

Davis Polk

FCPA Update: Recent anti-corruption developments and the year ahead

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Introductions



Greg D. Andres, Partner

Greg is co-head of our White Collar Defense & Investigations practice and one of *Benchmark Litigation's* "Top 100 Trial Lawyers." He focuses on white collar defense, congressional investigations, complex civil litigation and crisis management. In forums including federal and state court, mediation and arbitration, Greg represents financial institutions, hedge funds, private equity firms and companies in multiple industries.

As a member of Special Counsel Robert Mueller's team in 2017-2019, Greg was the lead trial lawyer in the successful prosecution of Paul Manafort. Earlier, he was a federal prosecutor and a Deputy Assistant Attorney General in the Criminal Division of the Department of Justice and the Chief of the Criminal Division in the U.S. Attorney's Office for the EDNY. As DOJ, Greg supervised the Department's FCPA practice nationwide.



Sidney Bashago, Partner

Sidney is a partner in our White Collar Defense & Investigations practice in New York. Sidney represents companies, boards of directors, financial institutions and individuals in criminal, regulatory and internal investigations involving allegations of securities fraud, sexual misconduct, foreign corrupt practices, money laundering and other financial crimes. Sidney also advises companies and boards on governance and compliance. Sidney has represented multinational companies, boards and other entities on various critical workplace misconduct matters, including highly sensitive sexual misconduct investigations, proactive assessments, crisis management, and related compliance.



Daniel S. Kahn, Partner

Dan represents clients in criminal and regulatory investigations and in civil and criminal trials. A former prosecutor, he served for 11 years in senior roles at the Department of Justice.

The *Wall Street Journal* described Dan as DOJ's "most recognizable expert on the Foreign Corrupt Practices Act." At DOJ, Dan was acting Deputy Assistant Attorney General of the Criminal Division and, earlier, head of the Fraud Section and FCPA Unit. He supervised matters involving FCPA violations, money laundering and sanctions violations, and fraud related to digital currency, fintechs, commodities, securities, healthcare and procurement.

Dan represents clients in internal investigations and government investigations, including corruption, healthcare fraud, securities fraud, commodities fraud, and compliance matters.



Fuad Rana, Counsel

Fuad is counsel in our White Collar Defense & Investigations group, practicing in the Washington DC office. Fuad recently joined the firm in July 2023 after 12 years at the SEC, most recently as Assistant Director in the Division of Enforcement. During his time at the SEC, Fuad conducted and oversaw complex investigations across all core enforcement areas, including FCPA, financial reporting and accounting, securities offering and registration, regulated entities, insider trading and other trading-related misconduct, and emerging areas such as SPACs, ESG, cybersecurity, and digital assets.

Agenda and Overview

1. Updated guidance

- Further clarity on new DOJ guidance
- Off-systems communication
- Clawbacks

3. Individual enforcement

- Fewer new individual enforcement actions but notable trial activity

2. Corporate enforcement

- Six enforcement actions announced
- Trends in DPA enforcement and monitors

4. What to Watch in 2023

- More proactive use of data analytics to drive enforcement
- Upcoming trials

Policy and Guidance Developments

01

DOJ Policy Updates

Clarity on Cooperation and Self-Reporting Expectations

The 2023 Corporate Enforcement Policy guidance requires that, where a company with aggravating factors seeks a declination, it must provide “extraordinary cooperation” and its voluntary self-disclosure must have been made “immediately”

- On March 23, 2023, former AAG Polite affirmed that the 2023 CEP guidance does not disturb the policy that, absent aggravating factors, a company that voluntarily self-discloses misconduct, fully cooperates with an investigation, and timely and appropriately remediates earns a presumption of a declination
- Regarding companies with aggravating factors, former AAG Polite pointed to prior DOJ resolutions as reflective of “extraordinary cooperation” and “immediate” self-disclosure:
 - Extraordinary Cooperation: The December 2022 resolution with ABB where cooperation included voluntarily making foreign-based employees available for interviews in the United States; producing documents located outside of the United States in ways that did not implicate foreign privacy laws; and analyzing and organizing the information in the production for the DOJ
 - Immediate Self-Disclosure: The August 2018 declination issued to Insurance Corporation of Barbados Limited (ICBL) where ICBL self-reported “within several weeks” of its parent company learning of bribery at its subsidiary



Kenneth A. Polite, Jr.
Former Assistant Attorney General

DOJ Policy Updates

March 2023 Corporate Compliance Program Updates

New areas of focus in the 2023 guidance

- *Personal Devices and Off-System Messaging:* Effective policies and systems governing the use of personal devices and third-party messaging platforms that ensure that all company electronic data and communications, including off-system communications, are appropriately tracked and preserved
- *Clawbacks:* Compensation structures that clearly and effectively impose financial penalties for misconduct, including salary and bonus clawback provisions

U.S. Department of Justice
Criminal Division
Evaluation of Corporate Compliance Programs
(Updated March 2023)

Introduction

The “Principles of Federal Prosecution of Business Organizations” in the Justice Manual describe specific factors that prosecutors should consider in conducting an investigation of a corporation, determining whether to bring charges, and negotiating plea or other agreements. JM 9-28.300. These factors include “the adequacy and effectiveness of the corporation’s compliance program at the time of the offense, as well as at the time of a charging decision” and the corporation’s remedial efforts “to implement an adequate and effective corporate compliance program or to improve an existing one.” JM 9-28.300 (citing JM 9-28.800 and JM 9-28.1000). Additionally, the United States Sentencing Guidelines advise that consideration be given to whether the corporation had in place at the time of the misconduct an effective compliance program for purposes of calculating the appropriate organizational criminal fine. See U.S.S.G. §§ 8B2.1, 8C2.5(f), and 8C2.8(11). Moreover, Criminal Division policies on monitor selection instruct prosecutors to consider, at the time of the resolution, whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal controls systems and whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future to determine whether a monitor is appropriate.

DOJ Policy Updates

Compensation and Clawback Pilot Program

Resolution Requirements

- As part of a resolution, companies will now need to implement criteria related to compliance in its compensation and bonus system
- Criteria may include, but are not limited to:
 - (1) a prohibition on bonuses for employees who do not satisfy compliance performance requirements
 - (2) disciplinary measures for employees who violate applicable law and others who both (a) had supervisory authority over the employee(s) and (b) knew of, or were willfully blind to, the misconduct
 - (3) incentives for employees who demonstrate full commitment to compliance processes

Credit for Clawbacks

- 100% credit against a fine/penalty for amount clawed back by company
- Up to 25% credit for amount “in good faith” attempted to claw back by company

**The Criminal Division’s Pilot Program
Regarding Compensation Incentives and Clawbacks¹**

March 3, 2023

The Department of Justice (Department) is committed to tackling corporate crime and will continue to investigate and prosecute companies (and responsible individuals) who engage in such misconduct. But the Department’s ultimate goal is to prevent corporate crime before it occurs. Through its policies and enforcement actions, the Department strives to deter criminal conduct, incentivize the development and implementation of effective compliance programs, and promote ethical corporate cultures.

Compensation systems that use affirmative metrics and benchmarks can reward compliance-promoting behavior. Compensation systems that clearly and effectively impose financial penalties for misconduct can also deter risky behavior and foster a culture of compliance. Consistent with the Deputy Attorney General’s September 15, 2022 memorandum setting forth revisions to the Department’s corporate criminal enforcement policies, the Department’s Criminal Division (Division) has considered how to reward corporations that develop solutions to incentivize better compliance through their compensation systems, including the use of clawback policies. Throughout this process, one consideration has been how policies may seek to potentially shift the burden of corporate financial penalties away from shareholders—who in many cases do not have a role in misconduct—onto those more directly responsible. In this review, the Division has consulted with its agency partners, members of the defense bar, academics, experts on executive compensation, and other regulators to gain valuable perspectives and data points.

Trends from Notable DOJ and SEC Enforcement Actions

02

Overview of Enforcement in 2023








Corporate resolutions

- 5 SEC and 1 DOJ corporate resolutions
- 1 declination
- 1 DPA breach
- \$330 million in monetary sanctions

Individual prosecutions

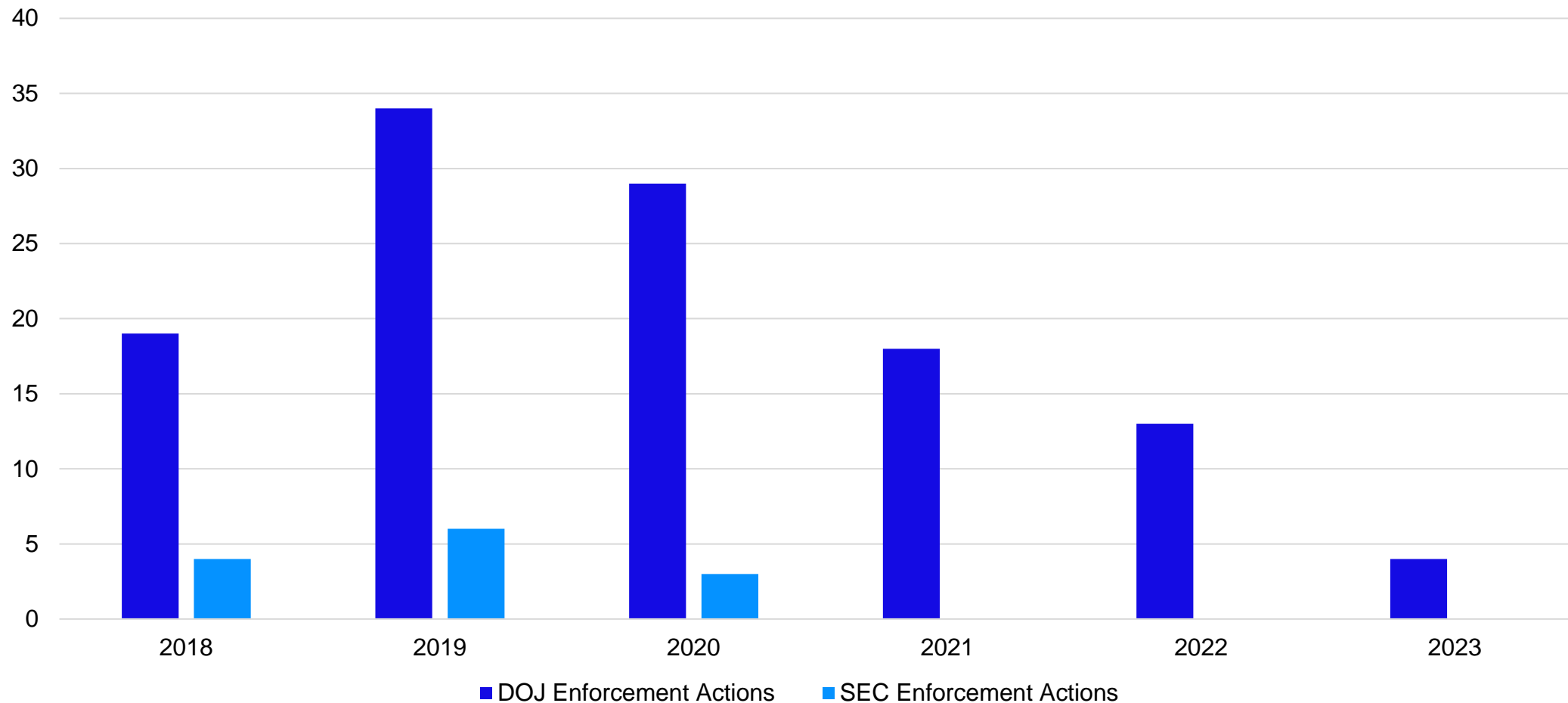
- 4 individuals charged by DOJ in 2023; none by SEC
- 1 individual guilty plea
- 4 individuals charged in 2020 convicted at trial

2023 Corporate Enforcement Actions Snapshot

Company	Prior Resolutions	Resolution Details
		<ul style="list-style-type: none"> — SEC cease-and-desist order — Guinea — \$15 million penalty to SEC
		<ul style="list-style-type: none"> — SEC cease-and-desist order — Russia — \$4 million penalty to SEC
		<ul style="list-style-type: none"> — DOJ declination — Egypt — \$32.7 million disgorgement (reduced to \$1.2 million based on an inability to pay)
		<ul style="list-style-type: none"> — SEC cease-and-desist order — Angola — \$5 million disgorgement and prejudgment interest; \$3 million penalty to SEC
		<ul style="list-style-type: none"> — SEC cease-and-desist order — China — \$47 million disgorgement and prejudgment interest; \$15 million penalty to SEC
		<ul style="list-style-type: none"> — SEC cease-and-desist order — South Africa — \$850,000 disgorgement and prejudgment interest; \$1.6 million penalty to SEC

*Data reflects U.S. resolutions (not reflecting offsetting payments to foreign authorities)

Individual Enforcement Actions Snapshot



Individual Enforcement Trends

- **Fewer new individual actions but several pending trials**
 - New DOJ individual enforcement actions continue to be low, on pace for the lowest level of individual criminal prosecutions since 2015, but the upcoming docket is filled with several pending trials
- **The DOJ's policy of incentivizing corporate self-reporting and cooperation against executives survives**
 - In July, a federal district court denied a motion to suppress statements made during an internal investigation, rejecting the defendant's argument that a cooperating company's investigators were functionally an extension of the prosecution
- **Follow-on FCPA charges in Sam Bankman-Fried, FTX investigation for alleged illicit transfer of cryptocurrency to a Chinese official to unfreeze certain cryptocurrency trading accounts**
 - First FCPA enforcement action based on an alleged bribe with cryptocurrency
- **Prosecutions continue out of long-running investigations in Latin America, with one odd hiccup**
 - Former General Counsel of PDVSA pled guilty to conspiracy to commit money laundering
 - Former National Treasurer of Venezuela and her husband convicted for money laundering, received 15 years
 - A Portuguese-Swiss citizen implicated in paying bribes related to PDVSA had his U.S. case dismissed with prejudice on Speedy Trial Act and Sixth Amendment grounds
- **Broad application of the FCPA's accounting provisions**
 - The accounting provisions do not require foreign conduct and can be applied to domestic conduct

What to Watch in 2023

03

What to Watch for the Rest of 2023



Continued increase in number of enforcement actions



Increased use of data to identify new cases



Relationship between financial sanctions and cooperation



Upcoming trials

What can companies do?

Takeaways

- Effective compliance programs and controls continue to be a company's best defense
- Incorporate guidance on messaging and clawbacks
- Be aware of the SEC's increasing use of the disclosure and internal accounting controls provisions
- Look for future resolutions applying the recent guidance on cooperation and self-disclosure

Appendix

2023 DOJ & SEC FCPA Resolution Tracker

Corporate FCPA resolutions from 01/01/2023 through 07/31/2023

Target	Enforcer	Resolution*	Alleged FCPA Violation	Industry	Geography	Allegations
3/6 Rio Tinto plc	SEC	\$15M (cease-and-desist order)	<ul style="list-style-type: none"> — Books and Records — Internal Controls 	Commodities and Mining	Guinea	Paid a third-party consultant to help the company retain mining rights to certain areas in Guinea by offering or paying money to benefit a Guinean government official
3/6 Flutter Entertainment plc (successor in interest to The Stars Group, Inc.)	SEC	\$4M (cease-and-desist order)	<ul style="list-style-type: none"> — Books and Records — Internal Controls 	Gaming	Russia	Failed to supervise, monitor, and accurately record the actions and invoices of third-party consultants in Russia paid to support the company's efforts to have poker legalized in Russia
3/8 Corsa Coal Corporation	DOJ	DOJ: \$32.7M reduced to \$1.2M based on inability to pay (declination with disgorgement)	<ul style="list-style-type: none"> — Anti-bribery 	Commodities and Mining	Egypt	Paid a third-party intermediary who, in turn, paid bribes to Egyptian government officials to secure coal contracts
4/26 Frank's International N.V.	SEC	\$8M (cease-and-desist order)	<ul style="list-style-type: none"> — Anti-bribery — Books and Records — Internal Controls 	Oil Services	Angola	Paid commissions to a sales agent in Angola despite a high probability that the agent would, and did, use the commissions to bribe Angolan government officials on behalf of the company
5/11 Koninklijke Philips N.V.	SEC	\$62M (cease-and-desist order)	<ul style="list-style-type: none"> — Books and Records — Internal Controls 	Conglomerate (Healthcare)	China	Subsidiaries used special price discounts with distributors that created a risk that excessive distributor margins could be used to fund improper payments to government officials and employees, distributors, or sub-dealers of subsidiaries in China engaged in improper conduct to influence hospital officials to draft technical specifications in public tenders in favor of Phillips' products
5/26 Gartner, Inc.	SEC	\$2.5M (cease-and-desist order)	<ul style="list-style-type: none"> — Anti-bribery — Books and Records — Internal Controls 	Technology	South Africa	At the direction of senior government officials, used a private South African company with close ties to the officials to obtain consulting contracts despite a company manager knowing that all or part of the funds paid to the private company would be paid to the officials

* Resolution figures do not reflect amounts credited to other state and federal agencies or international regulators.