IT'S ALL FUN AND GAMES UNTIL SOMEONE GETS HURT: LESSONS ON FCPA ENFORCEMENT FROM THE GOLDMAN SACHS AND 1MDB SCANDAL

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INTRODUCTION

In October 2020, the Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC") announced the largest Foreign Corrupt Practices Act ("FCPA") enforcement action of all time against Goldman Sachs, the parent company of Goldman Sachs Malaysia and a first-time FCPA violator, at $1.66 billion.[1] This enforcement action made a statement, and it signals where the Agencies may take future FCPA enforcement actions.

For about five years, two Goldman Sachs Malaysia executives, Tim Leissner and Ng Chong Hwa ("Roger Ng"), conspired to provide corrupt payments to foreign officials in Malaysia and the United Arab Emirates ("UAE"), and more specifically, foreign officials in Abu Dhabi.[2] Their desire to obtain business from 1Mayalysia Development Berhad ("1MDB") led to about $1.6077 billion[3] being siphoned out of a sovereign wealth fund meant to help the Malaysian people that instead went to pay bribes to foreign officials and foreign officials' relatives.[4] After bribing foreign officials to provide services, like underwriting three 1MDB bonds, advising 1MDB on an acquisition, and helping the company evaluate a possible initial public offering ("IPO"), Goldman Sachs made $606 million in fees and revenue.[5] Goldman Sachs

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1. *DOJ / SEC Announce Net $1.66 Billion (The Largest Of All-Time) FCPA Enforcement Action Against Goldman Sachs In Connection With 1MDB Fund*, FCPA PROFESSOR (Oct. 23, 2020), https://fcpaprofessor.com/doj-sec-announce-net-1-66-billion-largest-time-fcpa-enforcement-action-goldman-sachs-connection-1mdb-fund/; Jon Hill, *Goldman Sidesteps Monitor in 1MDB, Raising Eyebrows*, LAW360 (Oct. 23, 2020), https://www.law360.com/articles/1321968/print?section=assetmanagement.

2. DOJ Plea Agreement Attachment A at 23, 32, United States v. Goldman Sachs (Malaysia) SDN. BHD., Cr. No. 20-438 (E.D.N.Y. Oct. 22, 2020) (using numbers to reference the paragraph).

3. DOJ Plea Agreement Attachment A, *supra* note 2, at 23; *see* Press Release, Dep't of Just. Off. of Pub. Affs, Goldman Sachs Charged in Foreign Bribery Case and Agrees to Pay Over $2.9 Billion (Oct. 22, 2020), https://www.justice.gov/opa/pr/goldman-sachs-charged-foreign-bribery-case-and-agrees-pay-over-29-billion.

4. DOJ Plea Agreement Attachment A, *supra* note 2, at 7, 24, 51(a)–(h), 57(a)–(i), 64.

5. *Id.* at 24, 42, 50, 56, 63; *see also* Goldman Sachs Grp., Inc., Respondent, Exchange Act Release No. 90243, 2020 WL 6262335 (Oct. 22, 2020) at 1 (using numbers to reference the paragraph) [hereinafter SEC Cease-and-Desist Order] (requiring Goldman Sachs to pay $606 million in disgorgement payments). It is important to note that Goldman Sachs made $190 million on one of these transactions. In comparison, Goldman Sachs made less

wired payments that passed through the Eastern District of New York.[6]

Low Taek Jho, also known as Jho Low ("Low"), worked with the two Goldman Sachs executives to siphon off money from 1MDB.[7] As a result, Leissner, Ng, and Low violated U.S. money laundering laws.[8] Low used the money to buy real estate,[9] throw parties on yachts with celebrities,[10] and fund movies like *The Wolf of Wall Street* and *Dumb and Dumber To*.[11] He also used some of the money to throw an extravagant thirty-first birthday party in the Chairman Suite at the Palazzo in Las Vegas, which costs $25,000 per night.[12] Leonardo DiCaprio, Kim Kardashian, and several Goldman Sachs bankers—including Tim Leissner—attended Low's birthday bash.[13] Low even reportedly paid "a six-figure sum" to have Britney Spears serenade Low with "Happy Birthday."[14] The money once meant to help promote growth, prosperity, and economic development for the Malaysian people did not find its way there.

This Note explores what the DOJ and SEC's enforcement in the Goldman Sachs and 1MDB scandal reveals about FCPA enforcement. Part I describes the background of the FCPA and the current trends of FCPA enforcement. Part II describes the Goldman Sachs and 1MDB scandal in greater detail—focusing on the key players, what happened, and the indictments. Part III explores how the Goldman Sachs scandal informs trends in FCPA enforcement. Finally, this Note provides concluding thoughts on the scandal.

I. BACKGROUND TO UNDERSTAND THE CASE

Part I explains the history of the Foreign Corrupt Practices Act and the Act's key provisions. Part I ends with a discussion on the current trends in FCPA enforcement.

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on the Sarawak transaction the year before its work with 1MDB and normally earns a $1 million fee for similar work. TOM WRIGHT & BRADLEY HOPE, BILLION DOLLAR WHALE 185 (2018).

6. DOJ Plea Agreement Attachment A, *supra* note 2, at 24.

7. *Id.* at 23; *see* Wall St. J., *Goldman Sachs Entangled in Global 1MDB Scandal*, YOUTUBE (Nov. 8, 2018), https://youtu.be/f6-Q_sgP0uo.

8. Press Release, Dep't of Just. Off. of Pub. Affs., *supra* note 3.

9. Wall St. J., *supra* note 7.

10. *Id.*

11. *Id.*; *see* Yantoultra Ngui & Bradley Hope, *'Wolf of Wall Street' Producer Is Charged With Money Laundering in 1MDB Scandal*, WALL ST. J. (July 5, 2019), https://www.wsj.com/articles/the-wolf-of-wall-street-leads-to-1mdb-arrest-of-ousted-malaysian-leaders-stepson-11562242252; WRIGHT & HOPE, *supra* note 5, at 2.

12. Tom Wright & Bradley Hope, *The Billion-Dollar Mystery Man and the Wildest Party Vegas Ever Saw*, WALL ST. J. (Sept. 15, 2018), https://www.wsj.com/articles/the-billion-dollar-mystery-man-and-the-wildest-party-vegas-ever-saw-1536984061.

13. *Id.*

14. *Id.*; WRIGHT & HOPE, *supra* note 5, at 5–6.

A. A History of the Foreign Corrupt Practices Act

The Foreign Corrupt Practices Act emerged from the Watergate scandal.[15] The idea for the FCPA did not spawn from the much-publicized burglary at the Watergate Hotel but rather a small portion of the Watergate hearings that discussed corporate contributions to politicians and political campaigns.[16] Stanley Sporkin, the SEC Enforcement Director at the time, listened to the congressional hearings and was befuddled that public companies would engage in such behavior.[17] He felt determined to act.[18] As Director, Sporkin created a Volunteer Program for corporations to self-report "illicit" payments that eventually led to the statutory provision.[19]

In 1977, Congress enacted, and President Jimmy Carter signed, the Foreign Corrupt Practices Act into law.[20] The FCPA prohibits bribery of foreign officials by companies seeking their business.[21] The FCPA has two main categories of provisions: the anti-bribery provisions and the accounting provisions.[22] The anti-bribery provisions prohibit paying or planning to pay a bribe to a foreign official to obtain or retain business.[23] The Act does not require bribes or payments to be monetary.[24] For instance, offering a foreign official a large, extravagant gift, like a luxury vehicle, likely constitutes a bribe under the FCPA.[25] The accounting provisions require companies to keep and maintain accurate books and records.[26]

The DOJ and SEC share responsibility in FCPA enforcement actions.[27] The DOJ may bring criminal charges or civil actions against companies and individuals; the SEC may bring civil actions.[28] Since the Agencies have joint enforcement authority, the DOJ and SEC work closely on investigations and policy issues relating to the FCPA.[29] Likewise, the Agencies tend to share information during

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15. *See* Thomas O. Gorman, *The Origins of the FCPA: Lessons for Effective Compliance and Enforcement*, 43 SEC. REGUL. L.J. 43, 43 (2015).

16. *Id.* at 44.

17. *Id.*

18. *Id.*

19. *Id.* at 43.

20. *Id.* at 43; S. REP. NO. 95-114, at 4 (1977), http://www.justice.gov/criminal/fraud/fcpa/history/1977/senaterpt-95-114.pdf.

21. 15 U.S.C. § 78dd-1.

22. 15 U.S.C. §§ 78m (books and records provisions), 78dd-1 (anti-bribery provisions applicable to "issuers"), 78dd-2 (anti-bribery provisions applicable to "domestic concerns"), 78dd-3 (anti-bribery provisions applicable to other "persons").

23. 15 U.S.C. § 78dd-1.

24. *See id.*

25. *See* CRIM. DIV. OF THE U.S. DEP'T OF JUST. & THE ENF'T DIV. OF THE U.S. SEC. AND EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 15 (2d ed. 2020) [hereinafter 2020 FCPA RESOURCE GUIDE].

26. *See* 15 U.S.C. § 78m(b)(2)(A).

27. Paul V. Gerlach & George B. Parizek, *The SEC's Enforcement of the Foreign Corrupt Practices Act*, *in* FOREIGN CORRUPT PRACTICES ACT REPORTER § 14-3 (Thomson/West eds., 2d ed. 2007).

28. *Id.*

29. *Id.*

investigations.[30] The DOJ and SEC often bring joint enforcement actions against corporations.[31]

In April 2016, former Assistant Attorney General Leslie Caldwell announced the launch of a new FCPA program to ensure transparency in enforcement.[32] The pilot program attempted to encourage companies to self-disclose FCPA-related misconduct.[33] To incentivize companies to do so, the Agencies offered a reduction or "credit" for self-disclosure and cooperation with an investigation.[34] For instance, a company that voluntarily cooperates, remediates, and self-discloses misconduct may receive a "reduction of up to 50 percent below the low end of the applicable U.S. Sentencing Guidelines fine range."[35] The pilot program eventually turned into a new Corporate Enforcement Policy. Like the pilot program, the policy also favors declination, which means a company will generally benefit if it voluntarily discloses FCPA issues to the government.[36]

As part of their FCPA enforcement strategy, the DOJ and SEC also offer companies deferred prosecution agreements ("DPAs") and non-prosecution agreements ("NPAs"). A DPA means the "DOJ files a charging document with the court, but it simultaneously requests that the prosecution be deferred, [or] postponed [to allow] the company to demonstrate its good conduct."[37] When a company enters into a DPA, a company generally must "pay a monetary penalty, waive the statute of limitations, cooperate with the government, admit the relevant facts, and enter into certain compliance and remediation commitments."[38] Typically, after a company successfully completes its obligations, the DOJ will dismiss the charges. The DOJ does not treat a successful completion as a criminal conviction.[39] On the other hand, when the DOJ and a company agree to an NPA, the DOJ does not file a charge against the company in court.[40] This Note will provide further discussion about why the DOJ decides to use either a DPA or an NPA later.[41]

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30. *See id*.

31. *See 2021 Year-End FCPA Update*, GIBSON DUNN (Jan. 25, 2022), https://www.gibsondunn.com/2021-year-end-fcpa-update/; *see also* Gerlach & Parizek, *supra* note 27, at § 14-3 (noting the differences in investigation focus and standard of proof in DOJ and SEC actions); *see also DOJ and SEC Enforcement Actions per Year*, STAN. L. SCH. FOREIGN CORRUPT PRACTICES ACT CLEARINGHOUSE, https://fcpa.stanford.edu/statistics-analytics.html (noting situations in which SEC and DOJ jointly file actions).

32. Press Release, Dep't of Just. Off. of Pub. Affs., Criminal Division Launches New FCPA Pilot Program (Apr. 5, 2016), https://www.justice.gov/archives/opa/blog/criminal-division-launches-new-fcpa-pilot-program.

33. *Id*.

34. *Id*.

35. *Id*.

36. *See* Justin C. Danilewitz & Albert F. Moran, *Happy Birthday, FCPA: Implications of DOJ's New FCPA Corporate Enforcement Policy on the Act's 40th Anniversary*, 42 CHAMPION 36, 37 (2018) (discussing the fact that this Policy created a presumption of declination, leading to reduced uncertainty regarding the benefits of voluntary disclosure).

37. 2020 FCPA RESOURCE GUIDE, *supra* note 25, at 75 (footnotes omitted).

38. *Id*. at 75.

39. *Id*. at 76.

40. *Id*.

41. *See infra* Part I.B.

The DOJ and SEC expect companies will enact compliance programs to detect FCPA violations.[42] These corporate policies and programs should allow companies to proactively respond to potential threats of bribery and issues with the company's books and records. As discussed later, the DOJ and SEC will reward an organization that implements a robust compliance program and attempts to stop corruption before it gets out of hand.[43] The DOJ and SEC will also review a corporation's compliance program when a company tries to assert a "rogue employee" defense.[44] In essence, the "rogue employee" defense means the violation occurred as a "single isolated act of a rogue employee," so the corporation should not face strict liability for the violation.[45] However, the DOJ places a high emphasis on the "role and conduct of management."[46] It will hold a corporation liable when the company's corporate culture within a group or as a whole bred the criminal violation.[47]

The DOJ and SEC may work with other countries to enforce FCPA violations globally. In the Organisation for Economic Co-operation and Development's ("OECD") Phase 4 assessment of the United States, the OECD Working Group applauded the United States for its joint enforcement efforts with other countries.[48]

In addition, the SEC may require a company to pay disgorgement, meaning that a company returns "to the same position as before the crime, ensuring that the perpetrator [here, the company] does not profit from the misconduct."[49] For example, if a company earned $50 million in a bribery scheme, under a disgorgement order, the SEC would require the company to pay back the $50 million.

In conclusion, the DOJ and SEC achieve the FCPA's aim to combat corruption through its Corporate Enforcement Policy, DPAs and NPAs, and disgorgement orders, among other tactics.

B. Current Trends in FCPA Enforcement

As Professor Mike Koehler notes, the DOJ and SEC resolve most corporate enforcement through DPAs and NPAs, primarily because they avoid judicial scrutiny

42. 2020 FCPA RESOURCE GUIDE, *supra* note 25, at 56–57 ("A company's compliance and ethics program can help prevent, detect, remediate, and report misconduct, including FCPA violations, where it is well-constructed, effectively implemented, appropriately resourced, and consistently enforced."). *See* U.S. DEP'T OF JUST., CRIM. DIV., Evaluation of Corporate Compliance Programs, at 1 (June 2020), https://www.justice.gov/criminal-fraud/page/file/937501/download.

43. *See* 2020 FCPA RESOURCE GUIDE, *supra* note 25, at 76.

44. *See* U.S. Dep't of Just., Just. Manual §§ 9-28.500 (2008), 9-28.800 (2019).

45. *Id.* at § 9-28.500.

46. *Id.*

47. *See id.*

48. OECD Working Group on Bribery, *United States: Phase 4 Report, Implementing the OECD Anti-Bribery Convention*, OECD at 79–80 (Oct. 2020), https://www.oecd.org/corruption/oecd-anti-bribery-convention-phase-4.htm [hereinafter *Phase 4 Report*].

49. 2020 FCPA RESOURCE GUIDE, *supra* note 25, at 71.

or at least meaningful judicial scrutiny.[50] Less meaningful scrutiny means that authorities can more efficiently resolve matters and avoid press scrutiny.[51]

A few organizations have pointed to other rationales supporting this feature of DPAs and NPAs. The OECD Phase 3 report on the United States suggests, based on information provided by the United States, that DPAs and NPAs avoid collateral consequences.[52] Collateral consequences include the complete collapse of a company, which happened to Arthur Anderson after the Enron scandal.[53] Additionally, the OECD Working Group suggests that DPAs and NPAs result in more cooperation, self-reporting, and ease of obtaining evidence from foreign jurisdictions.[54] Furthermore, the United States Government Accountability Office proposes that DPAs and NPAs lack meaningful judicial review because judges "lack . . . [the] time and resources . . . to become more involved in the DPA process or" judges do not have a "willingness to do so."[55] On the other hand, some scholars and judges have criticized the lack of meaningful judicial review because it does not deter corporations from violating the FCPA, which is discussed more later.[56]

As previously mentioned, the DOJ and SEC commonly enter into DPAs or NPAs with corporations. In the first half of 2022, the DOJ had already enforced one corporate DPA.[57] In 2021, three companies entered into DPAs for FCPA-related crimes.[58] In 2020, the DOJ agreed to a DPA with companies in six out of eight FCPA-related prosecutions.[59] These statistics align with the general increase in reliance on DPAs and NPAs over the last few years.[60]

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50. Mike Koehler, *Has the FCPA Been Successful in Achieving Its Objectives?*, 2019 U. ILL. L. REV. 1267, 1290–91 (2019) (discussing whether the FCPA has been successful in the four decades since its enactment).

51. *See id.*

52. *See* OECD Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United States*, OECD at 33 (Oct. 2010), https://www.oecd.org/unitedstates/UnitedStates phase3reportEN.pdf [hereinafter *Phase 3 Report*].

53. *Id.*

54. *Id.*

55. U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-110, DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS 27–28 (2009).

56. *See, e.g.*, Barry J. Pollack & Annie Wartanian Reisinger, *Lone Wolf or the Start of A New Pack: Should the FCPA Guidance Represent A New Paradigm in Evaluating Corporate Criminal Liability Risks?*, 51 AM. CRIM. L. REV. 121, 127 (2014) ("[W]ithout binding judicial precedent, the DOJ is under no obligation to treat the same conduct by different corporations with any consistency, increasing the challenges of corporate compliance and risk reduction."); United States v. HSBC Bank USA, 863 F.3d 125, 143 (2d Cir. 2017) (quoting Judge Rosemary Pooler as she suggests "it is time for Congress to consider implementing legislation providing for" meaningful DPA review); *see infra* Part III.E.

57. *Mid-Year FCPA Report*, FCPA PROFESSOR (July 5, 2022), https://fcpaprofessor.com/mid-year-fcpa-report-6/.

58. *See 2021 Mid-Year Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements*, GIBSON DUNN (July 22, 2021), https://www.gibsondunn.com/2021-mid-year-update-on-corporate-non-prosecution-agreements-and-deferred-prosecution-agreements/#_ftn30 [hereinafter *2021 Mid-Year Update*]; CRIM. DIV. OF THE U.S. DEP'T OF JUST., FRAUD SECTION, YEAR IN REVIEW 2021 7 (2022).

59. CRIM. DIV. OF THE U.S. DEP'T OF JUST., FRAUD SECTION, YEAR IN REVIEW 2020 7 (2020).

60. *See 2021 Mid-Year Update*, *supra* note 58; YEAR IN REVIEW, *supra* note 58.

Recently, FCPA enforcement has included huge penalties and fines against companies. In 2019, the FCPA corporate fines had a record year, bringing in over $2.5 billion.[61] Two of the highest penalty cases in 2019—Mobile TeleSystems PJSC and Telefonaktiebolaget LM Ericsson—brought in $850 million and $1 billion, respectively.[62] In the first half of 2020, penalties had already reached a level that made 2020 the third-largest year ever.[63] By the end of 2020, FCPA corporate fines topped a whopping $2.78 billion—the highest grossing year in history.[64] The Goldman Sachs and 1MDB scandal—the case discussed in this Note—involved the largest fine ever imposed.[65]

Despite these mind-boggling numbers, they are likely much lower than the fines that prosecutors could extract if not tempered by corporate cooperation. The DOJ's *Principles of Federal Prosecution of Business Organizations* recommends that prosecutors consider self-disclosure, timely disclosure, and remedial measures when determining penalties and fines.[66] If a corporation does any of the latter, the DOJ will decrease the fine referenced in the U.S. Sentencing Guidelines.[67] Since 2016, the DOJ and SEC have provided at least forty-one companies with some discount for one of the three described categories.[68] Thirteen companies self-disclosed, and ten of those companies received a declination.[69] In contrast, only one out of the twenty-eight companies that did not self-disclose but cooperated received a declination from the DOJ.[70] This difference reveals that the DOJ generally values and prefers self-disclosure.[71]

The DOJ and SEC have also occasionally assigned independent monitors, or compliance monitors, to FCPA violators. An independent monitor is an independent third party who ensures a company meets the compliance requirements of its agreement with the DOJ or SEC.[72] The DOJ and SEC consider several factors when determining whether to impose an independent monitor:

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61. *2020 Year-End FCPA Update*, GIBSON DUNN 5 (Jan. 12, 2021), https://www.gibsondunn.com/2020-year-end-fcpa-update/ [hereinafter *2020 Year-End FCPA Update*].

62. *Id.*

63. Bill Steinman, *2020 Has Been a Crazy Year for the FCPA Too*, FCPA BLOG (July 22, 2020, 7:58 AM), https://fcpablog.com/2020/07/22/2020-has-been-a-crazy-year-for-the-fcpa-too/.

64. *2020 Year-End FCPA Update, supra* note 61, at 1; *see Corporate FCPA Enforcement in 2020 Compared to Prior Years*, FCPA PROFESSOR (Jan. 4, 2021), https://fcpaprofessor.com/corporate-fcpa-enforcement-2020-compared-prior-years/.

65. *2020 Year-End FCPA Update*, *supra* note 61, at 5.

66. *See* U.S. Dep't of Just., Just. Manual § 9-28.900 (2015); *id.* § 9-28.300 (2020); *id.* § 9-28.700 (2018); *id.* § 9-28.800 (2019).

67. *See* 2020 FCPA RESOURCE GUIDE, *supra* note 25, at 55.

68. Ryan Rohlfsen, Elizabeth Noonan-Pomada & Andrew Kaplan, *Self-Disclosure Trends in FCPA Corporate Enforcement*, LAW360 (Sept. 17, 2020, 3:57 PM), https://www.law360.com/articles/1310500/self-disclosure-trends-in-fcpa-corporate-enforcement-policy.

69. *Id.*

70. *Id.*

71. *See id.*

72. *See* 2020 FCPA RESOURCE GUIDE, *supra* note 25, at 73–74.

> [The] nature and seriousness of the offense; [d]uration of the misconduct; [p]ervasiveness of the misconduct, including whether the conduct cuts across geographic and/or product lines; [t]he risk profile of the company, including its nature, size, geographical reach, and business model; [q]uality of the company's compliance program at the time of the misconduct; [s]ubsequent remediation efforts and quality of the company's compliance program at the time of the resolution; [w]hether the company's current compliance program has been fully implemented and tested.[73]

Former Assistant Attorney General Brian Benczkowski also suggests that prosecutors consider whether the "misconduct occurred under different corporate leadership or within a compliance environment that no longer exists within a company" and account for "the potential benefits that employing a monitor may have for the corporation and the public."[74]

The trends in imposing independent monitors have varied over the years. The OECD Working Group noted in its 2010 Phase 3 report that twenty-three out of forty-four enforcement actions since 1998 had independent monitors.[75] Between 2016 and 2018, the DOJ imposed an independent monitor in approximately thirty-eight percent of its FCPA enforcements or about eleven enforcement actions.[76] The OECD Working Group acknowledged that judges have limited involvement in monitorships. The DOJ normally selects the monitor, determines the scope, receives the company's updates, and decides when to end the monitorship.[77] In its more recent Phase 4 report, the OECD Working Group recommended that the United States provide greater transparency about recidivism for FCPA violators that received a corporate monitor, even though the United States authorities claim there has been no recidivism.[78]

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73. *Id*. at 74. For instance, a prosecutor should consider:

> (a) whether the underlying misconduct involved the manipulation of corporate books and records or the exploitation of an inadequate compliance program or internal control systems; (b) whether the misconduct at issue was pervasive across the business organization or approved or facilitated by senior management; (c) whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal control systems; and (d) whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future.

Memorandum from Brian A. Benczkowski, Assistant Att'y Gen. U.S. Dep't of Just. on Selection of Monitors in Crim. Div. Matters to All Crim. Div. Pers. (Oct. 11, 2018), https://www.justice.gov/opa/speech/file/1100531/download (listing several factors prosecutors must evaluate).

74. Benczkowski, *supra* note 73, at 2.

75. *Phase 3 Report*, *supra* note 52, at 36.

76. *More on the DOJ's New Monitor Policy*, FCPA PROFESSOR (Oct. 16, 2018), https://fcpaprofessor.com/dojs-new-monitor-policy/.

77. *Phase 3 Report*, *supra* note 52, at 37–38; *see also* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 55, at 27–28 (finding that the government recommended against increased judicial involvement in the process).

78. *Phase 4 Report*, *supra* note 48, at 88.

In summary, FCPA enforcement over the last several years has seen more DPAs and NPAs, greater fines, higher discounts for self-disclosure, and fewer independent monitors. Next, this Note will review how some of these trends came to life in the 1MDB scandal.

PART II: AN IN-DEPTH LOOK INTO THE GOLDMAN SACHS AND 1MDB SCANDAL

Part II discusses what happened in the scandal and the penalties and fines Goldman Sachs endured.

A. What Happened?

Goldman Sachs violated the anti-bribery, books and records, and internal accounting controls provisions of the FCPA.[79] But what really happened to lead to these charges? This Section explores (i) the key players, (ii) the series of projects that led to the FCPA violations, and (iii) the mishandling of internal controls at Goldman Sachs.

1. Key Players

Before diving into the details of the scheme, it is important to understand who played a key role in the scandal. Goldman Sachs employed Tim Leissner ("Leissner") for eighteen years.[80] Leissner held many roles, including senior positions in the Investment Banking division, Participating Managing Director, Chairman of the Southeast Asia region, and a member of the Goldman Sachs Malaysia Board of Directors.[81] Leissner had great influence and ambition to make Malaysia a profitable area for Goldman Sachs.[82] His ambitions, however, led him astray. Eventually, Leissner pled guilty to money laundering and FCPA charges.[83]

Goldman Sachs also employed Ng Chong Hwa, also known as Roger Ng ("Ng").[84] Ng held positions at various Goldman Sachs subsidiaries for nine years.[85] From 2010 to 2014, Ng worked as a Managing Director.[86] He also served as Head of Investment Banking and as a member of the Goldman Sachs Malaysia Board of

79. The Goldman Sachs Grp., Inc., Exchange Act Release No. 90243, 2020 WL 6262335 (Oct. 22, 2020).

80. DOJ Plea Agreement Attachment A, *supra* note 2, at 4. Leissner is also married to fashion designer and model Kimora Lee Simmons. Alexandra Stevenson & Matthew Goldstein, *Goldman Sachs and Malaysia Reach $3.9 Billion Settlement in 1MDB Scandal*, N.Y. TIMES (July 24, 2020), https://www.nytimes.com/2020/07/24/business/goldman-sachs-malaysia-1mdb.html?searchResultPosition=4; WRIGHT & HOPE, *supra* note 5, at 241.

81. DOJ Plea Agreement Attachment A, *supra* note 2, at 4.

82. *See* Dep't of Just. Off. of Pub. Affs., *supra* note 3; *see also* Wright & Hope, *supra* note 5, at 182–89 (describing Leissner's efforts to get others on board with lucrative deals).

83. *Id.*

84. DOJ Plea Agreement Attachment A, *supra* note 2, at 5.

85. *Id.*

86. *Id.*

Directors for some time.[87] Ng worked with Leissner on most of the transactions at the heart of the scandal.[88]

Finally, Low Taek Jho, also known as "Jho Low" ("Low"), had a reputation that preceded him. Low, a Malaysian national, had connections in high places that he leveraged for personal gain and on behalf of foreign officials.[89] Low organized the bribes Leissner and Ng paid to foreign officials.[90]

In addition, several foreign entities and foreign officials contributed to the scandal. First, and most importantly, 1MDB played a key role in the scandal. 1MDB was a "strategic investment and development company wholly owned by the Government of Malaysia through its Ministry of Finance."[91] 1MDB had business ventures in energy, real estate, tourism, and agriculture.[92]

1MDB is also a sovereign wealth fund. This means 1MDB is "a state-owned investment fund or entity that is commonly established from:[sic] [a] balance of payment surpluses, official foreign currency operations, the proceeds of privatizations, governmental transfer payments, fiscal surpluses, and/or receipts resulting from resource exports."[93] Generally, investments from a sovereign wealth fund help "promote growth, prosperity, and economic development."[94] However, as the scandal shows, the general function of a sovereign wealth fund did not apply to 1MDB. Instead, the fund engaged in several bribery schemes.[95] And it did so at the economic expense of the Malaysian people, who should have benefited from the fund.

The International Petroleum Investment Company ("IPIC"), an "investment fund wholly owned by the Government of Abu Dhabi . . . and . . . overseen by senior Abu Dhabi government officials,"[96] helped finance several bond transactions in the scandal.[97] Another Abu Dhabi company, Aabar Investments PJS ("Aabar"), was also involved in securing the transaction.[98] Aabar was a "private joint stock

87. *Id.*

88. *Id.*

89. *Id.* at 21. *See also* Wright & Hope, *supra* note 12 (describing a lavish party Low hosted in Las Vegas with the money Low siphoned off from 1MDB). For a more in-depth description of Low's involvement in the 1MDB scandal, see generally WRIGHT & HOPE, *supra* note 5 (discussing Low's life and the 1MDB scandal).

90. DOJ Plea Agreement Attachment A, *supra* note 2, at 21, 23. Bankers at Goldman Sachs, such as Leissner, also became dependent on Low to make Malaysia a profitable business line for Goldman Sachs. WRIGHT & HOPE, *supra* note 5, at 241.

91. DOJ Plea Agreement Attachment A, *supra* note 2, at 7.

92. SEC Cease-and-Desist Order, *supra* note 5, at 4.

93. *What is a Sovereign Wealth Fund?*, SOVEREIGN WEALTH FUND INST., https://www.swfinstitute.org/research/sovereign-wealth-fund (last visited Oct. 22, 2021).

94. Int'l Working Grp. of Sovereign Wealth Funds, *Sovereign Wealth Funds: Generally Accepted Principles and Practice "Santiago Principles"* 3, INT'L F. OF SOVEREIGN WEALTH FUNDS (Oct. 2008), http://www.ifswf.org/sites/default/files/santiagoprinciples_0_0.pdf.

95. *Infra* Part II.A.2.

96. DOJ Plea Agreement Attachment A, *supra* note 2, at 8.

97. *Infra* Part II.A.2.

98. DOJ Plea Agreement Attachment A, *supra* note 2, at 9, 41.

company" and a "subsidiary of IPIC."[99]

Finally, several foreign officials entangled themselves in the scandal. The Plea Agreement identified five 1MDB officials, four Malaysian officials, and two Abu Dhabi Officials (one from both IPIC/Aabar and one from only Aabar).[100] Other sources have noted that the former Prime Minister of Malaysia, Najib Razak, also took part in the scandal.[101]

2. The Projects

Leissner and Ng worked with Low to gain business for Goldman Sachs for three separate projects referred to as Project Magnolia, Project Maximus, and Project Catalyze.[102] Box 1 briefly describes each of these projects and other ventures Goldman Sachs attempted to undertake.

Box 1: The Projects

Project Magnolia (2012): 1MDB used Goldman Sachs's services to purchase Tanjong Energy Holds Sdn Bhd, a Malaysian energy company.[103] Low helped Goldman Sachs broker the deal through e-mails between Leissner, Ng, and high-ranking 1MDB officials.[104] The parties also agreed they would need help from IPIC to finance the bond transaction.[105] After a meeting in London, Low told Leissner and Ng that "government officials from Abu Dhabi and Malaysia needed to be bribed to both obtain the guarantee from IPIC and get the necessary approvals from Malaysia and 1MDB" to complete the transaction.[106] Goldman Sachs internal controls eventually approved Project Magnolia in May 2012, earning about $192 million in fees for the bond and

99. *Id*. at 9; *see also* WRIGHT & HOPE, *supra* note 5, at 177 (discussing Goldman Sachs recommending IPIC guarantee the 1MDB bond).

100. DOJ Plea Agreement Attachment A, *supra* note 2, at 10–20.

101. Stevenson & Goldstein, *supra* note 80. The DOJ and SEC did not mention the former Prime Minister by name in the Plea Agreement documents. However, news sources have tied him to the scandal noting that he received money from the scandal. *See Goldman Sachs to Pay $3bn Over 1MDB Corruption Scandal,* BBC (Oct. 22, 2020), https://www.bbc.com/news/business-54597256.

102. Press Release, Dep't of Just. Off. of Pub. Affs., Malaysian Financier Low Taek Jho, Also Known As "Jho Low," and Former Banker Ng Chong Hwa, Also Known As "Roger Ng," Indicted for Conspiring to Launder Billions of Dollars in Illegal Proceeds and to Pay Hundreds of Millions of Dollars in Bribes (Nov. 1, 2018), https://www.justice.gov/opa/pr/malaysian-financier-low-taek-jho-also-known-jho-low-and-former-banker-ng-chong-hwa-also-known.

103. DOJ Plea Agreement Attachment A, *supra* note 2, at 33–35; *see* SEC Cease-and-Desist Order, *supra* note 5, at 26, 29.

104. DOJ Plea Agreement Attachment A, *supra* note 2, at 34.

105. DOJ Plea Agreement Attachment A, *supra* note 2, at 35; WRIGHT & HOPE, *supra* note 5, at 177–78.

106. DOJ Plea Agreement Attachment A, *supra* note 2, at 37; *see also* WRIGHT & HOPE, *supra* note 5, at 178 (suggesting Leissner and Ng knew about the bribes after the London meeting).

$16.8 million for advising the acquisition of the Malaysian energy company.[107] Leissner and Ng knew Low used the $1.75 billion bond to pay bribes to foreign officials in Malaysia and Abu Dhabi, as the parties previously discussed.[108] Low and Leissner used shell companies to pay bribes of approximately $576 million to Abu Dhabi officials,[109] $193 million to a close relative of a Malaysian official,[110] and $25.98 million to Leissner and Ng.[111]

Project Maximus (2012): 1MDB procured Goldman Sachs's services again to acquire a second energy company with another $1.75 billion bond backed by IPIC.[112] Yet, the company only cost around $814 million to acquire.[113] The deal closed in October, and Goldman Sachs wired approximately $1.64 billion to a different 1MDB subsidiary.[114] Goldman Sachs collected an additional $110 million in fees.[115] Low and Leissner siphoned money into shell companies totaling about $137.2 million to Malaysian officials,[116] including Najib Razak, Malaysia's Prime Minister at the time,[117] $8.7 million to 1MDB officials, $245.6 million to Abu Dhabi officials, $21 million to UAE officials, and $664 million to Low.[118]

Project Catalyze (2012–2013): 1MDB engaged Goldman Sachs for another bond transaction that 1MDB described as necessary to fund a joint venture with Aabar for $3 billion.[119] Goldman Sachs's committees approved the transaction, and Goldman Sachs wired approximately $2.7 billion to a third 1MDB subsidiary account.[120] This time the company made $279 million in fees.[121] For this transaction, Low and Leissner paid bribes totaling approximately $683.88 million to Malaysian officials, $10 million to Abu Dhabi officials, $10 million to 1MDB officials, $30 million to UAE officials, and $6 million to

107. DOJ Plea Agreement Attachment A, *supra* note 2, at 50.

108. SEC Cease-and-Desist Order, *supra* note 5, at 28–29, 33.

109. DOJ Plea Agreement Attachment A, *supra* note 2, at 51(a).

110. *Id*. at 51(c), (d). $60 million went through a U.S. movie production company owned by a close relative of Malaysian Official 1, and it was used to finance movies. *Id*. at 51(d). This money eventually financed *The Wolf of Wall Street*. Press Release, Dep't of Just. Off. of Pub. Affs., *supra* note 102.

111. DOJ Plea Agreement Attachment A, *supra* note 2, at 51.

112. *Id*. at 52; WRIGHT & HOPE, *supra* note 5, at 189.

113. DOJ Plea Agreement Attachment A, *supra* note 2, at 52.

114. *Id*. at 56.

115. *Id*.

116. *Id*. at 57(c)–(d), 58(a).

117. SEC Cease-and-Desist Order, *supra* note 5, at 29, 39.

118. DOJ Plea Agreement Attachment A, *supra* note 2, at 57–58.

119. *Id*. at 59. Ng did not have involvement in this project as a member of the deal team because he had switched roles at Goldman Sachs by this time, but he continued to act as a contact point for 1MDB. *Id*. at 59 n.3.

120. *Id*. at 62–64.

121. *Id*. at 63.

Leissner's friend.[122] Low also spent approximately $137 million to purchase high-end works of art from a New York City auction house.[123]

Proposed Projects: Outside the main three projects, Goldman Sachs attempted to procure other deals from 1MDB. Specifically, Leissner and others hoped to help 1MDB make an IPO.[124] In New York, Goldman Sachs hosted a roundtable for a Malaysian official to attract more business. 1MDB asked Goldman Sachs for a proposal.[125] A few months earlier, Leissner and Low continued to bribe Malaysian officials to close another deal.[126] In private chats between Low and Leissner, Low made clear that Leissner needed to persuade a Malaysian official by doing something nice for the official's wife.[127] During the Malaysian official's visit, his wife received a gold necklace that cost $4.1 million, which the government traced back to Leissner.[128]

In sum, Goldman Sachs spent years trying to obtain and retain 1MDB's business. It went as far as bribing foreign officials to gain $606 million. However, the Wall Street Journal broke the story on the 1MDB scandal, leading to one of the largest indictments in FCPA history.[129]

3. Internal Controls

As previously mentioned, companies need to have internal controls to detect bribery and accounting issues related to the FCPA. Goldman Sachs is no different. At the time of the scandal, Goldman Sachs, like other firms, had an anti-corruption policy that prohibited illicit payments to government officials for the purposes of obtaining or retaining business.[130] Goldman Sachs had a document called the "Statement of Principles Regarding Anti-Bribery" and policies and procedures relating to anti-bribery efforts.[131] The policy covered all Goldman Sachs

122. *Id.* at 64.
123. Press Release, Dep't of Just. Off. of Pub. Affs., *supra* note 102.
124. *Id.*
125. *Id.*; DOJ Plea Agreement Attachment A, *supra* note 2, at 65.
126. *Id.*
127. *Id.*
128. *See id.*
129. Tom Wright & Simon Clark, *Investigators Believe Money Flowed to Malaysian Leader Najib's Accounts Amid 1MDB Probe*, WALL ST. J. (July 2, 2015), https://www.wsj.com/articles/malaysian-investigators-probe-points-to-deposits-into-prime-ministers-accounts-1435866107; *DOJ / SEC Announce Net $1.66 Billion (The Largest Of All-Time) FCPA Enforcement Action Against Goldman Sachs in Connection with 1MDB Fund*, FCPA PROFESSOR (Oct. 23, 2020), https://fcpaprofessor.com/doj-sec-announce-net-1-66-billion-largest-time-fcpa-enforcement-action-goldman-sachs-connection-1mdb-fund/.
130. SEC Cease-and-Desist Order, *supra* note 5, at 15.
131. *Id.*

employees.[132] Goldman Sachs's Compliance Group ("Compliance") and Business Intelligence Group ("BIG") oversaw the policy.[133]

Furthermore, the company's internal controls required every 1MDB transaction to receive authorization. Goldman Sachs has three main groups that approve firm transactions: Compliance, BIG, and Firmwide Capital Committee ("FWCC").[134] FWCC "provide[s] global oversight and approval of bond transactions."[135] In 2012, around the time the events occurred, the FWCC conditionally approved two-thirds of the transactions it reviewed.[136] As part of Goldman Sachs's internal accounting controls, BIG and Compliance also reviewed bond transactions like the ones at issue here.[137]

Around September 2009, Leissner and Ng tried to bring Low on as a client through the company's private wealth management group.[138] But when BIG reviewed Low's finances, the group raised red flags about how Low obtained his wealth.[139] The business side pressured compliance to approve Low; however, BIG did not approve him.[140] Leissner attempted two other times to bring Low on as a client.[141] Again, BIG rejected him.[142] In one e-mail during Low's review, a high-ranking BIG employee and Managing Director noted that Low's "name [is one] to be avoided."[143]

When the bond deals with 1MDB came around, the compliance groups failed to ensure Low did not participate in the deals, despite their awareness that Low posed a risk. In Project Magnolia, the Goldman Sachs compliance function became suspicious that Low was involved, despite earlier disapproval of Low.[144] In a telephone conversation in March 2012, a high-ranking BIG employee questioned Leissner about Low's involvement in Project Magnolia.[145] However, Leissner denied Low had any involvement, and compliance accepted Leissner's word.[146] In two subsequent meetings, Leissner continued to lie about Low's involvement in the project.[147]

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132. *Id.*

133. *Id.*

134. *See* DOJ Plea Agreement Attachment A, *supra* note 2, at 25.

135. *Id.*

136. GOLDMAN SACHS, BUSINESS STANDARDS COMMITTEE IMPACT REPORT 14 (2013), https://www.goldmansachs.com/our-firm/people-and-culture/bcs-report.pdf.

137. DOJ Plea Agreement Attachment A, *supra* note 2, at 25.

138. DOJ Plea Agreement Attachment A, *supra* note 2, at 28; WRIGHT & HOPE, *supra* note 5, at 137–38.

139. DOJ Plea Agreement Attachment A, *supra* note 2, at 28. *See* SEC Cease-and-Desist Order, *supra* note 5, at 19–22.

140. DOJ Plea Agreement Attachment A, *supra* note 2, at 28–29.

141. *Id.* at 30–31 (explaining that one of these attempts was to onboard two of Low's companies and another was an additional attempt to onboard Low).

142. *Id.*

143. *Id.* at 31.

144. *Id.* at 44; *see* SEC Cease-and-Desist Order, *supra* note 5, at 19–22.

145. DOJ Plea Agreement Attachment A, *supra* note 2, at 45.

146. *Id.*

147. *Id.* at 45–46.

In the Plea Agreement, the DOJ highlighted that this behavior was a mistake on Goldman Sachs's part. The Plea Agreement stated:

> Goldman's control functions accepted the statements of the deal team members about Low's involvement at face value, rather than taking additional steps that Goldman's control functions took in other deals, such as reviewing the electronic communications of members of the deal team to look for evidence of Low's involvement (e.g., searching for references to Low). For example, had Goldman conducted a review of Leissner's electronic communications at this time, it would have discovered multiple messages linking Low to, among others, the bond deal, 1MDB officials, Malaysian Official 1 and Abu Dhabi Official 1, as well as the use of personal email addresses by Leissner and Ng to discuss Goldman business.[148]

Like Project Magnolia, Project Maximus also had compliance issues. This time the compliance group accepted a deal team member's reassurance that Low had not participated in the 1MDB deals.[149] Likewise, a firmwide committee again believed Leissner's lie that Low was not involved in the project.[150] Project Maximus also raised new red flags. Mainly, 1MDB had not yet used all the money it had raised from Project Magnolia, and 1MDB asked for *significantly* more money than the energy company's price tag.[151] Again, the DOJ highlighted its dismay with the compliance team for these failures.[152]

Continuing with the same theme as the previous projects, Project Catalyze had its own slew of compliance issues. On this project, Leissner once again denied Low's involvement in the project when compliance asked.[153] Likewise, the compliance team once again failed to recognize that 1MDB recently raised a large sum of money.[154] Compliance also did not check if 1MDB had spent the last deposit.[155]

Goldman Sachs's control functions failed to act upon additional red flags after discovery. These red flags came from the press and internal phone calls amongst Goldman Sachs employees and executives about Low's connection to the projects, as well as potential bribes.[156] For instance, a distraught Goldman Sachs employee involved in the 1MDB deals told senior executives about the bribes on a recorded call, to which a senior executive replied, "[w]hat's disturbing about that? It's nothing new, is it?"[157] This example provides evidence that the incident originated from a culture of avoiding compliance.

148. *Id.* at 47.
149. *Id.* at 53–54.
150. *Id.*
151. *Id.* at 55.
152. *See id.*
153. *Id.* at 60–61.
154. *Id.*
155. *Id.*
156. *Id.* at 72–75.
157. *Id.* at 73 (noting that the employee agreed that the situation was "nothing new").

Goldman Sachs originally claimed that the scandal occurred because of rogue employees.[158] But the company later changed its tune as institutional evidence showed the company knew what had happened and turned a blind eye.[159] Employees at Goldman Sachs felt encouraged to circumvent the rules, and the 1MDB scandal was a product of that culture.

Goldman Sachs had all the right tools to fix the problem but failed to use them properly. The tools just sat at the wayside while impropriety flourished. Next, this Note explores the indictment and the DPA Goldman Sachs entered into with the government.

B. Goldman Sachs's Indictment and Deferred Prosecution Agreement

The DOJ brought charges against Goldman Sachs Group, Inc., the parent company of Goldman Sachs Malaysia, in the Eastern District of New York for violating the anti-bribery and accounting provisions.[160] Goldman Sachs pled guilty to the charges.[161] Goldman Sachs then entered into a three-year DPA with the United States Government.[162]

The DPA outlined the DOJ's reasoning for the company's sentencing. As previously mentioned, companies receive credit for voluntary disclosures and cooperation, among other things.[163] The DOJ did not give Goldman Sachs a voluntary disclosure credit because the company failed to voluntarily self-disclose the FCPA violation in a timely manner.[164] However, Goldman Sachs did receive partial credit for its cooperation with the DOJ investigation because the company produced significant evidence from foreign countries, provided investigation updates, and volunteered foreign employees for interviews.[165] Though Goldman Sachs received partial credit for cooperation, it was not the full amount because the company dragged its feet sending over a phone recording about the bribery and misconduct allegations between the company's bankers, executives, and control functions personnel.[166]

As a result of the scandal, Goldman Sachs took several remedial precautions that exceeded previous ones. The precautions included "(i) implementing heightened controls and additional procedures and policies relating to electronic surveillance and investigation, due diligence on proposed transactions or clients and the

158. *Goldman Sachs to Pay $3Bn Over 1MDB Corruption Scandal*, BBC (Oct. 22, 2020), https://www.bbc.com/news/business-54597256.

159. *Id.*

160. *See* Deferred Prosecution Agreement, United States v. The Goldman Sachs Group, Inc., No. 1:20-cr-00437, at 1–2 (E.D.N.Y. Oct 22, 2020) (using numbers to reference the paragraph).

161. *Id.* at 2.

162. *Id.* at 2–3.

163. *See supra* Part I.A.

164. Deferred Prosecution Agreement, *supra* note 160, at 4(a).

165. *Id.* at 4(b).

166. *Id.* at 4(c).

use of third-party intermediaries across business units; and (ii) enhancing anti-corruption training for all management and relevant employees."[167]

The DOJ made a few interesting choices with Goldman Sachs's DPA. First, the DOJ did not require an independent monitor for Goldman Sachs.[168] Instead, the DOJ noted that Goldman Sachs's compliance program and frequent reporting as prescribed in the DPA were enough to meet the agreed-upon requirements.[169] Second, the DOJ gave Goldman Sachs a ten percent discount on the imposed fine under the Sentencing Guidelines.[170] This Note will discuss the implications of these decisions in Part III.

The SEC also brought charges against Goldman Sachs. The SEC found that Goldman Sachs violated the FCPA's anti-bribery and accounting provisions.[171] The agency charged Goldman Sachs with a $606.3 million disgorgement, amounting to the profits from Projects Magnolia, Maximus, and Catalyze, and a $400 million civil penalty.[172]

Goldman Sachs settled with several other foreign entities that cooperated with the United States in investigating the 1MDB scandal. Goldman Sachs paid a £96.6 million ($126 million) civil penalty to the United Kingdom Financial Conduct Authority and Prudential Regulation Authority.[173] The Singapore Attorney-General's Chambers charged Goldman Sachs with a $122 million penalty after the Monetary Authority of Singapore and Commercial Affairs Department of Singapore Police Force's investigation.[174] Finally, Hong Kong's Securities and Futures Commission charged Goldman Sachs with a $350 million penalty.[175] The Hong Kong charge represented "the largest single fine ever levied by the regulator in the Asian financial hub."[176] Thus, the United States did not stand alone in taking a harsh stance against Goldman Sachs for the 1MDB scandal.

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167. *Id.* at 4(f).

168. *See id.* at 4(h).

169. *Id.*

170. *Id.* at 4(n).

171. Press Release, U.S. Sec. and Exch. Comm'n, SEC Charges Goldman Sachs With FCPA Violations (Oct. 22, 2020), https://www.sec.gov/news/press-release/2020-265.

172. *Id.*

173. Press Release, Fin. Conduct Auth., FCA and PRA fine Goldman Sachs International £96.6m for risk management failures in connection with 1MDB (Oct. 22, 2020), https://www.fca.org.uk/news/press-releases/fca-pra-fine-goldman-sachs-international-risk-management-failures-1mdb; *see* Deferred Prosecution Agreement, *supra* note 160, at 4(k).

174. Jamie Lee, *Goldman Sachs to Pay Out US$122m to Singapore Authorities Over 1MDB Scandal*, BUS. TIMES (Oct. 23, 2020, 9:18 PM), https://www.businesstimes.com.sg/banking-finance/goldman-sachs-to-pay-out-us122m-to-singapore-authorities-over-1mdb-scandal; *see* Deferred Prosecution Agreement, *supra* note 160, at 4(k).

175. Auln John, *Hong Kong Fines Goldman Sachs Record $350 Million Over 1MDB Failings*, REUTERS (Oct. 22, 2020, 5:20 AM), https://www.reuters.com/article/goldman-sachs-1mdb-hong-kong/hong-kong-fines-goldman-sachs-record-350-million-over-1mdb-failings-idUSKBN27717P; *see* Deferred Prosecution Agreement, *supra* note 160, at 4(k).

176. John, *supra* note 175.

Goldman Sachs received a harsh penalty from the DOJ and SEC. However, despite the size and magnitude of the FCPA violation, the DOJ and SEC did not provide the severest punishment possible to Goldman Sachs. It also did not add an independent monitor to check up on the Firm's progress implementing compliance measures. The United States' punishment fell in line with several other co-investigating countries. In the next Part, this Note will explore the implications of the 1MDB scandal on future enforcement actions.

PART III: HOW THE GOLDMAN SACHS AND 1MDB SCANDAL INFORMS FCPA TRENDS

This Part explores several insights about where enforcement trends may go after the Goldman Sachs and 1MDB scandal. More specifically, it considers FCPA enforcement in areas, such as (A) Red Flags and Internal Controls, (B) Joint Enforcement, (C) Independent Monitors Usage, (D) Corporate Enforcement Policy and Penalties, and (E) DPA Usage.

A. Red Flags and Internal Controls

First, the Goldman Sachs and 1MDB case tells us what the DOJ will focus on when calculating sentencing decisions. As previously mentioned, the DOJ made a point that the internal control functions at Goldman Sachs knew Low had a questionable background.[177] Nevertheless, the control functions failed to ensure Low did not participate in the Goldman Sachs deals. In other words, the oversight groups at Goldman Sachs identified "red flags" but ignored them for profit.

The DOJ and SEC care about preventing transactions where participants show clear signs of red flags. In the 2020 Resource Guide, the DOJ and SEC emphasized that companies will be liable when third parties bribe foreign officials in connection with their work for the company.[178] In addition, the guidance recommended that companies watch for several common red flags when dealing with third parties, such as third parties who have regular close contact with foreign officials or those that request their payment in an offshore bank account.[179]

The combination of the Goldman Sachs enforcement and the guidance suggests that the DOJ and SEC will pay special attention to companies ignoring red flags when making enforcement decisions. In particular, the Agencies will look negatively at companies that have identified red flags for third-party consultants but failed to take steps to prevent involvement. As a result of this observation, companies—especially companies that deal with third parties in highly corrupt areas—need to take extra precautions in their compliance mechanisms to ensure third parties understand

177. *See supra* Part II.A.3.
178. 2020 FCPA RESOURCE GUIDE, *supra* note 25, at 22–23.
179. *Id.* at 23.

the United States' bribery laws. Likewise, companies should select third-party individuals that are honest and trustworthy people who will not engage in bribery.[180]

In addition to the guidance on third-party consultants, the Goldman Sachs and 1MDB scandal provides insights into preventative measures that the financial sector should adopt. In the Plea Agreement, the DOJ alluded to specific internal controls for financial services.[181] For instance, if a financial institution works with a repeat client[182] for a bond issuance, the financial institution should check if and how the client spent the money from the initial bond issuance.[183] If the client has not used the money, this should raise red flags for the compliance department. The compliance group should proceed with caution before approving the transaction. Furthermore, if financial institutions have not reviewed their compliance policies, they should do so to ensure that their protocols address this issue.

More generally, the Goldman Sachs and 1MDB scandal suggest that corporations should adopt additional internal control measures. First, a policy and a procedure are not always enough for companies to avoid liability. Goldman Sachs had a policy. Goldman Sachs had a procedure.[184] In fact, Goldman Sachs's compliance department even reviewed and denied other transactions with Low.[185] But Goldman Sachs had a substandard compliance culture. And the DOJ emphasized that a policy and procedure without teeth will not suffice. Compliance groups cannot simply rubber stamp "denied" and ignore all signs of impropriety. A company must internally apply the policy and procedure when a triggering event occurs. This requires a compliance-focused corporate culture.

Further, compliance departments need to do something more than take an employee's word when a situation is questionable. In Goldman Sachs's case, Compliance questioned employees on several occasions about Low's involvement.[186] Yet, it took employees at their word and did nothing to stop his involvement.[187] In the Plea Agreement, the DOJ faulted Goldman Sachs, stating that the compliance group should have taken additional steps "such as reviewing the electronic communications of members of the deal team to look for evidence of Low's involvement (e.g., searching for references to Low)."[188] For compliance groups,

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180. *See* Bill Steinman, *The FCPA in 2020: New Compliance Requirements Shake Industries, and Severe Punishment for Broken Controls*, FCPA BLOG (Jan. 19, 2021, 7:38 AM), https://fcpablog.com/2021/01/19/the-fcpa-in-2020-new-compliance-requirements-shake-industries-and-severe-punishment-for-broken-controls/.

181. *See* DOJ Plea Agreement Attachment A, *supra* note 2, at 55.

182. The term "repeat client" here presumes that the client has recently obtained a bond. If, however, there is a significant period of time between repeat business or when an unrelated service was conducted, I am not including those individuals in this hypothetical.

183. *See* DOJ Plea Agreement Attachment A, *supra* note 2, at 55.

184. *See id*. at 25, 72.

185. *Id*. at 27–29.

186. *See supra* Part II.A.3.

187. *See, e.g*., DOJ Plea Agreement Attachment A, *supra* note 2, at 72.

188. *Id*. at 47.

this seems like a small change. If a compliance member flags a third party to a transaction, then the team should follow up by searching through the deal member's e-mail accounts to look for references to the third party. This will show the DOJ and SEC that the corporation takes precautionary measures to prevent bribery in deals and ensure that the deals are "clean." And since most corporations have some policy allowing the company to review corporate e-mails, this does not seem like a large organizational change.

In sum, the Goldman Sachs and 1MDB scandal suggests that the DOJ and SEC will continue to review a company's internal protocols and scrutinize obvious failures of the company's compliance program. However, it also informs companies about changes they can incorporate into their policies and procedures to better comply with the FCPA.

B. Joint Enforcement

A smaller insight gleaned from the Goldman Sachs and 1MDB scandal is consistent with a growing trend for the DOJ and SEC: global joint enforcement. The DOJ and SEC have joined forces with several other countries to attack bribery on a global scale.[189] With the Goldman Sachs and 1MDB scandal, the DOJ and SEC brought charges against Goldman Sachs alongside the United Kingdom,[190] Hong Kong,[191] and Singapore.[192] As previously mentioned, the OECD Phase 4 assessment of the United States commended the United States for its joint enforcement efforts with other countries.[193] The OECD Working Group has encouraged the United States to continue this trend and collaborate with law enforcement globally.[194]

Given the large sums of money levied against Goldman Sachs from this joint effort and the OECD's encouragement, it seems that the DOJ and SEC will continue to collaborate with foreign governments to bring anti-bribery charges across the globe. Joint enforcement has a few implications for multi-national corporations. First, it suggests that anti-bribery violations may result in larger fines because more sovereigns will bring charges against a single violator. Second, it insinuates that compliance teams will need to stay alert to changes across all jurisdictions, not only in the United States. Finally, cooperation with other nations serves as additional deterrence to potential violators.

Though these are not groundbreaking insights, they still warrant discussion here because the DOJ and SEC seem likely to continue this trend.

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189. *See supra* Part I.A.
190. Press Release, Fin. Conduct Auth., *supra* note 173.
191. John, *supra* note 175.
192. Lee, *supra* note 174.
193. *Phase 4 Report*, *supra* note 48, at 79–80.
194. *See id.*

C. Independent Monitor Usage

The Goldman Sachs and 1MDB scandal also informs us about the government's independent monitor usage. As a refresher, the DOJ may assign an independent monitor to a corporation that violated the FCPA.[195] "A monitor is an independent third party who assesses and monitors a company's adherence to the compliance requirements of an agreement that was designed to reduce the risk of recurrence of the company's misconduct."[196] At the time this Note was written, the DOJ had assigned several active independent monitors for FCPA violators.[197] Goldman Sachs was not among them.[198]

The DOJ's decision against assigning an independent monitor seems odd given the magnitude of Goldman Sachs's violation and the DOJ and SEC's disgruntled attitudes towards Goldman Sachs's compliance standards. This piece is not the first to express confusion. Other commentators have also found it curious that the DOJ did not appoint an independent monitor for Goldman Sachs, especially given the historic nature of the case and the criticism of its compliance measures.[199] The DOJ stated that they did not appoint an independent monitor "based on the Parent Company's remediation, the state of the Parent Company's compliance program and the Parent Company's agreement to report to the Offices as set forth" in the DPA.[200]

As a reminder, the DOJ considers the following factors when deciding whether to appoint an independent monitor:

> [The] nature and seriousness of the offense; [d]uration of the misconduct; [p]ervasiveness of the misconduct, including whether the conduct cuts across geographic and/or product lines; [t]he risk profile of the company, including its nature, size, geographical reach, and business model; [q]uality of the company's compliance program at the time of the misconduct; [s]ubsequent remediation efforts and quality of the company's compliance program at the time of the resolution; [w]hether the company's current compliance program has been fully implemented and tested.[201]

In addition, the DOJ will consider whether the company has a new corporate leadership structure from when the misconduct occurred and any possible benefits to the company and public of assigning an independent monitor.[202]

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195. *See* 2020 FCPA RESOURCE GUIDE, *supra* note 25, at 73–74.

196. *Id.*

197. CRIM. DIV., U.S. DEP'T OF JUST., MONITORSHIPS, https://www.justice.gov/criminal-fraud/strategy-policy-and-training-unit/monitorships (last updated Sept. 22, 2022).

198. *See id.*

199. *See, e.g.*, Michael Volkov, *The Curious Absence of Corporate Monitors*, JDSUPRA (Jan. 19, 2021), https://www.jdsupra.com/legalnews/the-curious-absence-of-corporate-1866216/.

200. DOJ Plea Agreement at 6(h), United States v. Goldman Sachs (Malaysia) SDN. BHD., Cr. No. 20-438 (E.D.N.Y. Oct. 22, 2020) (using numbers to reference the paragraph).

201. 2020 FCPA RESOURCE GUIDE, *supra* note 25, at 74; *see* Benczkowski, *supra* note 73, at 2.

202. Benczkowski, *supra* note 73, at 2.

A few individuals have pointed to these factors to comment on the DOJ's decision against appointing an independent monitor. Thomas Fox, for instance, notes key Goldman Sachs players were fired or resigned either before or directly after the indictment.[203] In addition, Goldman Sachs sought clawbacks[204] from top executives; in total, the Firm took back about $174 million after the scandal.[205] Likewise, Fox highlighted David Solomon's, Goldman Sachs's Chief Executive Officer ("CEO"), comments about the increase in compliance functions at the Firm, which had "nearly doubled in size."[206] Fox's piece suggests these factors weighed in favor of the prosecutor's decision to forgo an independent monitor in the Goldman Sachs case.

Other commentators have been more critical about the failure to impose an independent monitor. Michael Volkov, a former prosecutor, said the failure to "impose a monitor" means "that the Goldman Sachs culture that led to this is going to continue" and that the public as well as corporate governance and accountability lost on this indictment.[207] Stephen Hall, a legal director at an organization that pushes for reforms on Wall Street, also noted that factors such as Goldman Sachs's delay in turning over evidence, the perpetrators' executive positions, and the lack of compliance control, in this case, weigh more in favor of finding for the imposition of an independent monitor.[208] Overall, commentators have different opinions on the DOJ's reasoning for not appointing an independent monitor.

Next, this Note will conduct its own analysis of the DOJ factors based on the 1MDB and Goldman Sachs scandal. First, the nature and seriousness of Goldman Sachs's violation are high, given the historic nature of the prosecution. Second, the violations were not a quick, one-off incident as the conduct occurred for approximately five years.[209] However, the government may have considered the fact that this was Goldman Sachs's first criminal incident.[210] Third, the pervasiveness of the misconduct cut across several locations, as indicated by the joint enforcement. However, based on the facts, it seems like it was limited to Goldman Sachs Malaysia rather than pervasive across groups. Fourth, Goldman Sachs has a high-risk profile because the company engages in aggressive deal-making; this is especially true in countries like Malaysia, where regulations are lax and political institutions are weak.[211] Fifth, as the Plea Agreement denotes, Goldman Sachs had a weak compliance system at the time the misconduct occurred. Senior individuals,

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203. Thomas Fox, *Goldman Sachs: Part 4 – Avoiding a Monitor*, JDSUPRA (Oct. 29, 2020), https://www.jdsupra.com/legalnews/goldman-sachs-part-4-avoiding-a-monitor-66004/; *see also* WRIGHT & HOPE, *supra* note 5, at 353–54 (discussing Leissner's demise at Goldman Sachs).

204. The company sought to take back deferred compensation.

205. Fox, *supra* note 203.

206. *Id.*

207. Hill, *supra* note 1.

208. *See id.*

209. DOJ Plea Agreement Attachment A, *supra* note 2, at 1.

210. *See* Hill, *supra* note 1.

211. *See* Wall St. J., *supra* note 7.

like Leissner, easily worked around the enforcement mechanisms in place. Sixth, the DOJ considers the remedial measures the company has taken. In a seven-page document released in October 2020—around the same time as the announcement of the DPA—Goldman Sachs released a document entitled "Completed and Ongoing Enhancements Since the 1MDB Transactions."[212] Goldman Sachs listed compliance updates such as "heightened scrutiny of senior level people engaged in high risk areas, business or products," development of "targeted e-communication surveillance based on new emerging technology," an evaluation of the committee structure, a change in process for "red flags," and training, among many other improvements.[213] In addition, Goldman Sachs changed leadership in 2018, after the misconduct occurred in 2012, from former CEO Lloyd Blankfein to its new CEO David Solomon.[214] Seventh, the DOJ prosecutors must consider the public benefit of an independent monitor because it would have shown greater accountability and may have deterred other companies from violating the FCPA.

Prosecutors have a difficult job weighing all the above factors. In reading the extensive measures Goldman Sachs took in compliance and the new leadership changes, it makes more sense how the DOJ could have weighed these factors more heavily to find it appropriate to forgo assigning an independent monitor. However, all the other factors seem to weigh more heavily in favor of assigning an independent monitor to Goldman Sachs. And if prosecutors had done so, it would have come off as a stronger enforcement action because it would have required greater accountability.

It seems that the lack of an independent monitor in the Goldman Sachs case tells us that the DOJ will accept a corporate violator's expansive remedial actions, and in exchange, the DOJ will not appoint an independent monitor. It also suggests companies will face fewer independent monitors in the future. Corporations may welcome this news because independent monitors pose a significant cost to the corporation.[215] Likewise, it means corporations may take fewer steps to fix a violation. However, this trend decreases corporate accountability. The benefit of an independent monitor is that they act as an additional check on the corporation.[216] In the coming years, it will be important to see whether companies without an independent monitor will become repeat FCPA violators.

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212. Goldman Sachs, Completed and Ongoing Enhancements Since the 1MDB Transactions (2020) (on file with author).

213. *Id*. at 2.

214. *David Solomon Is Appointed CEO and Chairman*, GOLDMAN SACHS, https://www.goldmansachs.com/our-firm/history/moments/2018-solomon-ceo.html (last visited Dec. 10, 2020); *see also* WRIGHT & HOPE, *supra* note 5, at 358 ("In fall 2018, Lloyd Blankfein stepped down as CEO under a cloud after over a decade of running the bank, first through the mortgage crisis and now the 1MDB imbroglio. There was no sign he had done anything criminally wrong, but his legacy had been tainted.").

215. *See* GLOB. INVESTIGATIONS REV., THE GUIDE TO MONITORSHIPS 49 (Anthony S. Barkow, Neil M. Barofsky & Thomas J. Perrelli eds., L. Bus. Rsch. Ltd. 2d ed. 2020).

216. *See* 2020 FCPA RESOURCE GUIDE, *supra* note 25, at 73.

In an October 2021 speech, Deputy Attorney General Lisa O. Monaco proposed changes to the DOJ's approach to independent monitors.[217] Monaco stated:

> In recent years, some have suggested that monitors would be the exception and not the rule. To the extent that prior Justice Department guidance suggested that monitorships are disfavored or are the exception, I am rescinding that guidance. Instead, I am making clear that the department is free to require the imposition of independent monitors whenever it is appropriate to do so in order to satisfy our prosecutors that a company is living up to its compliance and disclosure obligations under the DPA or NPA.[218]

Monaco acknowledged that prosecutors will still consider a company's efforts to correct its compliance measures.[219] However, where trust is "limited or called into question," then an independent monitor is not out of the question.[220] In 2022, we have already seen the DOJ impose two independent monitors on corporations.[221] Perhaps under this DOJ, Goldman Sachs would have had an independent monitor. And maybe future violators at the scale of Goldman Sachs will have independent monitors after this renewed commitment to the practice.

In sum, we may expect to see companies taking notes from Goldman Sachs's playbook and implementing extensive compliance measures during negotiations with the DOJ. In addition, despite the current trends, we may see more independent monitors in the future based on the Deputy Attorney General's remarks.

D. Corporate Enforcement Policy and Penalties

A big takeaway from the Goldman Sachs and 1MDB scandal is the DOJ's commitment to its Corporate Enforcement Policy. As previously mentioned, Goldman Sachs received a ten percent discount on its penalty for voluntary disclosure and cooperation.[222] This scandal represented the largest enforcement action in FCPA history, yet the company still received credit. Even though Goldman Sachs did not get full credit for its cooperation, the DOJ's decision to give a discount suggests that the DOJ will honor its Corporate Enforcement Policy, regardless of the circumstances. It will continue to abide by the guidelines that it has made widely available to the public. This should provide some relief to corporations because they can rely on the DOJ to properly invoke the policy during an FCPA enforcement action.

In addition, the discount in the Goldman Sachs case suggests that the DOJ and SEC will continue to reward violators who voluntarily self-disclose and cooperate

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217. Lisa O. Monaco, Deputy Att'y Gen., Dep't of Just., Keynote Address at ABA's 36th National Institute on White Collar Crime (Oct. 28, 2021).

218. *Id.*

219. *See id.*

220. *See id.*

221. *Mid-Year FCPA Report*, FCPA PROFESSOR (July 5, 2022), https://fcpaprofessor.com/mid-year-fcpa-report-6/.

222. Deferred Prosecution Agreement, *supra* note 160, at 4.

with the process, even after initial resistance. However, the Goldman Sachs case shows that if a company does not *fully* cooperate with the standards, then it will not receive the full credit available. As a result, corporations that uncover an FCPA violation should report it to the DOJ and SEC as soon as they can. Likewise, corporations should cooperate with the investigations, as doing so could result in a future sentencing reduction. This highlights the necessity for corporations to implement effective detection programs and anti-bribery policies to uncover bribery before the government to obtain the benefits of self-disclosure.

Though the FCPA violations penalties can be high, the DOJ and SEC reiterated their commitment to honoring the corporate enforcement policy, and it seems we can expect the Agencies to continue to do so in future FCPA enforcement actions.

E. DPA Usage

Finally, the Goldman Sachs and 1MDB scandal tells us about the mechanisms corporations can expect the DOJ and SEC to utilize in enforcement. As mentioned in Part I, the DOJ and SEC have increased their DPA usage during enforcement proceedings.[223] The Goldman Sachs and 1MDB scandal is no different. DPAs avoid significant judicial scrutiny, and it seems likely that the DOJ and SEC will continue the growing trend of resolving FCPA enforcement cases through DPAs or NPAs rather than litigation.

But, again, given the historic nature of this case, it begs a few questions. Should the DOJ use DPAs without meaningful judicial review? How effective are DPAs in deterrence? Do other countries use the same type of DPAs as the United States?

This Note is not the first to consider these issues. In the OECD Phase 3 report, the OECD Working Group acknowledged the massive growth of DPAs since their inception in FCPA litigation in 2004.[224] The OECD Working Group had generally approved the United States' use of DPAs because it resulted in "strong enforcement" and compliance efforts from private-sector companies.[225] The OECD Working Group noted that DPAs lack substantial judicial review yet incentivize cooperation from defendants, self-disclosure, and quick resolution of matters.[226] At the time of the Phase 3 report, the DOJ did not extensively report information on DPAs, and the Phase 3 report had called for greater transparency.[227]

In the 2020 Phase 4 report, the OECD Working Group acknowledged the United States had made efforts to make DPAs more transparent.[228] The report mentioned the debate over judicial review of DPAs, which the United States presented to the group. Commentators "argue[d] that in practice, [the] court 'rubber stamps' DPAs,

223. *See supra* Part I.B.
224. *Phase 3 Report*, *supra* note 52, at 33.
225. *Id.* at 32.
226. *Id.* at 33.
227. *See id.* at 34, 38.
228. *Phase 4 Report*, *supra* note 48, at 74.

and stress[es] that 'as a result, the boundaries of the laws . . . are not tested and there is . . . [room] for abuse of power.'"[229] Yet, the Working Group did not offer a specific criticism of this practice.[230] This may suggest that the OECD Working Group is not overly concerned with judicial review for DPAs in the United States, and the DOJ may still continue to use DPAs without greater reforms in judicial review.

The OECD Working Group also discussed corporate recidivism as well as deterrence with DPA usage. The OECD Working Group did not seem to seriously question the United States' current practices because the DOJ prosecutors insisted that repeat offenders are subject to more punishment.[231] Given the lack of additional commentary from the OECD, the OECD Working Group does not seem troubled with the impact on deterrence from the DPAs.

On the other hand, scholars have criticized the lack of deterrence in DPAs. Nicole Vele suggests that corporations view DPA fines as "just the cost of doing business."[232] Others, like Mike Koehler, have highlighted the number of repeat offenders.[233] And Susan Rose-Ackerman points out, more generally, that the FCPA has had a limited impact on U.S. corporations as evidenced by their continued investment in corrupt countries.[234] It seems like the DOJ and SEC are trying to strike a balance between heavy enforcement and ensuring corporate longevity and financial security of the markets.

More recently, Deputy Attorney General Lisa O. Monaco addressed corporate recidivism for those that previously received a DPA or NPA. She stated, "somewhere between 10% and 20% of all significant corporate criminal resolutions involve companies who have previously entered into a resolution with the department."[235] She also said that the DOJ plans to investigate whether companies engaged in recidivism should receive a DPA or NPA for their second violation.[236] In other words, there is a consensus that DPAs and NPAs do not fully deter companies from violating the FCPA again. However, the DOJ is still not fully aware of the scope.

It is important to note that other countries handle DPAs much differently than the United States, offering more judicial scrutiny. For instance, when the United Kingdom implemented a DPA system for its equivalent of the FCPA, the Joint Head of Bribery and Corruption insisted the only effective way of handling DPAs

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229. *Id.* at 74–75 n.260 (quoting CORRUPTION WATCH, OUT OF COURT, OUT OF MIND: DO DEFERRED PROSECUTION AGREEMENTS AND CORPORATE SETTLEMENTS FAIL TO DETER OVERSEAS CORRUPTION? (2016)).

230. *Id.* at 75.

231. *See id.* at 91.

232. Nicole Vele, *Eliminating Corruption? How the FCPA and Corporate Compliance Programs Fail to Deter Greed Amongst the Most Challenging Offenders*, 11 WAKE FOREST J.L. & POL'Y 625, 638 (2021).

233. Koehler, *supra* note 50, at 1304–08 (highlighting several repeat offenders between 1989 and 2018).

234. SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM 465 (2d ed. 2016).

235. Monaco, *supra* note 217.

236. *See id.*

was to receive approval from a judge after the DPA underwent full scrutiny.[237] Unlike in the United States, where the judge rubber stamps the prosecutors' decision, the United Kingdom's prosecutors ask a judge to declare whether the use of a DPA is in the interest of justice and whether the terms are fair, reasonable, and proportionate to the crime.[238] This additional review gives a degree of separation from the prosecutor seeking the enforcement and the fairness of the DPA.[239] The United Kingdom's choice suggests that the United States' lack of judicial review may not be the best option for DPAs.

Finally, scholars have pointed to several disadvantages of DPA usage. First, the government garnishes a large bargaining power against the companies it is pursuing for FCPA violations, which can pressure companies into agreements.[240] In addition, the prosecutors overseeing the compliance efforts do not always have expertise in corporate compliance programs.[241] DPAs also do not offer judicial precedent compared to the alternative option of litigation.[242] Even some United States judges have criticized the lack of judicial review in DPAs.[243] This suggests that, unlike the OECD's analysis, there may be room for improvement with regards to the role of judicial scrutiny in DPAs and NPAs.

The debate around DPAs and the magnitude of Goldman Sachs's violation call into question whether DPAs are the most effective tool. As mentioned, DPAs do not always deter conduct. They are simply a greater expense for the company. And a wealthy company like Goldman Sachs can pay the fines and implement the necessary programs. Likewise, Goldman Sachs can continue to operate in high-risk countries. It may be time to reevaluate their usage because of their lack of meaningful deterrence and judicial review. However, this is a topic that other scholars should consider exploring further in subsequent discussions.

CONCLUSION

The DOJ and SEC's FCPA enforcement action against Goldman Sachs represents the largest enforcement in FCPA history. The amount of money Goldman

237. Peter R. Reilly, *Sweetheart Deals, Deferred Prosecution, and Making a Mockery of the Criminal Justice System: U.S. Corporate DPAs Rejected on Many Fronts*, 50 ARIZ. ST. L.J. 1113, 1117–18 n.19 (2018).

238. *Id.*

239. In the United States, the prosecutor in a DPA conducts "the functional equivalents of adjudicating guilt, sentencing, and determining periods of probation," which the judiciary typically performs. *Id.* at 1124.

240. *See* Irina Sivachenko, *Corporate Victims of "Victimless Crime": How the FCPA's Statutory Ambiguity, Coupled with Strict Liability, Hurts Businesses and Discourages Compliance*, 54 B.C. L. REV. 393, 396 (2013).

241. *See* Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1185 (2006).

242. *See* Peter R. Reilly, *Justice Deferred is Justice Denied: We Must End Our Failed Experiment in Deferring Corporate Criminal Prosecutions*, 2015 BYU L. REV. 307, 318 (2015).

243. *See, e.g.*, *United States v. HSBC Bank USA*, 863 F.3d 125, 143 (2d Cir. 2017) (quoting Judge Rosemary Pooler who is suggesting "it is time for Congress to consider implementing legislation providing for" meaningful DPA review).

Sachs employees siphoned to pay bribes to foreign officials is stunning. Worst yet, the scandal happened at a cost to the Malaysian people.

Over the years, the DOJ and SEC have enforced the FCPA provisions to prohibit bribery and accounting violations. The Goldman Sachs case is just one of the more recent shocking enforcement actions. However, the case provides insights into what companies, especially multinational companies, might expect from future FCPA enforcement actions.

Though future discussions may uncover more lessons, this Note identifies several takeaways. The DOJ and SEC will pay particular attention to a company's internal controls as well as the company's ability to identify and take preventative measures against third parties who pose greater compliance risks for the company. In addition, the success of global investigation efforts around the 1MDB scandal suggests that future anti-bribery enforcement actions will span across the globe. We may also see companies preemptively implement greater compliance measures. And the DOJ may appoint more independent monitors, as it recently suggested. This case also reaffirmed the DOJ and SEC's commitment to fairly imposing the corporate enforcement policy. The Agencies want corporations to self-disclose and cooperate with the government, and those companies that do will receive a benefit. This commitment will likely continue to play a large role in future FCPA enforcement actions. Finally, it seems that we can continue to expect more DPAs in future enforcement actions despite their limited deterrent effect and lack of judicial scrutiny.

Despite the mind-boggling numbers of this case, the Goldman Sachs and 1MDB scandal provides valuable lessons for other companies to learn from and avoid similarly harsh penalties. Hopefully, Goldman Sachs truly learned its lesson after this violation. However, only time will tell how effective the DOJ and SEC's choices were in their FCPA enforcement against Goldman Sachs. For now, we will have to suffice with taking away a few lessons to help corporations prevent or navigate FCPA violations.