

PATTERN OR PARANOIA: DO U.S. PROSECUTORS ENFORCE
THE FOREIGN CORRUPT PRACTICES ACT DIFFERENTLY
BASED ON THE NATIONALITY OF THE DEFENDANT?

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INTRODUCTION

Even before its adoption, the Foreign Corrupt Practices Act of 1977 (“FCPA”), which prohibits bribery of foreign officials to advance business interests, was subject to criticism that it would unfairly put U.S. companies at a competitive disadvantage in global markets.¹ In the legislative history of the ground-breaking statute and its subsequent amendments, critics of the law called for a leveling of the playing field, either by relaxing the restrictions imposed by the FCPA or by encouraging other developed countries to take similar measures.² Indeed, this desire to level the playing field played a large role in U.S. efforts to encourage the Organization for Economic Coordination and Development (“OECD”) to adopt the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“OECD Convention”) in 1977.³

After the OECD Convention went into effect, FCPA enforcement substantially increased. American prosecutors focused their efforts not only on U.S. businesses, but also on foreign companies, as the FCPA generally extends to foreign issuers of securities traded on U.S. stock exchanges and to bribery schemes with minimal touchpoints to U.S.

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¹ Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (current version at 15 U.S.C. § 78dd-1, *et seq.*).

² *See, e.g.*, Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5003(d), 102 Stat. 1107, 1415–25 (1988) (“It is the sense of the Congress that the President should pursue the negotiation of an international agreement, among the members of the [OECD], to govern persons from those countries concerning acts prohibited [by the FCPA.]”); S. REP. NO. 105-277, at 1–2 (1998) (“Since the passage of the FCPA, American businesses have operated at a disadvantage relative to foreign competitors who have continued to pay bribes without fear of penalty.”) (describing efforts to encourage U.S. trading partners to enact legislation similar to the FCPA to “[level] the playing field for U.S. businesses in international contracts”).

³ OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. TREATY DOC. NO. 105-43 [hereinafter OECD Convention on Bribery].

territory. Enforcement took a major turn in 2008 with German industrial company Siemens's FCPA resolution with the U.S. Department of Justice ("DOJ") and U.S. Securities and Exchange Commission ("SEC"), which, at \$800 million in criminal and civil penalties, was more than fifteen times greater than the next largest FCPA resolution.⁴ The landmark Siemens resolution was succeeded in short order by several other huge FCPA resolutions involving multinational companies, such as the \$1.7 billion resolution reached in 2010 with a group of engineering companies (only one of which was U.S.-based) for bribes paid to government officials in Bonny Island, Nigeria,⁵ the \$772 million dollar settlement reached with French rail transport systems manufacturer Alstom in 2014,⁶ and later, the record-breaking \$2.3 billion resolution with French aerospace company, Airbus, in 2020.⁷

These resolutions sparked new criticisms of the FCPA which pivoted 180 degrees from earlier concerns of disadvantage to U.S. companies. Instead, prominent voices in international law accused the U.S. of using the FCPA to advance its economic interests through selective enforcement of the law against foreign competitors. A 2019 report prepared by French National Assembly member Raphaël Gauvain and others ("Gauvain Report"), at the behest of the French Prime Minister, signaled the high-water mark of such attacks.⁸ In its opening page, the Gauvain Report asserts:

⁴ Plea Agreement, *United States v. Siemens Aktiengesellschaft*, No. CR-08-367 (D.D.C. Dec. 15, 2008); U.S. Sec. & Exch. Comm'n v. *Siemens Aktiengesellschaft*, No. 08-CV-02167 (D.D.C. Dec. 15, 2008); *Press Release: Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines*, U.S. DEP'T OF JUST. (Dec. 15, 2008), <https://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html#:~:text=In%20connection%20with%20the%20cases,passed%20by%20Congress%20in%201977> [<https://perma.cc/M2BH-9SRT>].

⁵ See, e.g., *Deferred Prosecution Agreement, United States v. Technip S.A.*, No. 10-cr-439 (S.D. Tex. June 28, 2010); *Bonny Island Bribery Statistics*, FCPA PROFESSOR (Jan. 26, 2012), <https://fcpaprofessor.com/bonny-island-bribery-statistics/> [<https://perma.cc/J9N7-9Q95>].

⁶ Plea Agreement, *United States v. Alstom S.A.*, No. 3:14-cr-00246 (D. Conn. Dec. 12, 2014).

⁷ *Deferred Prosecution Agreement, United States v. Airbus SE*, No. 20-cr-00021 (D.D.C. Jan. 28, 2020).

⁸ Raphaël Gauvain et al., *Rétablir la souveraineté de la France et de l'Europe et protéger nos entreprises des lois et mesures à portée extraterritoriale [Restoring the sovereignty of France and Europe and protecting our companies from extraterritorial laws and measures]*, ASSEMBLÉE NATIONALE [NATIONAL ASSEMBLY] (June 26, 2019) (Fr.), <https://www.vie-publique.fr/sites/default/files/rapport/pdf/194000532.pdf> [<https://perma.cc/A2GR-W5FB>] [hereinafter Gauvain Report]. See also Robert Luskin & Bridget Vuona, *Reconciling the "Gauvain Report" with Continued Multi-Jurisdictional Cooperation in the Global Fight Against Corruption*, 3 REVUE DE DROIT INTERNATIONAL D'ASSAS 255 (2020), www.communication.uparis2.fr/medias/RDIA_n3_2020.pdf [<https://perma.cc/A7W3-LKUG>].

The United States of America has dragged the world into the era of judicial protectionism. While the rule of law has always been used as an instrument of regulation, it has now become a weapon of destruction in the United States' economic war against the rest of the world, including its traditional allies in Europe.⁹

The authors of the Gauvain Report further insist that the FCPA's territorial basis of jurisdiction is inconsistent with principles of international law and U.S. prosecutors rely on the law's broad jurisdiction to maliciously target foreign (primarily European) companies.¹⁰

To date, nine of the ten largest FCPA resolutions still involve foreign companies,¹¹ and criticisms of the FCPA akin to those raised in the Gauvain Report have not waned. So, President Donald Trump's February 10, 2025 Executive Order directing the DOJ to pause FCPA enforcement and develop new guidance aimed at "stopping excessive, unpredictable, FCPA enforcement that makes American companies less competitive" ("FCPA Executive Order"), was truly a bolt from the blue.¹² It revived early attacks on the law that had long been overtaken by complaints that the FCPA was a tool wielded *by* Americans *against* Europeans and others.

As evidenced by the Gauvain Report and FCPA Executive Order, criticisms of the FCPA have devolved into a classic "he-said, she-said" faceoff. These mutually contradictory set of grievances about FCPA enforcement raise the fundamental question: *Has the FCPA been enforced selectively based on the nationality of the defendant?* This article seeks to answer that question by looking at widely available data on criminal FCPA enforcement actions over approximately the past decade. First, we isolated criminal FCPA enforcement actions involving similarly situated U.S. and foreign companies based on severity of the misconduct, nature and history of the company, and the company's voluntary disclosure, cooperation, and remediation. We then compared the resulting terms of resolution to see whether we could identify any apparent disparities in DOJ's application of the U.S. Sentencing Guidelines and its own policies based on the nationality of the defendant.

⁹ Gauvain Report, *supra* note 8, at 3.

¹⁰ *Id.* at 13–18.

¹¹ *Largest U.S. Monetary Sanctions by Entity Group*, STANFORD LAW SCHOOL FCPA CLEARINGHOUSE, <https://fcpa.stanford.edu/statistics-top-ten.html> [<https://perma.cc/2M5D-KRGP>] (last visited Mar. 1, 2026).

¹² Exec. Order No. 14209, 90 Fed. Reg. 9587 (Feb. 10, 2025) [hereinafter FCPA Executive Order]; THE WHITE HOUSE, *Fact Sheet: President Donald J. Trump Restores American Competitiveness and Security in FCPA Enforcement* (Feb. 10, 2025), <https://www.whitehouse.gov/fact-sheets/2025/02/fact-sheet-president-donald-j-trump-restores-american-competitiveness-and-security-in-fcpa-enforcement/> [<https://perma.cc/3X7L-KC69>] [hereinafter FCPA Executive Order Fact Sheet].

Drawing from the findings of this exercise, we contend that neither of the dueling narratives leveraged by the Gauvain Report and FCPA Executive Order to advance protectionist enforcement policies are supported. The data simply does not show that U.S. or foreign companies have received harsher treatment in FCPA investigations relative to their similarly situated counterparts. What the data *does* show, however, is that foreign companies have generally been less willing than U.S. companies to voluntarily self-disclose potential FCPA violations and cooperate with U.S. authorities; and it is *this* distinction—rather than the nationality of the defendant—that accounts for the greater frequency with which foreign companies resolve FCPA violations under less favorable terms.

I. BACKGROUND

In 1977, Congress amended the Securities Exchange Act of 1934 and enacted the FCPA.¹³ The FCPA's passage followed an extensive SEC investigation that revealed U.S. companies paid millions of dollars in bribes to secure business from foreign officials.¹⁴ Seeking to restore public confidence in the business community, Congress passed the FCPA, which prohibits covered parties from offering anything of value to foreign officials, broadly defined, in order to obtain or retain business.¹⁵ The FCPA's anti-bribery provisions operate in tandem with accounting provisions that generally obligate covered securities issuers to keep accurate financial records and maintain robust internal accounting controls.¹⁶

At the time of its enactment, the FCPA only allowed for prosecution of foreign companies that listed securities on U.S. stock exchanges.¹⁷ The FCPA's jurisdictional scope did not change significantly until 1998, when amendments to the law were adopted to conform with the OECD Convention.¹⁸ The OECD Convention primarily obligates signatories to enact or strengthen laws prohibiting bribery of foreign officials, outline criminal sanctions for violations, and cooperate with other signatories in

¹³ 15 U.S.C. § 78dd-1, *et seq.*

¹⁴ *See* S. REP. NO. 95-114, at 3–4 (1977); H.R. REP. NO. 95-640, at 4–5 (1977); *see also* U.S. SEC. & EXCH. COMM'N, REPORT OF THE SEC ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES (May 12, 1976), *as reprinted in* Sec. Reg. & L. Rep. (BNA) No. 353 (May 19, 1976).

¹⁵ 15 U.S.C. §§ 78dd-1–3.

¹⁶ 15 U.S.C. § 78m(b)(2)(A)–(B).

¹⁷ Pub. L. No. 95-213, § 203, 91 Stat. 1494 (1977) (current version at 15 U.S.C. § 78dd-1). *See also* 15 U.S.C. §§ 78m(b)(2)(A)–(B), 78dd-1. The FCPA also applies to foreign securities issuers required to file certain reports with the SEC. 15 U.S.C. §§ 78dd-1, 78m(b)(2)(A)–(B), 78o(d).

¹⁸ International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (codified as amended at 15 U.S.C. § 78dd-1, *et seq.* (2018)) [hereinafter the 1998 FCPA Amendments].

investigating and extraditing those charged with bribery offenses.¹⁹ Article 4 of the Convention provides that “each party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offense is committed *in whole or in part in its territory*.”²⁰ The 1998 amendments to the FCPA accordingly embraced principles of territorial jurisdiction embedded in Article 4 and extended the scope of the law’s anti-bribery provisions to cover foreign natural persons and entities, and their officers, agents, or employees, that “make use of the mails or any means or instrumentality of [U.S.] interstate commerce” or take “any other act in furtherance of” unlawful bribery payments while *physically present* in the territory of the United States.²¹ These amendments garnered the attention of the OECD Working Group on Bribery (“WGB”), which conducts reviews of each signatory’s implementation of the OECD Convention. In 2002, the WGB described the FCPA as “a landmark in the effort to combat foreign bribery” that had since evolved into a “mature piece of legislation.”²² The WGB further praised the U.S. in 2020, stating that “FCPA enforcement against both natural and legal persons reflects the United States’ continued strong commitment to fighting foreign bribery . . . as well as its prominent role in promoting implementation of the Convention.”²³

Conversely, although the OECD Convention was ratified by all thirty-eight OECD member states and several non-member states, most signatories were slow to implement their obligations. Notably, over fifteen years after the OECD Convention went into effect, the WGB expressed concerns over data showing that most signatories had never sanctioned a single individual or entity for foreign bribery.²⁴ Over time, however, these

¹⁹ OECD Convention on Bribery, *supra* note 3.

²⁰ *Id.* at art. 4 (emphasis added).

²¹ 15 U.S.C. § 78dd-3. For foreign companies, the FCPA’s jurisdictional element is satisfied when their officers, agents, or employees take any act in furtherance of the bribery scheme while physically present in U.S. territory, including, for example, by attending a meeting or sending an email related to the bribery scheme while in the U.S.

²² OECD Working Group on Bribery in International Business Transactions [hereinafter OECD Working Group on Bribery], *Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions Phase 2 Report: United States* (Oct. 20, 2002), https://www.oecd.org/en/publications/report-on-the-application-of-the-convention-on-combating-bribery-of-foreign-public-officials-in-international-business-transactions-and-the-1997-recommendation-on-combating-bribery-in-international-business-transactions-phase-2-report-un_a9c3f1d3-en.html [<https://perma.cc/XPM3-E84G>].

²³ OECD Working Group on Bribery, *Implementing the OECD Anti-Bribery Convention Phase 4 Report: United States* 12 (Sep. 23, 2020), www.oecd.org/content/dam/oecd/en/publications/reports/2020/09/implementing-the-oecd-anti-bribery-convention-phase-4-report-united-states_501faf3a/0cd34e9f-en.pdf [<https://perma.cc/RE5D-CCQR>] [hereinafter WGB Phase 4 Report for United States].

²⁴ OECD Working Group on Bribery, *2016 Data on Enforcement of the Anti-Bribery*

WGB reviews put significant pressure on signatories lagging in implementation and ultimately resulted in fundamental changes to the bribery laws and enforcement practices of several key players in the global economy. For example, the United Kingdom adopted the far-reaching UK Bribery Act in 2010,²⁵ and France enacted what is known as the Sapin II Law in 2016.²⁶ These changes—undertaken in direct response to WGB criticisms—created dedicated anti-corruption enforcement agencies, corporate prosecution agreements similar to those used by DOJ, and new requirements for French companies to develop comprehensive anti-corruption compliance programs.²⁷ These developments, together with a growing trend towards cooperation among anti-bribery enforcement authorities around the world, ushered marked and unprecedented progress in the global fight against corruption. Standing in stark contrast to this progress, however, are the economic protectionist postures towards anti-bribery enforcement advanced by the Gauvain Report and FCPA Executive Order.

As previously mentioned, in 2019 Raphaël Gauvain submitted a report to the French National Assembly calling for the adoption of several measures aimed at protecting the “essential economic interests of [European] States” and ensuring that “cooperation [with other countries] does not undermine State sovereignty and . . . the protection of [French] citizens and business.”²⁸ For example, the Gauvain Report proposed additional procedural hurdles for sharing certain information with foreign enforcement authorities and increased penalties for non-compliance.²⁹ These proposals were driven in large part by the authors’ desire to stave off perceived threats of strategic and malicious FCPA enforcement.³⁰

The Gauvain Report, while damning in its accusations, merely added an academic gloss to an existing mainstream media conclusion that the

Convention: Special Focus on International Co-operation 3 (Nov. 2017), <https://web.archive.oecd.org/pdfViewer?path=/2017-11-15/455236-Anti-Bribery-Convention-Enforcement-Data-2016.pdf> [<https://perma.cc/59Y2-BJNJ>] (stating that, as of 2016, “the data indicate that 21 of the Parties whose implementing legislation has entered into force have never sanctioned an individual or an entity for foreign bribery”).

²⁵ Bribery Act of 2010, c. 23 (Eng.).

²⁶ Loi n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, communément appelée Loi Sapin [Law 2016-1691 of Dec. 9, 2017, on Transparency, Fighting Corruption and Modernizing Economic Life], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Dec. 10, 2016.

²⁷ *Id.*

²⁸ Gauvain Report, *supra* note 8, at 39, 82.

²⁹ *Id.*

³⁰ *Id.* at 8. The Gauvain Report contends, for example, that “vaguely defined jurisdictional criteria [of the FCPA]” coupled with “quasi-institutional collusion” among private practice lawyers and the US government “reinforces the doubts and even fears of the use of US judicial proceedings for economic or commercial purposes.” *Id.* at 14–15.

U.S. had declared economic war on its Western European allies and was wielding the FCPA as a weapon in that war, as purportedly evidenced by the large number of FCPA resolutions involving foreign companies. So, it was a shock when President Trump revived earlier, contrary concerns about the FCPA's perceived harm to U.S. companies.³¹ In an effort to "stop excessive, unpredictable FCPA enforcement that makes American companies less competitive," the White House issued an executive order on February 10, 2025 directing the DOJ, for an initial period of 180 days, to (i) "cease initiation of any new FCPA investigations or enforcement actions" (unless the Attorney General determines that an exception should be made); (ii) "review in detail all existing FCPA investigations or enforcement actions and take appropriate action" to "restore proper bounds on FCPA enforcement and preserve Presidential foreign policy prerogatives;" and (iii) issue updated guidelines or policies governing FCPA investigations and enforcement actions, as appropriate, to "prioritize . . . American economic competitiveness with respect to other nations, and the efficient use of Federal law enforcement resources."³² The FCPA Executive Order reflects a renewed focus on leveling the playing field for U.S. companies through use of the FCPA to further the administration's broader foreign policy statements of "America First."³³

The anti-bribery enforcement priorities advocated by the Gauvain Report and FCPA Executive Order appear to stand in stark contrast; but, in fact, they share more commonalities than differences. First, both positions run afoul of the principles embodied in the OECD Convention. In stating that "investigation and prosecution of the bribery of a foreign public official . . . shall not be influenced by considerations of national economic interest, the potential effect upon relations with another States or the identity of the natural or legal persons involved," Article 5 of the OECD Convention definitively prohibits discretionary enforcement decisions based on considerations of national economic interest or political relations.³⁴ Implicit in this prohibition is an obligation to refrain from blocking the valid anti-bribery enforcement actions of other

³¹ FCPA Executive Order, *supra* note 12.

³² *Id.*

³³ FCPA Executive Order Fact Sheet, *supra* note 12.

³⁴ OECD Convention on Bribery, *supra* note 3, at art. 5. *See also* Peter J. Cullen, *Article 5: Enforcement*, in *THE OECD CONVENTION ON BRIBERY: A COMMENTARY* 357 (Mark Pieth et. al. eds., 2007) ("The Convention's use of the term national economic interests clearly encompasses the economic activities of private undertakings and corporations incorporated under that state Party's laws and operating from its territory."); Rachel Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 VA. L. REV. 1611, 1640 (2017) (stating that the Convention's ratification "was an unmistakable statement that foreign bribery was illegitimate and could not be justified by a nation's commercial interests, such as maintaining jobs or promoting exports, or foreign policy").

countries based on these impermissible considerations. The protectionist enforcement policies advanced by the Gauvain Report and FCPA Executive Order, respectively, therefore represent a huge step backwards with respect to the cooperative and coordinated global enforcement framework that the OECD Convention and many of its signatory states, including the U.S. and France, have sought to achieve, and where much progress has been made.

Additionally, the authors of the Gauvain Report and FCPA Executive Order both aim to evoke a considerable degree of anxiety about the perceived unfair treatment of French or U.S. companies under the FCPA, and yet the evidence cited as support for their respective grievances is either non-existent or inconclusive. The “fact sheet” published by the White House as support for the FCPA Executive Order simply references the average number of FCPA-related enforcement actions per year without any consideration of defendant nationalities or specific examples of negative impact on American competitiveness.³⁵ And the Gauvain Report points only to the comparatively greater number of European companies than U.S. companies subject to FCPA enforcement between the years of 2008 and 2018 as conclusive support for the presumed malicious intent of U.S. prosecutors.³⁶ In both instances, the evidence is inconclusive because it fails to account for information that may explain or justify perceived trends or inconsistencies. Indeed, foreign companies are frequently subject to FCPA enforcement actions and have historically received higher fines than U.S. companies.³⁷ And the United States has historically prosecuted foreign bribery offenses at significantly higher rates than other OECD Convention signatories.³⁸ But is there any credence to the sweeping claims made on either side of the discussion—i.e., that the FCPA has historically been enforced in a manner that, intentionally or unintentionally, unfairly disadvantages certain companies based on their nationality? This article seeks to answer that question through a data-driven review of criminal FCPA enforcement actions over approximately the last decade.

³⁵ FCPA Executive Order Fact Sheet, *supra* note 12.

³⁶ Gauvain Report, *supra* note 8, at 18–20.

³⁷ *Largest U.S. Monetary Sanctions by Entity Group*, STANFORD LAW SCHOOL FCPA CLEARINGHOUSE, <https://fcpa.stanford.edu/statistics-top-ten.html> [<https://perma.cc/2M5D-KRGP>] (last visited Mar. 1, 2026).

³⁸ OECD Working Group on Bribery, *2021 Enforcement of the OECD Anti-Bribery Convention: Investigations, Proceedings, and Sanctions* (Dec. 20, 2022), www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/fighting-foreign-bribery/oecd-anti-bribery-convention-enforcement-data-2009-2021.pdf [<https://perma.cc/PEA5-MA2Z>]; WGB Phase 4 Report for United States, *supra* note 23, at 12.

II. REVIEW METHODOLOGY

A. Scope of Review

Between April 5, 2016, and January 31, 2025, we identified eighty-two distinct guilty plea agreements, deferred prosecution agreements (“DPAs”), conditional non-prosecution agreements (“NPAs”), or declinations (communication of DOJ’s decision to not pursue prosecution) resulting from DOJ investigations of U.S. and foreign companies for potential FCPA violations (collectively, the “FCPA Enforcement Action(s),” or the “Dataset”). April 5, 2016 was selected as the starting point for the review because it is the date the DOJ piloted the first of several iterations of corporate prosecution policies aimed at incentivizing companies to voluntarily self-disclose potential FCPA violations, fully cooperate with enforcement authorities, and fully remediate the misconduct by offering a buffet of benefits, in the form of reduced fines, more favorable resolutions, and reduced likelihood of monitorships.³⁹ The review period runs through January 31, 2025, just prior to the issuance of the FCPA Executive Order.

B. Review Process

First, we categorized each of the eighty-two FCPA Enforcement Actions in scope for this review as involving either a “U.S. company” or a “foreign company” based on the principal place of operation of the parent company, regardless of whether the FCPA misconduct occurred at the parent-level or whether the parent company was named as a defendant in the resolution documents. For example, if DOJ entered a DPA with an Italian subsidiary of a parent company based in the United States for misconduct that occurred primarily in Italy, that DPA has been categorized as involving a U.S. company even if the parent company did not independently sign the DPA. The Dataset consists of FCPA Enforcement Actions involving forty-two U.S. companies and forty foreign companies.

Next, we reviewed all publicly available documents related to each FCPA Enforcement Action in the Dataset, including DOJ and company-issued press releases, prosecution agreements and declination letters published by DOJ on its website, court documents, and corporate SEC filings. Based on our review of these documents, for each FCPA Enforcement Action we recorded the following datapoints: (i) information related to key considerations for determining appropriate resolutions of

³⁹ See Memoranda from Andrew Weissmann, Former Chief, Fraud Section, Criminal Div., U.S. Dep’t of Justice, on The Fraud Section’s Foreign Corrupt Practices Act Enforcement Plan and Guidance (Apr. 5, 2016), [https://www.justice.gov/opa/file/838386/dl?inline= \[https://perma.cc/ZW6K-QPEW\]](https://www.justice.gov/opa/file/838386/dl?inline= [https://perma.cc/ZW6K-QPEW] [hereinafter Pilot Program].)

FCPA matters (“Key Considerations”), and (ii) details regarding the terms of any resulting resolutions (“Resolution Details”), as described below.

C. Key Considerations

Key considerations for FCPA matters are laid out in U.S. Sentencing Guidelines (“USSG”) criteria applicable to FCPA violations and DOJ policies governing corporate prosecutions and FCPA matters in particular. The Sentencing Guidelines applicable to this review include all versions published between 2014 and 2024.⁴⁰ The relevant DOJ policies are listed below and further described in [Appendix A](#) (“DOJ Policies”):

- DOJ Justice Manual, Section 9-28.300 (Effective Jul. 2017–Present): Relevant considerations for prosecutors to consider in determining whether to bring charges against a corporation, and in negotiating guilty pleas or other types of prosecution agreements.⁴¹
- FCPA Pilot Program (Effective Apr. 2016–Nov. 2017): One-year pilot program that offered either: (a) declination of prosecution or fifty percent discount from the low end of the applicable USSG fine range (and generally no appointment of monitor) to companies that voluntarily disclosed, fully cooperated, and fully remediated misconduct; or (b) twenty five percent discount from the low end of the applicable USSG fine range for full cooperation and remediation alone.⁴² The Pilot Program required consideration of “countervailing interests,” such as resolution with DOJ in the past five years or executive management involvement in misconduct.⁴³
- FCPA Corporate Enforcement Policy (“CEP”) (Effective Nov. 2017–May 2025): Permanent version of the Pilot Program rolled out in 2017, and revised in 2019 and 2023, that notably: (a) called for publication of all declinations awarded under the policy; (b) revised “aggravating circumstances” to include all instances of criminal recidivism; (c) required payment of disgorgement, forfeiture, or restitution to qualify for penalty discounts; (d) extended declination presumptions to companies involved in mergers or acquisitions under certain circumstances; and, starting in 2023, (e) provided additional

⁴⁰ U.S. SENTENCING GUIDELINES MANUAL §§ 2B1.1, 2C1.1, 8C2.4, 8C2.5 (U.S. SENT’G COMM’N 2014–2024) [hereinafter USSG]. DOJ typically applies the Sentencing Guidelines in place at the time of the underlying misconduct, rather than the Guidelines in place at the time of resolution.

⁴¹ U.S. DEP’T OF JUSTICE, JUST. MANUAL § 9-28.300 (2023) (Principles of Federal Prosecution of Business Organizations) [hereinafter Justice Manual Filip Factors].

⁴² Pilot Program, *supra* note 39.

⁴³ *Id.*

opportunities for declinations with aggravating factors under certain circumstances and a greater range of available penalty discounts.⁴⁴

- DOJ DAG Monaco Memos (Published Oct. 2021 / Sept. 2022): Directed DOJ prosecutors to consider companies’ entire record of past misconduct (including criminal, civil, and regulatory actions by domestic and foreign authorities) in determining appropriate resolutions.⁴⁵
- Compensation Clawbacks Program (Effective Mar. 2023–Present): Offers further fine reductions for good faith attempts to recoup compensation from responsible employees prior to resolution.⁴⁶

Pursuant to the applicable Sentencing Guidelines and DOJ Policies, there are three overarching considerations prosecutors must consider in evaluating FCPA matters and determining appropriate outcomes: (i) the nature and severity of the misconduct at issue; (ii) the nature and history of the company; and (iii) the company’s voluntary disclosure, cooperation, and remediation of the misconduct (“Key Considerations”)

- Nature and Severity of the Misconduct: For each FCPA Enforcement Action in the Dataset, we recorded the applicable USSG Base Offense

⁴⁴ U.S. DEP’T OF JUSTICE, JUSTICE MANUAL § 9-47.120 (2017) (FCPA Corporate Enforcement Policy); U.S. DEP’T OF JUSTICE, JUSTICE MANUAL § 9-47.120 (2019) (FCPA Corporate Enforcement Policy); U.S. DEP’T OF JUSTICE, JUSTICE MANUAL § 9-47.120 (2023) (Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy) [hereinafter CEP].

⁴⁵ Memorandum from Lisa Monaco, Dep’t. Atty. Gen., U.S. Dep’t of Justice to Corporate Crime Advisory Grp., on Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies (Oct. 28, 2021), [www.justice.gov/archives/dag/file/1173651-0/dl?inline](https://perma.cc/DDM2-JR7C) [https://perma.cc/DDM2-JR7C]; Memorandum from Lisa Monaco, Dep’t Att’y Gen., U.S. Dep’t of Justice to Corporate Crime Advisory Grp., on Further Revisions to Corporate Criminal Enforcement Policies Following Discussion with Corporate Crime Advisory Group (Sep. 15, 2022), [www.justice.gov/d9/pages/attachments/2022/09/15/2022.09.15_ccag_memo.pdf](https://perma.cc/U5LB-FNPZ) [https://perma.cc/U5LB-FNPZ] [hereinafter Monaco Memos].

⁴⁶ U.S. DEP’T OF JUST., CRIM. DIV., PILOT PROGRAM REGARDING COMPENSATION INCENTIVES AND CLAWBACKS (Mar. 3, 2023), [www.justice.gov/criminal/criminal-fraud/file/1571941/dl](https://perma.cc/GP5M-V7AC) [https://perma.cc/GP5M-V7AC] [hereinafter Compensation Clawbacks Program].

Level,⁴⁷ USSG Offense Level Addition(s),⁴⁸ and USSG Base Fine,⁴⁹ or estimates thereof, to capture the nature and severity of the misconduct at issue. These datapoints generally reflect the number of bribe payments made, the involvement of elected or high-level officials, the value of the bribe payment, the value of the resulting benefit received by the company, and/or the value of the loss caused by the misconduct.

- Nature and History of the Company: To capture the nature and history of the companies involved in each FCPA Enforcement Action, we recorded any applicable USSG Culpability Score Additions or Reductions that go towards this consideration,⁵⁰ or estimates thereof, and any other information contained in the resolution documents related to these considerations. The collected datapoints generally reflect the extent of senior management involvement in, or tolerance of, the misconduct,⁵¹ whether the company committed the offense less than five or ten years after a prior criminal action or multiple prior civil and/or regulatory actions for similar misconduct (or during the term of an ongoing DPA/NPA),⁵² whether the company willfully obstructed the government’s investigation, whether the company had an effective compliance program at the time of the offense, and whether the misconduct was by an acquired company with prompt post-acquisition disclosure by the successor company.
- Disclosure, Cooperation, and Remediation: The relevant USSG

⁴⁷ Starting point for the USSG offense level calculation relates to whether DOJ identified sufficient evidence to charge anti-bribery violations (base offense level is twelve) or only accounting provisions violations (base offense level is seven). USSG §§ 2B1.1, 2C1.1.

⁴⁸ USSG offense level additions reflect crucial details of the crime that significantly *increase* or *decrease* the base offense level and work alongside the USSG Culpability Score to determine the defendant’s final penalty range. USSG § 2C1.1.

⁴⁹ Determined by using the greatest of the amount indicated in the USSG Offense Level Fine Table contained in Section 2B1.1(b)(1) of the Guidelines, the value of benefit the company received from the misconduct, the value of loss caused, or the value of the bribe payment. USSG §§ 8C2.4(a)(1)-(3), 2C1.1(d).

⁵⁰ The USSG Base Culpability Score for FCPA violations is five, and the score is increased or decreased depending on whether any of the Culpability Score Additions or Reductions listed in Section 8C2.5 are present. USSG § 8C2.5.

⁵¹ Senior or executive (i.e., C-Suite level) involvement is treated as a “countervailing interest” under the Pilot Program and an “aggravating circumstance” under the CEP and can render a company ineligible for the full range of benefits otherwise available under these policies. Pilot Program, *supra* note 39; CEP, *supra* note 44.

⁵² While prior enforcement actions for other types of misconduct are not expressly considered under the Sentencing Guidelines or Pilot Program/CEP, the Justice Manual and DAG Monaco Memos direct prosecutors to consider a company’s *entire* record of prior misconduct in resolving FCPA matters. Justice Manual Filip Factors, *supra* note 41; Monaco Memos, *supra* note 45.

Culpability Score Additions or Reductions,⁵³ or estimates thereof, and any other information contained in the resolution documents related to these considerations were also recorded for each FCPA Enforcement Action in the Dataset. These considerations are particularly significant given that they determine a company's USSG Culpability Score as well as its eligibility for Pilot Program and CEP benefits.⁵⁴

The specific Key Considerations information recorded for each FCPA Enforcement Action in the Dataset is contained in [Appendix A: FCPA Enforcement Actions Data \(April 2016–January 2025\)](#). We were aided in the exercise by DOJ's inclusion of detailed Sentencing Guidelines calculations in all of its DPAs and guilty plea agreements, as well as lists of DOJ's "relevant considerations" under the Policies included in almost all FCPA resolution documents.⁵⁵ For FCPA Enforcement Actions for which detailed Guidelines calculations and/or a full list of relevant policy considerations was not available, we recorded our own assessments of these factors based on the known facts and circumstances of each matter.⁵⁶

The Key Considerations data provides an objective basis for conducting a comprehensive comparison of the FCPA Enforcement Actions. To be sure, the Sentencing Guidelines criteria and DOJ Policy considerations are not completely objective, and there is room for discretion in their application. Nevertheless, the fact that the Guidelines determinations and assessments of DOJ Policy considerations are typically set out in the resolution documents in conjunction with a detailed explication of the underlying facts gives a high degree of confidence that the Guidelines and DOJ Policy considerations are applied neutrally. We also recognize, of course, that other considerations apart from those identified above may be relevant to assessing the relative culpability of defendant companies or the appropriateness of a given resolution. But we rely on these Key Considerations because they reflect the considerations that the DOJ asserts control its decisions about the appropriateness of a given resolution. Isolating these Key Considerations, therefore, may not tell us whether a particular resolution is—by some standard—fair or unfair; but it does permit us to test whether DOJ is applying its own

⁵³ USSG § 8C2.5(g). The final USSG Culpability Score determines the minimum and maximum "fine multipliers" applied to the applicable USSG Base Fine to produce the recommended minimum and maximum fine range, prior to application of any penalty discounts or crediting under DOJ Policies.

⁵⁴ Pilot Program, *supra* note 39; CEP, *supra* note 44.

⁵⁵ The only FCPA Enforcement Actions in the Dataset for which no USSG calculations or list of "relevant considerations" are available are declinations announced only in company-issued press releases or SEC filings, as compared to formal declination letters issued under the CEP and published on DOJ's website.

⁵⁶ Estimates of Sentencing Guidelines calculations or DOJ policy considerations are indicated in purple text in [Appendix A](#).

standards consistently or whether, instead, they have been applied in a manner that advantages or disadvantages U.S. or foreign companies relative to their similarly situated counterparts. That is, this approach allows to answer the question: Is DOJ treating likes alike?

D. Resolution Details

In conjunction with the Key Considerations, the following datapoints pertaining to the form and terms of any resulting resolutions were recorded for each FCPA Enforcement Action in the Dataset:

- Form of Resolution (Parent and Subsidiary): Relevant form(s) of resolution (i.e., guilty plea, DPA, NPA, declination) for the parent company and any subsidiary companies involved in the misconduct, where applicable.
- Penalty Discounts: Penalty discount applied to the applicable USSG fine range under the Pilot Program or CEP, including the amount of the discount as a percentage and the point in the USSG fine range from which the discount was applied. For example, under the 2024 revisions to the CEP, non-recidivist companies that voluntarily self-disclose, cooperate, and remediate are eligible for a fifty to seventy percent reduction off the *bottom* of the USSG fine range, whereas recidivist companies are only eligible for a fifty to seventy percent discount from a point *above* the bottom of the USSG fine range.⁵⁷
- Criminal Penalty, Forfeiture, and Disgorgement Before Crediting: Resulting criminal penalty after application of any penalty discounts, as well as any criminal forfeiture or criminal disgorgement obligations (final criminal penalty may not reflect final amount paid to DOJ, as DOJ routinely credits payments made to other U.S. and foreign enforcement authorities in connection with the same misconduct, as further explained below).⁵⁸
- Other Credits or Reductions to Criminal Penalty: Reductions to the criminal penalty based on crediting of payments made (or to be made) by the defendant company to other U.S. and foreign enforcement authorities in connection with the same misconduct, including civil disgorgement paid to the SEC in related resolutions,⁵⁹ or based on amounts the company clawed back from implicated employees’

⁵⁷ Pilot Program, *supra* note 39; CEP, *supra* note 44.

⁵⁸ *See, e.g.*, U.S. DEP’T OF JUST., JUSTICE MANUAL §1-12.100 (2018) (Policy on Coordination of Corporate Resolution Penalties in Parallel and/or Joint Investigations and Proceedings Arising from the Same Misconduct).

⁵⁹ *Id.*

compensation.⁶⁰ Further reductions to criminal penalties based on companies' inability to pay were also recorded.

- Compliance Program Reporting Obligations: These datapoints reflect whether DOJ appointed an independent compliance monitor to oversee and report to DOJ on the company's remediation and compliance program enhancements during the term of the prosecution agreement, or, alternatively, whether the company was allowed to self-report its progress in these areas to DOJ.⁶¹

The specific Resolution Details information recorded for each FCPA Enforcement Action in the Dataset is contained in [Appendix A](#).

E. Review Process (Continued)

Based on the Key Considerations information recorded for each FCPA Enforcement Action (i.e., severity of misconduct, nature of organization, and disclosure/cooperation/remediation), we isolated actions involving similarly situated U.S. and foreign companies, controlling for any variations in eligibility criteria and benefits available under applicable Sentencing Guidelines and DOJ Policies. For example, FCPA Enforcement Actions involving U.S. companies and foreign companies with similar base fines, senior management involvement, prior history, disclosure, cooperation, and/or remediation efforts were considered to be similarly situated for the purposes of the review so long as there were no material differences in Sentencing Guidelines criteria or DOJ Policies in place at the time of the respective resolutions.

Finally, we compared the respective outcomes of actions involving similarly situated U.S. and foreign companies to determine whether there were any apparent disparities in DOJ's application of the Sentencing Guidelines and its own policies, including any apparent disparities in the relevant weights given to the Key Considerations. For example, we noted instances where U.S. and foreign companies had similar base fines, no prior criminal history or other aggravating factors, and similar levels of cooperation and remediation, but the terms of the resulting resolutions were materially different, whether in form of resolution, penalty discounts, or reporting obligations. Given the nature and form of the data, we were also able to work backwards and isolate FCPA Enforcement Actions involving similar forms of resolution or penalty discounts, for example, to identify any commonalities or differences among the Key Considerations.

⁶⁰ Compensation Clawbacks Program, *supra* note 46.

⁶¹ DOJ considers the status of the company's remediation and state of its anti-bribery compliance program at the time of the resolution, including whether compliance program enhancements have been sufficiently implemented and tested in making this determination. *See* Justice Manual Filip Factors, *supra* note 41.

III. DETAILED REVIEW FINDINGS

A. *Declinations*

The Dataset contains twenty-three declinations with and without disgorgement obligations, consisting of nineteen formal declination letters issued by DOJ under the Pilot Program or CEP and publicly disclosed on its website,⁶² as well as four company-issued disclosures through press releases or SEC filings of DOJ decisions to close FCPA investigations without further action.⁶³

Notably, and unsurprisingly, all U.S. and foreign companies that received formal declination letters from DOJ also received full credit under DOJ Policies for voluntary self-disclosure, cooperation, and remediation. These findings suggest that DOJ generally adheres to its own policies with respect to declinations, as these are the only circumstances where declinations are considered appropriate under DOJ Policies.

Among all twenty-three declinations, a large majority—specifically seventy-eight percent—involve U.S. companies. While all U.S. companies that received formal declination letters from DOJ also received full voluntary self-disclosure, cooperation, and remediation credit, as noted above, there were several declinations of investigations into U.S. companies despite the apparent presence of “aggravating circumstances” that could render a company ineligible for declination under the Pilot Program or CEP, even if the company satisfied all other declination-qualifying criteria. In 2017, Halliburton announced in a press release that it had reached a resolution with the SEC for alleged FCPA violations in connection with the company’s operations in Angola and Iraq.⁶⁴ The press

⁶² *CEP VSD Resolutions (Part 1)*, U.S. DEP’T OF JUSTICE (Dec. 18, 2025), [https://www.justice.gov/criminal/criminal-fraud/vsd-resolutions-part-1#:~:text=In%20re%20Corsa%20Coal%20Corporation,re%3A%20World%20Acceptance%20Corporation%20\(8%2F5%2F20\)\[https://perma.cc/NZA5-C5XU\]](https://www.justice.gov/criminal/criminal-fraud/vsd-resolutions-part-1#:~:text=In%20re%20Corsa%20Coal%20Corporation,re%3A%20World%20Acceptance%20Corporation%20(8%2F5%2F20)[https://perma.cc/NZA5-C5XU]).

⁶³ We recognize this category may be both over and under-inclusive. Some of the declinations covered in this review, primarily declinations not issued under the Pilot Program or CEP, may have been based on factors other than nature and severity of the misconduct, such as lack of jurisdiction or evidentiary problems. There are also other company-issued disclosures of FCPA investigations concluded without prosecution that are not covered in this review, and not all companies disclose this information to begin with. The four declinations in the Dataset that were not issued under the Pilot Program or CEP were selected for review precisely *because* these companies previously resolved FCPA violations with DOJ or SEC. In contrast to most declinations of this type, where little is known regarding the underlying misconduct or presence of any “aggravated circumstances,” these four declinations allow for more meaningful analysis due to the availability of information regarding these companies’ prior histories of similar misconduct.

⁶⁴ Press Release, Halliburton, Halliburton Resolves Investigations Regarding Angola and Iraq Operations (July 27, 2017), <https://halliburton.gcs-web.com/news-releases/news-release-details/halliburton-resolves-investigations-regarding-angola-and-iraq>

release also reported that DOJ had closed its related investigation of Halliburton without taking any enforcement action.⁶⁵ DOJ declined to prosecute Halliburton despite the company's prior FCPA resolution with DOJ eight years prior, which would typically prevent a company from receiving a declination under DOJ Policies.⁶⁶ Other examples include Cognizant's receipt of a formal declination letter under the CEP in 2019 despite C-level executive involvement in the misconduct,⁶⁷ which is also an aggravating factor weighing against declination under DOJ Policies, as well as Orthofix's 2017 announcement of DOJ's decision to close its investigation of Orthofix without further action, even though the company resolved an FCPA matter with DOJ five years prior.⁶⁸ Moreover, Orthofix's voluntary-self disclosure to DOJ occurred during a period when the company had an ongoing disclosure obligation, and in the SEC Cease and Desist Order issued against Orthofix for FCPA violations in 2017, the SEC found that Orthofix had delayed implementation of remediation actions following their prior FCPA resolution.⁶⁹ Conversely, there is only one example of a foreign company receiving a declination in the face of aggravating factors: In 2019, Eni SpA disclosed in a press release that DOJ closed their investigation of Eni for potential FCPA violations, despite Eni having resolved FCPA violations with DOJ and SEC in 2010.⁷⁰

While these cases may suggest U.S. companies are more likely to receive declinations despite the presence of aggravating factors so long as they meet the other DOJ Policy requirements, this is not a statistically relevant trend from which concrete conclusions can be reached. In particular, lack of detailed information regarding the misconduct in most

[<https://perma.cc/2LSL-QEEG>].

⁶⁵ *Id.*

⁶⁶ See Press Release, U.S. Dep't of Just., Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay \$402 Million Criminal Fine (Feb. 11, 2009), <https://www.justice.gov/archives/opa/pr/kellogg-brown-root-llc-pleads-guilty-foreign-bribery-charges-and-agrees-pay-402-million> [<https://perma.cc/CFT5-LHAS>].

⁶⁷ Letter from U.S. Dep't of Just., Crim. Div., to Cognizant Tech. Solutions Corp. (Feb. 13, 2019), <https://fcpa.stanford.edu/fcpac/documents/5000/003830.pdf> (on file with Stanford Law School FCPA Clearinghouse).

⁶⁸ Press Release, Orthofix, Orthofix Announces Resolution of SEC Investigations, (Jan. 18, 2017), <https://ir.orthofix.com/news/news-details/2017/Orthofix-Announces-Resolution-of-SEC-Investigations/default.aspx> [<https://perma.cc/HJY7-TLH7>] (“After careful review by the DOJ, the Company was informed that DOJ has decided to take no further action with respect to this matter.”)

⁶⁹ Cease-and-Desist Order, Orthofix Int. N.V., Exchange Act Release No. 79828, File No. 3-17800 (U.S. Sec. & Exch. Comm'n January 18, 2017).

⁷⁰ Press Release, Eni, Eni: SEC Closes its Investigation in Nigeria and Congo Matters, (Apr. 22, 2020), <https://www.eni.com/en-IT/media/press-release/2020/04/eni-sec-closes-its-investigation-in-nigeria-and-congo-matters.html> [<https://perma.cc/BY9C-EY4Z>] (“On October 1, 2019 the [DOJ] had also closed its investigation of Eni with respect to the Algeria and OPL 245 matters without taking any action.”)

declination documents means that there may be other examples of declinations issued in the face of aggravating factors that are not accounted for here. It is also possible that some of the above-noted declinations involving aggravating circumstances were issued based on factors other than those laid out in DOJ Policies, such as jurisdictional hurdles or evidentiary issues.⁷¹ Even so, there are several notable examples of foreign companies receiving significant favorable treatment under DOJ Policies despite the presence of aggravating factors, such as Swiss electrification and automation company ABB and German software company SAP's avoidance of a parent-level, or any level, guilty plea and receipt of significant penalty discounts in 2022 and 2024, respectively, despite their prior FCPA resolutions and senior management involvement.⁷² What is clear based on these findings, however, is that U.S. companies are significantly more likely to voluntarily self-disclose potential FCPA violations, and reap the significant benefits, compared to their foreign counterparts.

B. Non-Prosecution Agreements (NPAs)

Of the eighty-two FCPA Enforcement Actions initiated by DOJ during the review period, only eleven were resolved exclusively through NPAs.⁷³ Among these standalone NPA dispositions, seventy-two percent involve U.S. companies. What accounts for this disparity? According to the data, voluntary self-disclosure, no prior history of similar misconduct, and lower-severity misconduct, as represented by USSG base fines at or below \$150 million, are the determining factors here, rather than nationality of the defendant.

Approximately half of the companies that resolved FCPA violations through NPAs received full voluntary self-disclosure credit, or some recognition for making a voluntary, but not "reasonably prompt" self-disclosure. By comparison, only two percent of companies that resolved FCPA violations through DPAs and/or guilty pleas were acknowledged in the resolution documents for having made voluntary, but not sufficiently

⁷¹ Although cases closed by DOJ without a declination "on the record" in the exercise of prosecutorial discretion could permit a prosecutor to treat a company more or less favorably based on nationality without public appearance of favoritism, given the breadth of data available above the waterline, we have no reason to conclude that such non-public case closures are being used to favor or disfavor companies based on nationality.

⁷² Deferred Prosecution Agreement, *United States v. ABB Ltd.*, No. 1 :22-CR-220 (E.D. Va. Dec. 2, 2022); Deferred Prosecution Agreement, *United States v. SAP, SE*, No. 1:23-CR-202 (E.D. Va Jan. 10, 2024).

⁷³ This review covers eleven standalone NPAs and one "hybrid" NPA (i.e., where there is a related guilty plea entered by a subsidiary in connection with the same misconduct) with Walmart, a U.S. company. Consistent with the approach taken for DPAs, the findings in this section focus on standalone NPAs and Walmart's resolution is captured in the review findings for hybrid dispositions.

timely, self-disclosures. The fact that both companies in the NPA group afforded self-disclosure recognition—but not full Sentencing Guidelines or Pilot Program/CEP credit—are U.S. companies further undercuts theories of U.S. favoritism, as DOJ could have exercised its discretion to find that these companies met the requirements for full disclosure credit if it was, indeed, looking to cut U.S. companies a break.

Additionally, none of the companies that received NPAs had a prior history of similar misconduct, and all but one had base fines at or below \$150 million. The only outlier here is the resolution DOJ reached with Petrobras, a Brazilian company, which, standing alone, does not undermine these observations.

Surprisingly, over half of the NPAs in the Dataset involved aggravating factors or partial cooperation or remediation credit under DOJ Policies. There is no apparent distinction between U.S. and foreign companies that received NPAs under these circumstances.

C. Deferred Prosecution Agreements (DPAs)

Within the Dataset, there are thirty-nine dispositions involving DPAs signed at the parent or subsidiary level. These DPAs have been divided into two categories: (i) those that are part of “hybrid” dispositions where a related entity enters a guilty plea in connection with the same misconduct, and (ii) “standalone” DPAs with no related guilty plea(s). While hybrid dispositions are a popular form of resolution and are crucial for companies because they enable avoidance of significant negative collateral consequences associated with parent-level guilty pleas, our observations here focus on the twenty-seven stand-alone DPAs in the Dataset, as the review findings for DPAs in hybrid dispositions are meaningfully captured elsewhere. In contrast to the comparably lower percentage of declinations and NPAs received by foreign companies during the review period, approximately two-thirds of the standalone DPAs in the Dataset involve foreign companies, which is double the number of U.S. companies in this group. The review findings also show that DPAs (and guilty pleas) more commonly involve violations of the FCPA’s anti-bribery provisions than NPAs or declinations, with seventy-seven percent of the standalone DPAs deferring anti-bribery charges, as opposed to lesser accounting provisions charges.⁷⁴ These metrics—together with the relatively lower number of declinations and NPAs involving foreign companies and relatively higher number of foreign companies that entered guilty pleas—show that foreign companies are significantly more likely than U.S. companies to resolve FCPA violations through dispositions that require express acceptance of responsibility, are executed through the court system, and involve more serious anti-bribery

⁷⁴ Only thirty-three percent of NPAs in the Dataset involve anti-bribery violations.

charges with higher penalties.

Why, then, are foreign companies resolving FCPA violations through standalone DPAs (or guilty pleas) at least twice as often as U.S. companies? The data shows that higher instances of prior history of similar misconduct or breach of prior DPA terms among foreign companies are among the main reasons for this disparity. While none of the U.S. or foreign companies that received NPAs or formal declination letters were found to have a prior history of similar conduct, fourteen percent of companies with stand-alone DPAs had prior enforcement actions for bribery conduct or breached DPA terms, with one hundred percent of this group comprised of foreign companies.⁷⁵

As discussed below, there is an even stronger correlation between recidivism and plea agreements. Given this, one might wonder why four foreign companies out of the eleven total companies in the Dataset with prior histories or DPA breaches were able to resolve their FCPA violations through DPAs, particularly since the only two U.S. companies in the Dataset with prior histories or DPA breaches, Zimmer Biomet and TechnipFMC, entered guilty pleas for their violations. A closer look at these four foreign companies shows that, for the most part, their relevant prior history was limited to prior civil, rather than criminal, resolutions for bribery violations.⁷⁶ Conversely, both Zimmer Biomet and Technip committed additional bribery violations after entering into DPAs with DOJ for similar misconduct.

Where the findings are consistent across foreign and U.S. companies with stand-alone DPAs is in the relative percentage of DPAs signed at the parent-level compared to the subsidiary-level, as both U.S. and foreign companies are twice as likely to have parent-level DPAs. Additionally, U.S. and foreign companies with DPAs generally received consistent credit for their cooperation and remediation, with the majority receiving full cooperation and remediation credit, and only one company receiving partial cooperation and partial remediation credit.

D. Guilty Pleas

Guilty pleas are typically regarded as the most severe form of resolution due to their significant collateral consequences. The Dataset contains a total of twenty-one guilty plea agreements entered at the parent or subsidiary level, and seventy-one percent of these guilty pleas involve foreign companies. Of the foreign company guilty plea agreements,

⁷⁵ These metrics increase to twenty-two percent when also accounting for companies with standalone DPAs that covered concurrent criminal charges, with foreign companies still comprising the majority of this group.

⁷⁶ While Deutsche Bank is a true recidivist, its criminal recidivism relates to commodities trading misconduct rather than FCPA violations.

approximately thirty percent were entered at the parent level, which is significant compared to the four percent of guilty pleas entered at the parent level for U.S. companies.

All but two of the guilty plea agreements in the Dataset involve USSG base fine calculations above \$100 million. This is true for both U.S. and foreign companies. The only company that entered into a guilty plea agreement despite having no prior criminal history and a base fine below \$100 million is Trafigura Beheer B.V. (“Trafigura”), a Singaporean company.⁷⁷ While it is not initially apparent why Trafigura received a guilty plea when other seemingly similarly situated U.S. companies did not,⁷⁸ a close reading of Trafigura’s guilty plea agreement shows significant shortcomings in Trafigura’s cooperation with DOJ.⁷⁹ Additionally, all companies that pled guilty despite having base fines on the lower end of the spectrum (i.e., at or below \$500 million) either had prior resolutions for similar misconduct, as further discussed below, or the misconduct was directed or sanctioned by executives at the highest levels of the company. For example, Sargeant Marine pled guilty to bribery violations in 2020 even though its base fine was only \$150 million, the company fully cooperated and remediated, and had no prior history, because the eight-year bribery scheme at issue was directed by a senior executive and part owner of the company.⁸⁰

Another notable trend among the guilty plea agreement group is that at least one-third involved companies with a prior history of similar conduct, including companies that breached terms of their prior DPAs, the majority of which are foreign companies.⁸¹ While prior history does not wholly account for the relatively greater number of guilty pleas entered by foreign companies, the data strongly suggests this factor is among the top reasons DOJ imposes plea agreements on foreign companies

Indeed, for most of the Sentencing Guidelines criteria and policy considerations upon which DOJ prosecutors rely, there are degrees of

⁷⁷ Plea Agreement, *United States of America v. Trafigura Beheer B.V.*, No. 23-cr-20476 (S.D. Fla. Dec. 14, 2023) [hereinafter *Trafigura Plea Agreement*].

⁷⁸ *See, e.g.*, *Deferred Prosecution Agreement, United States v. Freepoint Commodities LLC*, No. 23-cr-00224 (D. Conn. Dec. 14, 2023) [hereinafter *Freepoint Commodities DPA*].

⁷⁹ *Compare* *Trafigura Plea Agreement*, *supra* note 77 (noting that “the Defendant, in particular during the early phase of the government’s investigation, failed to preserve and produce certain documents and evidence in a timely manner and, at times, took positions that were inconsistent with full cooperation”), *with* *Freepoint Commodities DPA*, *supra* note 78 (noting only that “the Company’s cooperation was limited in degree and impact, and largely reactive.”)

⁸⁰ *Plea Agreement, United States v. Sargeant Marine, Inc.*, No. 20-cr-363 (E.D.N.Y. Sep. 22, 2020).

⁸¹ Again, these metrics increase to thirty-three percent when also accounting for U.S. and foreign companies whose guilty plea agreements covered concurrent criminal charges, with foreign companies still comprising the majority of this group.

discretion in how the factors are applied, and the “recidivism” consideration is no different. Here, the fact that several foreign companies were *not* treated as recidivists under the Sentencing Guidelines despite previously reaching resolutions with foreign authorities for bribery misconduct implies that the DOJ interprets this Sentencing Guidelines factor as being limited to prior criminal, civil, or regulatory proceedings with *U.S.* authorities.⁸² Although this could be seen as a disadvantage to U.S. companies more likely to have prior resolutions with U.S. authorities than their foreign counterparts, any disadvantage to U.S. companies embedded in DOJ’s application of the recidivism Guidelines factor is counter-balanced by DOJ’s consideration of prior enforcement actions with foreign regulators in application of its own policies.

E. Penalties and Penalty Discounts

An equal number of U.S. and foreign companies received some form of penalty discount under the Pilot Program or CEP for fully cooperating and remediating, both of which are prerequisites for receipt of any penalty discounts under these policies. Additionally, both U.S. and foreign companies equally received penalty discounts off the bottom of the Sentencing Guidelines fine range, or in excess of the full range of penalty discounts provided for by the Policies, despite *not* meeting the relevant policy criteria. For example, Beam Suntory Inc., a U.S. company, and Credit Suisse (Hong Kong) Limited, a Swiss headquartered company, both received ten to fifteen percent discounts off the bottom of their USSG fine ranges, even though neither company self-disclosed the misconduct and both companies only partially cooperated and/or remediated the misconduct.⁸³ Och-Ziff Capital Management Group, an American company, and Glencore, a Swiss company, also received fifteen to twenty

⁸² For example, the Sentencing Guidelines calculations in Gunvor S.A.’s 2023 plea agreement for FCPA violations did not reflect a culpability score addition for the company’s prior 2019 resolution with Swiss authorities for bribery misconduct. Plea Agreement, *United States v. Gunvor S.A.*, No. 24-cr-85 (E.D.N.Y. Mar. 1, 2024). Similarly, Glencore’s prior 2012 resolution with Belgian authorities for bribery violations was also not counted against the company in the Sentencing Guidelines calculations contained in its 2022 guilty plea agreement for FCPA violations. Plea Agreement, *United States v. Glencore International A.G.*, No. 22-cr-297 (S.D.N.Y. May 24, 2022).

⁸³ Deferred Prosecution Agreement, *United States v. Beam Suntory Inc.*, No. 1:20-cr-00745 (N.D. Ill. Oct. 23, 2020); Letter from U.S. Dep’t of Just., Crim. Div., to Credit Suisse (Hong Kong) Ltd. on Non-Prosecution Agreement (May 24, 2018), <https://fcpa.stanford.edu/fcpac/documents/5000/003707.pdf> (on file with Stanford Law School FCPA Clearinghouse); Press Release, U.S. Dep’t of Just., Credit Suisse’s Investment Bank in Hong Kong Agrees to Pay \$47 Million Criminal Penalty for Corrupt Hiring Scheme that Violated the FCPA (Jul. 5, 2018), <https://www.justice.gov/archives/opa/pr/credit-suisse-s-investment-bank-hong-kong-agrees-pay-47-million-criminal-penalty-corrupt> [<https://perma.cc/S8CN-5CVL>].

percent discounts off the bottom of their USSG fine ranges despite neither company receiving full cooperation credit and both of their USSG base fine amounts among the top ten highest in the Dataset.⁸⁴

Overall, however, U.S. companies more frequently received *significant* penalty discounts, including discounts at or in excess of the full amount available under the Pilot Program or CEP, as compared to similarly situated foreign companies that also met these policies cooperation and remediation requirements. But this variance is also largely consistent with DOJ Policies. Most foreign companies that did not receive the full penalty discount available under DOJ Policies faced concurrent criminal charges or had some prior criminal or civil history, and DOJ Policies call for prior history and other aggravating factors to be accounted for in determining the appropriate penalty discount. In fact, later iterations of the CEP expressly provided that “recidivists will be eligible for a fifty to seventy percent reduction from the fine range, *but generally not from the low end of the range*, and prosecutors will have discretion to determine the starting point for the reduction based on the particular facts and circumstances of the case.”⁸⁵ Many of these foreign companies did, however, benefit from significant crediting of payments to foreign regulators in connection with the same misconduct against their criminal U.S. fine.

With respect to final penalties imposed after application of penalty discounts, and before crediting of any payments made by the company to other authorities in connection with the same misconduct, there is only one U.S. company on the list of the top ten highest criminal penalties resulting from FCPA violations: Goldman Sachs. As mentioned in Part I, the remaining nine highest penalties imposed for FCPA violations involve foreign companies. Separate and apart from the above-discussed observations around penalty discounts, the data shows a significant correlation between a company’s USSG base fine and the final penalty imposed by DOJ before crediting, as companies with the highest base fines generally received the highest penalties, and vice versa. The only exceptions to this trend are DOJ’s resolutions with BK Medical and Goldman Sachs, both U.S. companies. In the BK Medical resolution, the company received one of the lowest penalties despite having a higher USSG base fine than eight other U.S. and foreign companies. This favorable outcome for BK Medical appears to have been due to the company’s voluntary-self disclosure, which resulted in the company receiving a thirty percent discount off the bottom of the USSG fine

⁸⁴ Plea Agreement, *United States v. OZ Africa Management GP, LLC*, No. 16-cr-00515 (E.D.N.Y. Sep. 29, 2016); Plea Agreement, *United States v. Glencore International A. G.*, No. 22-cr-00297 (S.D.N.Y. May 24, 2022).

⁸⁵ CEP, *supra* note 44.

range.⁸⁶ Additionally, Goldman Sachs received a higher penalty than SBM, a Dutch company, despite having a lower base fine, no C-suite executive involvement in the misconduct, and all other factors equal.⁸⁷

F. Independent Compliance Monitors

Of the sixteen companies required to retain an independent compliance monitor as a condition of their FCPA resolutions with DOJ, sixty-two percent are foreign companies. As expected, monitors were generally reserved for companies that breached the terms of their prior FCPA resolutions or were determined to have only partially remediated the misconduct at issue, as well in instances where misconduct occurred at the highest levels of the company. No discernable trends suggesting DOJ deviates from its policies to the disadvantage of U.S. or foreign companies were observed with respect to independence compliance monitors.

CONCLUSION

As evidenced by the review findings covered in Part III, the mutually contradictory set of grievances about FCPA enforcement leveraged by the authors of the Gauvain Report and the FCPA Executive Order to advance their respective protectionist anti-bribery enforcement policies simply cannot be substantiated, as the data does not show that U.S. prosecutors have historically enforced the FCPA against U.S. or foreign companies differently based on their nationality. For example, while Goldman Sach's guilty plea agreement appears to be an example of a U.S. company potentially receiving relatively harsher treatment than other similarly situated foreign companies, this matter is a unique outlier rather than evidence of a larger trend of the FCPA being systematically applied to disadvantage U.S. companies. Conversely, while foreign companies more consistently resolve FCPA violations under less favorable terms than U.S. companies, the data also shows that foreign companies are generally less willing than U.S. companies to voluntarily self-disclose potential FCPA violations and extensively cooperate with U.S. authorities, and it is *this* distinction—rather than the nationality of the parent company—that

⁸⁶ Letter from U.S. Dep't of Justice, Crim. Div. to BK Medical ApS on Non-Prosecution Agreement (Jun. 21, 2016), <https://fcpa.stanford.edu/fcpac/documents/4000/003276.pdf> (on file with Stanford Law School FCPA Clearinghouse); Press Release, U.S. DEP'T OF JUSTICE, Analogic Subsidiary Agrees to Pay More than \$14 Million to Resolve Foreign Bribery Charges (June 21, 2016), <https://www.justice.gov/archives/opa/pr/analogic-subsidiary-agrees-pay-more-14-million-resolve-foreign-bribery-charges> [<https://perma.cc/K3UF-JEU4>].

⁸⁷ Deferred Prosecution Agreement, *United States v. Goldman Sachs Group, Inc.*, No. 20-cr-437 (E.D.N.Y. Oct. 22, 2020); Deferred Prosecution Agreement, *United States v. SBM Offshore N.V.*, No. 17-cr-686 (S.D. Tex. Nov. 30, 2017).

accounts for these findings. To be clear, we do not suggest U.S. companies are innately more transparent and cooperative with regulators than foreign companies. Rather, the relatively greater willingness of U.S. companies to voluntarily self-disclose is likely driven, in large measure, by the unique existence of U.S. laws and regulatory rules that offer legal protections and a share of fine proceeds to whistleblowers who alert U.S. authorities of potential FCPA violations.⁸⁸ U.S. companies may therefore be far more willing to self-disclose, and reap the significant benefits of doing so, if they perceive measurably greater risks of inevitable disclosure through whistleblowers.

What the data *does* show is that DOJ generally applies the Sentencing Guidelines and its own policies neutrally and consistently across U.S. and foreign companies, with any disparities in outcomes among similarly situated companies largely attributable to changes in available penalty discounts and other benefits under DOJ Policies. While the FCPA Executive Order and Gauvain Report provide the lens through which this article assesses FCPA resolutions, the comprehensive dataset from which the observations in this article are drawn has utility far beyond the scope of this article, as the data can be used by legal practitioners and academics alike to conduct further analysis of FCPA enforcement trends from and for a variety of perspectives and objectives.

⁸⁸ U.S. DEP'T OF JUST., CRIM. DIV., WHISTLEBLOWER AWARDS PILOT PROGRAM (May 12, 2025), <https://www.justice.gov/criminal/media/1400041/dl?inline> [<https://perma.cc/H62X-BNMU>] (originally issued August 1, 2025 and later revised on May 12, 2025); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010) (codified as amended at 15 U.S.C. § 78u-6). *See also* Securities Whistleblower Incentives and Protections, 17 C.F.R. § 240.21F-1 (2018).