



# AMERICAS INVESTIGATIONS REVIEW 2022

# Americas Investigations Review 2022

---

Reproduced with permission from Law Business Research Ltd

This article was first published in October 2021

For further information please contact [insight@globalinvestigationsreview.com](mailto:insight@globalinvestigationsreview.com)

Published in the United Kingdom  
by Global Investigations Review  
Law Business Research Ltd  
Meridian House, 34-35 Farringdon Street, London, EC4A 4HL  
© 2021 Law Business Research Ltd  
[www.globalinvestigationsreview.com](http://www.globalinvestigationsreview.com)

To subscribe please contact [subscriptions@globalinvestigationsreview.com](mailto:subscriptions@globalinvestigationsreview.com)

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer–client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as at September 2021, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – [david.samuels@globalinvestigationsreview.com](mailto:david.samuels@globalinvestigationsreview.com)

© 2021 Law Business Research Limited

ISBN: 978-1-83862-592-4

Printed and distributed by Encompass Print Solutions  
Tel: 0844 2480 112

# Contents

<b>OVERVIEWS</b>	
<b>The Evolution and Current Approach to Corporate Cooperation in US Enforcement Investigations.....</b>	<b>3</b>
Virginia Chavez Romano, Tami Stark, Nida Jafrani and Ben Elron	
<i>White &amp; Case LLP</i>	
<b>How US Authorities Obtain Foreign Evidence in Cross-Border Investigations.....</b>	<b>25</b>
Jason Linder, Michael P Heffernan and William D Sinnott	
<i>Mayer Brown LLP</i>	
<b>Moving Forward after an Investigation.....</b>	<b>45</b>
Frances McLeod, Jenna Voss and Umair Nadeem	
<i>Forensic Risk Alliance</i>	
<b>COUNTRY-SPECIFIC: BRAZIL AND UNITED STATES</b>	
<b>Brazil: Internal Investigations and Cooperation with Enforcement Authorities.....</b>	<b>65</b>
Isabel Franco and Glaucia Ferreira	
<i>Azevedo Sette Advogados</i>	
<b>Anti-corruption in Brazil: Current Status and the Next Steps.....</b>	<b>86</b>
Carlos Ayres and Carolina Furquim	
<i>Maeda, Ayres &amp; Sarubbi Advogados</i>	

**Key Considerations in US Government Investigations..... 99**

Arian M June, Winston M Paes and Douglas S Zolkind

*Debevoise & Plimpton LLP*

**United States: Use of Data to Detect Crimes and Evaluate  
Corporate Compliance ..... 123**

Palmina M Fava, Jessica S Heim, G Zachary Terwilliger and Meghan Natenson

*Vinson & Elkins LLP*

# Preface

Welcome to the *Americas Investigations Review* 2022, a Global Investigations Review (GIR) special report. GIR strives to be the online home for all those who investigate, and resolve, suspected corporate wrongdoing for a living, telling them all they need to know about everything that matters – wherever it may take place.

Throughout the year, GIR's team of journalists delivers daily news, surveys and features; organises the liveliest events (GIR Live) – covid-19 permitting; and provides our readers with innovative tools and know-how products.

In addition, assisted by external contributors, GIR curates a range of comprehensive regional reviews – online and in print – that go deeper into developments than the exigencies of journalism allow.

The *Americas Investigations Review*, which you are reading, is one of those reviews. It contains insight and thought leadership from 21 pre-eminent practitioners from the region. All contributors are vetted for their standing and knowledge before being invited to take part.

Across seven articles, and 142 pages, they capture and interpret the shifts of the past year in the region, supported with plenty of footnotes and statistics.

As so often with these reviews, a close read yields many nuggets. For this reader, they include that:

- foreign bribery is now a 'core' national security interest in the United States;
- 'hold notices' in Brazil routinely achieve the opposite effect;
- the OECD is so concerned about corruption in Brazil that it has established a special working group to monitor it. In the meantime, data from within Brazil is quite encouraging; and
- the US Securities and Exchange Commission and Department of Justice are at serious odds about the meaning of 'cooperation'.

And much, much more.

Every article is splendid. I thoroughly commend all the authors.

If you have any suggestions for future editions of this review, or want to take part in it, we would love to hear from you.

Please write to [insight@globalinvestigationsreview.com](mailto:insight@globalinvestigationsreview.com).

**David Samuels**

Publisher, Global Investigations Review

September 2021

# Part 1

---

## Overviews



# How US Authorities Obtain Foreign Evidence in Cross-Border Investigations

**Jason Linder, Michael P Heffernan and William D Sinnott**  
Mayer Brown LLP

## IN SUMMARY

An insider's perspective from former Department of Justice (DOJ) and Federal Bureau of Investigation staff about how the US government gathers evidence abroad. Without either the compulsory investigative tools available for domestic investigations or the lawful authorisation to conduct witness interviews or engage in other law enforcement activities abroad, the government has to turn to other methods.

## DISCUSSION POINTS

- Formal requests under bilateral and multilateral treaties
- Informal requests to foreign authorities with whom the US government has built relationships
- Incentives for cooperating companies and individuals
- Domestic evidence of foreign conduct
- Press reports and other public sources abroad

## REFERENCED IN THIS ARTICLE

- US DOJ and its Office of International Affairs
- Securities and Exchange Commission
- Foreign Corrupt Practices Act (FCPA)
- Working Group on Bribery in International Business Transactions of the Organisation for Economic Co-operation and Development
- FCPA Corporate Enforcement Policy
- Anti-Money Laundering Act of 2020

## Introduction

United States authorities – including primarily the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC), with a growing cast of others – investigate and punish white-collar crime in the farthest corners of the world. Just in 2020 and 2021, Foreign Corrupt Practices Act (FCPA) resolutions and prosecutions, for example, involved conduct in Brazil,<sup>1</sup> Venezuela,<sup>2</sup> Ecuador,<sup>3</sup> Mexico,<sup>4</sup>

- 
- 1 See Department of Justice [DOJ] Office of Public Affairs [OPA], 'J&F Investimentos S.A. Pleads Guilty and Agrees to Pay Over \$256 Million to Resolve Criminal Foreign Bribery Case' (14 Oct. 2020) (guilty plea by Brazilian company over scheme to bribe Brazilian authorities), available at <https://www.justice.gov/opa/pr/jf-investimentos-sa-pleads-guilty-and-agrees-pay-over-256-million-resolve-criminal-foreign>.
  - 2 See, e.g., DOJ OPA, 'Sargeant Marine Inc. Pleads Guilty and Agrees to Pay \$16.6 Million to Resolve Charges Related to Foreign Bribery Schemes in Brazil, Venezuela, and Ecuador' (11 Sep. 2020), available at <https://www.justice.gov/opa/pr/sargeant-marine-inc-pleads-guilty-and-agrees-pay-166-million-resolve-charges-related-foreign>.
  - 3 *id.*; see also Information, *United States v. Raymond Kohut*, Cr. No. 21-115 (E.D.N.Y. 6 Apr. 2021), available at <https://www.justice.gov/criminal-fraud/file/1388211/download> (detailing scheme to bribe Ecuadorian officials); DOJ OPA, 'Two Men Charged in Ecuadorian Bribery and Money Laundering Scheme' (2 Mar. 2021), available at <https://www.justice.gov/opa/pr/two-men-charged-ecuadorian-bribery-and-money-laundering-scheme>.
  - 4 DOJ OPA, 'Vitol Inc. Agrees to Pay over \$135 Million to Resolve Foreign Bribery Case' (3 Dec. 2020) (resolution of Foreign Corrupt Practices Act [FCPA] case over scheme to bribe officials in Brazil, Ecuador and Mexico), available at <https://www.justice.gov/opa/pr/vitol-inc-agrees-pay-over-135-million-resolve-foreign-bribery-case>.

Greece,<sup>5</sup> Saudi Arabia,<sup>6</sup> the United Arab Emirates,<sup>7</sup> India,<sup>8</sup> China,<sup>9</sup> Malaysia<sup>10</sup> and numerous other countries. So, too, do US authorities gather evidence from abroad in cases involving money laundering,<sup>11</sup> export controls,<sup>12</sup> sanctions,<sup>13</sup> and numerous other potential criminal and regulatory violations.<sup>14</sup>

- 
- 5 DOJ OPA, 'Novartis AG and Subsidiaries to Pay \$345 Million to Resolve Foreign Corrupt Practices Act Cases' (25 Jun. 2020) (resolution of FCPA case over allegations to bribe officials in Greece), available at <https://www.justice.gov/usao-nj/pr/novartis-ag-and-subsidiaries-pay-345-million-resolve-foreign-corrupt-practices-act-cases>.
  - 6 DOJ OPA, 'Deutsche Bank Agrees to Pay over \$130 Million to Resolve Foreign Corrupt Practices Act and Fraud Case' (8 Jan. 2021), available at <https://www.justice.gov/opa/pr/deutsche-bank-agrees-pay-over-130-million-resolve-foreign-corrupt-practices-act-and-fraud>.
  - 7 id. (Deutsche Bank case involving bribery to UAE official); DOJ OPA, 'Goldman Sachs Charged in Foreign Bribery Case and Agrees to Pay Over \$2.9 Billion' (22 Oct. 2020) (resolution of FCPA case over allegations of scheme to bribe officials in Malaysia and UAE), available at <https://www.justice.gov/opa/pr/goldman-sachs-charged-foreign-bribery-case-and-agrees-pay-over-29-billion>.
  - 8 DOJ OPA, 'Beam Suntory Inc. Agrees to Pay Over \$19 Million to Resolve Criminal Foreign Bribery Case' (27 Oct. 2020) (scheme to bribe officials in India), available at <https://www.justice.gov/opa/pr/beam-suntory-inc-agrees-pay-over-19-million-resolve-criminal-foreign-bribery-case>.
  - 9 DOJ OPA, 'Airbus Agrees to Pay over \$3.9 Billion Global Penalties to Resolve Foreign Bribery and ITAR Case' (31 Jan. 2020) (bribery of Chinese government officials), available at <https://www.justice.gov/opa/pr/airbus-agrees-pay-over-39-billion-global-penalties-resolve-foreign-bribery-and-itar-case>; DOJ OPA, 'Herbalife Nutrition Ltd. Agrees to Pay Over \$22 Million to Resolve FCPA Case' (28 Aug. 2020) (same), available at <https://www.justice.gov/opa/pr/herbalife-nutrition-ltd-agrees-pay-over-122-million-resolve-fcpa-case>.
  - 10 DOJ OPA, 'Goldman Sachs Charged in Foreign Bribery Case and Agrees to Pay Over \$2.9 Billion' (22 Oct. 2020) (resolution of FCPA case over allegations of scheme to bribe officials in Malaysia and UAE), available at <https://www.justice.gov/opa/pr/goldman-sachs-charged-foreign-bribery-case-and-agrees-pay-over-29-billion>.
  - 11 See DOJ OPA, 'Bank Julius Baer Agrees to Pay More than \$79 Million for Laundering Money in FIFA Scandal' (27 May 2021) (deferred prosecution agreement with Swiss bank with offices in Uruguay and Switzerland in FIFA bribery scandal), available at <https://www.justice.gov/opa/pr/bank-julius-baer-agrees-pay-more-79-million-laundering-money-fifa-scandal>.
  - 12 DOJ OPA, 'Turkish National Indicted for Wire Fraud and Illegally Exporting Defense Articles to Turkey' (21 Jul. 2021) (indictment of Turkish national over scheme to pass off Turkish-manufactured military equipment as US-manufactured in violation of Arms Exports Control Act), available at <https://www.justice.gov/usao-ma/pr/turkish-national-indicted-wire-fraud-and-illegally-exporting-defense-articles-turkey>.
  - 13 Dep't of the Treasury, 'OFAC Enters Into \$8,527,500 Settlement with Union de Banques Arabes et Francaises for Apparent Violations of Syria-Related Sanctions Program' (4 Jan. 2021) (settlement with French bank for facilitating financial transactions on behalf of sanctioned Syrian entities).
  - 14 One of the most interesting recent investigations in which US authorities gathered foreign evidence is Operation Trojan Shield, an international sting operation in which US and Australian authorities sold organised crime networks 'encrypted devices' advertised as shielding communications

Set aside, for the moment, the capacious jurisdictional reach the US agencies claim for themselves and focus on a more practical question: how do US authorities gather evidence of all that conduct that occurred far away (and often long ago)? For domestic investigations, US authorities have numerous compulsory powers and investigative tools at their disposal,<sup>15</sup> as well as the legal authority to interview witnesses and conduct other law enforcement activities. Those powers, with the limited exceptions we discuss below, stop at the US borders.

To overcome that limitation in their efforts to gather evidence, US authorities rely on methods and sources that range from highly formal (and often bureaucratic and slow-moving) to the most informal, and include:

- formal requests for assistance from foreign law enforcement and regulatory agencies, most commonly through mutual legal assistance treaties (MLATs) for the DOJ and through international enforcement assistance for the SEC;<sup>16</sup>
- the informal information sharing and investigation coordination that comes from the close working relationships that the DOJ, SEC and other agencies have built with their foreign counterparts, particularly during the past decade, and particularly under the auspices of the Working Group on Bribery in International Business Transactions of the Organisation for Economic Co-operation and Development (OECD), as well as from other public international organisations, such as multi-lateral development banks;<sup>17</sup>
- information from cooperating companies, both those that voluntarily self-disclose potential misconduct and those the government approaches first;
- information from individuals, including cooperators and potential whistleblowers;

---

from investigators. Instead, the devices recorded all communications and submitted them to law enforcement. The investigation resulted in 800 arrests, major drug and weapons seizures and the seizure of more than US\$48 million in currency. See DOJ OPA, 'FBI's Encrypted Phone Platform Infiltrated Hundreds of Criminal Syndicates; Result is Massive Worldwide Takedown' (8 Jun. 2021), available at <https://www.justice.gov/usao-sdca/pr/fbi-s-encrypted-phone-platform-infiltrated-hundreds-criminal-syndicates-result-massive>.

15 These include wiretaps, search warrants, grand jury subpoenas, court orders for phone and other electronic records, the ability to use pole cameras and tracking devices, and numerous other tools and techniques.

16 See DOJ, Criminal Resource Manual [Criminal Resource Manual], § 275, <https://www.justice.gov/archives/jm/criminal-resource-manual>.

17 See Organisation for Economic Co-operation and Development [OECD], OECD Working Group on Bribery in International Business Transactions, <https://www.oecd.org/corruption/anti-bribery/anti-briberyconvention/oecdworkinggrouponbriberyininternationalbusinesstransactions.htm>.

- evidence of foreign conduct that exists within the United States – such as bank records evincing foreign transactions, and email and phone exchanges with those abroad – that is subject to the US agencies’ formal, compulsory law enforcement powers; and
- information gleaned from foreign and domestic press reports and increasingly sophisticated analysis and mining of both public and non-public data and information.

In just the past year, the US Congress gave DOJ two new tools to gather foreign evidence: one is the power to subpoena foreign bank accounts and the other is the possibility of offering whistleblower awards in money laundering cases. Even more recently, President Biden has issued an executive memorandum directing a whole-of-government approach to investigating and combatting foreign bribery that may expand even further the government’s focus, reach and efficacy.<sup>18</sup>

Below, we explore in detail each of these methods and the evidence that US agencies may gather using them, and give recent examples of how they have done so.

## Formal requests

US authorities routinely obtain evidence from abroad through formal requests.<sup>19</sup> DOJ’s formal request mechanisms include (1) treaty requests, (2) requests under executive agreements, and (3) letters rogatory.<sup>20</sup> The SEC has similar mechanisms in place.<sup>21</sup> The first two methods involve close cooperation, on the US side, between DOJ’s litigating components and its Office of International Affairs (OIA). OIA then transmits requests to its counterpart in the relevant foreign country, which then, in turn, often enlists litigating components in its government to fulfil requests. That process, at best, takes a matter of months and can routinely add years to an investigation.

---

18 Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest (3 Jun. 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/03/memorandum-on-establishing-the-fight-against-corruption-as-a-core-united-states-national-security-interest/>.

19 Criminal Resource Manual, § 274, <https://www.justice.gov/archives/jm/criminal-resource-manual-274-methods>.

20 *id.*

21 See *id.* § 267; US Securities and Exchange Commission [SEC], About the Office of International Affairs, <https://www.sec.gov/oia/Article/oia-about.html> (last accessed 29 July 2019).

Multiple types of treaties govern foreign evidence gathering. ‘Most treaty requests are made pursuant to a mutual legal assistance treaty’,<sup>22</sup> which are bilateral treaties with the force of law. The United States has signed MLATs ‘with every European Union member state, many of the organization of American States member states’ and numerous other countries.<sup>23</sup> In addition to MLATs, certain tax enforcement and extradition treaties contain evidence-related provisions.<sup>24</sup> The United States is also party to corruption-specific multinational treaties such as the United Nations Convention Against Corruption (UNCAC)<sup>25</sup> and the OECD Anti-Bribery Convention.<sup>26</sup> Anecdotaly, not all evidence obtained through MLAT requests is created equal. Although most authorities respond to requests in good faith, occasionally a foreign government will respond to an MLAT request in a less-than-helpful fashion. For example, during one FCPA investigation, a country responded to a formal MLAT request by delivering to one of the authors several burlap sacks filled with thousands of loose, untranslated, tobacco-stained pages that required many hours of work to become useful.

At the sub-treaty level, the United States has executive agreements with a number of countries that govern foreign evidence, most of which ‘apply to investigations arising from international narcotics trafficking’.<sup>27</sup> The SEC for its part relies on less formal multilateral and bilateral memoranda of understanding (MOUs) to obtain evidence from foreign sources. The SEC and more than 100 other securities regulators across the world are signatories to the International Organization of Securities Commissions (IOSCO) Multilateral Memorandum of Understanding on information-sharing

---

<sup>22</sup> Criminal Resource Manual at § 276.

<sup>23</sup> Federal Judicial Center, ‘Mutual Legal Assistance Treaties and Letters Rogatory: A Guide for Judges’ (2014), <https://www.fjc.gov/sites/default/files/2017/MLAT-LR-Guide-Funk-FJC-2014.pdf/>.

<sup>24</sup> *id.*

<sup>25</sup> United Nations, Signature and Ratification Status: UNCAC (6 Feb. 2020), <https://www.unodc.org/unodc/en/corruption/ratification-status.html>.

<sup>26</sup> OECD, Ratification Status (May 2018), <https://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf>.

<sup>27</sup> *id.* § 277.

among securities regulators.<sup>28</sup> The SEC also has bilateral cooperation agreements with a number of other countries, including France, Germany, Hong Kong, Switzerland, Singapore and the United Kingdom.<sup>29</sup>

In the absence of a treaty, executive agreement or MOU, letters rogatory are the customary method of obtaining evidence from abroad.<sup>30</sup> A letter rogatory is a request from a judge in the United States to the judiciary of a foreign country to perform an act that would otherwise constitute a violation of that country's sovereignty.<sup>31</sup> Letters rogatory are customarily transmitted via a diplomatic channel – a time-consuming process that can take a year or more.

Formal evidence requests afford US authorities two advantages that make them worthwhile, and often necessary. First, the certifications that accompany evidence obtained through formal requests may be necessary to admit the evidence at trial.<sup>32</sup> Second, transmitting MLAT requests allows DOJ to toll the statute of limitations for the crimes it is investigating until the request is fulfilled.<sup>33</sup>

Gathering evidence from abroad through formal requests is a slow process and, consequently, US authorities often focus on other methods during the investigatory stage of an enforcement action. In addition, the pursuit of evidence solely through formal requests has other disadvantages. For example, a money trail that extends through multiple countries requires multiple, time-consuming seriatim MLAT requests, which can quickly exceed a crime's state of limitations to fulfil.

---

28 SEC, SEC's Cooperative Arrangements with Foreign Regulators, available at [https://www.sec.gov/about/offices/oia/oia\\_coopfactsheet.htm](https://www.sec.gov/about/offices/oia/oia_coopfactsheet.htm) (last accessed 29 July 2021).

29 SEC, 'Cooperative Arrangements with Foreign Regulators', available at [https://www.sec.gov/about/offices/oia/oia\\_cooparrangements.shtml](https://www.sec.gov/about/offices/oia/oia_cooparrangements.shtml).

30 Criminal Resource Manual, § 275.

31 *id.*

32 See Fed. R. Evid. 902(3) (certified foreign public documents are self-authenticating). Foreign records of regularly conducted activity, such as bank and phone records, may be admissible even in the absence of the formal certification obtained through the mutual legal assistance treaty [MLAT] process. See 18 U.S.C. §§ 3505, 3494.

33 18 U.S.C. § 3292.

## Informal relationships

During the past decade, the number of US law enforcement personnel (DOJ prosecutors, SEC attorneys and accountants, and federal agents from a number of law enforcement agencies) focused on cross-border issues has increased substantially.<sup>34</sup> Conversely, many countries have passed their own versions of foreign bribery laws and have begun investing in the personnel, resources and expertise to give them meaningful enforcement teeth.

In that span, US authorities have built close, productive relationships with many of their foreign counterparts. The fruits of those relationships – eye-poppingly large, multi-country resolutions – feature prominently in the business sections of leading news sources.<sup>35</sup>

These relationships have led to robust information sharing and investigation coordination that both extend the United States's ability to gather evidence in the farthest corners of the world and multiply its forces. Foreign law enforcers can use any of the domestic tools available to them in their home country (witness interviews, subpoenas, search warrants, and so on) and share those fruits with the United States.<sup>36</sup> On its side, the United States can do the same, though DOJ has to seek a court order before sharing any grand jury information with foreign authorities (or even domestic authorities such as the SEC).

Many of these relationships began in the regular law enforcement meetings held by the OECD, the Asia-Pacific Economic Cooperation and other international organisations.<sup>37</sup> Others – such as the highly productive relationship with Brazilian authorities – have been forged in the trenches of investigations into Petrobras, Odebrecht, Embraer and others.

Still others have grown from relationships the US investigative agencies have themselves. For example, the US Internal Revenue Service is a member of the Joint Chiefs of Global Tax Enforcement (known as the J5), which according to its mission

34 See FBI.gov, 'FBI Establishes International Corruption Squads, Targeting Foreign Bribery, Kleptocracy Crimes' (2015), available at <https://www.fbi.gov/news/stories/fbi-establishes-international-corruption-squads>.

35 e.g., [https://www.wsj.com/articles/foreign-bribery-enforcement-on-track-for-record-breaking-year-11607114397?mod=searchresults\\_pos1&page=1](https://www.wsj.com/articles/foreign-bribery-enforcement-on-track-for-record-breaking-year-11607114397?mod=searchresults_pos1&page=1).

36 Whether a defendant may later successfully seek to suppress that evidence depends on the degree to which US authorities directed or worked jointly with their foreign counterparts.

37 See OECD.org, 'Fighting the Crime of Foreign Bribery', The Anti-Bribery Convention and the OECD Working Group on Bribery, available at <https://www.oecd.org/daf/anti-bribery/Fighting-the-crime-of-foreign-bribery.pdf>.



statement, ‘is committed to combatting transnational tax crime through increased enforcement collaboration’.<sup>38</sup> The US Immigration and Customs Enforcement’s El Dorado Task Force, established in 1992, is focused on financial crimes – particularly money-laundering – and consists of more than 200 domestic and international members.<sup>39</sup> El Dorado has a long track record of success in international money laundering investigations.<sup>40</sup> The SEC joined IOSCO in 2002, under a multilateral memorandum of understanding (MMOU) with more than 100 securities and derivatives regulators.<sup>41</sup> ‘Pursuant to the MMOU, signatories agree, among other items, to provide each other with certain critical information, to permit use of that information in civil or administrative proceedings and for onward sharing with self-regulatory organizations and criminal authorities.’<sup>42</sup> These organisations, often created through less-formal MMOUs such as the IOSCO, place law enforcement personnel in direct contact with one another.

Presently, the Federal Bureau of Investigation (FBI) maintains 63 legal attaché offices. Of those, 17 are new additions since 2004. During the same period, the FBI also added more than two dozen sub offices in key cities providing coverage for more than 180 countries, territories, and islands.<sup>43</sup> Each office operates through mutual agreement with the host nation and works to assist US authorities in coordinating investigations with the host nation. Similarly, the Drug Enforcement Agency (DEA) operates 91 foreign offices in 68 countries.<sup>44</sup>

In 2005, the then FBI Director Robert S Mueller, III summed up the reason for building such an international presence:

*Today, an organized crime enterprise based in Budapest could launder money through banks in Switzerland and communicate with operatives in Slovakia or Singapore. A terrorist cell based in the Middle East could plan in Europe, finance operations in North America,*

38 IRS.gov, Joint Chiefs of Global Tax Enforcement, available at <https://www.irs.gov/compliance/joint-chiefs-of-global-tax-enforcement>.

39 ICE.com, El Dorado Task Force, available at <https://www.ice.gov/partnerships-centers/el-dorado>.

40 See ACAMS Today, ‘Chasing the Money: Celebrating 25 Years of Homeland Security Investigations El Dorado Task Force’ (2017), available at <https://www.acamstoday.org/chasing-the-money-celebrating-25-years-of-homeland-security-investigations-el-dorado-task-force/>.

41 SEC.gov, International Enforcement Assistance, available at [https://www.sec.gov/about/offices/oia/oia\\_crossborder.shtml#multilateral](https://www.sec.gov/about/offices/oia/oia_crossborder.shtml#multilateral).

42 id.

43 FBI.gov, International Operations, <https://fas.org/irp/agency/doj/fbi/legat.pdf>.

44 DEA.gov, Foreign Offices, <https://www.dea.gov/foreign-offices>.

*and carry out an attack anywhere in the world. And a single computer programmer in the Philippines could launch a cyber-attack that paralyzes information networks throughout the world, causing billions of dollars in economic damage.*<sup>45</sup>

That international expansion comes with a white-collar focus. In 2020, the FBI disseminated guidance to its investigators that concluded ‘with high confidence’ that money launderers will continue to use hedge funds and private equity funds to evade detection by anti-money laundering programmes.<sup>46</sup> Examples contained in the training material included a Mexican drug cartel opening a hedge fund in Los Angeles, a United Kingdom-based hedge fund using private placement funds to purchase prohibited items from sanctioned countries, and a New York-based private equity firm that received more than US\$100 million from Russian organised crime figures.

The FBI, DEA, Bureau of Alcohol, Tobacco, Firearms and Explosives and other agencies proactively search for money launderers in the act. This is precisely why, in 2007, American Express Bank International forfeited US\$55 million for its participation in the Black Market Peso Exchange,<sup>47</sup> why in 2009 Credit Suisse was fined US\$536 million for violating trade sanctions with Iran,<sup>48</sup> and why in 2010 Deutsche Bank was fined US\$553 million for providing illegal tax shelters.<sup>49</sup> Each of the named entities was caught in proactive under-cover money laundering stings by agents pursuing ‘flight capital’ in coordination with other agencies from various parts of the world.<sup>50</sup>

---

45 FBI.gov, ‘Robert S. Mueller, III, Speech at Graduation of the 50th Session of the International Law Enforcement Academy’, (13 May 2005), available at <https://archives.fbi.gov/archives/news/speeches/addressing-global-threats-through-global-partnerships>.

46 Diana M Joscowicz, ‘Leaked FBI Report Reveals Private Equity Under Enhanced Money Laundering Scrutiny’, Money Laundering Watch (2020), available at <https://www.moneylaunderingnews.com/2020/07/leaked-fbi-report-reveals-private-equity-under-enhanced-money-laundering-scrutiny/>.

47 *U.S.A. v. American Express Bank International* (Southern District of Florida, 2007), available at [https://www.dea.gov/sites/default/files/2018-06/wdo080607\\_attachment.pdf](https://www.dea.gov/sites/default/files/2018-06/wdo080607_attachment.pdf).

48 *U.S.A. v. Credit Suisse AG* (District of Columbia, 16 Dec. 2009) Information, see <https://www.justice.gov/opa/pr/credit-suisse-agrees-forfeit-536-million-connection-violations-international-emergency>.

49 See DOJ, ‘Deutsche Bank to Pay More Than \$550 Million to Resolve Federal Tax Shelter Fraud Investigation’ (21 Dec. 2010), available at <https://www.justice.gov/archive/usao/nys/pressreleases/December10/deutschebankpr.pdf>.

50 Illegal capital flight, also known as illicit financial flows, is intended to disappear from any record in the country of origin and earnings on the stock of illegal capital flight outside a country generally do not return to the country of origin. It is indicated as missing money from a nation’s balance of payments.

This focus on international relationships recently found full expression in Operation Trojan Shield, the product of initial collaboration between the FBI and the Australian Federal Police (AFP).<sup>51</sup> Together, agents from the FBI and AFP developed an encrypted messaging app with which they enlisted cooperating witnesses to market to various criminal enterprises. The operation resulted in thousands of hours of recorded conversations among, and between, some of the world's most notorious criminals. The ensuing arrests – more than 500 globally – largely occurred simultaneously in a multitude of jurisdictions around the world.

### Cooperating companies

Cooperating companies are perhaps the US authorities' most straightforward and often largest source of foreign evidence. Companies – particularly publicly traded companies – often cooperate with US authorities' investigations. Although some companies in highly regulated industries may be required to do so, the majority are not. Still, US authorities (especially DOJ) have worked to create incentives for companies both to cooperate with their investigations and even to self-disclose potential misconduct voluntarily.

The most prominent programme is the DOJ Criminal Division's FCPA Corporate Enforcement Policy (CEP).<sup>52</sup> It delineates benefits that a company under investigation for FCPA violations can obtain if it:

- voluntarily self-discloses misconduct prior to an imminent threat of disclosure or government investigation and reasonably promptly after becoming aware of the offence;
- provides full and proactive cooperation, including, as is particularly relevant for this article, (1) the disclosure of overseas documents, (2) producing overseas witnesses over whom the company has authority, and (3) providing translations of relevant documents in foreign languages; and
- fully remediates the misconduct, including through improving its compliance programme and disciplining culpable individuals.

---

51 See DOJ, 'FBI's Encrypted Phone Platform Infiltrated Hundreds of Criminal Syndicates; Result is Massive Worldwide Takedown' (8 Jun. 2021), available at <https://www.justice.gov/usao-sdca/pr/fbi-s-encrypted-phone-platform-infiltrated-hundreds-criminal-syndicates-result-massive>.

52 Attorney General Guidelines, Section 9-47.120 – FCPA Corporate Enforcement Policy.

The CEP's benefits are substantial. A company that meets all three criteria – voluntary self-disclosure, full cooperation and full remediation – enjoys a presumption that it will obtain a declination from DOJ, even if the investigation yields evidence of criminal conduct. And even when aggravating circumstances prevent a declination – as when a company is a recidivist or the criminal conduct is too egregious, too pervasive, too profitable or at too high a level within the company – a company will still get a 50 per cent reduction off the low end of the applicable guideline range and will generally not receive a monitor. For a company that did not voluntarily self-disclose misconduct but still fully cooperated with a DOJ investigation and fully remediated, the CEP calls for a 25 per cent reduction off the low end of the applicable sentencing guideline range.

The incentives set out in the CEP have been successful, both in inducing more companies to disclose potential misconduct voluntarily,<sup>53</sup> and in encouraging companies, whether they voluntarily self-disclosed or not, to cooperate fully with DOJ.

Encouraged by the success the Criminal Division has had with the CEP, other DOJ components and enforcement agencies have fashioned similar policies. In December 2019, the DOJ's National Security Division adopted the same standards as the CEP under its Export Control and Sanctions Enforcement Policy for Business Organizations.<sup>54</sup> Similarly, the self-disclosure policy promulgated by the Department of the Treasury's Office of Foreign Assets Control tracks the CEP.<sup>55</sup> The Commodities Futures Trading Commission (CFTC) also promulgated its own policy in 2017.<sup>56</sup> Like the CEP, the CFTC enforcement advisory requires full disclosure of all relevant facts for a company to obtain cooperation credit.

---

53 In its first year, 2016, as a pilot programme, the DOJ Criminal Division's FCPA Corporate Enforcement Policy [CEP] yielded 22 voluntary self-disclosures, up from 13 in 2015. After 18 months, the CEP netted 30 voluntary reports, up from 18 in the prior 18-month period.

54 See DOJ, 'Department of Justice Revises and Re-Issues Export Control and Sanctions Enforcement Policy for Business Organizations' (13 Dec. 2019), available at <https://www.justice.gov/opa/pr/departments-justice-revises-and-re-issues-export-control-and-sanctions-enforcement-policy>.

55 31 C.F.R. Appendix A to Part 501, (I).

56 See Commodities Futures Trading Commission [CFTC] 'Enforcement Advisory, Updated Advisory on Self Reporting and Full Cooperation' (19 Jan. 2017), available at <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisoryselfreporting0917.pdf>.

## Cooperating individuals

Individuals living abroad (whether US or foreign nationals) often find it in their interest to cooperate in a US investigation, even when the US authorities cannot legally compel them to do so. Their incentives vary widely: some seek a whistleblower payout, others want to keep their jobs, and some are working to lighten criminal or civil punishments they face here or abroad.

US authorities seek, in the first instance, to have foreign individuals travel here for interviews. If they cannot do so, they must seek approval from a foreign country – usually, although not always, through a formal MLAT – to conduct an interview there. In some countries, foreign law enforcement may insist either on joining an interview or even conducting it itself, which can, depending on the local laws, create potential taint problems if they compel testimony.<sup>57</sup>

The SEC's whistleblower programme is perhaps the US government's most potent tool to attract cooperating witnesses with knowledge of criminal violations. In 2010, the Dodd-Frank Act authorised the SEC and CFTC to pay whistleblowers between 10 per cent and 30 per cent of monetary sanctions over US\$1 million that resulted from information provided in tips.<sup>58</sup> Since that time, the SEC has awarded more than US\$900 million to whistleblowers, resulting in US\$3.5 billion in financial penalties.<sup>59</sup> The programme is designed to elicit information that the SEC may not have otherwise discovered – a carrot more enticing than the stick of retaliation whistleblowers fear.

In January 2021, Congress armed DOJ and the Treasury with their own whistleblower programme, one aimed at combatting money laundering by offering rewards to individuals who voluntarily provide original information to DOJ or Treasury about possible violations of the Bank Secrecy Act. As with the SEC programme, tipsters may receive up to 30 per cent of the monetary penalties the authorities collect. That reward programme (for which the Treasury has delegated responsibility to the Financial Crimes Enforcement Network), once it is up and running, may prove as fruitful as the SEC programme has been in gathering foreign evidence. That is particularly

---

<sup>57</sup> cf. *United States v. Allen*, 864 F.3d 63 (2d Cir. 2017) (reversing convictions based on testimony compelled by foreign law enforcement); see also '2nd Circ. Labor Ruling Won't Slow Cross-Border Enforcement', Jason Linder and John Long, *Law360*, available at <https://www.law360.com/articles/947754/2nd-circ-libor-ruling-won-t-slow-cross-border-enforcement>.

<sup>58</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173-466, 111th Cong. § 922 (2010).

<sup>59</sup> SEC.gov, Whistleblower Awards, <https://www.sec.gov/page/whistleblower-100million>.

true because the money laundering focus of the programme dovetails well with the FBI's and DEA's long history and deep expertise of focusing on foreign money laundering activity.

### **Domestic evidence of foreign conduct**

In addition to information gathered from foreign jurisdictions, US authorities can obtain substantial evidence of foreign misconduct through their ordinary domestic evidence gathering. The United States occupies a privileged position with respect to the two main sources of evidence on cross-border crime: digital records and banking information. The popularity of US-based technology and social media platforms (Facebook, Gmail and the like) and the global ubiquity of dollar-denominated transactions ensures that evidence concerning potential misconduct abroad is often stored in or transits through the United States. US authorities use subpoenas and search warrants to seize everything from personal email accounts and social media data to transaction records.

Domestic evidence gathering could become less useful if bad actors are careful to avoid any nexus with the United States. Congress, however, has attempted to mitigate this issue through a new statutory provision that greatly expands US authorities' ability to obtain financial information from foreign banks.

The Anti-Money Laundering Act of 2020 (AMLA), passed as part of the 2021 National Defense Authorization Act (NDAA), greatly expands the subpoena power of US authorities with respect to foreign bank accounts. It authorises the DOJ and Treasury Department to 'issue a subpoena to any foreign bank that maintains a correspondent bank account in the United States and request any records relating to the correspondent bank account or any account at the foreign bank, including records maintained outside the United States' that are the subject of an investigation of any criminal law of the United States, civil forfeiture actions, and anti-money laundering investigations.<sup>60</sup> Given that a substantial swathe of foreign banks have established US correspondent accounts, the AMLA may give DOJ the functional ability to compel production of bank records from every corner of the world.

Prior to the AMLA's enactment, US authorities could subpoena correspondent bank accounts, which are limited in their utility, but had no ability to obtain information from foreign bank accounts without the assistance of a foreign government, either

---

<sup>60</sup> 31 U.S.C. § 5318(k)(3).

through formal or informal means, or, sometimes, cooperating companies.<sup>61</sup> Now US authorities can subpoena information on any account at the foreign bank, irrespective of that account's connection with the correspondent bank account, so long as the foreign bank maintains a correspondent relationship with a US bank. These correspondent banking relationships are a key component of the international banking system,<sup>62</sup> which means most large international financial institutions maintain such a relationship with a US bank.

The new provisions of the NDAA also contain an enforcement mechanism. Failure to comply with a subpoena can result in contempt proceedings,<sup>63</sup> substantial fines<sup>64</sup> and an order to US financial institutions to terminate their correspondent relationships with the foreign bank. Failure to terminate those relationships can result in substantial fines levied against the domestic bank.<sup>65</sup> These enforcement provisions are essential to the operation of the law because it puts pressure on US banks to ensure compliance with subpoenas by their foreign partners.

## Public sources

In addition to formal evidence gathering, US authorities may rely on press reports and other publicly available information, either as substantive proof of misconduct or as a starting point for further investigation. Bribery scandals that at first appear to be small or limited to a particular country can spiral into major multinational investigations. For instance, Operation Car Wash began as a minor investigation into misconduct by executives at Petrobras and sparked arguably the largest and widest-ranging anti-corruption and money-laundering investigations in history; it now spans more than a

---

61 See Mengqi Sun, 'Defense Act Expands Scope of Foreign Bank Records U.S. Authorities Can Obtain', *The Wall Street Journal* (14 Jan. 2021), available at <https://www.wsj.com/articles/defense-act-expands-scope-of-foreign-bank-records-u-s-authorities-can-obtain-11610620202>.

62 See Dep't of the Treasury, 'U.S. Department of the Treasury and Federal Banking Agencies Joint Fact Sheet on Foreign Correspondent Banking: Approach to BSA/AML and OFAC Sanctions Supervision and Enforcement' (30 Aug. 2016), available at <https://www.treasury.gov/press-center/press-releases/Documents/Foreign%20Correspondent%20Banking%20Fact%20Sheet.pdf>; 'Foreign Correspondent Banking – The Good, The Bad and The Ugly', *The National Law Review* (15 Feb. 2016), <https://www.natlawreview.com/article/foreign-correspondent-banking-good-bad-and-ugly>.

63 id. § 5318(k)(3)(D)(ii).

64 id. § 5318(k)(3)(E)(iii)(II).

65 id. § 5318(k)(3)(E)(iii)(I).

dozen countries.<sup>66</sup> To this day the DOJ is pursuing cases stemming from that initial investigation in Brazil.<sup>67</sup> Because it is difficult to tell where bribery allegations may lead, public source material in foreign countries can be useful in pointing US authorities towards potential violations of US law.

## Conclusion

US authorities have an extensive toolkit to gather evidence from abroad. If US agencies believe there is relevant evidence located overseas, they will use each and every tool in that kit to build their cases. Moreover, as the expansion of subpoena power under the NDAA demonstrates, Congress has expanded the jurisdictional reach of 'domestic' evidence gathering by US authorities to ensure the robust enforcement of US law. US authorities have a long arm when it comes to gathering evidence from abroad and there is no sign that Congress, the courts or the executive branch intends to curtail that reach any time soon.

---

<sup>66</sup> Jonathan Watts, 'Operation Car Wash: Is this the biggest corruption scandal in history?', *The Guardian* (1 Jun. 2017), available at <https://www.theguardian.com/world/2017/jun/01/brazil-operation-car-wash-is-this-the-biggest-corruption-scandal-in-history>.

<sup>67</sup> DOJ OPA, 'Amec Foster Wheeler Energy Ltd. Agrees to Pay Over \$18 million to Resolve Charges Related to Bribery Scheme in Brazil' (25 Jun. 2021), available at <https://www.justice.gov/opa/pr/amec-foster-wheeler-energy-limited-agrees-pay-over-18-million-resolve-charges-related-bribery>.



**JASON LINDER**

Mayer Brown LLP

Jason Linder, a former senior federal prosecutor, co-chairs Mayer Brown's global anti-corruption and FCPA practice. Resident in the firm's Washington, DC, and Los Angeles offices, Jason is a trial lawyer who counsels and defends boards, multinational companies and executives through corporate crises and government and media scrutiny; leads internal and government-facing investigations; and provides proactive compliance counselling. Jason has led matters in more than 65 countries and has deep experience in matters involving corruption, securities fraud and other financial fraud, money laundering, tax evasion and anticompetitive conduct.

Jason is highly regarded by US and foreign authorities. He has worked with or against nearly every major US Attorney's Office, many components of the Department of Justice's (DOJ) Main Justice, the Securities and Exchange Commission, other US law enforcement and regulatory agencies, and foreign authorities and multilateral development banks across the globe. Before joining Mayer Brown, Jason chaired another major firm's global investigations and white-collar criminal defence practice. From 2007 to 2017, he served as a federal prosecutor, both in the DOJ's Criminal Division – where he led many of the Department's most cutting-edge cross-border white-collar investigations – and as an assistant US attorney in the Southern District of Florida, where he tried numerous cases and argued multiple appeals.



**MICHAEL P HEFFERNAN**

Mayer Brown LLP

Michael Heffernan is a litigation and dispute resolution associate in Mayer Brown's New York office. His practice focuses on white-collar defence, anti-corruption and complex internal investigations. Michael has significant experience in investigations led by the US Department of Justice, the Securities and Exchange Commission and other regulators. He focuses on FCPA/public corruption, commercial bribery, securities laws, US sanctions, antitrust and money laundering. Michael also has experience of counselling clients on compliance programmes, compliance audits and due diligence arising out of acquisitions and joint ventures, and employee mobility matters.

Prior to joining Mayer Brown, Michael spent a decade as a special agent in the Federal Bureau of Investigation (FBI), where he investigated a wide range of federal crimes, including in the financial services. While serving within the FBI's International Corruption Unit, he investigated numerous crimes in respect of the Foreign Corrupt Practices Act, anti-money laundering and international antitrust. In addition, Michael led several multi-jurisdictional task forces conducting racketeering investigations into complex criminal enterprises and ultra-violent gangs.



**WILLIAM D SINNOTT**

Mayer Brown LLP

Will Sinnott is an associate in Mayer Brown's Washington, DC, office whose practice focuses on high-stakes, cross-border government investigations, internal investigations, and compliance and remediation counselling. He has extensive experience in US Department of Justice (DOJ) and Securities and Exchange Commission investigations into international financial fraud and corruption. Prior to law school, Will was a contract paralegal for the Foreign Corrupt Practices Act enforcement division of the DOJ.

# MAYER | BROWN

---

Mayer Brown is a distinctively global law firm, uniquely positioned to advise the world's leading companies and financial institutions on their most complex deals and disputes. With extensive reach across four continents, we are the only integrated law firm in the world, with approximately 200 lawyers in each of the world's three largest financial centres – New York, London and Hong Kong – the backbone of the global economy. We have deep experience in high-stakes litigation and complex transactions across industry sectors, including our signature strength, the global financial services industry.

Mayer Brown offers clients all-encompassing investigations and regulatory defence solutions to ensure compliance with an increasingly global regulatory framework and to help respond effectively to investigations by regulators throughout the world. Our practice includes numerous former government officials in the United States and worldwide, including US Department of Justice prosecutors and Securities and Exchange Commission lawyers, a general counsel at the US National Security Agency, the Attorney General of Brazil, and the Director of Enforcement at the Hong Kong Securities and Futures Commission.

With experience in hundreds of civil and criminal jury trials, Mayer Brown's lawyers understand the nuances of corporate investigations and how they might come into play at trial. The team uses its first-hand knowledge of how government enforcement works to help clients respond in the most effective manner to the challenges and risks posed by administrative, regulatory or criminal investigations and related civil enforcement proceedings, and how to minimise the risks when conducting internal investigations.

---

350 South Grand Avenue  
25th Floor  
Los Angeles, CA 90071  
United States  
Tel: +1 213 229 9500

1999 K Street, NW  
Washington, DC 20006  
United States  
Tel: +1 202 263 3000

**Jason Linder**  
jlinder@mayerbrown.com

**Michael P Heffernan**  
mheffernan@mayerbrown.com

1221 Avenue of the  
Americas  
New York, NY 10020  
United States  
Tel: +1 212 506 2500

**William D Sinnott**  
wsinnott@mayerbrown.com

[www.mayerbrown.com](http://www.mayerbrown.com)

---

The Americas Investigations Review 2022 contains insight and thought leadership from 21 pre-eminent practitioners from the region. Across 142 pages, it provides an invaluable retrospective on what's been happening, and where, in the corporate criminal space.

All articles come complete with footnotes with, where appropriate, relevant statistics.

This edition has a particular focus on Brazil and the United States and includes, among other things, overviews on the expectations of the US Department of Justice regarding corporate data systems and how to learn the lessons from an investigation.

Visit [globalinvestigationsreview.com](https://globalinvestigationsreview.com)  
Follow @GIRalerts on Twitter  
Find us on LinkedIn

ISBN 978-1-83862-592-4