



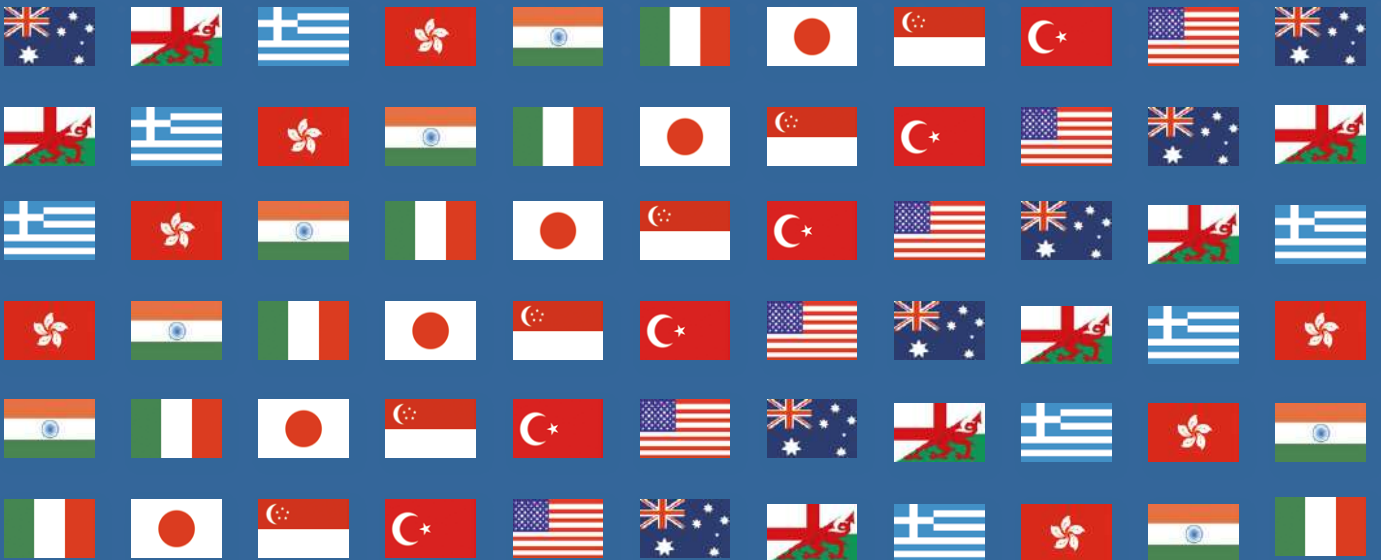
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Getting The Deal Through

# GOVERNMENT INVESTIGATIONS 2024

Contributing editor

**John D Buretta**



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**START READING**

# Government Investigations

Consulting editors

**John D Buretta**

*Cravath, Swaine & Moore LLP*

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Quick reference guide enabling side-by-side comparison of local insights, including into enforcement agencies; forms of liability; requirements and trigger events for investigations; whistle-blower and employee protections; document preservation and production (including data protection, privacy, and legal privilege limitations); investor notification; cooperation with enforcement agencies; resolution of investigations; potential civil and criminal penalties; and recent trends.

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# Global overview

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This past year has brought a bevy of headlines about government investigations and enforcement matters across a wide range of activities, including, for example, the exporting of sensitive technologies to authoritarian countries without a licence, the operation of unregistered cryptocurrency trading platforms and the bribing of foreign government officials by a recidivist company. These headlines reveal several key themes that have gained prominence among enforcement agencies: reliance on enforcement to protect national security interests, use of existing regulations to rein in emerging technologies in the absence of new laws and the continuing importance of making voluntary self-disclosures and cooperating with government authorities.

The enforcement of sanctions and export controls has become an important priority area for the United States. Indeed, coordination between the US and its allies has increased to seize sanctioned assets, the US has expanded its funding for enforcement in this area and violations have been publicised widely by US enforcement agencies. Sanctions and export controls are no longer niche areas that concern only companies that deal in sensitive technologies or dual-use items. With heightened sanctions and export controls imposed by the US, the EU member states and many other countries in the wake of Russia's invasion of Ukraine, as well as any business organisation conducting international trade – regardless of industry sector – should understand the rules of their jurisdiction and any additional rules with extraterritorial reach that also apply. As geopolitical tensions continue to increase, it would not be surprising to see other countries adopt an enforcement approach similar to that of the US, in order to protect their national security.

Despite the focus of government regulators and enforcers on crypto assets and the platforms that support their trading, few countries have passed national legislation specifically regulating such assets and platforms. In the US, regulators contend that existing securities laws are sufficient, arguing that most crypto tokens are, in fact, securities. This theory undoubtedly will be tested in connection with recent civil lawsuits brought by the US Securities Exchange Commission against Coinbase and Binance for allegedly operating unregistered securities exchanges. The debate over the status of cryptocurrency as a security may offer lessons for other emerging technologies that lack any governing standards or regulations, such as generative artificial intelligence. While this area may be ripe for uniform cross-border standards or regulations, in their absence, it remains to be seen whether and how enforcement agencies will seek to apply existing laws to ensure that generative artificial intelligence is not used for spreading misinformation and other nefarious purposes.

When faced with evidence of unlawful conduct, the primary questions for a business organisation are whether to disclose voluntarily the conduct to the relevant government enforcer and the extent to which the business organisation will cooperate with any government

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investigation. Recent policy changes by the US have created greater incentives for business organisations to submit voluntary self-disclosures and to cooperate with any government investigation. In January 2023, the US Department of Justice (DOJ) announced that business organisations will receive a greater sentencing reduction if they provide 'extraordinary' cooperation. Additionally, in April 2023, the US Department of Commerce announced steeper potential penalties for business organisations that become aware of potential export controls violations but choose not to submit a voluntary self-disclosure. In contrast, those who submit timely voluntary self-disclosures could receive a 'substantial' penalty reduction. Multinational companies must consider the US policy on voluntary self-disclosures in the context of any similar policies (or lack of similar policies) from other relevant jurisdictions. Taking a consistent approach to self-disclosure across all relevant jurisdictions may have its strategic advantages even if some jurisdictions do not offer benefits similar to the US approach.

A recent prosecution under the Foreign Corrupt Practices Act (FCPA) further underscores the importance that the DOJ places on cooperation commitments. In 2019, Ericsson, a Swedish multinational telecommunications company, entered into a three-year deferred prosecution agreement (DPA) with the DOJ, which, among other things, required it to cooperate with any DOJ investigation and to disclose to the DOJ any additional violations of the FCPA. In March 2023, the DOJ found that Ericsson violated the DPA by failing to uphold its cooperation and disclosure requirements with regard to bribery schemes in Djibouti and China and other violations of the FCPA. As a result, Ericsson pleaded guilty to conspiring to violate the FCPA and was required to pay an additional monetary penalty.

We hope that Lexology Getting the Deal Through's Government Investigations 2024 – a practitioner's guide to civil and criminal investigations of corporate entities around the world – will provide business organisations with fundamental considerations that should be addressed when confronting investigative matters on these topics and much more.

\* The author would like to thank of counsel Megan Y Lew and summer associate Martin Rather for their contributions to this guide.

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# United States

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## ENFORCEMENT AGENCIES AND CORPORATE LIABILITY

## Government agencies

- 1 | What government agencies are principally responsible for the enforcement of civil and criminal laws and regulations applicable to businesses?

The Department of Justice (DOJ) handles a broad range of civil and criminal enforcement matters that concern corporations. The Securities and Exchange Commission (SEC) is the primary civil regulator for public companies and private offerings of securities. Numerous other agencies have civil enforcement authority over designated subject matter areas. For example, the Department of the Treasury's Office of Foreign Assets Control (OFAC) has jurisdiction over enforcement following violations of economic sanctions and the Department of Commerce's Bureau of Industry and Security (BIS) enforces export controls laws. In addition, the DOJ and the Federal Trade Commission (FTC) share jurisdiction over enforcement of the antitrust laws. The Commodity Futures Trading Commission (CFTC) regulates the US derivatives markets, including swaps.

## Scope of agency authority

- 2 | What is the scope of each agency's enforcement authority? Can the agencies pursue actions against corporate employees as well as the company itself? Do they typically do this?

The DOJ and the SEC have authority to pursue corporations and individuals for liability, and frequently pursue matters that concern both. Other federal agencies, including OFAC, BIS, the FTC and the CFTC, can pursue actions against corporations and individuals within their respective enforcement jurisdictions.

## Simultaneous investigations

- 3 | Can multiple government entities simultaneously investigate the same target business? Must they coordinate their investigations? May they share information obtained from the target and on what terms?

Different government agencies can simultaneously investigate the same company. Ordinarily, the agencies coordinate their efforts and engage in information sharing to make the process more efficient. For example, the DOJ and the SEC often coordinate investigations involving the Foreign Corrupt Practices Act, and the DOJ and OFAC can conduct parallel investigations into violations of the United States' sanctions regime.

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## Civil forums

### 4 | In what forums can civil charges be brought? In what forums can criminal charges be brought?

In federal investigations, civil actions and criminal charges are brought in federal courts, which have jurisdiction over both. Civil enforcement actions can be brought within the adjudicatory systems that many federal agencies, such as the SEC, have developed, with appeal available to the federal courts. State and local authorities can pursue civil and criminal matters in state courts of the appropriate jurisdiction.

## Corporate criminal liability

### 5 | Is there a legal concept of corporate criminal liability? How does the government prove that a corporation is criminally liable for the acts of its officers, directors or employees?

The doctrine of *respondeat superior* provides that corporations can be held criminally liable for misconduct committed by their employees and agents acting within the scope of their employment (which is construed broadly).

## Bringing charges

### 6 | Must the government evaluate any particular factors in deciding whether to bring criminal charges against a corporation?

In assessing whether to bring criminal charges against a corporation, the DOJ applies the written guidelines set forth in its Principles of Federal Prosecution of Business Organizations, which include:

- the nature and seriousness of the offence;
- the pervasiveness of wrongdoing within the corporation;
- the corporation's history of similar misconduct;
- the corporation's willingness to cooperate, including by providing information about all individuals involved in any wrongdoing;
- the adequacy and effectiveness of the corporation's compliance programme at the time of the offence and thereafter;
- the corporation's remedial actions;
- any collateral consequences to persons not proven culpable;
- the adequacy of non-criminal remedies;
- the adequacy of the prosecution of individuals; and
- the interests of any victims.

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## INITIATION OF AN INVESTIGATION

### Investigation requirements

- 7** | What requirements must be met before a government entity can commence a civil or criminal investigation?

There are no specific predication requirements to initiate an investigation.

### Triggering events

- 8** | What events commonly trigger a government investigation? Do different enforcement entities have different triggering events?

Investigations can be triggered in a number of ways, such as by press reports, whistle-blower complaints, self-reporting by the company or by one of its competitors, or data analytics.

### Whistle-blowers

- 9** | What protections are whistle-blowers entitled to?

Whistle-blowers are protected under federal non-retaliation laws in some circumstances. For example, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 expanded protections for whistle-blowers and broadened prohibitions against retaliation. The Securities and Exchange Commission (SEC) implemented rules under the Act enabling the SEC to take legal action against employers who have retaliated against whistle-blowers. The Act also created a private right of action regarding securities law violations, enabling whistle-blowers to bring a retaliation complaint in federal court.

### Investigation publicity

- 10** | At what stage will a government entity typically publicly acknowledge an investigation? How may a business under investigation seek anonymity or otherwise protect its reputation?

Ordinarily, a government agency does not publicly acknowledge an investigation unless and until a public court filing occurs in the matter that involves the initiation of a civil action or criminal prosecution, or the investigation is resolved via settlement, which would include a public announcement from the government agency but may not require a court filing.

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## EVIDENCE GATHERING AND INVESTIGATIVE TECHNIQUES

### Covert phase

- 11** | Is there a covert phase of the investigation, before the target business is approached by the government? Approximately how long does that phase last?

On occasion, government agencies investigate a company before advising the company about the investigation. There is no rule regarding the length of such a covert phase, although ordinarily it lasts for less than a year.

- 12** | What investigative techniques are used during the covert phase?

A covert phase can involve a variety of investigative techniques, such as conducting witness interviews (including interviews of current or former employees of the company), issuing subpoenas for documents and information from third parties involved in the alleged misconduct (eg, financial institutions or co-conspirators) and obtaining covert recordings by witnesses of conversations with persons of interest in the investigation.

### Investigation notification

- 13** | After a target business becomes aware of the government's investigation, what steps should it take to develop its own understanding of the facts?

Typically, a company conducts its own independent internal investigation of the facts and cooperates with the government during its investigation.

### Evidence and materials

- 14** | Must the target business preserve documents, recorded communications and any other materials in connection with a government investigation? At what stage of the investigation does that duty arise?

When a company becomes aware of a government investigation it is involved in, the company typically seeks to preserve all pertinent materials, which can include electronic communications and documents as well as hard-copy documents. Preservation steps may include sending hold notices to relevant employees, suspending any routine document disposal policies to ensure that documents are preserved and, in some circumstances, undertaking an affirmative collection of relevant materials.

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## Providing evidence

- 15** | During the course of an investigation, what materials - for example, documents, records, recorded communications - can the government entity require the target business to provide? What limitations do data protection and privacy laws impose and how are those limitations addressed?

Government agencies can seek production of all forms of relevant materials. Ordinarily, the agency and the company discuss an appropriate scope for production, including the applicable time frame, relevant custodians and pertinent search criteria. In criminal investigations, government requests can be made by voluntary request or by way of grand jury subpoena. In civil matters, government requests can occur through voluntary requests, investigative demands or civil subpoenas.

Data protection and privacy laws do not, in respect of production from US geographic locations, impose meaningful limitations on production. Production from locations outside the United States, by contrast, can implicate data protection, privacy, national security or other blocking statute issues. Companies typically discuss those limitations openly with government agencies to ensure transparency.

- 16** | On what legal grounds can the target business oppose the government's demand for materials? Can corporate documents be privileged? Can advice from an in-house attorney be privileged?

Companies ordinarily do not produce materials protected by attorney-client privilege or attorney-work product protection. On occasion, companies decide to waive those privileges and protections to produce such materials, for example where a company seeks to demonstrate that it relied in good faith on legal advice.

Attorney-client privilege extends to all communications pertaining to seeking or receiving legal advice and includes in-house attorneys.

## Employee testimony

- 17** | May the government compel testimony of employees of the target business? What rights against incrimination, if any, do employees have? If testimony cannot be compelled, what other means does the government typically use to obtain information from corporate employees?

All individuals have a right under the Fifth Amendment to the US Constitution to refuse to provide testimony that would tend to incriminate them. Where an individual invokes his or her right to avoid self-incrimination, a government agency may only compel testimony from that individual in a criminal investigation and only by granting the individual immunity from prosecution.

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- 18** | Under what circumstances should employees obtain their own legal counsel? Under what circumstances can they be represented by counsel for the target business?

Employees should have separate legal counsel where they or the company believe that their personal interests diverge from the interests of the company. Absent such a divergence, employees are often represented by company counsel.

### Sharing information

- 19** | Where the government is investigating multiple target businesses, may the targets share information to assist in their defence? Can shared materials remain privileged? What are the potential negative consequences of sharing information?

A common interest or joint defence privilege exists under US law and enables the sharing of information across companies.

### Investor notification

- 20** | At what stage must the target notify investors about the investigation? What should be considered in developing the content of those disclosures?

Disclosure to investors may be governed by securities law requirements or by written agreements with investors that may, in certain circumstances, require disclosure. For example, public companies traded on US exchanges should conduct a careful analysis into whether an investigation is material to the company, and should assess the likelihood and quantum of potential liability to understand whether a contingent liability reserve is appropriate under applicable accounting standards and securities law requirements. When disclosure is necessary, such disclosures should also be transparent to ensure that there is no material omission or misstatement in the company's public statements.

## COOPERATION

### Notification before investigation

- 21** | Is there a mechanism by which a target business can cooperate with the investigation? Can a target notify the government of potential wrongdoing before a government investigation has started?

Voluntary self-disclosure of issues, before the government has commenced an investigation, is encouraged and can lead to full declination even under circumstances with aggravating factors such as executive misconduct, while companies that do not voluntarily self-disclose can receive a maximum of only a 50 per cent penalty reduction. A declination is when the Department of Justice (DOJ) chooses not to seek prosecution where it would have otherwise done so had the company not disclosed, cooperated and remediated.

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## Voluntary disclosure programmes

- 22** | Do the principal government enforcement entities have formal voluntary disclosure programmes that can qualify a business for amnesty or reduced sanctions?

US enforcement agencies generally encourage voluntary disclosure by providing greater leniency in resolving misconduct issues where voluntary disclosure has occurred. In January 2023, the DOJ revised its voluntary disclosure programme to offer a 50 to 75 per cent reduction from the low end of the applicable sentencing guidelines if the company voluntarily self-discloses, cooperates fully and remediates in both a timely and appropriate manner. In the antitrust, export controls and (in some instances) tax contexts, companies can secure amnesty or a penalty reduction by voluntarily self-disclosing relevant matters.

## Timing of cooperation

- 23** | Can a target business commence cooperation at any stage of the investigation?

Yes.

## Cooperation requirements

- 24** | What is a target business generally required to do to fulfil its obligation to cooperate?

To secure cooperation credit, a company is generally required to provide the requested documents and communications, to relay factual information and to make employees available for interviews. The Biden administration has made clear that companies must provide all non-privileged information about all individuals involved in any misconduct to earn full cooperation credit. In December 2022, the DOJ declined to prosecute a French aerospace company for violations of the Foreign Corrupt Practices Act after it made a full disclosure, fully cooperated, ensured that remediation was complete and disgorged ill-gotten gains.

## Employee requirements

- 25** | When a target business is cooperating, what can it require of its employees? Can it pay attorneys' fees for its employees? Can the government entity consider whether a business is paying employees' (or former employees') attorneys' fees in evaluating a target's cooperation?

Companies can, as a matter of policy, require employees to cooperate with government investigations. Companies can also provide – on a voluntary basis, or pursuant to contractual or other legal requirements – reimbursement of counsel costs. Such a reimbursement is not ordinarily viewed as suggestive of any lack of cooperation on the company's part.

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## Why cooperate?

- 26** | What considerations are relevant to an individual employee's decision whether to cooperate with a government investigation in this context? What legal protections, if any, does an employee have?

Employees generally seek to cooperate in government investigations and internal investigations by their companies. Where employees decide to refuse to cooperate, they may have certain employment protections depending on the terms of their employment contract, the company's written policies and the US state in which they are employed. For example, for employees who can only be terminated for cause and where the company does not have a written policy requiring cooperation in an investigation, failure to cooperate does not necessarily provide a for-cause basis upon which to terminate the employee.

## Privileged communications

- 27** | How does cooperation affect the target business's ability to assert that certain documents and communications are privileged in other contexts, such as related civil litigation?

A company can fully cooperate in a government investigation without divulging any privileged material to the government. Where a company provides privileged material to the government, the privilege ordinarily would be deemed waived in respect of any civil litigation.

## RESOLUTION

### Resolution mechanisms

- 28** | What mechanisms are available to resolve a government investigation?

There are several mechanisms. In the criminal context, guilty pleas, deferred prosecution agreements (DPAs) (ie, filing criminal charges, the pursuit of which is deferred for a specified period) and non-prosecution agreements are available. In the civil context, consent orders, cease-and-desist orders and other similar forms of civil settlement are available. These typically involve the payment of a fine, a requirement that the company not engage in further similar misconduct and a requirement that the company implement a more robust compliance programme, which may include hiring an independent monitor (see, for example, *United States ex rel DiGiacomo v Genotox Laboratories, Ltd, et al* No. 2:20-cv-97 (SD Ga)). Recent guidance from the Biden administration and prosecutions by the Department of Justice have emphasised that any company entering into a DPA or non-prosecution agreement would be monitored closely during the term of the agreement to ensure its compliance.

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## Admission of wrongdoing

**29** | Is an admission of wrongdoing by the target business required? Can that admission be used against the target in other contexts, such as related civil litigation?

Ordinarily, a company admits to a statement of facts, which can be used against the company in related civil litigation.

## Civil penalties

**30** | What civil penalties can be imposed on businesses?

Corporations can receive a monetary fine, have profits stemming from the misconduct disgorged, be subject to compliance requirements and have an independent compliance monitor imposed. Such penalties do not significantly differ from criminal penalties, so penalties are often offset in cases involving both a civil and criminal settlement. Recent guidance from the Biden administration makes the use of independent compliance monitors more likely going forward.

## Criminal penalties

**31** | What criminal penalties can be imposed on businesses?

Corporations can receive a monetary fine, have profits stemming from the misconduct disgorged, be subject to compliance requirements and have an independent compliance monitor imposed.

## Sentencing regime

**32** | What is the applicable sentencing regime for businesses?

Federal courts consider the Sentencing Guidelines when formulating an appropriate sentence for a corporation. These Guidelines are discretionary but influential.

## Future participation

**33** | What does an admission of wrongdoing mean for the business's future participation in particular ventures or industries?

An admission of wrongdoing by a company can, in certain circumstances, cause the company to be suspended or debarred from governmental contracting. It can also cause the company to lose other governmental privileges, such as preferential filing status with the Securities and Exchange Commission or its qualified pension asset manager status with the Department of Labor.

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## UPDATE AND TRENDS

### Key developments of the past year

#### 34 | Are there any emerging trends or hot topics that may affect government investigations in your jurisdiction in the foreseeable future?

Recent enforcement matters and policy announcements have focused on increasing incentives to cooperate, closely monitoring a company's ongoing compliance with the terms of a negotiated resolution and expanding enforcement concerning violations that intersect with national security issues.

The DOJ's Corporate Enforcement and Voluntary Self-Disclosure Policy, updated in September 2022, sets forth that there is a presumption of declination if there are no aggravating circumstances present and corporate entities provide full cooperation. Cooperation includes, but is not limited to, voluntary self-disclosure and timely and appropriate remediation.

Where aggravating factors are present, the Department of Justice (DOJ) will not apply a presumption of declination but may conclude that a declination is appropriate if the entity voluntarily self-disclosed the matter promptly, had an effective compliance programme at the time of the misconduct, provided extraordinary cooperation and undertook extraordinary remediation. This policy provides an avenue for the violator to receive at least a 50 per cent reduction in criminal fines, up from 25 per cent under the prior policy.

The DOJ is also highlighting that it will pay close attention to compliance with the terms of a negotiated resolution. In a recent example, a Swedish telecommunications company entered into a deferred prosecution agreement (DPA) with the DOJ over a Foreign Corrupt Practices Act (FCPA) violation in 2019 and paid over US\$520 million in penalties to the DOJ. The DPA required the company to cooperate with the DOJ and disclose information about any other FCPA violations it committed. In March 2023, the DOJ found that the company had breached the DPA because it failed to disclose additional FCPA violations. The company pleaded guilty and paid an additional US\$206 million in penalties, which reflected the amount that the 2019 penalties had been reduced for cooperation credit.

Finally, the Biden administration announced that it is prioritising the enforcement of cases that concern national security matters, including those that intersect with sanctions, export controls and FCPA violations. The DOJ's budget request for 2024 included an additional US\$32.7 million for national security efforts, while the interagency Task Force KleptoCapture has seized US\$500 million in assets relating to illegal smuggling in violation of sanctions on Russia. The Department of the Treasury has also revised its rewards system and now offers up to US\$5 million for information leading to restraint or recovery of assets linked to foreign corruption. We expect to see the results of these enhanced efforts through prosecutions or resolutions in the coming months and years.

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