

# FCPA Update

A Global Anti-Corruption Newsletter



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## U.S. Authorities Settle with Former Sports Lottery Business and Charge Former Top Executive

On November 18, 2024, BIT Mining, Ltd. (“BIT Mining”), formerly an online sports lottery business known as 500.com Ltd. (“500.com”),<sup>1</sup> agreed to pay \$10 million to resolve DOJ and SEC investigations into alleged FCPA violations. These settlements related to an unsuccessful scheme to bribe government officials in seeking to enter Japan’s integrated resort and casino market. Following raids on 500.com’s offices in 2019, Japanese prosecutors charged government officials and third-party consultants that allegedly facilitated the bribery. In parallel with announcing a DPA with BIT Mining, DOJ unsealed a June 2024 indictment charging 500.com’s former CEO with conspiracy and substantive FCPA charges.<sup>2</sup>

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1. The relevant findings in the DPA and the SEC Order relate to the period when BIT Mining, Ltd. was operating as 500.com, Ltd.
2. *United States v. Zhengming Pan*, Indictment ¶¶ 4–5, Docket No. 24-cr-00402-EP (June 18, 2024), <https://www.justice.gov/opa/media/1377336/dl> (“Pan Indictment”).

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This case highlights U.S. authorities' willingness to prosecute even unprofitable bribery schemes and reflects the risk of FCPA enforcement relating to conduct even in jurisdictions that typically pose lower corruption risk.

### Corporate Resolution with BIT Mining

500.com operated an online sports lottery service headquartered in China, and its American Depositary Shares (ADSs) traded on the New York Stock Exchange until April 2021. 500.com then changed its name to BIT Mining, which is now a crypto assets mining company whose shares trade on the NYSE.<sup>3</sup>

In December 2016, Japan's parliament, the National Diet, lifted a prior casino ban and legalized gambling in the country. In 2018, Japan enacted legislation permitting the licensing of a limited number of Integrated Resorts ("IRs")—large resorts integrating casinos with other hospitality and entertainment venues. 500.com's then-CEO learned of the opportunity and allegedly sought to enter the Japanese market to turn around 500.com's declining business.<sup>4</sup>

According to the DPA, between approximately 2017 and 2019, 500.com engaged multiple Japanese third-party consultants in a scheme to bribe at least two Japanese government officials, including members of the National Diet, to support 500.com's efforts to open an IR in Japan. Improper payments were made through sham consulting fees and reimbursements, cash bribes, and travel and entertainment expenses. Specifically, the DPA's statement of facts specified that:<sup>5</sup>

- 500.com illicitly paid ¥2 million (approximately \$26,500) to a Japanese official after the official—who later became a key decisionmaker with respect to IRs—spoke at a 500.com-sponsored IR conference. This payment was recorded as a "lecture fee" and was later increased beyond the agreed-upon amount with the unilateral approval of 500.com's then-CEO after the official's promotion, even though the official already had delivered the lecture;<sup>6</sup>

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3. Order, *In re BIT Mining Ltd.* ¶ 3, Securities Exchange Act Release No. 101649 (Nov. 18, 2024), <https://www.sec.gov/files/litigation/admin/2024/34-101649.pdf> ("BIT Mining SEC Order").

4. *Id.* ¶¶ 13–15.

5. Deferred Prosecution Agreement, Attachment A ¶¶ 2, 7–9, 13–15, *United States v. BIT Mining, Ltd. (f/k/a/ 500.com Ltd)*, Case No. 2:24-cr-00744-EP (Nov. 18, 2024), <https://www.justice.gov/opa/media/1377341/dl> (hereinafter "BIT Mining DPA").

6. *Id.* ¶¶ 19, 21.

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- At the direction of its then-CEO, 500.com paid multiple Japanese officials a total of ¥26.5 million (approximately \$233,715). These payments were hand-delivered in cash and through wire transfers and disguised as due under a sham consulting agreement between 500.com and a Japanese marketing and media resource company tied to one of 500.com’s consultants. These payments were intended to obtain non-public information to aid 500.com’s IR bid;<sup>7</sup>
- 500.com illicitly provided multiple Japanese officials with luxury trips, private jet travel, shopping sprees, and entertainment. These were disguised as payments to the consultants or as reimbursable expenses; and<sup>8</sup>
- 500.com’s then-CEO signed annual Sarbanes-Oxley (“SOX”) CEO certifications for the 2017 and 2018 fiscal years that falsely stated that he had disclosed to 500.com’s auditors and the board any fraud involving management.<sup>9</sup>

**“This case highlights U.S. authorities’ willingness to prosecute even unprofitable bribery schemes and reflects the risk of FCPA enforcement relating to conduct even in jurisdictions that typically pose lower corruption risk.”**

The SEC Order also found that 500.com failed to follow its own procurement policy when it retained its consultants, evidenced by 500.com’s failure to verify that payments made to the consultants were for their stated purpose and that services in fact rendered were before paying or reimbursing the consultants. The Order further noted that the company did not provide anti-bribery training to its employees who interacted with government officials on its behalf and that executives allegedly could direct employees to pay invoices without supporting documentation.<sup>10</sup>

To resolve DOJ’s investigation, BIT Mining entered into a three-year DPA in connection with a criminal information filed in the U.S. District Court for the District of New Jersey that charged the company with: (1) conspiring to violate the anti-bribery and the books and records provisions of the FCPA, and (2) violating the

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7. *Id.* ¶¶ 27–35.

8. *Id.* ¶¶ 36–43.

9. *Id.* ¶¶ 44–46.

10. BIT Mining SEC Order ¶¶ 31–36.

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books and records provisions of the FCPA.<sup>11</sup> BIT Mining consented in a parallel action to an SEC cease-and-desist order that charged the company with violations of the FCPA's anti-bribery, books and records, and internal accounting controls provisions.<sup>12</sup>

After verifying BIT Mining's inability to pay the \$54 million penalty that otherwise would have been appropriate under the Sentencing Guidelines (which itself reflected a 10% discount off the bottom of the Guidelines' fine range), DOJ and BIT Mining agreed on the imposition of a \$10 million criminal penalty.<sup>13</sup> The SEC Order imposed a \$4 million civil penalty,<sup>14</sup> which DOJ agreed to credit towards the amount BIT Mining owes under the DPA. No disgorgement or forfeiture was imposed because there were no proceeds traceable to the offenses.<sup>15</sup>

Both the SEC and DOJ highlighted BIT Mining's remedial efforts, including that the company disposed of its entire lottery-related business in 2021, that it transitioned "to an industry that presents a lower corruption risk and "reduced its presence in high risk regions," that it no longer employs any of the executives involved in the misconduct, that it terminated its contracts with the third-party intermediaries involved in the scheme, and that it has revised and enhanced its policies, procedures, and training programs related to the FCPA.<sup>16</sup>

#### Indictment of 500.com's Former CEO

On June 18, 2024, a federal grand jury in the District of New Jersey returned an indictment against 500.com's then-CEO, Chinese national Zhengming Pan. The indictment charged him with four counts based on the same facts underlying the DPA and SEC Order against BIT Mining. Specifically, Pan was charged with: (1) conspiring to violate the anti-bribery and books and records provisions of the FCPA; (2) violating the anti-bribery provisions of the FCPA; and (3-4) violating the books and records provisions of the FCPA through the filing of false SOX CEO certifications for the 2017 and 2018 fiscal years.<sup>17</sup>

The case against Mr. Pan is currently ongoing.

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11. BIT Mining DPA ¶ 1.
  12. BIT Mining SEC Order ¶ 1.
  13. DOJ's Criminal Division appears to be continuing to follow the guidance issued in October 2019 by factoring BIT Mining's "current financial condition" and "alternative sources of capital" into its determination that BIT Mining had met its burden of establishing an inability to pay the proposed criminal penalty. See Brian A. Benczkowski, Assistant Attorney General, Criminal Division, U.S. Dep't of Justice, *Evaluating a Business Organization's Inability to Pay a Criminal Fine or Criminal Monetary Penalty* at 3 (Oct. 8, 2019), <https://www.justice.gov/opa/speech/file/1207576/dl?inline> (providing factors for determining whether a business organization has met its burden of establishing an inability to pay a proposed criminal penalty).
  14. BIT Mining DPA ¶¶ 8–10; BIT Mining SEC Order at 9.
  15. BIT Mining DPA ¶ 10.
  16. BIT Mining SEC Order at 8; BIT Mining DPA ¶ 4(e).
  17. Pan Indictment ¶¶ 4–5.

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## Conclusion

The enforcement action against BIT Mining and the criminal indictment of its former CEO provide several important takeaways:

- **Even unsuccessful bribery schemes can attract enforcement authorities' interest.** FCPA violations are complete with attempted bribery. Both DOJ and the SEC have shown that they are not shying away from bringing such cases, regardless of whether the bribe brings a substantial return—or any return at all—for the company.<sup>18</sup> For example, this past October, Raytheon Company agreed to pay approximately \$360 million to resolve DOJ and SEC investigations related to alleged schemes to bribe military officials in Qatar to obtain military defense contracts, including one to build a joint operations center with anticipated profits of more than \$72 million that Qatar ultimately decided not to go forward with.<sup>19</sup>
- **Corruption risk is not limited to higher-risk jurisdictions.** FCPA actions tend to highlight and target bribery and corruption schemes involving higher-risk jurisdictions. For example, Brazil and China have featured prominently in FCPA actions in the past several years. These countries tend to score relatively poorly based on measures of perceived risk, including Transparency International's Corruption Perceptions Index.<sup>20</sup> On the other hand, Japan ranks sixteenth on the index (with a very positive score), and this action appears to mark the first FCPA action brought against a company based on misconduct occurring in Japan. This matter therefore underscores that it is important not to lose sight of anti-corruption controls, even in jurisdictions perceived as lower-risk.

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18. See, e.g., *In re Flutter Entertainment plc, as successor-in-interest to The Stars Grp, Inc.*, Securities Exchange Act Release No. 97044 (Mar. 6, 2023), <https://www.sec.gov/files/litigation/admin/2023/34-97044.pdf> (SEC charging violations of the FCPA's accounting provisions in connection with company's employment of various consultants to lobby Russian government officials to promote the legalization of poker, despite the fact that poker was never legalized in Russia); Order, *In re Rio Tinto plc.* ¶¶ 1, 16 Securities Exchange Act Release No. 97049 (Mar. 6, 2023), <https://www.sec.gov/files/litigation/admin/2023/34-97049.pdf> (SEC charging violations of the FCPA's accounting provisions in connection with company's employment of a consultant who bribed Guinean government officials in an effort to allow Rio Tinto to retain its mining and exploration rights in the country's Simandou mountain region, notwithstanding the fact that the company "ultimately never...extracted anything of value from [the Simandou mountain region] because, in part, declining iron ore prices made mining in the Simandou region economically not viable.").
  19. See, e.g., Deferred Prosecution Agreement ¶ 21, *United States v. Raytheon Company*, Case No. 1:24-cr-00399-RER (E.D.N.Y. Oct. 16, 2024), <https://www.justice.gov/criminal/media/1373661/dl?inline>; Debevoise & Plimpton LLP, "Recent Resolutions Involving Aerospace and Defense Companies Highlight Importance of Third-Party Risk Management and Compliance Culture," FCPA Update, Vol. 16, No. 3 (Oct. 2024), <https://www.debevoise.com/insights/publications/2024/10/fcpa-update-october-2024>.
  20. See Transparency International, "Corruption Perceptions Index" (2023), <https://www.transparency.org/en/cpi/2023> (Brazil is ranked 104th and China is ranked 76th).

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- **Individuals are in the spotlight.** DOJ has long emphasized that individual accountability is the “most important priority” when it comes to corporate enforcement.<sup>21</sup> Although the number of FCPA charges announced against individuals has trended downwards over the past few years, this year has featured significant developments with respect to individual accountability. DOJ charged a number of individuals publicly in connection with a variety of schemes and won convictions at trials of implicated employees and government officials, including the former Comptroller General of Ecuador and the former Finance Minister of Mozambique.<sup>22</sup> Additionally, this month, the SEC charged an individual with FCPA violations for the first time since 2020.<sup>23</sup>

Pan’s indictment on FCPA books and records and conspiracy charges for his alleged role in directing a bribery scheme also highlights the organizational risk involved where members of management are implicated in wrongdoing. In such cases, the onus is on the board (and other members of management) and the structural integrity of the organization’s governance and compliance program to support and reaffirm a compliance-promoting culture. The DPA, in that vein, highlights as noteworthy remedial measures the company’s “increasing governance and oversight of compliance risks and audit findings by the Board,” its company-wide communications to promote compliance, and its incorporation of “compliance criteria in performance evaluations for senior management.”<sup>24</sup> Increased Board oversight, enhanced leadership by example, and implementation of compliance-promoting incentives help facilitate a strong compliance culture.

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21. See, e.g., Deputy Attorney General Lisa Monaco, “Remarks as Prepared for Delivery to the American Bar Association National Institute on White Collar Crime” (Mar. 2, 2023), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-remarks-american-bar-association-national>.
  22. See U.S. Dep’t of Justice Press Release No. 24-1243, “Former Comptroller General of Ecuador Sentenced in International Bribery and Money Laundering Scheme” (Oct. 1, 2024), <https://www.justice.gov/opa/pr/former-comptroller-general-ecuador-sentenced-international-bribery-and-money-laundering> (Carlos Ramon Polit Faggioni); U.S. Dep’t of Justice Press Release No. 24-995, “Former Finance Minister of Mozambique Convicted of \$2B Fraud and Money Laundering Scheme” (Aug. 8, 2024), <https://www.justice.gov/opa/pr/former-finance-minister-mozambique-convicted-2b-fraud-and-money-laundering-scheme> (Manuel Chang); U.S. Dep’t of Justice Press Release No. 24-1209, “Former Connecticut-Based Energy Trader Convicted of International Bribery Scheme” (Sept. 26, 2024), <https://www.justice.gov/opa/pr/former-connecticut-based-energy-trader-convicted-international-bribery-scheme>; U.S. Dep’t of Justice Press Release, “Ex-Trader for Vitol Convicted of Foreign Bribery and Money Laundering Scheme” (Feb. 23, 2024), <https://www.justice.gov/usao-edny/pr/ex-energy-trader-vitol-convicted-foreign-bribery-and-money-laundering-scheme> (Javier Aguilar).
  23. See U.S. Sec. & Exch. Comm’n Press Release No. 2024-181, “SEC Charges Three Senior Executives in Two Actions Alleging Massive Bribery Scheme Involving Indian Energy Companies Adani Green and Azure Power” (Nov. 20, 2024), <https://www.sec.gov/newsroom/press-releases/2024-181>.
  24. BIT Mining DPA at 5.

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## DOJ Revises Policy to Incentivize Companies to Self-Report Even If They Cannot Meet All Voluntary Self-Disclosure Requirements

On November 22, 2024, Principal Deputy Assistant Attorney General Nicole M. Argentieri announced several important changes to the U.S. Department of Justice's Corporate Enforcement Policy (the "CEP").<sup>1</sup> The changes seek to further incentivize companies to voluntarily self-disclose misconduct, cooperate with DOJ and remediate any wrongdoing. In particular, these revisions provide that: (i) a company can receive significant benefits from a good-faith self-disclosure to DOJ, even if the disclosure does not technically qualify as a "voluntary self-disclosure" under the CEP; (ii) to qualify as a "voluntary self-disclosure," the company must disclose "original" information of which DOJ was not previously aware; and (iii) a company that voluntarily self-discloses can receive a presumption of a declination even if it earned "significant profit" from the misconduct.

### Key Changes to the Corporate Enforcement Policy

When DOJ last amended the CEP, in January 2023, it expanded the range of circumstances in which a company that self-discloses misconduct could be eligible for a declination with disgorgement. DOJ specified that companies can receive a declination even if aggravating factors exist—but only if the company meets DOJ's rigorous expectations for voluntary self-disclosure, cooperation, and remediation. DOJ's newly announced revisions to the CEP expand and clarify the incentives for companies that voluntarily self-disclose in good faith, even if they fall somewhat short of DOJ's full expectations.

- First, even when a company's self-disclosure did not meet the strict requirements to be a "voluntary self-disclosure" (for example, if not "reasonably prompt"), the company still may receive significant benefits if it nevertheless acted in good faith to self-report, fully cooperated and timely and appropriately remediated. Those benefits may include a non-prosecution agreement, increased credit for cooperation and remediation and a shorter term of non-prosecution agreement or deferred prosecution agreement. In other words, prosecutors may consider even an "imperfect" self-disclosure in determining how to resolve the matter.

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1. U.S. Dep't of Justice, Principal Deputy Assistant Attorney General Nicole M. Argentieri, "Transparency in Criminal Division Enforcement" (Nov. 22, 2024), <https://www.justice.gov/opa/blog/transparency-criminal-division-enforcement>; U.S. Dep't of Justice, "Corporate Enforcement and Voluntary Self-Disclosure Policy" (updated Nov. 2024), <https://www.justice.gov/criminal/criminal-fraud/file/1562831/dl?inline>.



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- Second, DOJ has clarified that a “voluntary self-disclosure” must involve the disclosure of information of which DOJ was not already aware. When a company makes a good-faith self-disclosure of information already known to DOJ, prosecutors may consider that self-disclosure, but the company will not be eligible for a declination with disgorgement. Again, DOJ’s goal is to incentivize companies to come forward even if they believe that DOJ already may be aware of the information at issue.
- Third, DOJ has decided to “remove[] one of the aggravating circumstances—significant profit—that could make a company ineligible for a presumption of a declination” under the CEP.<sup>2</sup> DOJ’s reasoning for this change is that the amount of profits derived from misconduct may not be known early in an investigation, and companies should not hesitate to self-disclose due to a concern that DOJ later will determine those profits to have been significant.

### Implications of DOJ’s Amendments to the CEP

The current administration’s DOJ continues to prioritize self-disclosure and cooperation as key pillars in its corporate enforcement framework. With the newest changes, DOJ seeks to “balance [its] desire to incentivize reasonably prompt disclosures of crimes . . . with the reality that sometimes companies may come forward and fulfill many of [the CEP’s] requirements but not qualify for a [Voluntary Self-Disclosure].”<sup>3</sup> As an example of “a company that tried to do the right thing, but narrowly missed the [voluntary self-disclosure] mark,” DOJ cited its recent settlement with Albemarle Corporation. Even though Albemarle’s self-disclosure was not sufficiently prompt to meet DOJ’s voluntary self-disclosure criteria, the company received a non-prosecution agreement rather than a deferred prosecution agreement, as well as a substantial penalty discount.<sup>4</sup>

Of course, a key question is how this corporate enforcement framework may change under the new administration. We will be watching closely for any public remarks or policy pronouncements and will provide an update as soon as we have more information.

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2. U.S. Dep’t of Justice, Principal Deputy Assistant Attorney General Nicole M. Argentieri, “Transparency in Criminal Division Enforcement” (Nov. 22, 2024), <https://www.justice.gov/opa/blog/transparency-criminal-division-enforcement>.

3. *Id.*

4. *Id.*; U.S. Dep’t of Justice, “Albemarle to Pay Over \$218M to Resolve Foreign Corrupt Practices Act Investigation” (Sept. 29, 2023), <https://www.justice.gov/opa/pr/albemarle-pay-over-218m-resolve-foreign-corrupt-practices-act-investigation>.

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