

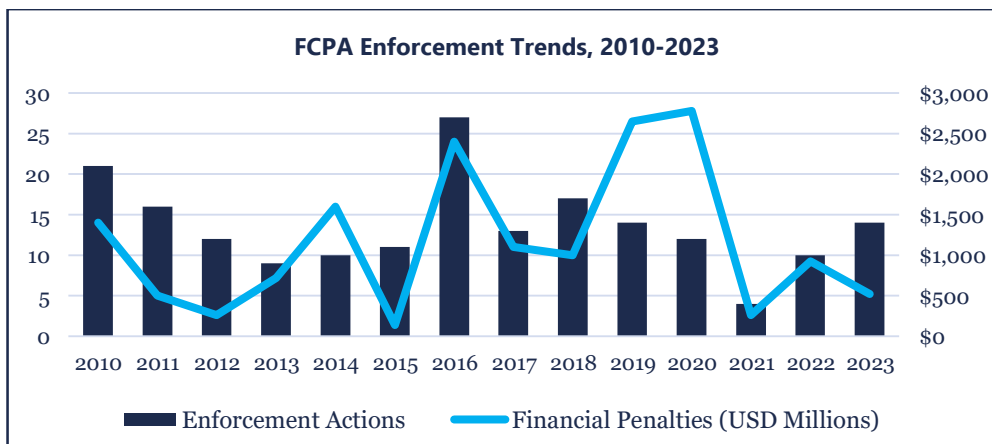


# FCPA Enforcement Outlook and Latest Compliance Guidance

Over the past year, the Foreign Corrupt Practices Act (**FCPA**) has remained an important fixture in the enforcement and compliance landscape for global companies. In 2023, the Department of Justice (**DOJ**) and the Securities and Exchange Commission (**SEC**) announced 14 corporate resolutions, and, amid steady enforcement, DOJ and SEC also issued new and revised policies to encourage voluntary disclosure, increase individual accountability, and strengthen corporate compliance programs. At the same time, these efforts continued to fuel complementary enforcement and compliance efforts by regulators in other countries. Global companies know that it is critical to stay on top of these often complex and nuanced trends. In this article, we take stock of 2023 developments and trends underway in 2024.

## I. Enforcement Trends

At the outset of the Biden Administration, the White House announced that international corruption is a “national security” priority, and it has also prioritized sanctions cases and other national security-related corporate crime. While the focus of criminal enforcement has expanded in interesting ways to such areas, DOJ and SEC have continued to devote significant resources to investigating and resolving allegations of FCPA violations, as summarized in the chart below.



In 2023, DOJ and SEC announced 14 corporate resolutions, which collectively amounted to \$521 million in financial penalties.<sup>1</sup> The number of corporate resolutions was consistent with an historical average of about 13 resolutions per year over the previous ten years. But the total amount of financial penalties remained lower than an historical average of about \$1.36 billion per year over the past ten years. These trends are reminiscent of the early 2010s, before a surge in FCPA-related financial penalties in the pre-pandemic years, peaking at \$2.78 billion in 2020.

In 2024, FCPA enforcement has continued, driven by a stable pipeline of ongoing FCPA investigations. As of February 2024, according to company filings and public reports, there were at least 90 companies with active FCPA-related investigations, including 68 companies with investigations that have been open for at least four years. Indeed, US authorities have announced significant FCPA resolutions since the start of the year. For example, at the end of January 2024, SAP entered into a deferred prosecution agreement with DOJ and SEC that resulted in \$220 million in penalties, as part of a parallel resolution with South African authorities, to resolve investigations into alleged schemes to pay bribes to government officials in South Africa and Indonesia. In March 2024, Gunvor S.A. pleaded guilty to one count of conspiracy to violate the FCPA and agreed to pay \$661 million in criminal penalties to resolve allegations that the company paid intermediaries to corruptly obtain business with Ecuador's national oil company Petroecuador, as part of a broader investigation that involved US cooperation with law enforcement authorities in the Cayman Islands, Colombia, Ecuador, Panama, Portugal, Singapore, and Switzerland; Gunvor has also agreed to resolve investigations with Swiss and Ecuadorian authorities related to the same misconduct. And at the end of March 2024, Trafigura Beheer B.V. pleaded guilty to conspiracy to violate the FCPA and agreed to pay over \$126 million to resolve an investigation into an alleged scheme by Trafigura to pay bribes to Brazilian government officials to secure business with Brazil's state-owned and state-controlled oil company Petrobras. DOJ noted assistance provided by law enforcement authorities in Brazil, Switzerland, and Uruguay in investigating relevant conduct; Trafigura also agreed to resolve an investigation by Brazilian authorities for related conduct.

## II. New Enforcement and Compliance Policies

Amid FCPA enforcement efforts, US authorities have announced new enforcement policies and issued revised compliance guidance over the past year. At the American Bar Association's 39th National Institute on White Collar Crime in early March 2024, acting Assistant Attorney General Nicole Argentieri pointed to these new policies and guidance updates when emphasizing the importance of implementing effective corporate compliance programs: "[C]ompanies are the first line of defense against misconduct. A strong compliance program is key to preventing corporate crime before it occurs and to addressing misconduct when it does take place. Our corporate enforcement policies are designed to encourage companies to invest in strong compliance functions and to step up and own up when misconduct occurs."

In line with broader efforts to encourage corporate self-policing, these new policies and revised guidance emphasize voluntary disclosure incentives, individual accountability expectations, and certain compliance program enhancements. Importantly, unlike prior DOJ policy initiatives such as the FCPA Pilot Program that focused on the FCPA only, many of these updated DOJ policies apply across the

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<sup>1</sup> Appreciating there are different methodologies to track FCPA statistics regarding enforcement actions and resulting penalties, for purposes of this article, we count joint DOJ and SEC resolutions involving a single company as a single enforcement action; for 2023, the chart above includes enforcement actions involving: (1) 3M; (2) Albemarle; (3) Clear Channel; (4) Corsa Coal; (5) CorfiColombiana; (6) Ericsson; (7) Flutter International; (8) Freepoint Commodities; (9) Gartner; (10) H.W. Wood; (11) Lifecore Biomedical; (12) Phillips; (13) Rio Tinto; and (14) Tysers. It includes two resolutions (Corsa Coal and Lifecore) involving DOJ declinations with disgorgement.

Criminal Division’s enforcement areas. As Deputy Attorney General Lisa Monaco recently explained, the “entire Department [of Justice] shares the same principles,” which include “incentivizing compliance, self-disclosure, remediation, and cooperation.” By taking a broader approach, DOJ has created greater incentives for companies to consider disclosure decisions and implement other enhancements to their existing compliance programs.

### **A. Voluntary Self-Disclosure Incentives**

In recent years, DOJ has revised enforcement policies to incentivize corporate voluntary self-disclosure of misconduct. In January 2023, DOJ announced revisions to the Criminal Division’s Corporate Enforcement Policy (**CEP**). Under the CEP, if there are no “aggravating” factors present (e.g., involvement by executive management in the misconduct; a significant profit to the company from the misconduct; egregiousness or pervasiveness of the misconduct within the company; or criminal recidivism), a company can qualify for a presumption of a declination if it voluntarily and promptly self-discloses the misconduct, fully cooperates, and timely and appropriately remediates the issue. Moreover, the revised CEP notes that DOJ may determine that a corporate declination is appropriate *despite* the existence of “aggravating” factors that would ordinarily warrant a criminal prosecution if the company: (a) makes an “immediate” self-disclosure of the alleged misconduct, (b) had already implemented an effective compliance program and internal controls that enabled the identification of the misconduct and led to the company’s self-disclosure, and (c) engaged in “extraordinary” cooperation and remediation. Finally, even when a company may not qualify for a declination under the CEP, a company that self-discloses, fully cooperates, and timely and appropriately remediates will be eligible for a fine reduction of up to 50-75 percent. Companies that do not self-disclose but do engage in “extraordinary cooperation and remediation” are eligible for a fine reduction of up to 50 percent.

Acting Assistant Attorney General Argentieri has emphasized that DOJ is “committed to using all the tools in our tool kit to encourage companies to make voluntary self-disclosures.” During 2023, DOJ illustrated such principles when announcing certain declinations, including declinations for Corsa Coal Corporation and Lifecore Biomedical because, in part, DOJ determined they engaged in timely and voluntary disclosure. DOJ declined to prosecute Corsa Coal for violations of the FCPA because the company voluntarily self-disclosed the misconduct, cooperated with the government’s investigation, and timely and appropriately remediated; Corsa Coal also agreed to disgorge certain profits. In the Lifecore Biomedical matter, DOJ concluded that a declination was appropriate under the CEP because, in part, the company provided “timely and voluntary self-disclosures” within “three months of first discovering the possibility of misconduct and hours after an internal investigation confirmed that misconduct had occurred.” By comparison, in entering a non-prosecution agreement with Albemarle, DOJ indicated that it did not give the company full credit for its voluntary disclosure because, even though the disclosure occurred prior to discovery of the misconduct by DOJ, DOJ determined that it was not “reasonably prompt” as the company did not disclose until 16 months after first learning of the allegations and 9 months after internally substantiating certain allegations.

In October 2023, DOJ introduced a new Safe Harbor Policy for Voluntary Self Disclosures Made in Connection with Mergers and Acquisitions. Under this Safe Harbor Policy, DOJ will presumptively decline to prosecute a company that voluntarily self-discloses misconduct that it discovers at another company that it acquired within six months of the closing date, so long as the company cooperates with DOJ’s investigation of the misconduct and fully remediates the misconduct within one year of the closing date, which may include restitution and disgorgement payments. When an acquiring company voluntarily self-discloses under the Safe Harbor Policy, the acquired entity may also qualify for certain voluntary self-disclosure benefits, including potentially a declination, unless “aggravating factors” exist

at the acquired entity. Deputy Attorney General Monaco has explained, “Our goal is simple: good companies—those that invest in strong compliance programs—will not be penalized for lawfully acquiring companies when they do their due diligence and discover and self-disclose misconduct.” In the coming year, the Safe Harbor Policy will undoubtedly spur discussion within acquiring companies about the appropriate scope of due diligence during and after acquisitions, including consideration of how potentially to benefit from the Safe Harbor Policy if any historical misconduct is identified at the acquired company.

And on March 7, 2024, DOJ announced that it will launch a pilot program this year to award payments to non-culpable whistleblowers who deliver tips on financial misconduct, overseas bribery, and other corporate fraud that results in criminal or civil forfeitures, adding to similar financial incentives for whistleblowers offered by the SEC and other agencies. Since 2011, a separate SEC whistleblower program for reporting securities law violations has resulted in nearly \$2 billion in payments to almost 400 whistleblowers. The program awarded nearly \$600 million and generated 18,000 whistleblower tips from individuals to the SEC in fiscal year 2023 alone.

## **B. Individual Accountability Expectations**

At the same time, DOJ and SEC have emphasized the importance of individual accountability. In public statements, Deputy Attorney General Monaco has promised that DOJ will “hold wrongdoers accountable, no matter how prominent or powerful they are.” DOJ expects companies to identify and provide relevant information about the conduct of culpable executives and employees to qualify for full cooperation credit under the CEP. While there is a backlog of trials, DOJ has pursued several high-profile prosecutions of individuals alleged to have violated the FCPA in recent years.

In March 2023, as part of its efforts to hold individuals accountable, DOJ announced a Pilot Program on Compensation Incentives and Clawbacks. Under the Pilot Program, companies that enter into criminal resolutions with DOJ will be required to implement compliance-related criteria to their compensation and bonus systems. In addition, DOJ prosecutors have been instructed to consider fine reductions when companies “seek to recoup compensation” from culpable employees and their supervisors. If a company is unsuccessful in clawing back compensation but can demonstrate a “good faith” attempt to do so, they can receive a reduction of up to 25 percent of the amount of compensation that they attempted to claw back.

## **C. Updated Guidance on Off-Channel Communications**

In March 2023, DOJ also released updates to the Criminal Division’s Evaluation of Corporate Compliance Programs guidance document. Amid the growing use of personal devices and ephemeral message platforms by employees within many companies, the guidance advises DOJ prosecutors to consider a corporation’s approach to the use of personal devices as well as various communications platforms and messaging applications, including those offering ephemeral messaging. Under the updated guidance, companies are encouraged to preserve as much electronic data as possible, and DOJ prosecutors are asked to “consider how the policies and procedures have been communicated to employees, and whether the corporation has enforced the policies and procedures on a regular and consistent basis in practice.” Although the precise nature of DOJ’s expectations regarding ephemeral messaging and off-channel communications continues to be a subject of debate, it is prudent for companies to consider the use of personal devices and ephemeral messages and take appropriate preservation measures in the event of a regulatory or enforcement inquiry.

### III. Global Anti-Corruption Efforts

US authorities have not pursued FCPA enforcement in isolation. In November 2023 at the 40th International Conference on the FCPA, Acting Assistant Attorney General Argentieri touched upon the importance of cross-border collaboration when announcing an International Corporate Anti-Bribery Initiative to “leverage our prosecutors’ particular experience, expertise, and language skills, which will allow them to build relationships with counterparts around the world to facilitate cooperation and information sharing.” She went on to explain that “empowering experienced anti-bribery prosecutors to build critical relationships with our international counterparts in key parts of the world will result in enhanced information sharing, cooperation, and case development with our foreign partners.” These efforts will undoubtedly increase the total number of multijurisdictional investigations in the future.

Consistent with US efforts to combat international corporate crime, France, the United Kingdom, and the European Union also took steps in 2023 to enhance enforcement.

- **French Anti-Corruption Guide:** In March 2023, the French Anticorruption Agency and the National Prosecutor’s Office issued a Guide on Anti-Corruption Internal Investigations. Although the Guide is not binding, it provides advice for companies on how to conduct internal investigations and recommendations for best practices.
- **United Kingdom Economic Crime and Corporate Transparency Act:** In October 2023, the United Kingdom enacted the Economic Crime and Corporate Transparency Act. The Act includes reforms to the enforcement of economic crime, and the Director of the UK Serious Fraud Office described the Act as “the most significant boost to the SFO’s ability to investigate and prosecute serious economic crime in over 10 years.” The Act includes two key reforms: introducing a strict liability “failure to prevent fraud” offense; and broadening the scope of senior executives whose actions can be attributed to a corporation for the purpose of establishing criminal liability against it, such that if a “senior manager” commits misconduct within the scope of their authority, the corporation may also be deemed liable. The changes to attribution relate to a wide range of financial crimes, including bribery, and the list may be extended to all crimes if further proposed legislation is passed.
- **European Union Proposal to Combat Corruption:** In May 2023, the European Commission released a Proposal for Combatting Corruption, which aims to bring its anti-corruption framework into line with the UN Convention Against Corruption. Among other reforms, it extends the definition of criminal corruption beyond “mere bribery” to include “misappropriation, trading in influence, abuse of functions, as well as obstruction of justice and illicit enrichment related to corruption offences.”

Similar international efforts to combat bribery and corruption have continued into 2024. In late February 2024, Australia approved a new foreign bribery law, introducing a corporate offence of failing to prevent foreign bribery, which applies if anyone deemed an “associate” of the business commits bribery for the company’s benefit, as well as an “adequate procedures” defense for companies that can demonstrate they had implemented an appropriate compliance management system designed to avoid bribery.

Amid the convergence of international anti-corruption and corporate crime enforcement, even companies that operate entirely outside of the United States may wish to take notice of emerging US



compliance expectations and guidance, as international authorities often consider these US frameworks when combating corruption and other compliance risks in their own countries.

#### **IV. Enforcement Outlook**

FCPA and international anti-corruption enforcement will continue in the years ahead. As noted above, there are at least 90 companies with active FCPA-related investigations, and US authorities have already announced significant FCPA resolutions in 2024. In addition to considering potential international compliance risks identified by such enforcement actions, companies may also consider benchmarking existing compliance programs against recently announced compliance priorities and guidance described herein, particularly as US authorities' international enforcement focus continues to expand beyond the confines of the FCPA alone.

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Freshfields will continue to follow and report on these FCPA and compliance developments on our [Risk & Compliance](#) blog and other outlets during the coming year.



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