit (May 3, 2022), https://www.sec.gov/news/press-release/2022-78.
13. Press Release, BlockFi Agrees to Pay $100 Million in Penalties and Pursue Registration of its Crypto Lending Product (Feb. 14, 2022), https://www.sec.gov/news/press-release/2022-26. *See also* Debevoise FinTech Blog, Will the SEC Let BlockFi Register Digital Asset Interest Accounts? (May 10, 2022), https://www.debevoisefintechblog.com/2022/05/10/digital-asset-interest-accounts-and-the-sec/.
14. Press Release, SEC Charges Eleven Individuals in $300 Million Crypto Pyramid Scheme (Aug. 1, 2022), https://www.sec.gov/news/press-release/2022-134.
15. *See* Debevoise FinTech Blog, New DOJ and SEC Insider Trading Actions Fail to Clarify Issue of Digital Assets as Securities (Aug. 3, 2022), https://www.debevoisefintechblog.com/2022/08/03/new-doj-and-sec-insider-trading-actions-fail-to-clarify-issue-of-digital-assets-as-securities/.
16. Press Release, SEC Charges BNY Mellon Investment Adviser for Misstatements and Omissions Concerning ESG Considerations (May 23, 2022), https://www.sec.gov/news/press-release/2022-86.
17. Press Release, SEC Charges Brazilian Mining Company with Misleading Investors about Safety Prior to Deadly Dam Collapse (Apr. 28, 2022), https://www.sec.gov/news/press-release/2022-72.
18. Press Release, SEC Charges Robo-Adviser With Misleading Clients (Feb. 10, 2022), https://www.sec.gov/news/press-release/2022-24.

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highlighted that the Division has "focused attention on [ESG] issues with respect to public companies and investment products and strategies" and "applies time-tested principles concerning materiality, accuracy of disclosures, and fiduciary duty" in evaluating ESG claims. ESG is a quickly growing area of investment activity and one that the SEC will continue to be focused on in FY 2023.

Cybersecurity

Cybersecurity was another area of focus for the SEC in FY 2022. Again, in parallel with proposed rules, the Commission brought enforcement actions concerning failures to comply with recordkeeping and customer information safeguarding obligations. The SEC's year-end press release highlighted the agency's actions against several financial institutions concerning insufficient policies and procedures related to identity theft[19] and failure to protect customers' personal identifying information.[20]

"Recordkeeping violations received significant attention during FY 2022, primarily due to high-profile actions against many of the largest Wall Street firms following an investigative sweep relating to the preservation and supervision of business-related communications on personal devices."

Private Funds

Consistent with Chair Gensler's stated emphasis on enforcement in the private fund space,[21] the SEC brought a number of actions against private fund advisers in FY 2022 concerning fraudulent concealment of risks, misappropriation of investor funds, and misrepresentation of fund performance, fees, and expenses. These actions followed a January 2022 Risk Alert published by the Division of Examinations that identified four categories of deficiencies related to private fund adviser compliance issues.[22] The Division also brought actions against an investment adviser and

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19. Press Release, SEC Charges JPMorgan, UBS, and TradeStation for Deficiencies Relating to the Prevention of Customer Identity Theft (July 27, 2022), https://www.sec.gov/news/press-release/2022-131.
20. Press Release, Morgan Stanley Smith Barney to Pay $35 Million for Extensive Failures to Safeguard Personal Information of Millions of Customers (Sept. 20, 2022), https://www.sec.gov/news/press-release/2022-168.
21. Speech, Prepared Remarks at the Institutional Limited Partners Association Summit, Chair Gary Gensler (Nov. 10, 2021), https://www.sec.gov/news/speech/gensler-ilpa-20211110.
22. *See* Debevoise Update, SEC Continues Focus on Private Fund Adviser Disclosures and Other Topics (Feb. 4, 2022), https://www.debevoise.com/insights/publications/2022/02/sec-continues-focus-on.

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associated portfolio managers concerning an options trading strategy[23] and against private fund advisers for violations of the Custody Rule, misrepresenting fund performance, and misusing investor funds. In addition, the SEC charged an investment adviser in a matter involving management fee offsets.[24] In another example, the SEC filed a settled action against the Infinity Q Diversified Alpha Mutual Fund for mispricing its net asset value as part of an overvaluation scheme.[25]

Gatekeepers

In addition to the areas of focus discussed above, the SEC continued to target perennial areas of enforcement. The SEC brought a series of actions against so-called "gatekeepers"– i.e., auditors and lawyers – for "failing to live up to their heightened trust and responsibility." Specifically, the FY 2022 press release highlighted several significant actions against auditors, including, but not limited to, charges against the China-based affiliate of Deloitte for failure to comply with U.S. auditing requirements concerning audits of U.S. issuers and foreign companies listed on U.S. exchanges.[26] The Deloitte action called out certain actions by the auditor, such as allowing clients to select their own samples for testing and prepare their own audit documentation. We expect the focus on auditors to be magnified in light of the newly revitalized Public Company Accounting Oversight Board, which is likely to be much more active in the enforcement space, not least because its current Chair is a former SEC enforcement trial attorney.

The FY 2022 press release also noted both settled and litigated proceedings against lawyers in fraudulent securities offerings,[27] and it highlighted an action against a "recidivist" transfer agent for violating a previously imposed associational bar.[28] While such enforcement actions are not new or unusual, the Commission appears to have highlighted them to send a broader message that this area remains a focus.

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23. Press Release, SEC Charges Allianz Global Investors and Three Former Senior Portfolio Managers with Multibillion Dollar Securities Fraud (May 17, 2022), https://www.sec.gov/news/press-release/2022-84.
24. Press Release, SEC Charges Private Equity Fund Adviser with Fee and Expense Disclosure Failures (Dec. 20, 2021), https://www.sec.gov/news/press-release/2021-266.
25. Press Release, SEC Seeks Special Master to Oversee Return of Remaining Funds to Harmed Investors of the Infinity Q Mutual Fund (Nov. 10, 2022), https://www.sec.gov/litigation/litreleases/2022/lr25575.htm.
26. Press Release, Deloitte's Chinese Affiliate to Pay $20 Million Penalty for Asking Audit Clients to Conduct Their Own Audit Work (Sept. 29, 2022), https://www.sec.gov/news/press-release/2022-176.
27. *See, e.g.*, Press Release, SEC Charges Philadelphia Lawyer with Fraud (July 7, 2022), https://www.sec.gov/enforce/33-11080-s.
28. Press Release, SEC Charges Recidivists for Violations of a Previous Commission Order (Sept. 21, 2022), https://www.sec.gov/litigation/litreleases/2022/lr25514.htm.

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Individual Accountability

The SEC's press release identified "individual accountability" as a "pillar" of the SEC's enforcement program, and FY 2022 results seem to bear this out: more than two-thirds of the stand-alone enforcement actions during the fiscal year involved at least one individual, though this is down from levels in recent years.

In addition to highlighting actions against public company executives and senior personnel in the financial industry, the press release noted actions brought under Section 304 of the Sarbanes-Oxley Act of 2002 in which the SEC ordered a number of executives to return bonuses and compensation in light of misconduct at their firms, even though they were not charged in those actions or otherwise responsible for the misconduct. For example, in August 2022, the SEC ordered three former executives of an infrastructure company to return nearly $2 million in bonuses following their company's restatement of its financial results due to misconduct by another former official.[29]

Whistleblower Protections

Following a record-breaking year for whistleblower activity in FY 2021, the SEC in FY 2022 issued 103 whistleblower awards. These totaled approximately $229 million, a 59% decrease in amounts awarded. FY 2022 was nonetheless the SEC's second highest year in terms of both award amounts and the number of individual awards. The press release also highlighted that the Whistleblower Program received a record high number of tips – 12,300 – during the fiscal year. These results demonstrate the health of the Whistleblower Program and seem to indicate that the SEC has succeeded in its efforts to incentivize reporting.

Conclusion

While enforcement activity continued to increase in FY 2022, it still remains below pre-pandemic levels. On the other hand, the SEC is increasing its focus on a number of key industries, issues, and initiatives. The recent troubles in the crypto world may yield more enforcement actions in FY 2023, and it is already clear that the SEC is continuing to focus on the recordkeeping, ESG, and cybersecurity issues. Looking ahead to FY 2023, considering these priorities and the SEC's continued commitment to robust enforcement in more traditional cases concerning insider trading and financial reporting and accounting, we expect that the SEC's level of enforcement

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29. Press Release, SEC Charges Infrastructure Company Granite Construction and Former Executive with Financial Reporting Fraud (Aug. 25, 2022), https://www.sec.gov/news/press-release/2022-150.

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activity will grow, penalties will continue to be high, and the aggressive enforcement environment will continue.

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