

## DOJ FCPA Unit Officials' Take on 2022

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In an onstage interview at the American Conference Institute's 39th International Conference on the Foreign Corrupt Practices Act David Last, Chief of the FCPA Unit of Department of Justice, Criminal Division, Fraud Section, and David Fuhr, the Unit's Assistant Chief, reflected on the year's most pressing enforcement issues.

Acknowledging that 2022 had been difficult for DOJ's prosecution of individuals under the FCPA in light of *Hoskins II*,<sup>[1]</sup> Last and Fuhr commended their Unit's efforts, stating that the Unit is not afraid to take tough cases when there is sufficient evidence. Even though these individual cases can be challenging, "this is part of our mission," Last and Fuhr stated. They continued that, despite the outcome in the *Hoskins II* decision, DOJ's prosecution of individuals will remain a constant goal of the FCPA Unit, particularly those individuals on the supply side and any intermediaries.

Last and Fuhr also discussed the use of monitorships and pointed out that two of the three resolutions this year had imposed monitors. However, the use of monitors will remain a fact specific analysis and that there is no presumption against the use of a monitor—an application of policy changes directed by Deputy Attorney General Monaco.

Last and Fuhr also discussed (i) corporate compensation structures and (ii) the use of personal devices and third-party applications, and their associated risks in corporations. Notably, these were key topics also discussed in DAG Monaco's September 15, 2022, memorandum, which announced additional revisions to corporate criminal enforcement policies.<sup>[2]</sup> In her memorandum, DAG Monaco stated that in assessing a compliance program, prosecutors should consider whether the corporation's compensation systems provide affirmative incentives for compliance-promoting behavior or account for misconduct. Last and Fuhr further stated that the DOJ is considering new guidance related to corporate compensation structures, which should be coming out in the coming months.

Additionally, DAG Monaco's memorandum notes that the ubiquity of personal devices and third-party messaging apps pose significant compliance risks for corporations. On that basis, prosecutors will be required to assess "whether the corporation has implemented effective policies and procedures governing the use of personal devices and third-party messaging platforms to ensure that business-related electronic data and communications are preserved."<sup>[3]</sup> There has been growing concern inside

the government that secret messaging apps, ephemeral messaging apps, and apps offering end-to-end encryption limit data preservation and government investigations into wrongdoing. Last and Fuhr also explained that the Department and regulators have a renewed focus on the use of personal devices and third-party applications in corporations. Therefore, the officials stated, DOJ wants to make sure companies are aware of the issues that messaging apps and ephemeral messaging present for investigations, data retention policies, and data collection (and the potential for disappearing evidence). Further, since DOJ's corporate enforcement policy regarding cooperation credit prohibits business records from being destroyed, companies should implement measures to address the use of personal devices and ephemeral messaging platforms to preserve data, which DOJ will expect to see in its investigations. Consequently, companies should be thoughtful about policies addressing this issue, whether the policies are applying a risk-based approach, and whether the policies are comparable to a company's other policies.

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## FOOTNOTES

[1] *United States v. Hoskins*, 44 F.4th 140 (2d Cir. 2022). – In *Hoskins II*, the Second Circuit affirmed the district court's acquittal of Hoskins, holding that no reasonable jury could find that Hoskins, a non-U.S. citizen employed as an executive of a foreign affiliate of Alstom S.A., was an agent of the American counterpart of the affiliate.

[2] Deputy Attorney General Lisa Monaco, Department of Justice, "Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group" (Sep. 15, 2022).

[3] *Id.*

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