

**Davis Polk**

# **Fireside chat with Dan Kahn, Davis Polk partner and former senior DOJ official**

Presented by Greg Andres, Martine Beamon, and Dan Kahn

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# About Dan Kahn

## Department of Justice – 2010-2021

- Noteworthy Positions
  - Deputy Assistant Attorney General – 2021
  - Chief of DOJ's Fraud Section – 2020-2021
    - FCPA
    - Financial Fraud (securities, commodities, crypto, procurement, financial institution/FinTechs)
    - Healthcare Fraud
  - Chief of the DOJ's FCPA Unit – 2016-2019
- Described by Wall Street Journal as DOJ's "most recognizable expert on the FCPA"
- Oversaw more than 50 corporate resolutions and 20 monitorships
- Personally resolved 11 corporate FCPA resolutions, including Alstom and Odebrecht
- DOJ's liaison to the ABA standing committee on monitors
- Central role in drafting FCPA Corporate Enforcement Policy, Anti-Piling On Policy, Criminal Division's Monitorship Policy, Criminal Division's Evaluation of Corporate Compliance Programs, and the Section Edition of the FCPA Resource Guide

## Davis Polk – 2003-2010

# Big picture enforcement trends

- “Surge” in resources
  - E.g., FBI squad for Fraud Section
- Heightened expectations for cooperation
  - Reversion to Obama-era requirements, and likely more
- Harsher treatment of repeat offenders
  - DAG questioned whether repeat offenders should be able to resolve through NPA or DPA
- Heightened scrutiny of compliance programs
  - Risk-based compliance
  - Focus on measuring compliance, including culture
  - Focus on use of data
- More monitorships
- Additional changes likely

# Increase in use of monitors

## Compare FCPA monitors in:

- 2016 (8)
- 2017-2021 (7)

## Issues

- Mission creep
- Difficult monitor can find problems where they don't exist
- Depending on mandate, difficulty certifying compliance program

## Avoiding monitors

- Compliance enhancements
- Lessons learned
- Clear communications with regulators
- Defense counsel with credibility
- Company's role at government presentations

# Compliance program enhancements

- Evaluation of Corporate Compliance Programs good starting point
- Risk-based compliance
- Use of data
  - Use of data to measure effectiveness
  - Use of data to detect misconduct
- Increased attention to culture
- Remediation of misconduct, including misconduct at other similarly situated companies

# FCPA enforcement

Trends to watch in 2021 and beyond

- Enforcement rates have been steady across recent administrations—we now anticipate an uptick:
  - DOJ to “surge resources”
  - Biden Memo on Corruption as Core National Security Issue
  - Northern Triangle Anticorruption Task Force
- Proactive use of data
- Use of money laundering as catch-all
- Focus on high-risk jurisdictions
  - Latin America
  - Africa/Middle East
  - Asia-Pacific

# FCPA enforcement

Companies with risk

## Broad jurisdiction

- Publicly traded companies (includes ADRs)
- Companies with US presence
- Territorial jurisdiction (even if no US presence)
- Accounting provisions often used where there is no jurisdiction for anti-bribery provisions

## Types of companies

- Energy and Commodity Companies
- Financial Institutions, FinTechs, and Hedge Funds
- Cryptocurrency Companies
- Pharma/Healthcare Companies
- Private Equity
- Defense Contractors
- Technology Companies

# Fintechs and cryptocurrency companies

Trends to watch in 2021 and beyond

## Surge in resources

- DOJ announced National Cryptocurrency Enforcement Team (NCET)
- SEC and CFTC increased attention to (and competition over) cryptocurrency cases

## Areas of likely enforcement/risk

- Sanctions
- AML/BSA
- Fraud/Manipulation
- FCPA