



THE INTERNATIONAL ACADEMY  
OF FINANCIAL CRIME LITIGATORS

# Bulletin

| of The International Academy  
of Financial Crime Litigators

ISSUE 3 | SPRING 2024

## **Bulletin of The International Academy of Financial Crime Litigators**

Paris, France

**Editor:** Jonathan S. Sack

**Editorial Board/Publishers:** Stéphane Bonifassi, Lincoln Caylor and Elizabeth Ortega

**Publication/Art Director:** ECO Strategic Communications

The Bulletin appears twice a year and is available free of charge.

Current and back issues are available online at:  
<https://financialcrimelitigators.org/publications/>

To sign up for a subscription or to report an address change please send an email to [contact@financialcrimelitigators.org](mailto:contact@financialcrimelitigators.org).

For editorial comments or inquiries, please contact the editor at [jsack@maglaw.com](mailto:jsack@maglaw.com) or at the address below.

For further information about The Academy, please visit our website [www.financialcrimelitigators.org](http://www.financialcrimelitigators.org).

For general inquiries, please send an email to [contact@financialcrimelitigators.org](mailto:contact@financialcrimelitigators.org).

© The International Academy of Financial Crime Litigators 2023  
All rights reserved

ISSN 2999-3938

# Contents

ISSUE 3 | SPRING 2024

## 04 LETTER FROM THE EDITOR

### WELCOME

to the third issue of the Bulletin of The International Academy of Financial Crime Litigators.

## 05 GRETTA FENNER

In Memoriam

## 06 THE FOREIGN EXTORTION PREVENTION ACT

Should Kleptocrats and Their Enablers Beware? *Lucinda A. Low*

## 17 CONTOURS OF A FUTURE SWISS DPA REGIME

The time may at last be right for rapid, negotiated settlement of economic criminal proceedings: *Grégoire Mangeat*

## 24 CROSS-BORDER EVIDENCE GATHERING

A Primer on Mutual Legal Assistance Treaties and Letters Rogatory: *T. Markus Funk, Ph.D. & The Hon. Virginia Kendall*

## 35 DOJ'S UNRELENTING PUSH FOR CORPORATE COOPERATION

Rewards, sentencing reductions, and demanded loyalty reveal the government's expectation of voluntary corporate disclosure: *Karen Woody*

---

## 44 THE INTERNATIONAL ACADEMY OF FINANCIAL CRIME LITIGATORS FOUNDERS

---

# Letter FROM THE EDITOR

We must open this issue of the Bulletin with news of the tragic death of **Gretta Fenner\***, a founding Fellow of the Academy. As Managing Director of the Basel Institute on Governance, Gretta was a leader in the fight against global corruption. Gretta was a friend and colleague and source of strength to many of us, as **Nicola Bonucci\*** describes in a memorial tribute to Gretta which opens this issue of the Bulletin. May Gretta rest in peace, may her family be consoled, and may she be an inspiration in the fight for justice.

In this issue, we have four articles with widely varied subjects and some common themes, including the transnational nature of financial crime and related investigations and litigation.

**T. Markus Funk\*** and the **Honorable Virginia Kendall** provide a primer on mutual legal assistance treaties and letters rogatory, and the procedures for gathering evidence across borders. The importance of collecting evidence in foreign countries arises more frequently than ever in both criminal and civil litigation.

**Lucinda Low\*** give us an overview of the new “Foreign Extortion Prevention Act,” enacted in the United States in late 2023. The new law targets the “demand” side of foreign bribery by making it a crime for foreign government officials to seek things of value under particular circumstances. FEPA builds on the Foreign Corrupt Practices Act, which targets the “supply” side of foreign corruption--companies and individuals who pay or facilitate payment of bribes to foreign officials.

**Gregoire Mangeat\*** discusses revived plans in Switzerland for a Deferred Prosecution Agreement (DPA) regime along the lines of DPA programs in the United States, United Kingdom, France and other countries. A DPA proposal was rejected about five years ago, but the present one may have a better chance of being enacted by the Swiss government, as Gregoire explains.

**Karen Woody\*** describes recent U.S. Department of Justice (DOJ) pronouncements which revise and reinforce DOJ’s longstanding policy of offering incentives for corporate cooperation in white-collar criminal investigations. Most recently, DOJ has announced a new whistleblower reward program, which can be seen as encouraging corporate employees, and not just corporations themselves, to provide DOJ with evidence to prosecute individuals.

These articles exemplify the involvement of Academy fellows in cutting-edge developments in the field of global financial crime and litigation. The Academy is dedicated to continuing to inform and advance the work of practitioners in the field, and we will take inspiration from the work of the late Gretta Fenner.

*\* Fellows of The Academy*



---

I hope you enjoy  
this issue of  
**The Academy  
Bulletin.**

**Jonathan S. Sack\*** | *Editor*

---

# Gretta Fenner

## IN MEMORIAM

Nicola Bonucci

With the passing away of Gretta Fenner the anticorruption community has lost a very special trailblazer.

Gretta joined the OECD very young in 1999, just one month before the entry into force of the OECD Antibribery Convention, and she leaves us 25 years after this landmark event. During these years Gretta left an indelible mark; starting *andantino* in the first years at the OECD and then *moderato* when she became the Executive Director of the Basel Institute on Governance in 2005. Founded by another trailblazer, Professor Mark Pieth, the Institute was still an infant when Gretta arrived. It was in large part due to her energy, enthusiasm and skills that the Institute became what it is today: a unique institution with a worldwide reputation for leadership, clarity of purpose and effectiveness.

In the last years Gretta accelerated her own and the Institute's tempo to *allegro*, sometimes *vivace* and even *presto* or *prestissimo*. From Peru to Ukraine, from Bulgaria to Zambia, from the United Nations Conference of the Parties in Atlanta to the Global Anti-Corruption and Integrity Forum in Paris last March, Gretta was leading on all fronts. But let's be clear: Gretta was not a dreamer or a pure thinker; she was a *doer par excellence*!



It followed naturally that she would be involved in the establishment of the International Academy of Financial Crimes Litigators, the place “where theory meets practice,” because this was the essence of Gretta's great gifts. With her demise the Academy has lost more than one of its fellows; it has lost a point of reference.

And, yet, Gretta was also great fun to be with. She did not let the weightiness of the work she was committed to get in the way of wonderful relationships and joyous times with friends and colleagues. Gretta had an incredible strength. She was always able to “keep calm and carry on.” In this difficult moment for the world let's take inspiration for ourselves from the standards Gretta set and the passion and integrity she brought to her work and life.

The late Judge Giovanni Falcone once said, “humans pass away, but ideas remain and walk on the legs of other humans.” This is now our task, this is the task of the Basel Institute Gretta served, and it is the task of The Academy.

Nicola Bonucci served for many years as Director of Legal Affairs for the Organization for Economic Cooperation and Development and has been a prominent voice in efforts to fight global corruption and bribery. He is now in private practice in Paris.



TA

# The Foreign Extortion Prevention Act:

Should Kleptocrats and Their Enablers  
Beware?

LUCINDA A. LOW

# Introduction

Late last year, as part of the annual defense authorization bill—a “must pass” piece of legislation—Congress passed, and President Biden signed into law, the Foreign Extortion Prevention Act (FEPA) (Public Law No. 118-31, amending 18 U.S.C.§201).

As detailed below, FEPA targets the “demand” side of foreign official bribery—the foreign officials who seek illicit payments--the side left untouched by the U.S. Foreign Corrupt Practices Act (FCPA), which—like the OECD Antibribery Convention--has purely “supply side” application. The new provision’s sponsors have hailed it as the “most significant international criminal anti-corruption legislation in half a century.”

FEPA was first introduced as a bill several years ago, but failed to get any real traction. However, it has had strong supporters on a bipartisan basis in the U.S. Congress and that fact, coupled with efforts by anti-corruption NGOs and some other external groups, propelled it forward in 2023 amidst increasing concern about the lack of accountability on the demand side and the need for additional tools to combat it.

The U.S. has demonstrated its increasing concern with the demand side through its “no safe haven” initiative, pursuant to which persons involved in bribery or other corruption are denied entry into the United States. Global Magnitsky sanctions have also been used to prevent dealings with persons engaged in corruption or human rights violations. Relying principally on the anti-money laundering (AML) laws, the United States in recent years has stepped up its prosecutions of foreign government officials who receive bribes in the United States or subsequently bring their proceeds into the United States, but this tool has its limitations. The Biden Administration’s December 2021 strategy on countering corruption indicated that it planned to work with Congress to criminalize the demand side of bribery.

The “demand side” has also been the subject of increasing concern at the international level. The OECD Council’s 2021 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions (Nov.26,2021), [https://legalinstruments.oecd.org/en/instruments/OECD\\_LEGAL-0378](https://legalinstruments.oecd.org/en/instruments/OECD_LEGAL-0378), contained several recommendations focusing on the

“demand side”, following on a 2018 OECD study that found that only 20% of foreign officials involved in supply side bribery cases are prosecuted.

Of course, many bribery statutes around the world deal with the demand side. But, like the US domestic bribery statute found at 18 U.S.C. §201, they do not target foreign government officials, but are focused on their own officials. Imposing criminal penalties on officials of a foreign country is a far different matter than targeting one’s own officials. That is a big part of the reason why FEPA is significant. So what does this statute do?

## FEPA—KEY FEATURES

FEPA was not subject to extensive scrutiny prior to its enactment. No hearings were held in any of the congressional sessions during which the bill was pending. There is therefore little legislative history that can be consulted to shed light on its provisions. But a comparison of its terms to the FCPA is instructive.

Like the FCPA, FEPA takes a criminalization approach. And like the FCPA, it prohibits *quid pro quo* corruption in terms that are broader than the US domestic bribery statute to which it is attached and are closer to the FCPA’s. But although it represents the other side of the coin from the FCPA, it is not fully aligned with the FCPA. This is most apparent in who is covered.

### Who Is Covered by FEPA

One key difference between the FCPA and FEPA is FEPA’s definition of who is a foreign official. FEPA’s definition covers a number of persons who are treated as “foreign officials” under the FCPA, namely:

- a. officials or employees of a foreign government or any department, agency or instrumentality thereof;
- b. officials or employees of a public international organization; and
- c. persons acting in an official capacity for those in the previous two categories.



But FEPA's scope is broader. In addition to persons covered by the FCPA, FEPA covers:

- a. "senior political figures";
- b. any person acting in an unofficial capacity for foreign government or international organization officials; and
- c. international organizations that may be designated by the US President by executive order from time to time (i.e., not just those designed under the International Organizations Immunities Act, as is the case under the FCPA).

In addition, the definition of the offense brings into the ambit of the statute a person "selected" to be a foreign official.

*Who Is a "Senior Political Figure".* FEPA's definition of "senior political figure," taken from U.S. Treasury Department due diligence regulations for banks, is broad. It covers senior officials (defined as individuals with substantial authority over policy, operations or the use of government-owned resources), current or former, in any branch of a foreign government (including specifically the military), whether elected or not, of a "major" foreign political party, and of a foreign government-owned commercial enterprise; companies formed by or benefitting such individuals, their immediate family members (defined to include spouses, parents, siblings, children, and a spouse's parents or siblings), and their close associates based on wide public knowledge or actual knowledge. Prosecutors have treated many of these persons as officials under the FCPA, or used indirect payments prong of the FCPA to cover them, without their being explicitly covered, but FEPA's coverage removes any doubt as to their status.

*Acting in an Unofficial Capacity.* FEPA's coverage of persons acting in an "unofficial" as well as an official capacity is novel and likely to raise many questions. The concept of acting in an "official" capacity has been part of U.S. antibribery laws for many years and is well established. But who may be deemed to act in an unofficial capacity? Unregistered foreign agents? Family members who don't qualify as "senior political figures" but are in an economic relationship with the official? The issues this element will present will in the first instance be highly factual, but prosecutors and courts will have to determine what type of relationship is legally sufficient when the

traditional indicia of agency may not be present. And even the issue of what is needed for an agency relationship, as recent FCPA litigation has shown, is far from clear.

Interestingly, the Supreme Court recently addressed a similar question in the context of federal mail and wire fraud: when an individual with influence over government policy, but not a public official, may be charged with depriving the public of “honest services.” *Percoco v. United States*, 598 U.S. 319 (2023). In that case, the Supreme Court rejected a test based on an individual’s dominance over government policy and indicated that test should be whether decision-making authority was delegated to the individual.

*Persons “Selected” to Be an Official.* Covering persons “selected” to be officials is consistent with the federal domestic bribery statute, but diverges from the language of the FCPA. The FCPA covers not only foreign officials, but officials of political parties (not just “major” parties), candidates for political office, and the political parties themselves. While these campaign-related issues are outside the scope of FEPA, the concept of “selection” will likely require factual inquiries into the governmental processes of the foreign countries concerned. The definition of “person who has been selected to be a public official” in the domestic bribery statute is “any person who has been nominated or appointed to be a public official, or has been officially informed that such person will be so nominated or appointed”.

## FEPA’S DEFINITION OF THE OFFENSE

Although FEPA has extortion in its name, the offense it establishes goes well beyond the definition of extortion historically applied in the FCPA context, which involves threats of death or serious harm to persons or extreme damage to property. FEPA’s offense covers “foreign officials” who:

- Corruptly
- demand, seek, receive, accept, or agree to receive or accept
- directly or indirectly
- with the requisite jurisdictional nexus (discussed below)
- anything of value

- either personally or for any other person or nongovernmental entity
- from certain specified persons (discussed below)
- in return for certain actions, including an improper advantage
- in connection with obtaining or retaining business for or with, or directing business to, any person.

In a number of respects this definition is the mirror image of the FCPA, as the table below demonstrates. Indeed, several of the elements (“corruptly,” anything of value,” “directly or indirectly,” and “obtain or retain business”) are identical to those in the FCPA. Also similar is that mere agreement, rather than the actual receipt, of value will suffice. Some other elements are not present in the FCPA, but are part of the domestic bribery statute (e.g., the element of “either personally or for any other person or governmental entity”).

More significantly, the FCPA covers any “act in furtherance” of an offer, promise, payment, etc.,” while FEPA appears to focus on the completed act, which narrows its scope. And although FEPA is drafted more broadly than the domestic bribery statute in terms of its *quo*—which the courts have generally construed narrowly based on its “official act” requirement—its *quo* does not fully parallel the FCPA, as the table below demonstrates.

Furthermore, FEPA requires that the givers of value be a person covered by one the FCPA’s three antibribery prohibitions: an “issuer”, a “domestic concern”; or “any person.” Moreover, the “any person” category incorporates that provision’s territorial jurisdictional limitation, i.e., that the giving of value must occur while that person is in the territory of the United States. The meaning of this term has not been fully settled under the FCPA, and its uncertainties will undoubtedly be mirrored here, but it reinforces the territorial nature of FEPA, discussed further below.

What this means is FEPA will be triggered only by conduct involving, on the supply side, persons who are covered by the FCPA. Those are not just U.S. persons, but include foreign “issuers,” foreign companies with their principal place of business in the U.S., making them “domestic concerns”, and other foreign persons who act within the United States. Those foreign persons who are beyond the reach of the FCPA, however, can be involved in corrupt transactions with foreign officials without triggering FEPA. This suggests that FEPA, as a tool to pursue kleptocrats and their enablers as its sponsors have trumpeted, will not fill a major part of the gap that is perceived to exist.

## EXTRATERRITORIALITY AND RELATIONSHIP TO THE FCPA

FEPA provides that the offense it defines “shall be subject to extraterritorial federal jurisdiction.” 18 U.S.C. §201(f)(3). This language has presumably been included to overcome the presumption against extraterritorial application of federal laws that the U.S. Supreme Court has articulated in recent years. It is not entirely clear how this will operate, however, as FEPA’s offense is defined in territorial terms. FEPA’s jurisdictional nexus requirement for the demand side official is the well-known “use of the mails or other means or instrumentality of interstate or foreign commerce”. Thus, the statute is based on territoriality, rather than universal jurisdiction. It is therefore not clear what this provision will mean in practice.

FEPA also sets forth (in 18 USC §201(f)(5)) a rule of construction that states that:

*This subsection shall not be construed as encompassing conduct that would violate section 30A of the Securities Exchange Act of 1934 (15 U.S.C. 78dd-1) or section 104 or 104A of the Foreign Corrupt Practices Act of 1977 (15 U.S.C. 78dd-2; 15 U.S.C. 78dd-3) whether pursuant to a theory of direct liability, conspiracy, complicity, or otherwise.*

This provision, referencing the FCPA’s three anti-bribery prohibitions, appears to have been designed to create a wall between FCPA and FEPA prosecutions, such that conduct that would violate the FCPA is not covered by FEPA. FEPA’s language raises many questions, however, about the interface between the two. Many FCPA cases—perhaps as many as half—are brought not as straight FCPA violations but as conspiracy cases. Does this mean that persons whose conduct is covered by FEPA cannot be co-conspirators with a bribe payer? Cannot be charged with aiding and abetting or other secondary offenses? Since the FCPA’s indirect liability standard includes a specific prohibition on payments to “any person”, while “knowing” of a pass-through, collisions between the FCPA and FEPA, with its much broader definition of “foreign official,” seem destined to occur.

## PENALTIES

The penalties for a FEPA violation are a “fine of not more than \$250,000 or 3 times the monetary equivalent of the thing of value, imprisoned [sic] for not more than 15 years, or both”. 18 USC §201(f)(2).

## FEPA—CONCLUSIONS AND IMPLICATIONS

The press release of a key FEPA sponsor after its passage stated that: “This system gave unscrupulous companies operating in a corrupt environment a competitive edge while disadvantaging companies beholden to the rule of law, including American companies.” But these corrupt companies may be beyond the reach of the FCPA and the corrupt officials, if the supply side is not covered by the FCPA, may be beyond the reach of FEPA.

As with any legislation of this nature, some period of time will be necessary to assess the utility and value of the new tool FEPA provides to prosecutors. As this short article has shown, this new law is unclear in a number of respects. But prosecutions may not be the only relevant metric. Both the reporting provisions of the statute, and the fragmentary legislative history that exists, suggest one purpose of the legislation is to help arm companies subject to the FCPA against corrupt official demands, by potentially deterring those who would solicit them through the threat of their own criminal liability. Another may be to stimulate prosecution by the officials’ home countries.

Both goals are implied by the reporting requirements of FEPA, which mandate annual reporting by the Attorney General to the Congress, and made public, addressing: the efforts of foreign governments to prosecute “demand side” cases; US diplomatic effects to protect US companies from foreign bribery and their effectiveness; enforcement and other actions taken under FEPA and penalties imposed; and the effectiveness of enforcement efforts and additional measures that could be taken to ensure adequate enforcement. These provisions implicitly acknowledge the challenges that FEPA enforcement is likely to face.

Companies subject to the FCPA should incorporate FEPA in their training programs, to make their employees, agents and supply chains aware of this new tool and how it may help their response to corrupt solicitations by foreign officials or persons believed to be acting on their behalf. Foreign nationals with family or business links to foreign government officials, as well as the officials, on the other hand, face new risks as a result of FEPA.

FEPA may create new risks and challenges for companies dealing with enforcement authorities. Does full cooperation, for example, required by the Department of Justice to receive maximum credit against potential penalties,

include providing information about the foreign officials who have solicited a bribe? This may be an unattractive option, especially for companies with ongoing business in the official's jurisdiction, potentially adding additional disincentives to situations of self-reporting. And U.S. government officials other than prosecutors may face increased perceptions that they are acting as informants for the enforcement authorities.

### Elements of the FEPA Antibribery Offense: A Comparison to the FCPA and the U.S. Domestic Bribery Statute

FEPA	FCPA	Domestic Bribery
<p><i>Foreign Official:</i></p> <ul style="list-style-type: none"> <li>a. officials or employees of a foreign government or any department, agency or instrumentality thereof ((4) (A)(i));</li> <li>b. officials or employees of a public international organization ((4)(B); and (c) persons acting in an official capacity for those in the previous two categories ((4(C)); any senior political figure, as defined in section 1010.605 of title 31, Code of Federal Regulations, or any successor regulation”;</li> <li>c. in (4)(D), any person acting in an unofficial capacity for the government of international organization officials identified in (a) and (b) in the preceding paragraph; and (c) international organizations that may be designated by the President by executive order from time to time.</li> </ul> <p>Also covers persons “selected” to be a Foreign Official.</p>	<p><i>Foreign Official:</i></p> <ul style="list-style-type: none"> <li>a. The term “foreign official” means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.</li> <li>b. For purposes of subparagraph (A), the term “public international organization” means -- (i) an organization that is designated by Executive Order pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. § 288); or (ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication.</li> </ul> <p>Also prohibits improper payments to political party officials, candidate for political office, and the political parties.</p> <p>And prohibits improper payments to “any person, while knowing...”</p>	<p>Covers “public officials” and persons “selected” to be public officials.</p>
Corruptly	Same	Same

FEPA	FCPA	Domestic Bribery
demand, seek, receive, accept, or agree to receive or accept	No analog (supply side statute)	Same
directly or indirectly	Same	Same
Jurisdictional nexus: yes, use of the mails or other means or instrumentality of interstate or foreign commerce	Jurisdictional nexus: yes (differs for 3 antibribery prohibitions, both territoriality and alternative nationality)	No explicit statutory language
<i>Quid Pro Quo</i> Statute: yes	Same	Same [official act requirement?]
Quid: Anything of value	Same	Same
either personally or for any other person or nongovernmental entity	Not specified	Very similar to FEPA: "personally or for any other person or entity"
Giver of the quid: "issuer", "domestic concern", or "any person" under 15 USC §§ dd-1, dd-2 and dd-3 [FCPA tie-in]	Prohibits bribes by "issuers", "domestic concerns" and "any person", including officers, directors, shareholders, employees and agents	
<p><i>Quo</i>:</p> <ul style="list-style-type: none"> <li><b>a.</b> being influenced in the performance of any official acts;</li> <li><b>b.</b> being induced to do or omit to do any act in violation of the official duty of such foreign official or person; or</li> <li><b>c.</b> conferring any improper advantage.</li> </ul>	<ul style="list-style-type: none"> <li><b>a.</b> (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or</li> <li><b>b.</b> inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality</li> </ul>	<ul style="list-style-type: none"> <li><b>a.</b> being influenced in the performance of any official act;</li> <li><b>b.</b> being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or</li> <li><b>a.</b> being induced to do or omit to do any act in violation of the official duty of such official or person.</li> </ul>
in connection with obtaining or retaining business for or with, or directing business to, any person.	Same	No "business" element

---

## AUTHORS




### **Lucinda Low**

Fellow [Lucinda Low](#) practices at Steptoe LLP, based in its Washington, D.C. office. She is a well-known authority on the U.S. Foreign Corrupt Practices Act and other anti-corruption laws.



The logo consists of the letters 'T' and 'A' in a light blue, sans-serif font. The 'T' is positioned to the left of the 'A', and they are both rendered in a clean, modern style.

TA

A large, decorative graphic element on the left side of the page. It is a curved shape that starts wide at the bottom and tapers to a point at the top. It is composed of two overlapping layers: a darker blue outer layer and a lighter blue inner layer, separated by a thin white line. The overall shape is reminiscent of a stylized 'C' or a swoosh.

# Contours of a Future Swiss DPA Regime

The time may at last be right for rapid, negotiated settlement of economic criminal proceedings.

**GRÉGOIRE MANGÉAT**

# Introduction

Although not yet turned into a draft, or even a preliminary draft, a plan announced in February 2024 by the Swiss Office of the Attorney General (OAG) did not leave anyone indifferent. At an academic seminar on Negotiated Justice in Transnational Corruption, the Attorney General of the Swiss Confederation expressed the OAG's intention to promote the introduction of a Swiss Deferred Prosecution Agreement (DPA) regime and described the anticipated contours.

Notably, an earlier proposed DPA regime was rejected by the Federal Council (the Swiss government) 5 years ago. The reasons for the rejection given at the time included concerns over the added power a Swiss DPA authority would give to the already very strong position of Swiss prosecutors, and the proposal's failure to address the nature and scope of judicial review. The Federal Council also criticized the fact that a company and the OAG could agree via a DPA on how to treat civil claims without the plaintiff participating in the process. In general, the Federal Council was also reluctant to approve a regime in which a waiver of criminal prosecution could be "bought," or at least appear to be bought. (Message of 15 October 2019 regarding the amendment of the Swiss Code of Criminal Procedure, FF 2019 6351-6436 (6367))

But much has changed since 2019, and the conditions appear to be more receptive now to acceptance of a DPA regime in Switzerland.

## REASONS FOR A SWISS DPA REGIME

The OAG has given several reasons for revival of the idea of a Swiss DPA. The most important seems to be the length of criminal proceedings. Proceedings are lengthy for a variety of reasons, including the procedural obligation to prosecute and to seek the material truth, as well as sealing procedures. In complex international cases, over which several prosecuting authorities have jurisdiction, Switzerland loses out on opportunities for coordinated resolution (global deal) with other, faster jurisdictions. More broadly, the OAG now regards the introduction of a Swiss DPA authority as "an indispensable step towards guaranteeing the effectiveness of complex international prosecutions." (Blättler/Schnebli, *La poursuite pénale efficace*

en Suisse en matière de corruption internationale, in Capus/Hohl Zürcher, *Negotiated Justice in Transnational Corruption – Between Transparency and Confidentiality*, Neuchâtel, 2024, n. 45)

Swiss law now has a Summary Penalty Order Procedure, which enables the public prosecutor to terminate proceedings without going to court. Practice has shown that this procedure allows the parties, to a certain extent, to negotiate the stated facts, the amounts confiscated, as well as the sentence pronounced by the prosecutor, even if the law does not expressly provide for such negotiation. This was the procedure used to put an end to the Swiss part of the Alstom S.A. case in 2011.

But this summary procedure is not regarded as a substitute for a genuine DPA authority. This procedure has one major drawback: once in force, the summary penalty order has the effect of a judgment and a conviction. Compared with a DPA-type instrument, conviction can have disadvantages for the company's commercial activity — such as loss of existing public contracts, exclusion from future tenders — irrespective of the type of criminal order. The OAG has observed, correctly, that companies are more willing to cooperate with countries offering them the possibility of concluding an agreement that avoids conviction. (Blättler/Schnebli, n. 44)

Furthermore, since 2017, the OAG has refused to apply Article 53 of the Swiss Criminal Code (SCC) (abandonment of prosecution in case of reparation) in economic criminal proceedings concerning global companies actively engaged in business, for at least two reasons: respect for the will of the legislature, which designed Article 53 SCC for minor cases; and respect for the condition laid down in the same Article that the interest in prosecution on the part of the general public and of the persons harmed should be negligible. According to the OAG, in large-scale international cases, not only the public interest, but also the interest of the harmed party (e.g. the interest of the State harmed by corrupt conduct) cannot properly be considered “negligible.” In any event, the Article 53 SCC is no longer being used by public prosecutors to resolve foreign bribery proceedings subsequent to the 2018 OECD report on phase 4. (This Phase 4 report by the OECD Working Group on Bribery in International Business Transactions evaluates and makes recommendations on Switzerland's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business

Transactions, see n. 84, p. 41; see also OECD (2020 written follow-up), pp. 33-34 regarding recommendation 7 (e))

In short, the Summary Penalty Order Procedure is not an adequate substitute for a DPA procedure because it presumes a criminal conviction. As for abandonment of prosecution or reparation under Article 53 SCC, these procedures have not been applied since 2018. Switzerland therefore lacks an ideal instrument for the rapid, negotiated settlement of criminal proceedings involving economic crime.

## A FUTURE SWISS DPA REGIME

Although the OAG's proposal has not yet been reduced to specific legislation, the proposal is based on the elements that the OAG says it has retained following an analysis of the systems in place in the United States, the United Kingdom, Ireland, France, the Netherlands, the Czech Republic and Portugal. The OAG is seeking a proposal that addresses two main issues: reparation and compliance. To this end, the OAG considers the following features of a future Swiss DPA regime to be essential (Blättler/Schnebli, n. 42):

- Acknowledgement of the facts and full cooperation from the company;
- Self-disclosure would be favored, but is not a prerequisite;
- The company should repay its unjust enrichment and compensate the injured parties; in some cases, compensation could be made by means of payment to a charitable institution or a NGO;
- To prevent recurrence, conditions could be imposed on the company--for example, organizational compliance, which may include the development of awareness-raising and training programs for employees, the implementation of risk detection mechanisms or the establishment of a whistle-blowing platform, as well as control and compliance mechanisms, and adoption of a code of conduct (Blättler/Schnebli, n. 48; see also OECD Principles of Corporate Governance (2023));
- Monitoring of the implementation of conditions established by the DPA, whether by a state agency, specialized companies or law firms (the OAG contemplates selection of monitors who would be "experts" with "special

knowledge,” within the meaning of article 182 of the Swiss Code of Criminal Procedure (Blättler/Schnebli, n. 50), and who would also be considered public officials within the meaning of article 110 para. 3 SCC);

- Approval of the DPA by a judge, in open court, according to the principle of public hearings, would be required; and
- Adoption of published guidelines would be necessary to provide sufficient clarity to considering going the route of a DPA; the guidelines would cover such topics as the conditions for benefiting from such a program, the advantages to be gained from self-disclosure, or from full cooperation. (Blättler/Schnebli, n. 44)

## SOME IMPORTANT QUESTIONS ARE OPEN

The elements put forward by the OAG obviously raise numerous questions. Among them are three particularly sensitive ones, to which the drafters of the future bill will have to pay particular attention.

**1. The fate of individuals.** The OAG makes no secret of the fact that one of the aims of a Swiss DPA regime is “to convict the individuals responsible within the company” (Blättler/Schnebli, n. 34); in other words, prosecutors want to be able to make deals with companies in order to help secure convictions of individuals. The OAG will therefore want to obtain unlimited use of the evidence obtained in the DPA proceedings against the company, including possibly the DPA itself, and use it in parallel or subsequent proceedings against individuals. It would be up to the judge to evaluate the evidence in question under the principle of free evaluation of evidence. However, treating a contractual instrument such as a DPA as evidence would be highly questionable in a continental system without the procedural safeguards that normally accompany it, like restrictions related to their subsequent use in other proceedings.

In contrast, in the UK and the United States, a statement of facts contained in a DPA would not ordinarily be admissible in a subsequent proceeding against an individual because it would be considered hearsay not subject to an exception under Federal Rule of Evidence 803. Moreover, a statement of facts, to the same extent as a foreign judgment, should not be treated as

evidence of the facts investigated, evidence being a trace left by a fact in the material world or in a person's memory. (Kinzer, Les enjeux de la transparence du point de vue de la défense, in : Capus/Hohl Zürcher, Negotiated Justice in Transnational Corruption – Between Transparency and Confidentiality, Neuchâtel, 2024, n. 38)

**2. Judicial Review.** Switzerland will need to determine the role it intends to assign to judges with respect to a future DPA regime. The fundamental role of the judge in a continental legal system means that the American model, which lacks meaningful judicial oversight of DPAs, is unlikely to be adopted. It is simply inconceivable that the content of a DPA or, even more, the issue of whether a DPA has been violated, would be left solely to the discretion of prosecutors. So, the Swiss judge will have a role. It could be a role similar to that in the UK DPA system, where the court is involved at two stages and reviews the content to confirm it is in the interest of justice, and it is fair, reasonable and proportionate. The role could also be more significant, with the judge being required to conduct a limited review, e.g. a prima facie examination, to ensure that the content of the DPA broadly aligns with the file.

**3. Corporate Cooperation.** The issue of cooperation gives rise to a series of important questions: What corporate behavior amounts to sufficient or full cooperation to weigh against prosecution and in favor of entering into a DPA? Does cooperation require waiver of privilege? If a company waives privilege, can the waiver be limited, for example, to a narrowly defined subject matter, or must the waiver be broader to protect the rights of individual defendants? What is meant by full corporate cooperation is an important question for the drafters of DPA legislation and the guidelines that will follow.

## CONCLUSION

The thorny issues briefly outlined here are only some of the issues to be addressed in future legislation. The Swiss political system enacts new legislation only after extensive consultation and reflection. Yet a DPA-type instrument may be getting closer to adoption largely for the reasons set out by the OAG and summarized above. Adoption of a DPA regime should be accompanied by the necessary procedural reinforcement of the rights of individuals, and the rights of the defense, to resist vigorously and appropriately the increased powers of prosecutors through new instruments and procedures.

---

## AUTHORS



### **Grégoire Mangeat**

Fellow [Grégoire Mangeat](#) is one of the founders of MANGEAT and Former Chairman of the Geneva Bar Association (2016-2018). He specializes in assisting and representing companies and individuals in Swiss and International proceedings.



TA

# Cross-Border Evidence Gathering

A Primer on Mutual Legal Assistance  
Treaties and Letters Rogatory

**T. MARKUS FUNK, Ph.D.**

**THE HON. VIRGINIA KENDALL**



# Introduction

Whether engaging in the civil discovery process or investigating criminal conduct, the need to collect evidence located in a foreign country arises more frequently today than ever before. That said, national sovereignty, international treaties, and international law, typically preclude U.S. law enforcement officials or litigation counsel from simply flying to a foreign country to conduct searches, question suspects/witnesses, or obtain documents. The two indispensable vehicles for obtaining foreign evidence – the focus of this article – continue to be Mutual Legal Assistance Treaties (MLATs) and Letters Rogatory.

On the whole, MLATs are the principal means by which law enforcement authorities make transnational requests for evidence gathering; in contrast, MLAT requests are typically not available to civil litigants, who would generally turn to letters rogatory, as we explain below. We also provide at the conclusion of the article a table that compares the key features of MLATs and Letters Rogatory.

## LETTERS ROGATORY

Letters rogatory (also known in some circles as “letters of request” when presented by a nonparty “interested person”) are formal requests for judicial assistance made by a court in one country to a court in another country. Once issued, they may be conveyed through diplomatic channels, or they may be sent directly from court to court.

Letters rogatory are often used to obtain evidence, such as compelled testimony, which may not be available to a foreign criminal or civil litigant without judicial authorization. They are used primarily by non-government litigants who do not have access to the MLAT process. In contrast to MLATs, letters rogatory are not treaty-based; there is no guarantee that the requested country or tribunal will act on a request for assistance, or if it acts, how it will act.

## OUTGOING

The letter rogatory process is less formal than pursuing evidence through an MLAT, but its execution can be more time-consuming. Outgoing letters rogatory--requests for assistance with obtaining evidence abroad, made by counsel through the U.S. court--are issued by the U.S. State Department pursuant to 28 U.S.C. § 1781, and provided for under Federal Rules of Civil Procedure 28(b) and 4(f)(2)(B). Section 1781(b), however, also allows a district court (and, for that matter, a foreign court) to bypass the State Department and transmit the outgoing letter rogatory directly to the “foreign tribunal, officer, or agency.” Although not as common in practice, there is nothing in 28 U.S. Code § 1781 or otherwise preventing a state court from similarly issuing a letter rogatory (though it is possible that the responsiveness by some foreign courts may be reduced if they are not as familiar with the state court issuing the letter). Because the letter rogatory process is time-consuming and may involve unique issues of foreign procedural law, moreover, parties seeking evidence should consider contacting local counsel to file the letter rogatory on their behalf, a strategy that may facilitate the process.

In most cases, foreign courts honor requests issued pursuant to letters rogatory. However, international judicial assistance is discretionary, based upon principles of comity rather than treaty, and is also subject to legal procedures in the requested country.

## INCOMING

Incoming letters rogatory--requests for judicial assistance originating in a foreign or international tribunal--are also covered by 28 U.S.C. §§ 1781 and 1782. OIA receives incoming letters rogatory from foreign or international tribunals and transmits each approved request to the federal court in the district where the evidence is located or witness resides.

## ESSENTIAL ELEMENTS OF A LETTER ROGATORY

In addition, to facilitate the process, courts should ensure that the letter includes the following:

- a statement that the request for international judicial assistance is being made in the interests of justice;
- a brief synopsis of the case, including identification of the parties and the nature of the claim and relief sought, to enable the foreign court to understand the issues involved;
- the type of case (e.g., civil, criminal, or administrative);
- the nature of the assistance required (e.g., compel testimony or production of evidence, serve process);
- the name, address, and other identifiers, such as corporate title, of the person abroad to be served or from whom evidence is to be compelled, and a description of any documents to be served;
- a list of questions to be asked, where applicable (generally in the form of written interrogatories);
- a statement from the requesting court expressing a willingness to provide similar reciprocal assistance to judicial authorities of the receiving state; and
- a statement that the requesting court or counsel is willing to reimburse the judicial authorities of the receiving state for any costs incurred in executing the requesting court's letter rogatory.

The following chart outlines the typical outgoing letter rogatory process

## SUBMITTING A LETTER ROGATORY FOR EXECUTION BY A FOREIGN COURT

State or federal court (or counsel acting with their consent) transmits the letter rogatory to the U.S. Department of State (DOS)

DOS reviews the letter rogatory and, once approved, transmits it to the U.S. embassy in the applicable country

U.S. embassy transmits the letter rogatory to the Ministry of Foreign Affairs

Ministry of Foreign Affairs transmits the letter rogatory to the Ministry of Justice

Ministry of Justice transmits the letter rogatory to the foreign court

Provided the request comports with foreign laws and regulations, the foreign court provides requested assistance

Result of the assistance is transmitted to DOS via the diplomatic channels

DOS Office of American Citizens Services transmits the result to the requesting court in the United States via certified mail

Requesting counsel or party is notified

## MUTUAL LEGAL ASSISTANCE TREATIES

### OVERVIEW

MLATs are the principal vehicle through which law enforcement officials make transnational requests for assistance relating to evidence gathering and other law enforcement activities (MLATs are not available to non-law enforcement litigants). They are available for use by law enforcement officials involved in criminal investigations and proceedings (or in some civil matters where the case is related to a criminal matter). MLATs are legally binding negotiated commitments. Nonetheless, courts review specific requests for assistance and may deny them if they fail to comply with applicable domestic law or procedure.

## STATUTORY SCHEME

28 U.S.C. § 1782

Originally enacted in the mid-nineteenth century to encourage reciprocal assistance with transnational litigation, the statute now codified at 28 U.S.C. § 1782 permits federal courts to provide cross-border assistance via MLATs.

18 U.S.C. § 3512

The Foreign Evidence Efficiency Act, codified at 18 U.S.C. § 3512, was enacted to help streamline the MLAT process, making it “easier for the United States to respond to requests by allowing them to be centralized and by putting the process for handling them within a clear statutory system.”

## SCOPE

The United States has bilateral MLATs in force with every European Union member state, many of the Organization of American States member states, and many other countries around the world.

MLATs provide for cooperation between nations in the investigation and prosecution of transnational crime, and they do so through explicitly enumerated categories of law enforcement assistance unique to each treaty. Most MLATs also include a catchall provision authorizing the transfer of any evidence not prohibited by the requested nation’s law.

## PROCEDURE

When a foreign country requests assistance pursuant to an MLAT, the U.S. court must determine whether (1) the terms of the MLAT prescribe practices or procedures for the taking of testimony and production of evidence, (2) the Federal Rules of Procedure and Evidence apply, or (3) the MLAT requires some sort of a hybrid approach. It is also acceptable to follow specified practices and procedures of the requesting *country-provided* they are consistent with U.S. law, including the rules relating to privilege. MLATs executed in the United States must follow U.S. constitutional requirements, including the protection of Fourth Amendment and Fifth Amendment rights.

That said, U.S. legal standards do not apply to the seizure of evidence overseas when the foreign country is conducting the investigation independently and seizes evidence later introduced in a U.S. court, nor does the Sixth Amendment right to counsel attach to civil depositions.

## JUDICIAL REVIEW OF REQUESTS FOR MUTUAL LEGAL ASSISTANCE

Although there is a presumption in favor of honoring MLAT requests, the district court must still review the terms of each request, checking that they comply with the terms of the underlying treaty and comport with U.S. law. U.S. courts will also consider constitutional challenges to a request for legal assistance. Although such cases are rare, a district court may not enforce a subpoena that would offend a constitutional guarantee, such as a subpoena that would result in an egregious violation of human rights.

## LEGAL ISSUES

Although most requests for assistance pursuant to an MLAT proceed uneventfully, courts sometimes are called upon to resolve related legal issues, such as dual criminality, defense access to evidence located abroad, delay, and statute of limitations.

Dual Criminality. Unlike extradition treaties enforced in U.S. courts, most MLATs do not require dual criminality—that the offense for which the foreign state seeks assistance also constitutes a crime in the requested state. The utilitarian reason for this deviation from the norm is to facilitate responsiveness.

Defense Access to Evidence Located Abroad. The MLAT process was created to facilitate international cooperation in the investigation and prosecution of criminal cases. Each treaty's terms apply only to the contracting nations' parties, and the benefits conferred are available only to the governmental officials of those nations.

As noted, access to evidence through an MLAT is almost always restricted to prosecutors, government agencies that investigate criminal conduct, and

government agencies that are responsible for matters ancillary to criminal conduct, including civil forfeiture.

Commentators have noted that the lack of compulsion parity between prosecutors and the defense in obtaining foreign evidence has due process implications. However, few, if any, courts have been receptive to such petitions in the absence of language in the MLAT that provides for defense access to evidence abroad. Courts have consistently held that MLATs create no private rights permitting an individual defendant to force the government to request evidence pursuant to an MLAT, even when the defendant invokes constitutional concerns.

## STATUTE OF LIMITATIONS

When the government seeks evidence from abroad prior to the return of an indictment, it files an *ex parte* application with the court to toll the statute of limitations pursuant to 18 U.S.C. § 3292. The court must find by a preponderance of the evidence that “it reasonably appears” the evidence is in the foreign country, and the tolling of the statute may not exceed three years. The suspension of the statute of limitations begins on the date that the MLAT request is made; it ends when the foreign government takes its final action on the request. Section 3292, moreover, does not provide the defendant with a right to notice that the statute of limitations is being suspended or a hearing on the issue.

## IMPACT OF THE 2018 CLOUD ACT

The Clarifying Lawful Overseas Use of Data Act (“CLOUD Act”) (H.R. 4943) is a United States federal law enacted in 2018 by the passing of the Consolidated Appropriations Act, 2018, PL 115–141, Division V.

The Act, which primarily amends the 1986 Stored Communications Act (SCA), permits federal law enforcement to compel U.S.-based technology companies via warrant or subpoena to provide requested data stored on servers regardless of whether the data are stored in the U.S. or overseas. It was enacted to address the difficulties agencies like the FBI had when seeking to obtain remote data through service providers using outdated SCA warrants (which were developed prior to the availability of cloud computing).

he CLOUD Act requires U.S. data and communication companies to provide, pursuant to a court-ordered warrant, stored data for a customer or subscriber on any server they own and operate anywhere in the world. It also provides mechanisms for the companies or the courts to reject or challenge these if they believe the request violates the privacy rights of the foreign country where the data is stored.

Though a detailed analysis of the CLOUD Act is outside of the scope of this article, critics have argued that the CLOUD Act in effect has created a legal shortcut to circumvent the MLAT system and its privacy and due process safeguards.

## **USING INFORMAL CHANNELS TO GATHER EVIDENCE**

Although formal MLATs, letters rogatory, and other international conventions are the “public face” of transnational legal assistance, a significant amount of criminal investigation-related information is exchanged through informal channels: investigator to investigator, prosecutor to prosecutor, defense counsel to local counterpart. But to ensure admissibility and avoid issues with the relevant authorities, in most cases it is better to pursue the formal MLAT or Letters Rogatory channels.

## **CONCLUSION**

Whether through MLATs, letters rogatory, or informal means, the process of obtaining evidence from abroad in criminal and civil cases can be time-consuming and frustrating to all parties involved, including the courts. Armed with a basic understanding of how these transnational evidence-gathering tools operate, prosecutors, litigants, and courts can plan for potential delays and facilitate the evidence-gathering process in a manner that promotes fairness and conserves resources.



## Comparing the Key Features of MLATs and Letters Rogatory

Issue	MLAT	Letter Rogatory
Nature of instrument?	Bilateral cooperation treaty	Issued by state and federal courts as a matter of comity (and with the expectation of reciprocity)
Scope of use?	The primary method of obtaining foreign evidence and other assistance	Available to all parties in criminal and civil matters
Nature of judicial involvement?	U.S. district courts supervise issuance and execution only of incoming requests	Federal and state judiciaries supervise issuance and execution of outgoing and incoming requests
Available to criminal defendants?	No (except pursuant to the first three MLATS the United States signed)	Yes; in fact, is the primary formal means for defendants to obtain foreign evidence
Available to civil litigants?	No	Yes
Available to prosecutors?	Yes	Yes
Must a case have been filed for assistance to be available?	No	Yes
Available pre-indictment (during investigative phase)?	Yes	No
Efficient method of obtaining evidence?	Relatively speaking, yes	No, generally slow and cumbersome
Processed through diplomatic channels?	Always	Almost always

---

## AUTHORS



### **T. Markus Funk, Ph.D.**

Fellow [Markus Funk](#) a former federal prosecutor (Chicago) and DOJ/State Department Section Chief (Kosovo) in [private practice with Perkins Coie](#). You can reach him at [mfunk@perkinscoie.com](mailto:mfunk@perkinscoie.com) or follow him on Twitter(X) @TMarkusFunk1.



### **The Hon. Virginia Kendall**

Virginia M. Kendall is a federal district judge serving on the United States District Court for the Northern District of Illinois.



TA

# DOJ's Unrelenting Push for Corporate Cooperation

Rewards, sentencing reductions, and demanded loyalty reveal the government's expectation of voluntary corporate disclosure

**KAREN WOODY**

# Introduction

Over the last three years, Deputy Attorney General Lisa Monaco has announced a number of new policies and procedures for DOJ prosecutors. These recent DOJ policies double down on the notion that companies must be swift in voluntarily disclosing violations, quick to point fingers at any executives involved in prohibited activity, and must produce to the government potentially damning documents as quickly as possible upon discovery. The increased pressure brought on by the newer DOJ policies, in addition to the most recent whistleblower program announced in March 2024, creates spillover effects on corporations debating whether to voluntarily disclose potential violations.

## THE HISTORY OF CORPORATE COOPERATION IN CRIMINAL MATTERS

The assumption of corporate cooperation in federal prosecutions has existed for at least three decades. In the 1990s, the federal government gradually shifted its corporate criminal prosecutorial tactics to a practice that incorporated cooperation as federal policy. This policy shift was fueled primarily by the United States Sentencing Commission and the DOJ.

In 1991, the United States Sentencing Commission adopted the first Sentencing Guidelines for Organizations. Uniformity and predictability were the goals of the Guidelines, given that corporations often received varying sentences for similar conduct. Pragmatically, for corporations, the Sentencing Guidelines and standardized sentences represented a heightened risk of increased punishment because corporations often had previously benefited from sentencing disparities. The Guidelines incentivized companies to detect and deter criminal conduct of their employees because they afforded companies a reduction in corporate fines if the company could show it had established effective programs or systems to prevent criminal wrongdoing.

In the era of cooperation sparked by the Sentencing Guidelines, the DOJ began to issue memoranda establishing guidelines for prosecutors investigating and charging corporations for misconduct. The memoranda typically were promulgated by the then-current Deputy Attorney General. The criteria for cooperation and the level of aggressiveness taken by the DOJ have varied among the Deputy Attorneys General. However, there remains a common theme across all of the Memoranda: corporations that cooperate with the government can expect to receive favorable deals and can avoid prosecution.

## RECENT DOJ POLICIES AND PROGRAMS

The current DOJ leadership has been prolific in establishing new, and often stricter, procedures for corporations being investigated by the U.S. government. The gist of these policies have been announced in a [Memorandum from Deputy Attorney General Monaco in 2021](#) outlining more comprehensive procedures for cooperation credit; a subsequent [Memorandum from Deputy Attorney General Monaco in 2022](#); a January 2023 [speech](#) by then-Assistant Attorney General Kenneth Polite updating the Corporate Enforcement Program; a [March 2023 speech](#) by Deputy Attorney General Monaco announcing new voluntary disclosure procedures and executive clawback measures; and a [March 2024 speech](#) by Deputy Attorney General Monaco rolling out a whistleblower bounty program at the DOJ.

Each of these new policies underscores the ultimate priority of the DOJ: timely voluntary disclosure by corporations. In addition to timeliness, DOJ policies also emphasize the importance of thoroughness in identifying culpable individuals. In fact, the 2022 Monaco Memo stated that holding individuals accountable is the paramount goal of the Department's investigation and prosecution of corporations. What exactly does "timeliness" mean in the context of corporate cooperation? As stated in the 2021 Monaco Memo, companies must provide all relevant, nonprivileged facts in order to receive cooperation credit. The 2022 Monaco Memo added that the disclosures must be "swift and without delay." Further, "prosecutors will consider, for example, whether a company promptly notified prosecutors of particularly relevant information *once it was discovered*, or if the company instead delayed disclosure in a manner that inhibited the government's

investigation.” This statement was coupled with the threat that “[c]ompanies that identify significant facts but delay their disclosure will place in jeopardy their eligibility for cooperation credit.”

In a [speech](#) accompanying the release of the 2022 Monaco Memo, Deputy Attorney General Monaco put the timeliness requirement more bluntly:

If a cooperating company discovers hot documents or evidence, *its first reaction should be to notify the prosecutors*. This requirement is *in addition* to prior guidance that corporations must provide all relevant, non-privileged facts about individual misconduct to receive any cooperation credit.

(Emphasis added). A few months after the promulgation of the 2022 Monaco Memo, Assistant Attorney General Polite announced changes to the FCPA Corporate Enforcement Program (CEP), and sought to add clarity around the value proposition of voluntary self-disclosure.

Under the revised CEP, companies may be able to receive a declination even if aggravating factors are present. This is a change from the previous CEP which disqualified from a declination any company that had an aggravating factor, such as a recidivist company. Thus, under the revised CEP, although a company will not qualify for a *presumption* of a declination if aggravating circumstances are present, prosecutors may nonetheless determine that a declination is an appropriate outcome if the company “demonstrates to the Criminal Division that it has met all of the following factors:

- The voluntary self-disclosure was made immediately upon the company becoming aware of the allegation of misconduct;
- At the time of the misconduct and disclosure, the company had an effective compliance program and system of internal accounting controls, which enabled the identification of the misconduct and led to the company’s voluntary self-disclosure; and
- The company provided *extraordinary* cooperation with the Department’s investigation and undertook *extraordinary* remediation that exceeds the respective factors listed herein.

(Emphasis added). If all three factors listed are present, the Criminal Division will recommend at least a 50% percent reduction from the Sentencing Guidelines, and up to a 75% reduction. The case for recidivist companies, however, is different. Polite’s speech underscored that recidivist companies’ reduction will “generally not be from the low end of the fine range” and that “prosecutors will have discretion to determine the starting point within the Guidelines range.” That said, Polite reiterated that this overall revision is a “significant increase” from the previous *maximum* reduction of 50% off the Guidelines range.

What happens if a company does not voluntarily self-disclose, or is “scooped” before getting to the DOJ? The revised CEP states that such a company can avail itself of a 50% reduction in the low end of the Guidelines range, provided the company cooperates in a timely manner and appropriately remediates the issue. After laying out the carrot, Assistant Attorney General Polite reminded corporations of the stick, stating: “every company starts at zero cooperation credit and must earn it based on the parameters and factors outlined in the CEP. This is not a race to the bottom. A reduction of 50% will not be the new norm; it will be reserved for companies that truly distinguish themselves and demonstrate *extraordinary* cooperation and remediation.” (Emphasis added).

Assistant Attorney General Polite must have known that most attorneys in the defense bar, as well as in-house counsel, would question what he meant by “extraordinary” cooperation, because he continued in his speech by stating that the differences between “full” and “extraordinary” cooperation are “perhaps more in degree than in kind.” Further, “[t]o receive credit for extraordinary cooperation, companies must go above and beyond the criteria for full cooperation set [out? forth?] in our policies—not just run of the mill, or even gold-standard cooperation, but truly extraordinary.... And of course, the facts and circumstances of each case will be unique.”

The themes from Assistant Attorney General Polite’s speech echoed those of the other recent DOJ policies: timeliness/speed; *extraordinary* cooperation; and individual accountability.

Finally, in March 2024, Deputy Attorney General Monaco announced in a [speech](#) at the ABA White Collar Crime Annual Conference a new whistleblower bounty program. Under the whistleblower pilot program, individuals will be eligible to receive payment if they discover and report “significant corporate or financial misconduct” of which the DOJ was previously unaware. In such a case, “the individual could qualify to receive a portion of the resulting forfeiture” as a reward.

Deputy Attorney General Monaco’s speech laid out some of the parameters for the program, including: (1) that whistleblowers will be paid only after all victims are properly compensated; (2) the whistleblower cannot have been involved in the criminal activity; (3) the bounty program applies only in cases where there is no existing financial disclosure incentive, such as in a False Claims Act *qui tam* action.

The DOJ continues to emphasize the importance of companies’ implementing an effective corporate compliance program, including that companies create a mechanism for employees to confidentially report misconduct. However, as companies continue to invest in these internal channels and protect whistleblowers who use them, the DOJ’s new program creates challenges for companies to encourage their employees to report concerns internally instead of to DOJ given the potential for monetary payouts under DOJ’s new program.

## IMPLICATIONS OF DOJ POLICIES AND PRESSURES

*Attorney-Client Privilege.* Importantly, DOJ does not force waiver of attorney-client privilege under current DOJ cooperation policy, in contrast to earlier eras of DOJ prosecution policies. However, the push for real-time disclosure and “extraordinary” cooperation (above and beyond “full cooperation”) seems to be a wink by the DOJ that waivers of attorney-client privilege would be “seen favorably.” If nothing else, the tone of the recent DOJ policies suggests that a “culture of waiver” is being established implicitly.

The message expressed in Deputy Attorney General Monaco’s 2022 Memorandum and accompanying speech was clear – a corporation’s “first call” upon discovering a hot document should be to the government.



Nevertheless, a culture in which a “first call” is not to a company attorney but instead to the government is arguably *beyond* a culture of waiver --- it is side-stepping legal advice entirely, thereby eviscerating the functional role of defense counsel, be it in-house or outside, and creating significant risk for both the company and the individuals who work for the company.

When will the demand for “extraordinary” cooperation become a soft requirement for waiver? It is possible that the issue will never get to the courts. Such an outcome would be likely only when an individual, who would be willing to take these matters to trial because of the real threat of incarceration, was implicated for the effective waiver, much like the defendants at KPMG in the *United States v. Stein* litigation. See, e.g., *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008).

Of course, waiver of attorney-client privilege raises issues for the firm; even more, waiver has significant implications for individuals inside the firm if incriminating evidence is produced as a result. This is not incidental to DOJ policy but part of the design; the policy emphasizes that individuals must be held accountable for any illegal acts. But individuals in this context could be operating with one hand tied behind their backs because their employer could be turning over incriminating documents and interviews that help the government make a criminal case against them as individuals.

*Ethical Concerns.* While real-time disclosure may not be as obvious a danger as treading upon the sacrosanct attorney-client privilege, real-time disclosure of documents and other materials is effectively sidestepping any attempt or availability of providing both a privilege review and potentially creating a defense strategy. It is the effective deputization of in-house and outside defense counsel. According to the Monaco Speech, “strategization” by corporations will be deemed un-cooperative. Given this statement, what then is the role of defense counsel at all? This question raises concerns of the ethical duties of attorneys who may simply be pass-through agents to the government, risking consequences to both the corporate client and the individuals employed there. See Benjamin Gruenstein & Rebecca Schindel, “*The Risks of ‘Too Much’ Entanglement with the Government When Conducting Internal Investigations,*” Bulletin of the International Academy of Financial Crime Litigators, Summer 2023.

Companies, like individuals, have a right to have counsel. Companies have a right to have a robust defense. This is not inapposite to a culture of cooperation. Companies, like individuals, should be able to have a defense strategy and plan without being punished for it, and losing out on the “carrot” of cooperation credit.

Moreover, individuals within the corporation also have a right to counsel. These rights might be at odds with a requirement that a corporation incriminate individuals in order to be deemed cooperative, thus creating a conflict of interest for many at the firm. This conflict of interest has very real consequences for individuals who *can* go to jail, unlike the corporation. The liberty interests at stake between individuals and the corporation are vastly different, and call for some significant protections for individuals who might operate under the assumption that corporate counsel represents them as individuals, or at least not be adverse to them as individuals.

Finally, what happens if the government pushes too far and companies do not think the “value proposition” of cooperation credit is worth the gamble? The calculus a company will do regarding voluntary self-disclosure and cooperation must take into account: (1) the new risk that whistleblowers have more incentive to report to the DOJ rather than internally; (2) the implications concerning what will be required of the firm, including the possible waiver of attorney-client privilege; (3) what the likely consequences will be for the individuals in the firm, including the individuals in the role of defense counsel, both in-house and outside; (4) the implications and requirements for the compliance personnel; and (5) the legal, political and business ramifications for any international work the company does if clawback and data privacy laws in foreign countries must be eschewed in order to meet the cooperation standard required by the DOJ.

The DOJ wants and needs the culture of compliance and the voluntary self-disclosure regime in order to have the resources to take on major complex corporate crimes. Yet the balance between government and cooperating companies is a precarious one; it may be a house of cards that needs to be intact for both sides to come out ahead.

---

## AUTHORS



### **Karen Woody**

Fellow [Karen Woody](#) is a professor at Washington & Lee University School of Law. Prior to teaching, she practiced law as a white collar defense litigator in Washington, D.C.

# The International Academy of Financial Crime Litigators Founders

For further information, please consult our website:  
[www.financialcrimelitigators.org](http://www.financialcrimelitigators.org)



**STÉPHANE BONIFASSI**  
*Bonifassi Avocats*



**LINCOLN CAYLOR**  
*Bennett Jones*



**ELIZABETH ORTEGA**  
*ECO Strategic  
Communications*