

# Client Alert: Key Insights from the DOJ Fraud Section's 2022 Annual Report

## Publications

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Last month, the Fraud Section, part of the US Department of Justice (DOJ) Criminal Division, released its annual year-in-review report. In this article, we highlight three key takeaways from the 2022 report.

The Fraud Section investigates and prosecutes complex white-collar crimes, particularly large national and international corporate cases, and it also plays a significant role in the development of DOJ corporate criminal enforcement policy. The Fraud Section has primary jurisdiction over Foreign Corrupt Practices Act (FCPA) matters, and it also pursues fraud cases related to healthcare, securities, commodities, and cryptocurrency.

Since 2015, the Fraud Section has issued an annual report summarizing its enforcement activity and highlighting significant actions from the past year. The report also serves as a harbinger of the Fraud Section's near-term goals and priorities.

By and large, the Fraud Section's activities in 2022 reflect trends that began in 2021 following the change from the Trump administration to the Biden administration. The data shows a continued decrease in corporate criminal resolutions, an increase in individual convictions, and a steady willingness by the Department to impose independent compliance monitors. The report also signals that 2023 will likely bring increased enforcement activity in the cryptocurrency space based on anti-fraud and anti-money laundering laws.

More details about these takeaways follow:

### **1. There were fewer corporate criminal resolutions than in prior years, and convictions of individuals were up.**

Continuing a trend observed in 2021, the Fraud Section entered into fewer corporate resolutions in 2022 relative to prior years. From 2015 through 2020, the Fraud Section entered into between 10 and 15 corporate resolutions per year, but that number fell to seven in 2022. Moreover, the total criminal and civil penalties, restitution, and other monetary amounts required by these corporate resolutions fell by roughly \$1.2 billion in the last year (from \$3.3 billion in 2021 to \$2.1 billion in

2022). Despite the lower total number of corporate resolutions, however, the Fraud Section obtained a similar number of corporate guilty pleas (three in 2022) as it has in prior years.

In 2022, as in most years since the Fraud Section began issuing its annual report, roughly two thirds of corporate resolutions arose out of FCPA matters. This was in contrast to 2021, when six out of nine resolutions were attributed to the Market Integrity and Major Frauds (MIMF) Unit. The focus on non-FCPA matters in 2021 thus may have been an aberration rather than a sign of a durable shift in enforcement priorities.

In contrast to last year's slower pace of corporate resolutions, enforcement activity against individuals was above average for a second consecutive year. In 2022, the Fraud Section obtained 342 convictions of individuals by guilty plea or at trial (largely in healthcare fraud cases)—up from 329 in 2021 and from an average of roughly 230 from 2015 through 2020. The increased number of individual convictions during the last two years may be attributable in part to a backlog of cases that went unresolved during the pandemic. It could also reflect the recent shift in DOJ policy to prioritize the prosecution of individual wrongdoers before entering into corporate resolutions. To that end, while the majority of the Fraud Section's cases against individuals generally arise in the healthcare fraud context, the MIMF Unit obtained roughly twice as many convictions against individuals in 2021–2022 as it did in 2019–2020; by contrast, the Health Care Fraud Unit saw a more modest increase over the same time period, and individual convictions by the FCPA Unit held steady.

**2. The Fraud Section showed a continued inclination to impose independent compliance monitors, particularly where compliance programs were determined to be in nascent or untested stages.**

Three of the seven corporate resolutions reached in 2022 required companies to retain independent compliance monitors, underscoring DOJ's decisive turn away from the Trump-era policy that more or less expressly disfavored monitorships.

Two of these resolutions involved Glencore International A.G. (Glencore), a Switzerland-based commodities trading and mining firm, and its US-based subsidiary, Glencore Ltd. The entities pleaded guilty to violations of the FCPA that spanned several years and countries (Glencore), as well as commodity price manipulation-related violations (Glencore Ltd.). Each entity agreed to pay hundreds of millions of dollars in fines and forfeiture, as well as to retain independent compliance monitors for three years. Both corporate guilty pleas followed guilty pleas by employees of the corresponding entity.

The third monitorship of 2022 was imposed pursuant to a deferred prosecution agreement with Stericycle, Inc., an international waste-management company headquartered in Illinois. The company was charged with violating the FCPA by paying roughly \$10.5 million in bribes to officials in Argentina, Brazil, and Mexico by way of third-party intermediaries between 2011 and 2016.

Stericycle agreed to pay \$52.5 million in fines and forfeiture (and \$28.2 million to resolve a related SEC investigation) and to retain an independent compliance monitor for two years.

With respect to all three monitorships, DOJ acknowledged the companies' efforts at remediation but explained that enhancements to their compliance programs remained untested. This approach accords with recent DOJ guidance emphasizing that whether a compliance program has been tested and proven capable of preventing or detecting misconduct is a key consideration in deciding whether a monitor is necessary. Of note, neither the Fraud Section's public statements about these cases nor the resolution documents themselves offer a clear roadmap for testing and proving the effectiveness of a compliance system—particularly one that has undergone significant changes since the time of the misconduct at issue. Companies contemplating criminal resolutions will want to consider acting early and aggressively to demonstrate that their compliance mechanisms have gotten off the ground.

Looking ahead, we expect the Department will continue to emphasize—and hopefully articulate more specifically—the roles that a company's compliance program, self-disclosure, and cooperation may play during resolution negotiations with DOJ, particularly with respect to the type of criminal resolution reached, amount of monetary penalties imposed, and decision of whether an independent compliance monitor will be installed.

### **3. Enforcement activity in the cryptocurrency industry is likely to continue to receive DOJ's attention in 2023.**

The growth of cryptocurrency markets and non-fungible tokens (NFTs) led to a significant increase in related enforcement activity in 2022. In particular, the MIMF Unit charged nine defendants in seven separate schemes last year, secured the guilty plea of the “head trader” for a cryptocurrency platform that raised \$100 million from investors, and obtained a trial conviction and prison sentence of more than eight years for the founder of a cryptocurrency company that raised \$7.5 million on the basis of false claims that the currency was backed by gold and had a partnership with MasterCard.

These efforts were highlighted in a mid-year press release addressing the various different crypto resolutions, which were dubbed a “Crypto Fraud National Enforcement Action,” and reflect the keen interest across the Department in prosecuting ever-more-salient crypto and NFT schemes. The resolutions came roughly a year after Deputy Attorney General Lisa Monaco announced the creation of a National Cryptocurrency Enforcement Team (NCET), which consists of attorneys from the Money Laundering and Asset Recovery Section, the Computer Crime and Intellectual Property Section, and US Attorney's Offices across the country. The NCET has been active in a number of recent high-profile prosecutions, including the cases involving FTX and a former Coinbase Global, Inc. product manager in the Southern District of New York, and Bitzlato Ltd. in the Eastern District of New York.

Given DOJ's efforts to date and initiatives in this area, we expect that the Fraud Section—and the Department more generally—will continue to ramp up enforcement efforts related to cryptocurrency in 2023 and beyond.

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## **Related Capabilities**

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Investigations, Compliance, and Defense

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