U.S. Anti-Corruption Update

Joshua D. Roth

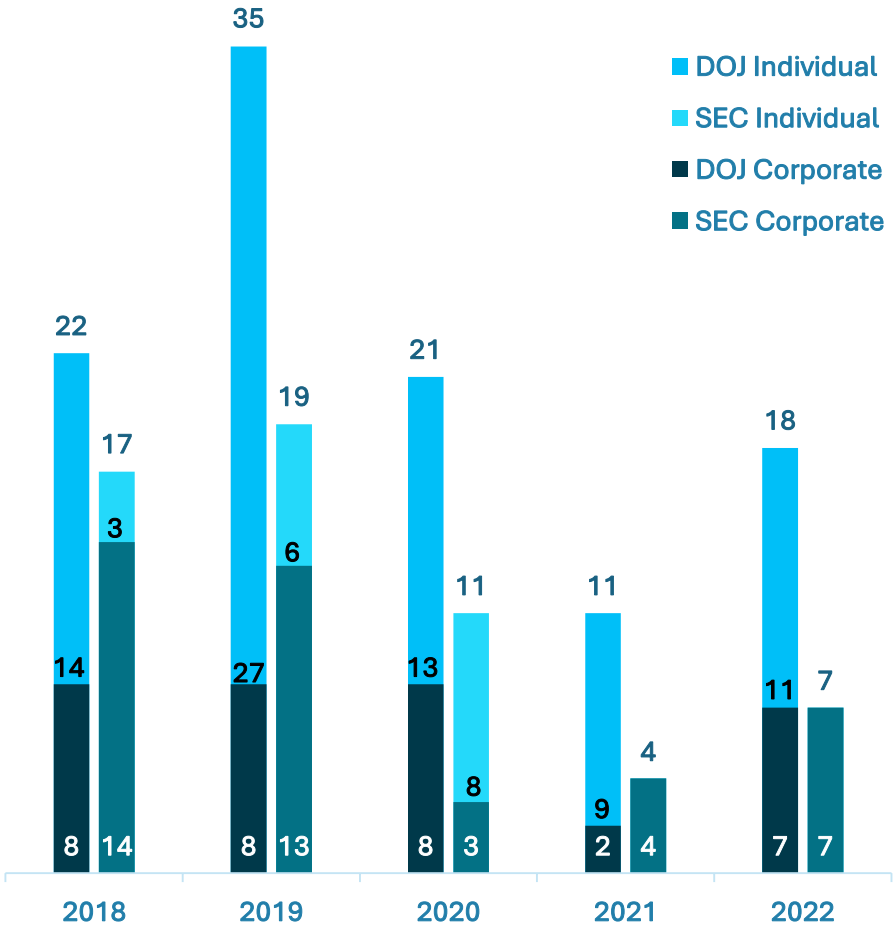
International Corporate Compliance Executive Webinar

May 10, 2023

Copyright © 2023 Fried, Frank, Harris, Shriver & Jacobson LLP. All rights reserved.

Fried Frank

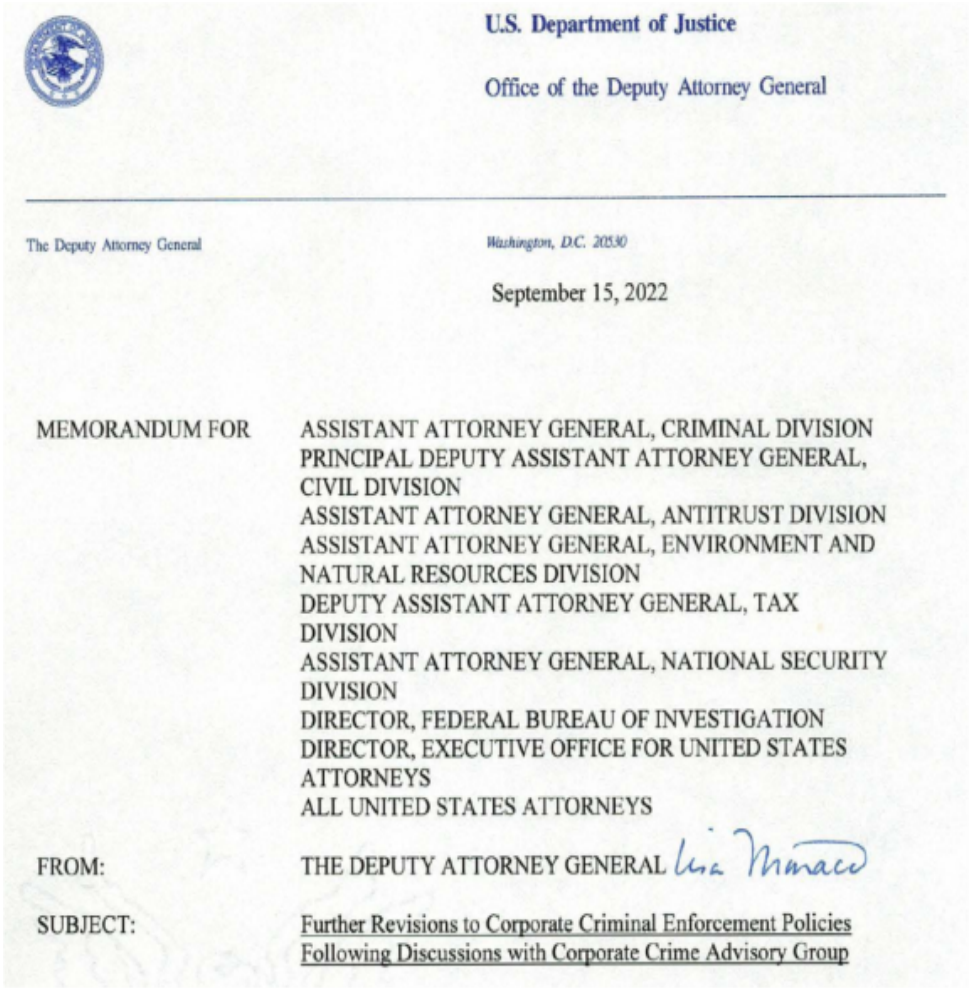
The Foreign Corrupt Practices Act ("FCPA"):
Enforcement Trends



- FCPA prosecutions and enforcement actions have declined under the Biden Administration
- DOJ prosecutions against both individuals and corporations have remained stable since 2020
- SEC enforcement actions against individuals have decreased from 8 in 2020 to 0 in 2021 and 2022

Fried Frank

The Monaco Memorandum



U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

September 15, 2022

MEMORANDUM FOR
ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION
PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION
ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION
ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION
DEPUTY ASSISTANT ATTORNEY GENERAL, TAX DIVISION
ASSISTANT ATTORNEY GENERAL, NATIONAL SECURITY DIVISION
DIRECTOR, FEDERAL BUREAU OF INVESTIGATION
DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS
ALL UNITED STATES ATTORNEYS

FROM: THE DEPUTY ATTORNEY GENERAL Lisa Monaco

SUBJECT: Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group

- On September 15, 2022, DOJ announced significant revisions to its corporate criminal enforcement policies.
- The memorandum covers four major areas:
  - individual accountability;
  - corporate accountability;
  - compliance monitors; and
  - transparency in corporate criminal enforcement.

Fried Frank

The Monaco Memorandum:
Individual Accountability, Corporate Accountability, and Monitors

- Individual Accountability
  - Timely disclosures and prioritization of individual investigations
  - Prosecuting individuals outside the U.S. who are responsible for corporate crime

- Corporate Accountability
  - Evaluating a corporation's history of misconduct
  - Voluntary self-disclosures by corporations
  - Evaluation of cooperation by corporations
  - Evaluation of a corporation's compliance program

- Compliance Monitors
  - Factors to consider when evaluating whether a monitor is appropriate
  - Selection of monitors
  - Continued review of monitorships

Fried Frank

The Wall Street Sweep:
Developing Tech & Problems in Compliance

- In September 2022, the SEC announced books and records, and failure to supervise charges, against 16 financial entities. The firms admitted to wrongdoing and paid combined penalties of approximately $1.1 billion.

- Central allegations included "pervasive off-channel communications," specifically:
  - employees communicated about business via text messages and third-party applications on their personal devices; and
  - the firms failed to maintain or preserve those communications in accordance with required record keeping practices.



Evolution of Corporate Compliance Programs

- In March 2023, DOJ updated its guidance regarding corporate compliance programs and set forth criteria for those assessments.

- The updated guidance primarily focused on two areas: preservation of communications from personal devices and tying executive compensation to compliance.

- Is the compliance program well designed?
  - ❑ Risk Assessment
  - ❑ Policies and Procedures
  - ❑ Training and Communications
  - ❑ Confidential Reporting Structure and Investigation Process
  - ❑ Third Party Management
  - ❑ Mergers and Acquisitions



Fried Frank

Evolution of Corporate Compliance Programs (Continued)

- Is the corporation's compliance program adequately resourced?
  - ❑ Tone at the Top
  - ❑ Autonomy and Resources
  - ❑ Compensation Structures & Consequence Management

- Does the corporation's compliance program work in practice?
  - ❑ Improvement, Testing, and Review
  - ❑ Investigation of Misconduct
  - ❑ Analysis and Mediation of Underlying Misconduct

Recent Notable Enforcement Actions

- In March 2022, Swedish telecom giant Ericsson came under scrutiny from the DOJ and SEC for breaching its 2019 DPA covering prior FCPA violations. *U.S. v. Telefonaktiebolaget LM Ericsson*, No. 19-CR-00884 (AJN) (S.D.N.Y. 2019).





- In May 2022, Glencore, a Swiss-based multinational commodity trading and mining company, entered a $700 million settlement and plea agreement with the DOJ pursuant to charges relating to over $100 million in bribes to foreign officials via third-party intermediaries. *U.S. v. Glencore Int'l A.G.*, 22-CR-297 (S.D.N.Y. 2022).

Fried Frank

U.K. White Collar Crime Update

James Kitching

International Corporate Compliance Executive Webinar

May 10, 2023

Copyright © 2023 Fried, Frank, Harris, Shriver & Jacobson LLP. All rights reserved.

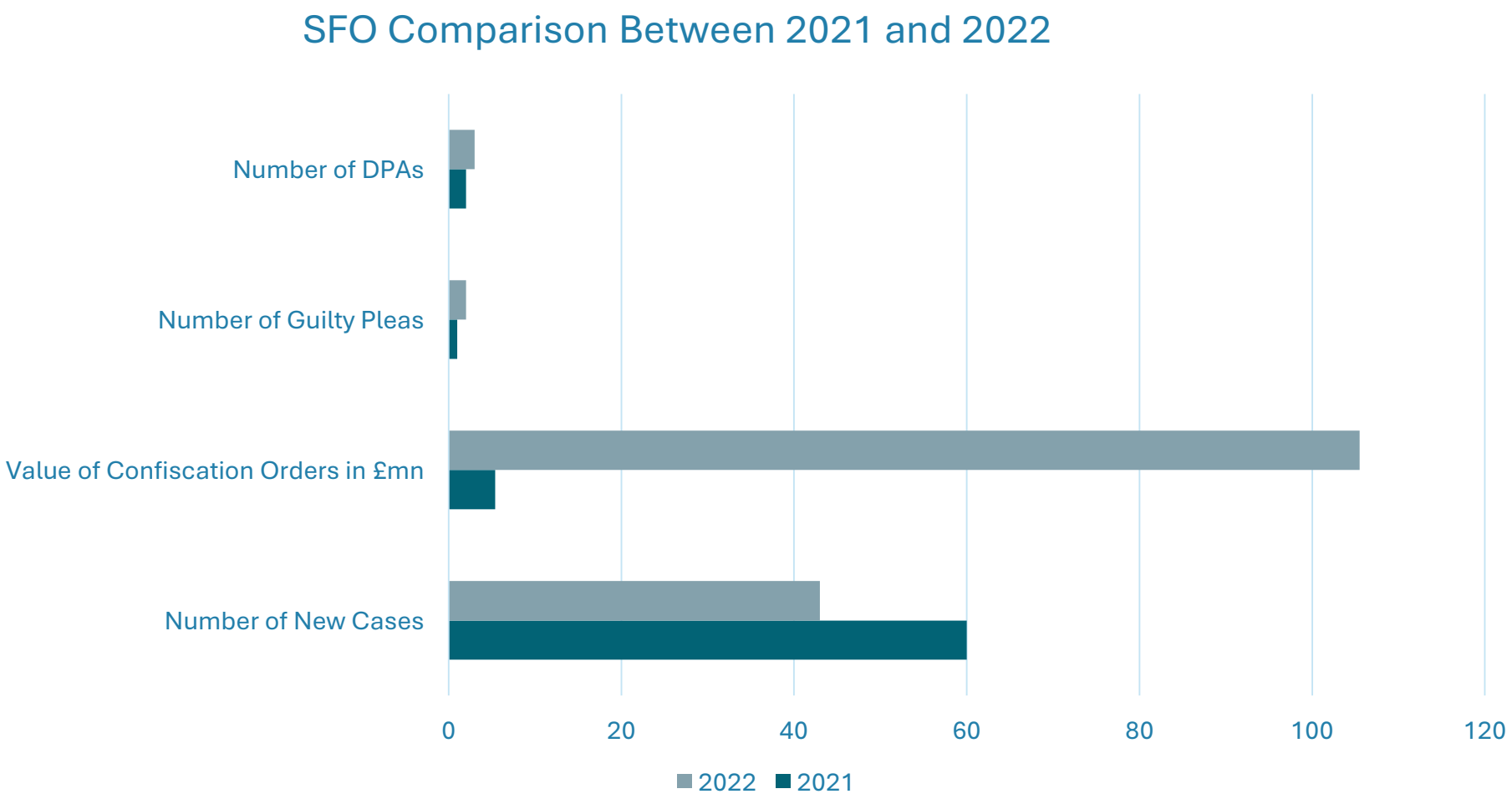
Fried Frank

2022-2023 in Review

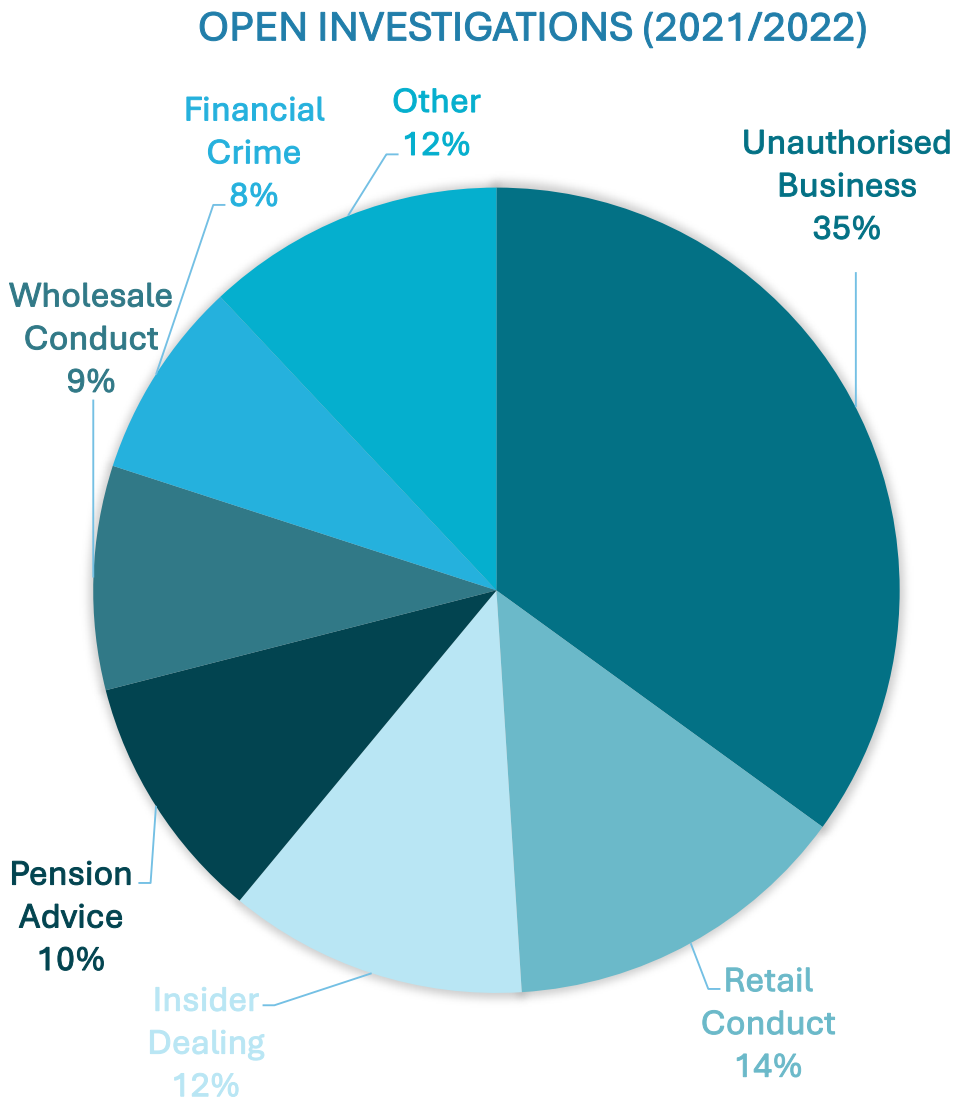


Fried Frank

Enforcement Snapshot - Serious Fraud Office



Enforcement Snapshot - Financial Conduct Authority

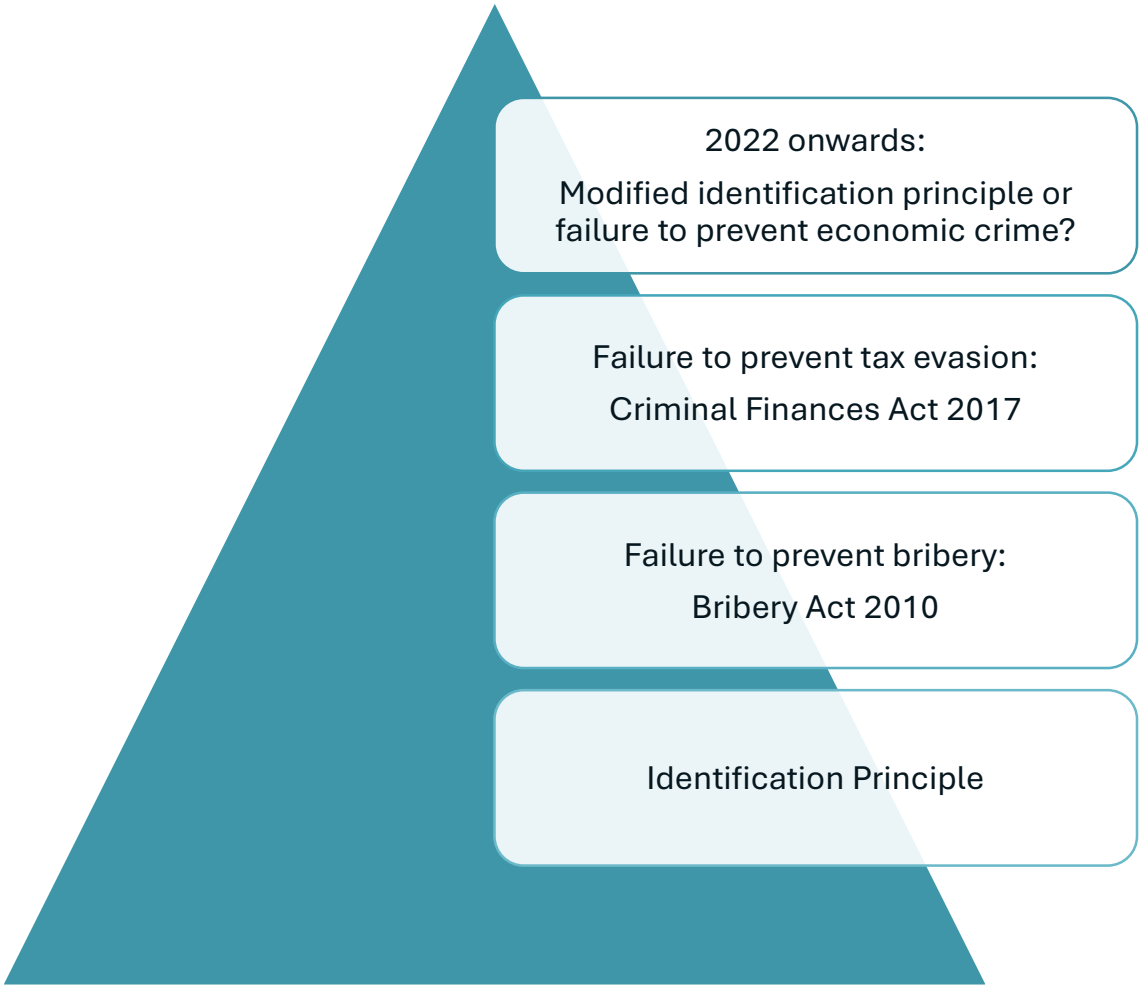


Key Statistics

- 194 new enforcement cases (increase of 55% to previous financial year)
- Enforcement investigations last, on average, 2.5 years
- 64% drop in number of cases referred to the RDC
- FCA commissioned 38 skilled person reviews (44% drop to previous financial year)
- 1031 whistleblowing reports were received, of which only 3 resulted in '*significant action to manage harm*'

Fried Frank

Corporate Criminal Liability - Historic Expansion



Corporate Criminal Liability - New Regime

- Economic Crime and Corporate Transparency bill will introduce new **strict liability** "***failure to prevent fraud***" offence.
- Organisations will be held criminally liable for specified fraud and false accounting offences that are committed:
  - by an employee or an agent; and
  - for the benefit of the organisation
- Money laundering offences will not be covered under this new offence.
- The offence will only apply to **large organisations** (incl. corporates, partnerships, and large not-for-profit organisations) across all sectors. A large organisation comprises any organisation that meets at least two of the following criteria:
  - More than 250 employees;
  - More than £36 million turnover; and
  - More than £18 million in total assets
- A company will have a defence if it can demonstrate it has **reasonable fraud prevention procedures** in place.
- An organisation is potentially liable for an **unlimited fine** if convicted.
- The offence has **extra-territorial effect**.

Fried Frank

Failure to Prevent Fraud Offence - Practical Tips

Businesses will need to reassess risk and examine existing fraud detection and prevention processes against the anticipated guidance.

If the guidance is similar to the pre-existing guidance in relation to anti-bribery and corruption, we envisage organisations needing to take steps along the following lines:

- **Risks have been assessed** and are kept under review;
- **Policies and procedures** are in place and supported by appropriate **training**;
- Reasonable financial, commercial and accounting **controls** are in place;
- **Conflicts of interest are avoided**, and internal functions are appropriately separated;
- Appropriate **enforcement mechanisms** and sanctions are in place;
- Risks in respect of transactions for **third-party** clients and contracts (e.g., suppliers or other potential agents) are effectively identified;
- **Whistleblowing procedures** are adapted or adopted; and
- Anti-fraud measures are periodically **monitored, reviewed and evaluated**.

Fried Frank

Economic Crime and Transparency Bill – Other Measures

- Expansion of the SFO's pre-investigative information gathering powers:
  - Section 2A of the Criminal Justice Act 1987 will now enable the SFO to **compel** individuals and companies to **disclose information** at the **pre-investigation stage** for **all SFO** cases.
  - This extends the previous scope beyond international bribery and corruption cases.
- The SRA will have the power to impose **unlimited fines on solicitors** and law firms for disciplinary matters relating to economic crime.
- Removal of requirement for pre-existing SAR before an **Information Order** can be made in relation to money laundering and terrorist financing offences.
- Additional powers to law enforcement so they can **seize and recover crypto assets** more quickly and easily.
- Various **Companies House reforms** to change it from a passive recipient to active gatekeeper.
- **Tightened transparency requirements** for limited partnerships.

Fried Frank

Bloomberg LP v ZXC

Key Facts

- Bloomberg reported on a U.S. citizen having been interviewed by a U.K. law enforcement body as part of an investigation into **allegations of fraud, bribery, and corruption** at his U.K. place of work (a regional division of a listed company operating overseas).
- Bloomberg published a confidential letter of request sent by U.K. law enforcement to a foreign state that sought information on the individual and his activities.
- The individual claimed he had a **reasonable expectation of privacy prior to charge** and brought a **claim for misuse of private information** against Bloomberg.
- The High Court held **Bloomberg liable** and awarded **£25,000 in damages** to 'ZXC'.

Determination

- U.K. Supreme Court **dismissed the appeal** by Bloomberg.
- Court ruled that a person under **criminal investigation** has, in general, a **reasonable expectation of privacy until charged**.
- The U.K. Supreme Court, in particular, took into the account the confidential nature of the letter of request.

Fried Frank

The Enforcement Landscape - Future of the SFO

The Good

- The SFO secured in excess of **£1 billion** for the UK Treasury through fines and recovery.
- **Glencore** was ordered to pay £276m for bribery and corruption after the SFO secured a conviction against the company on seven counts of bribery. €991m DPA with **Airbus**.

The Bad and the Ugly

- The SFO also **failed to provide adequate disclosure** in a fraud case against two former Serco executives causing the trial to collapse.
- Attorney-General launched an independent inquiry into failings during the SFO's trial of Unaoil executives after Court of Appeal found **"wholly inappropriate" dealings with a fixer**.

What Lies Ahead?

- Lisa Osofsky will **step down as SFO director** in August 2023.
- The Institute of Economic Affairs ("IEA") believes "*serious consideration*" should be given to **"*radical institutional change*"** of the SFO.
- IEA believes change is necessary due to a "*long string of failures*" in performance and the SFO having "*improper contacts*" between officials and companies being investigated.

Fried Frank

Enforcement Horizon - UK/US Cooperation

- **U.K./U.S. Data Access Agreement** came into force **3 October 2022**.
- Allows U.K. and U.S. law enforcement, with an appropriate court order, to **directly request data** held by **telecommunications providers** in the other country's jurisdiction to prevent, detect, investigate, and prosecute **serious crimes.**
- The SFO is keen to make use of these powers to investigate **fraud, corruption, cyberattacks, money laundering** and other serious economic offences.
- Covered Providers includes **social media platforms, messaging services, data hosting, storage**, and processing platforms.
- The new legislation helps circumvent the slow and cumbersome mutual legal assistance process.
- The Agreement will likely benefit U.K. agencies more than U.S. agencies:
  - Most Covered Providers are based in the U.S.
  - U.S. law enforcement can already make extraterritorial production requests under the CLOUD Act.
- Practical considerations for Covered Providers are to put in place a suitable process for handling requests when they are made. Legal advice will likely be required to address **tensions** with existing **confidentiality, data protection** and **legal professional privilege** laws.

Fried Frank

Joshua Roth



Joshua Roth

Partner
New York
T: +1.212.859.8035
joshua.roth@friedfrank.com

Joshua D. Roth is a partner in Fried Frank's White Collar Defense, Regulatory Enforcement and Investigations and Commercial Litigation Practices. Joshua represents entities and individuals in a diverse range of complex white collar, regulatory, and commercial litigation matters, including investigations and enforcement actions by various federal and state government authorities. Joshua also counsels clients on the Foreign Corrupt Practices Act ("FCPA") and related anti-corruption laws, representing entities and individuals in connection with investigations and internal reviews, anti-corruption due diligence for transactions, and designing and implementing anti-corruption compliance programs. Joshua also litigates corporate matters and business disputes in state and federal courts.

Joshua also maintains an active pro bono practice, defending clients in criminal and civil proceedings in the Southern District of New York, New York State courts, and Immigration Court. He has represented clients on a pro bono basis in criminal proceedings in the Southern District of New York, including clients charged with multiple felony violations. Joshua also successfully sought leave to appeal a pro bono client's criminal conviction to the New York State Court of Appeals, where he argued the appeal.

Joshua has written on various legal topics and has contributed articles to New York Law Journal and New York Commercial Litigation Insider, among other publications. His articles have also been re-published by prominent journals, including the Harvard Law School Forum on Corporate Governance and Financial Regulation and by the Employee Relations Law Journal.

Joshua was quoted by *The American Lawyer* in connection with a favorable settlement with the SEC achieved by the firm for a former executive at Bank of America. The settlement was featured in the "Litigator of the Week" column in The AM Law Litigation Daily. The publication focuses on cases that have great impact on the legal community and highlights both impressive lawyering and results.

Joshua received his JD, *magna cum laude*, from Boston University School of Law and his BA, *magna cum laude*, from Cornell University. He is admitted to practice in New York and the US District Courts for the Southern and Eastern Districts of New York.

Fried Frank

James Kitching



James Kitching

Partner
London
T: +44.20.7972.6295
james.kitching@friedfrank.com

James Kitching has over 20 years of experience in providing strategic advice and handling our clients' most significant and complex disputes.

A trusted barrister, James chairs our International Arbitration Practice. His work often involves the coordination of parallel civil, criminal, and regulatory proceedings in multiple jurisdictions. He has acted for governments, central banks, and some of the world's leading corporations and financial institutions, where the amounts in dispute often exceed US$1 billion.

James is a seasoned advocate, skilled in bringing and defending court actions. Clients regularly engage James to conduct arbitration proceedings under the rules of the leading international arbitration institutions, including the International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), and the Swiss Chambers' Court of Arbitration. He has routinely advised across a variety of sectors including financial services, private equity, pharmaceuticals, oil and gas, telecoms, and IT.

James undertakes white collar enforcement work and conducts internal investigations in connection with alleged bribery and corruption, money laundering, export control, and sanctions violations. He has particular expertise in advising on cross-border matters and has undertaken World Bank investigations. Our clients benefit from his substantial experience in dealing with data protection issues in the context of international disputes and investigations.

James was called to the Bar of England and Wales in 1999 and was awarded the Phillip Teichman Scholarship (Inner Temple). He continues to exercise full rights of audience in the High Court (Commercial Court, Companies Court, Queen's Bench, and Chancery Divisions), appellate courts, and arbitral tribunals.

James received his Bar Vocational Diploma from the Inns of Court School of Law in 1999 and his LLB from University College London in 1998.

He is admitted to practice in England and Wales.

Fried Frank

Attorney advertising. Prior results do not guarantee a similar outcome.

