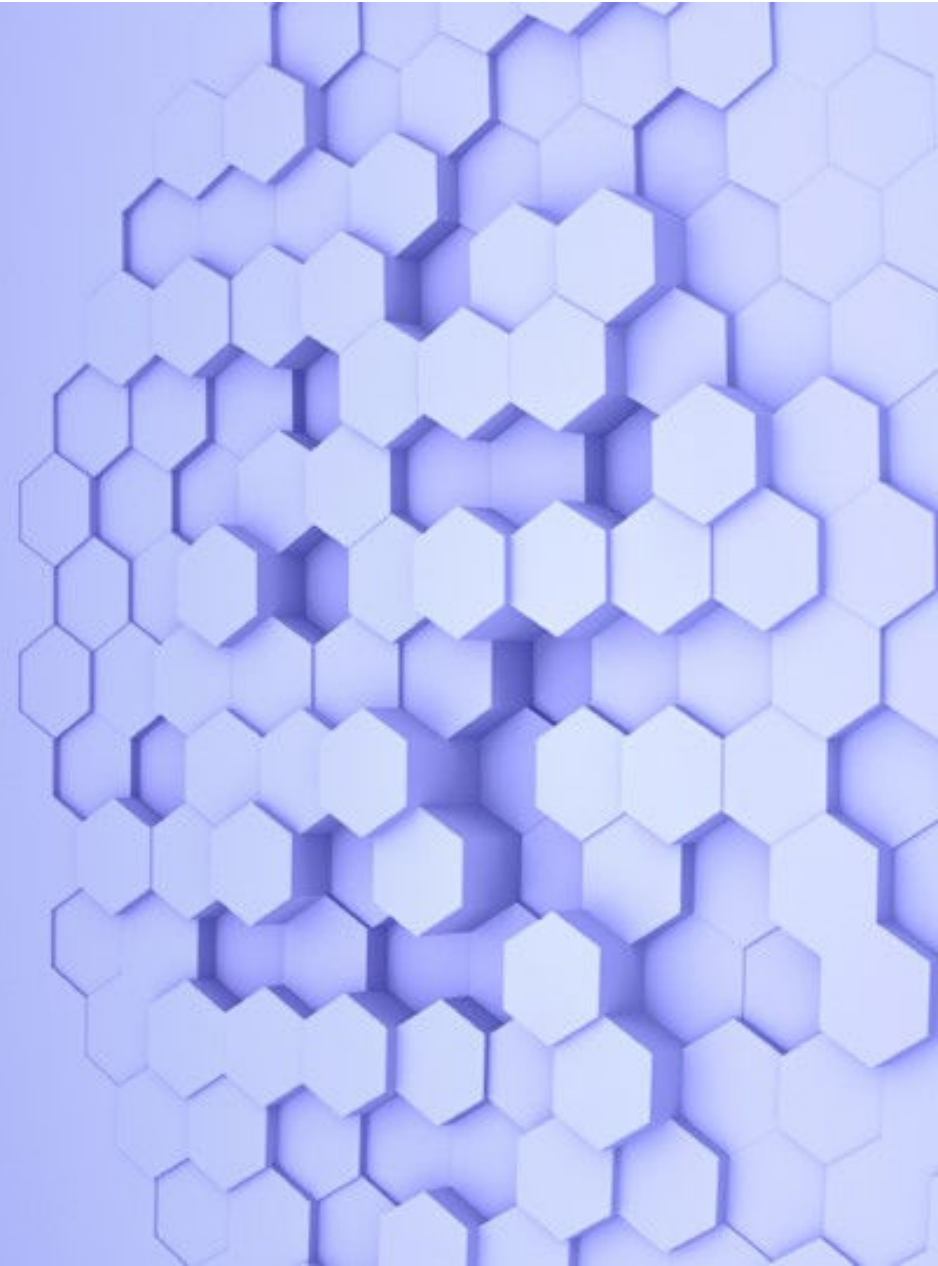


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**Annual Compliance
Conference 2024**



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McKenzie.**

Anti-bribery and corruption and economic crime

22 – 23 May 2024





Annual Compliance Conference 2024

01 Antitrust compliance
30 April – 1 May 2024

02 Sanctions and export controls
7 – 9 May 2024

03 Customs and key compliance developments
14 – 16 May 2024

04 Anti-bribery and corruption and economic crime
22 – 23 May 2024

05 ESG, supply chain and product compliance
3, 5 and 6 June 2024



Latest anti-bribery and corruption developments in the UK and US

Wednesday 22 May 2024





Speakers



Henry Garfield
Partner (Chair)
London



Aleesha Fowler
Partner
Washington, DC



Pete Tomczak
Partner
Chicago



Julian Godfray
Senior Associate
London



Ellie Wallis
Senior Associate
London



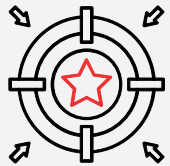
SFO: New strategic priorities?



Appointment of Nick Ephgrave as Director of the SFO in September 2023




Publication of SFO Strategy 2024 – 2029 in April 2024; speeches and evidence to Parliament



Strategic focus

- Faster investigations (< 3 years) NB: use of dawn raids and arrests
- Greater and smarter use of technology
- Co-operation with domestic and international partners
- Process changes (incentives for whistleblowers, incentives for co-operating suspects, changes to disclosure)
- Focus on domestic fraud cases?

SFO: Enforcement against corporates

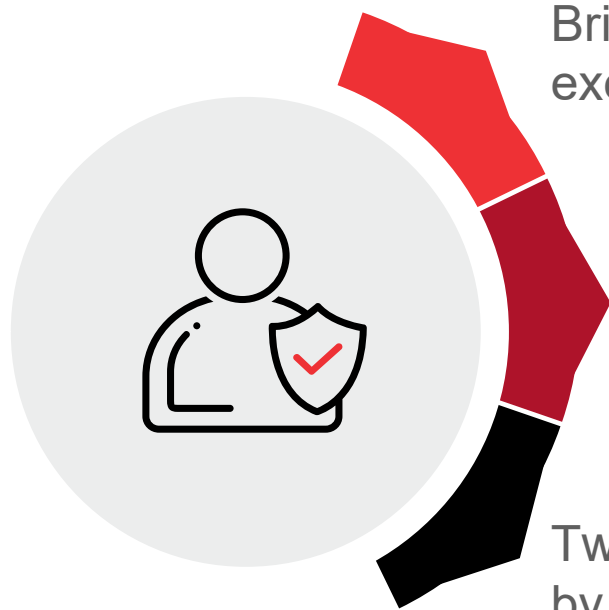


Entain PLC: Deferred Prosecution Agreement with the CPS
(December 2023)

Five new **fraud investigations** launched by the SFO since
September 2023

Ongoing **ENRC** litigation and **disclosure** reviews

SFO: Enforcement against individuals

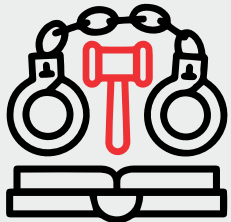


Bribery charges have been brought against former senior executives of **Petrofac**

Following **Glencore's** guilty plea, the SFO's decision as to whether to charge connected individuals remains on hold

Two individuals in the **GPT** corruption case were acquitted by a jury in March 2024

ECCTA 2023: Corporate criminal liability reforms



- **Previously:** Only the actions of individuals representing the "directing mind and will" of a company could be attributed to the company itself
- **Now:** If senior managers of a company or partnership "acting within the actual or apparent scope of their authority" commit a relevant economic crime offence, the company or partnership will also be guilty of an offence
 - Uncertainty as to scope of "Senior Manager"
 - Important to consider practical implications of change
- Applies in respect of any of the offences listed in Schedule 12 of the Act (including aiding, abetting, counselling or procuring the commission of an offence)
 - Includes common law conspiracy to defraud and various statutory offences including under FSMA 2000, Terrorism Act 2000, Theft Act 1968, Proceeds of Crime Act 2002, Companies Act 2006, Fraud Act 2006, Bribery Act 2010, and Sanctions and Anti-Money Laundering Act 2018

ECCTA 2023: Failure to prevent fraud

- Facilitates prosecution of large companies for fraud by introducing corporate liability for large organisations **failing to prevent fraud by associated persons**

Key elements of the offence



Relevant body
which is a large
organisation



Associated
person



Fraud offence



Intention to
benefit

- Broad extraterritorial reach
- Offence to come into force following publication of UK Government Guidance

Reasonable fraud prevention procedures?

Fraud risk and mitigation policies and procedures

Anti-fraud commitment

Risk assessment

Due diligence processes relating to fraud risk

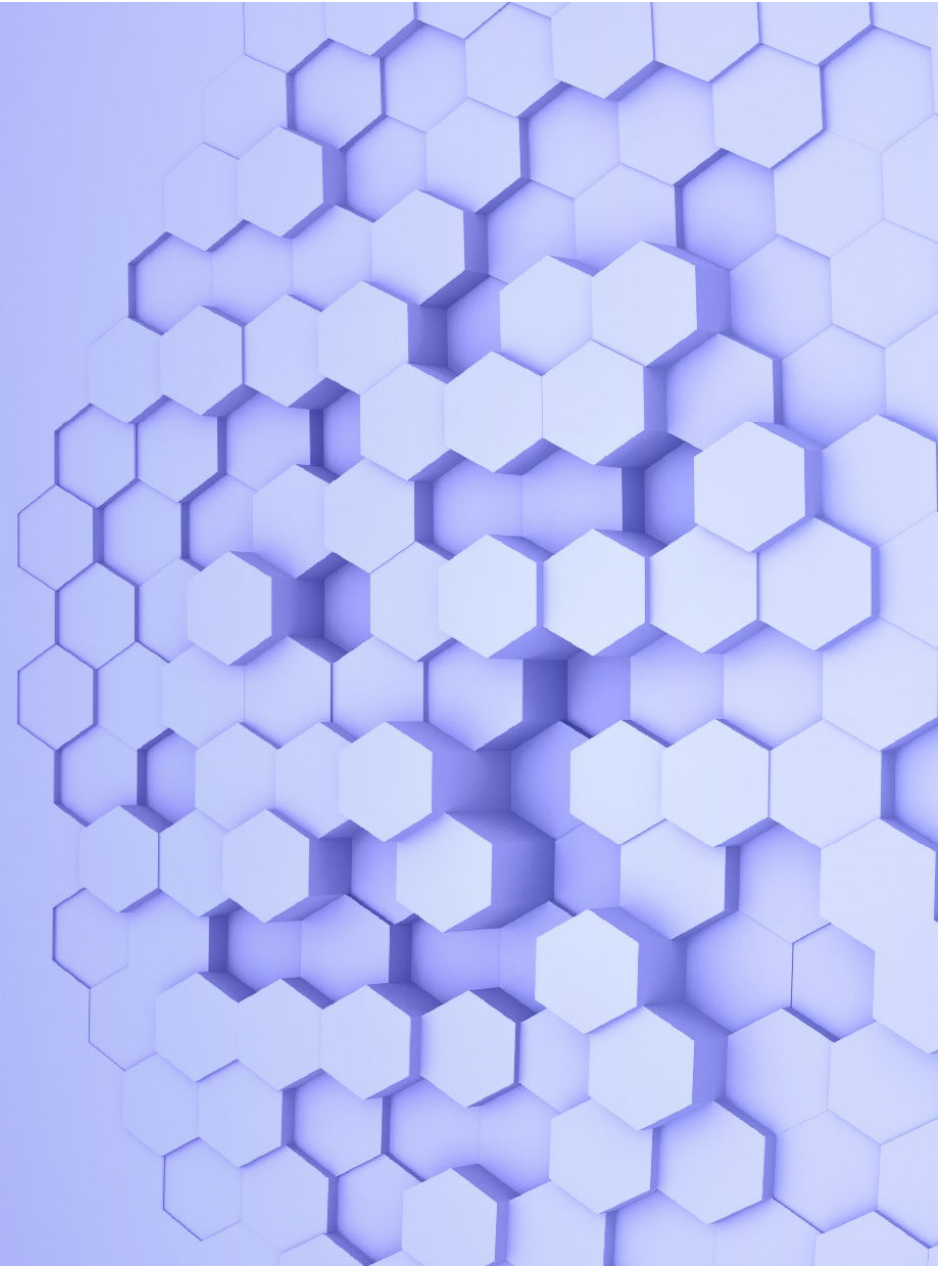
Training for employees and external communications

Monitoring and review



Building on existing obligations relating to Tax Evasion, ABC, AML/KYC, FCA reporting requirements...

US developments



Key global trends (2023-2024)







- Globally, we are in an era of increased corruption-related risks, both in terms of reputational damage and the legal and monetary consequences that flow from discovery of a bribe or other corrupt payment.
- The threat of exposure is even greater today, with increased investigative journalism breaking open corporate scandals and whistleblower activism at an all-time high.
- More and more countries have promulgated new and sophisticated anti-bribery legislation, and enforce anticorruption laws through more aggressive enforcement.
- There is also increased cooperation between enforcement agencies of different countries, as well as more efficient ways of sharing relevant information.
- Regulators and enforcement agencies announcing increasingly prescriptive compliance program expectations.



Key US corruption and enforcement trends (2023 – 2024)



- Focus on and number of individual prosecutions remains high, but DOJ has faced challenges asserting FCPA jurisdiction over foreign nationals.
- In 2023 and 2024, DOJ updated or introduced numerous policies:
 - Corporate Enforcement Policy ("CEP")
 - Evaluation of Corporate Compliance Programs
 - Compensation Incentives and Clawbacks Pilot Program 
 - Safe Harbor Policy for Voluntary Self-Disclosures Made in Connection with Mergers and Acquisitions 
 - Guidance on Non-Platform Messaging 
 - Whistleblower pilot program 

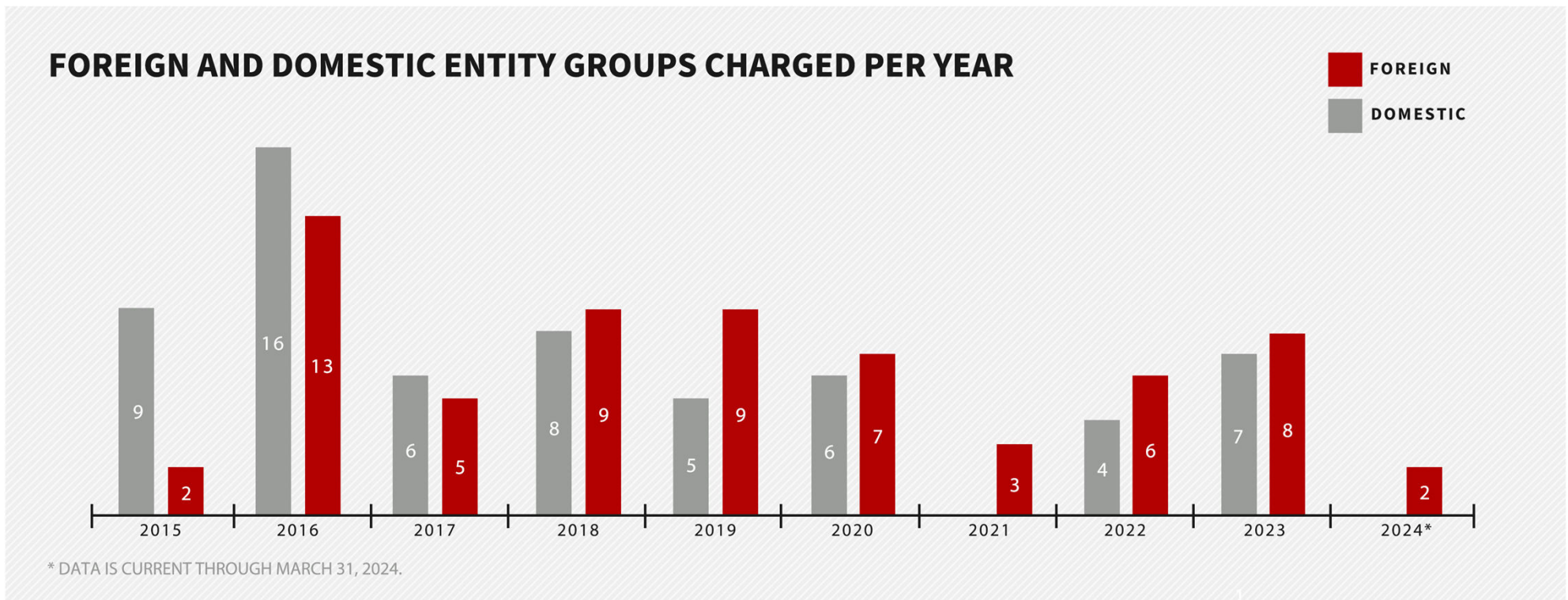


Key US corruption and enforcement trends (2023 – 2024)



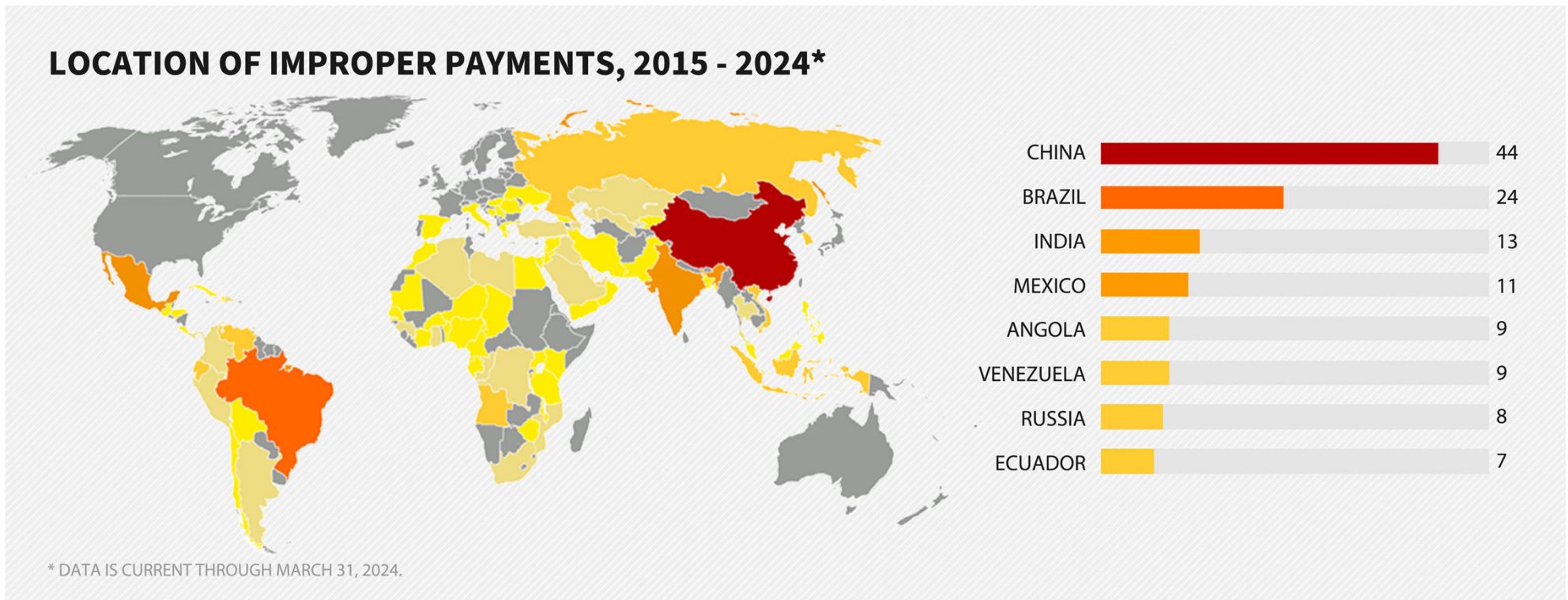
- DOJ Criminal Division has begun requiring forfeiture or disgorgement as part of all corporate resolutions, **in addition to** criminal penalties and fines.
- Focus on data:
 - Ephemeral messaging and new forms of communications
 - Increased use of data analytics by DOJ, including increased investments in personnel and tools that can interpret and synthesize data—both public and nonpublic—to enhance its ability to identify FCPA misconduct
- More broadly, anticorruption (along with anti-money laundering and anti-kleptocracy) is key element of a broader national security strategy of the Biden Administration.
 - More prosecutors and resources
 - More international cooperation

Corporate FCPA resolutions (from 2015)



Source: <https://fcpa.stanford.edu/>

Where most FCPA cases originate?



The majority of FCPA cases originated in China.

Source: <https://fcpa.stanford.edu/>

US FCPA – Recent enforcement statistics



**The Takeaway:
both the SEC and
DOJ remain active**



DOJ:

- 6 corporate resolutions
- 3 declinations with disgorgement
- 6 individual cases (unsealed, filed, guilty plea, trial convictions)



SEC:

- 6 corporate resolutions



DOJ corporate resolutions (from Sept. 2023)

Filed: September 29, 2023

Albemarle Corp.

Non-Prosecution Agreement
Penalty \$98.5 million and forfeiture
\$98.5 million

Filed: October 24, 2023
Unsealed: November 20, 2023

Tysers Insurance Brokers Limited and H.W. Wood Limited

Deferred Prosecution Agreements with
penalty \$36 million and forfeiture \$10.5
million (Tysers), \$22.5 and \$2.3 million
(H.W. Wood)

Filed: December 14, 2023

Freepoint Commodities LLC

Deferred Prosecution Agreement with
disgorgement \$7.6 million; penalty
\$68 million and forfeiture \$30.5 million

Filed: December 13, 2023
Unsealed: March 28, 2024

Trafigura Beheer B.V.

Guilty Plea (conspiracy to violate anti-
bribery provisions in connection with
improper payments to government officials
in Brazil; criminal fine of \$80,488,040 and
forfeiture of \$46,510,257)

Filed: March 1, 2024

Gunvor S.A.

Guilty Plea (conspiracy to violate the anti-
bribery provisions in connection with
improper payments to government officials
in Ecuador; criminal penalty \$374,560,071
and forfeiture \$287,138,444)

Filed: January 10, 2024

SAP SE

Deferred Prosecution Agreement
(conspiracy to violate the anti-bribery and
books and records provisions with
improper payments to government officials
in South Africa; criminal penalty \$118.8
million and forfeiture \$103,396,765)



DOJ individual prosecutions (from Sept. 2023)

Filed: September 20, 2023

United States v. Amadou Kane Diallo
(Superseding indictment of a Senegalese national and resident of California with allegations of \$1.8 million wire fraud and money laundering related to investments in defendant's companies)

Indictment: March 19, 2024

United States v. Abraham Cigarroa Cervantes
(Indictment with FCPA allegations related to Brazil, Mexico, and Argentina)

Filed: October 27, 2023

United States v. Christian Julian Cazarin Meza
(Indictment with FCPA allegations related to bribes to government officials in Mexico)

Filed and Plea: February 27, 2024

United States v. Mauricio Gomez Baez
(Indictment with FCPA allegations related to Brazil, Mexico, and Argentina)

Filed: November 28, 2023
Unsealed: December 20, 2023

United States v. Carl Zaglin, Aldo Marchena, Francisco Cosenza
(Indictment with FCPA allegations related to bribes to government officials in Honduras)


Date of Plea: November 2, 2023
Sentenced: February 16, 2024

United States v. Orlando Alfonso Contreras Saab
(Pled guilty and convicted of conspiracy to violate the FCPA relating to bribery in Venezuela)



Focus on individual prosecutions

- The Biden DOJ has repeated its intention to prosecute senior officers and directors.
- DOJ has re-introduced incentives for corporate defendants to provide evidence on individuals.
- DOJ regularly charges individuals with FCPA criminal offenses.
- Many cases follow (or sometimes even precede) large corporate resolutions (e.g., Goldman Sachs, "Lava Jato" / Odebrecht, PDVSA).
- Average length of sentence is 29 months.



"I have made it clear that the Department's first priority in corporate criminal cases is to prosecute the individuals who commit and profit from corporate malfeasance. It is our first priority because corporations only act through individuals. It is our first priority because penalties imposed on individual wrongdoers are felt by those wrongdoers, rather than by shareholders or inanimate organizations. It is our first priority because – as everyone who has counseled individual corporate officers know – the prospect of personal liability has an uncanny ability to focus the mind. That prospect is the best deterrent to corporate crime. And deterrence – after all – is what we are after. But most important, the prosecution of individuals is our first priority because it is essential to Americans' trust in the rule of law."

Merrick Garland, US Attorney General



SEC FCPA resolutions (from Sept. 2023)

September 28, 2023

Clear Channel Outdoor Holdings Inc.

- Alleged bribes paid by its agent, a former majority-owned affiliate in China
- Anti-bribery, recordkeeping, and internal accounting controls provisions
- \$26.1 million in disgorgement and prejudgment interest

September 29, 2023

Albemarle Corp

- Alleged misconduct in Vietnam, India, Indonesia, China, and the United Arab Emirates
- Anti-bribery, books and records, and internal accounting controls violations
- \$103.6 million in disgorgement and prejudgment interest

January 10, 2024

SAP SE

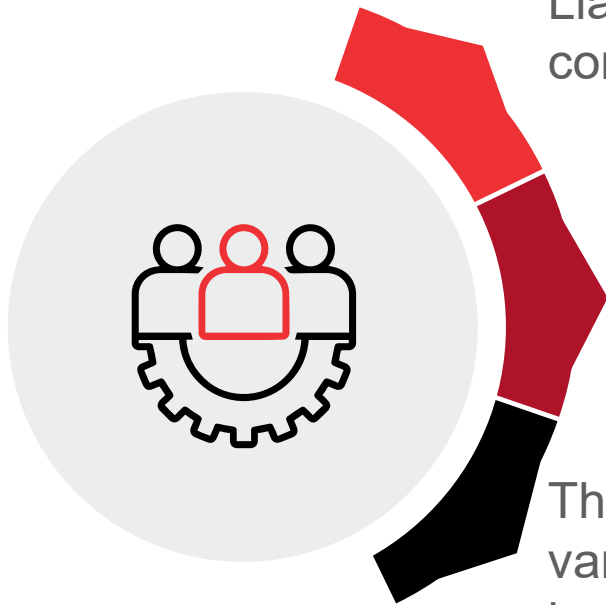
- Alleged that through its wholly-owned subsidiaries, employed third-party intermediaries and consultants in various schemes to pay bribes to government officials to obtain business in South Africa, Malawi, Kenya, Tanzania, Ghana, Indonesia, and Azerbaijan
- Anti-bribery, books and records, and internal accounting controls violations
- \$98 million in disgorgement

Third parties – Still key to FCPA risk

Liability for acts of third parties may be attributed to the company under the FCPA.

According to data from Stanford Law School, approximately 90% of FCPA cases involve the actions of third-party intermediaries.

The last year's FCPA cases involved third-party intermediaries in various schemes to obtain business and commercial advantages in South Africa, Malawi, Kenya, Tanzania, Ghana, Indonesia, and Azerbaijan, Vietnam, Indonesia, India, China, and the United Arab Emirates.



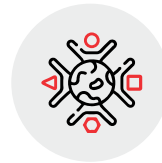
Third parties – Reasons for prevalence

Types of third parties that have given rise to liability in FCPA cases:

- Suppliers/vendors
- Distributors/resellers
- Business partners with connection to Foreign Public Officials
- Sales agents
- Consultants
- Joint venture partners/consortium partners
- Financial/business/tax/law advisors and consultants service providers (freight forwarders, logistics maintenance/facilities, supply chain management, storage)
- Contractors/subcontractors
- Marketing, PR, sales, customs, visa agents
- Lobbyists



Reliance of global companies on third parties – particularly in higher risk, growth markets



Reduced level of control and aligned cultural values in respect of such third parties

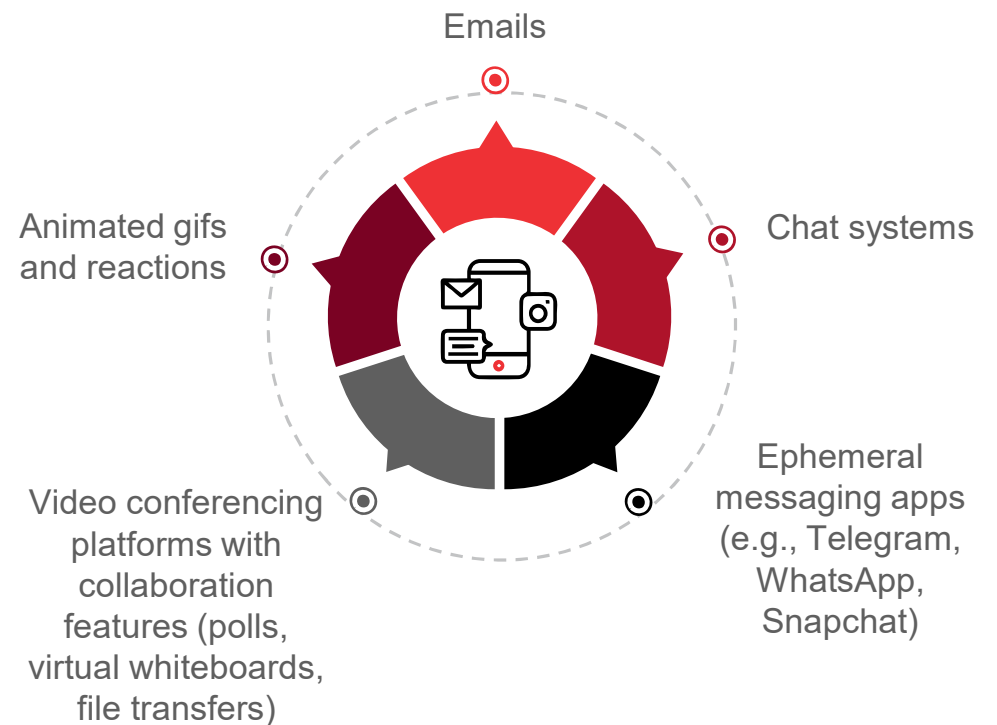


Need to circumvent accounting and other controls of companies often

Private and Ephemeral messaging

- New extensive direction regarding communication platforms and channels, instructing prosecutors to assess how a company has informed its employees of its communication-platform-related policies and procedures, and whether the company has enforced the policies and procedures regularly and consistently in practice
- In evaluating corporate communication-platform policies, **prosecutors will assess:**
 - 1 **Types of communication** channels company personnel use
 - 2 The **policies and procedures governing** the use of communication platforms and channels
 - 3 The **company's risk management measures**, such as the consequences for employees who refuse the company access to company communications, the impact of the use of ephemeral messaging applications on the company's evaluation of employees' compliance with company policies and procedures, and related disciplinary actions

Prevalence of Private and Ephemeral Communications, Particularly Outside US



DOJ resources

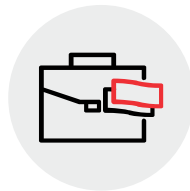


**Corporate
criminal
enforcement
a national
security concern**



More prosecutors:

- National Security Division adding more prosecutors
- Goal to investigate and prosecute sanctions evasion, export control violations and other economic crime



New resource to fight corruption:

- The International Corporate Anti-Bribery initiative

International cooperation

- International cooperation is a significant trend, and the DOJ and SEC are clearly committed to it continuing
- International cooperation is not limited to "mega" FCPA resolutions
- Most cooperation comes from countries in which the corrupt officials are not present, and often appears tied to banking activity and money transfers
- Authorities in a country where the foreign official who was bribed is located may not cooperate with US authorities
 - China or Russia; lesser degree, India and Mexico, though these are changing
 - In contrast, Brazil shows prosecutorial power of strong working relationships

"Simply put, the recent trend of coordinated investigations and resolutions is here to stay."

- Acting Principal Deputy Assistant Attorney General Nicole M. Argentieri, Remarks at the 39th International Conference on the FCPA (Dec. 1, 2022)

- Based on statements by US authorities in resolutions, since 2019, 24 of 50 FCPA corporate resolutions (48%) involved corruption of officials in multiple countries
- Apparent trend of increasing international cooperation based on percentage of corporate resolutions acknowledging cooperation with at least one other country's anticorruption enforcers

2019	2020	2021	2022	2023	2024
46%	55%	75%	88%	55%	100%

- 2019 and 2023 were impacted by relative percentage of resolutions involving China

Foreign Extortion Prevention Act (FEPA)

Criminalizes Demand-Side Bribery



- In late December 2023, US Congress enacted the FEPA and President Biden signed it into law.
- FEPA makes it a crime for a foreign official to corruptly solicit or receive a bribe:
 - A "foreign official" or someone selected to be "foreign official" cannot corruptly demand, seek, receive, accept, or agree to receive or accept, by use of interstate commerce, directly or indirectly, anything of value from:
 - Any person while in the territory of the United States;
 - An "issuer"; or
 - Any "domestic concern."
 - In return for:
 - Being influenced in the performance of an official act;
 - Being induced to do or omit an act in violation of an official duty; or
 - Conferring any improper advantage in connection with obtaining or retaining business for or with, or directing business to, any person.
- For benefit of "foreign official" or "any other person or nongovernmental entity."

What can companies do?

Key Takeways

Effective compliance programs and controls continue to be a company's best defense.

Assess how your compliance program would fare before the DOJ and SEC, in particular leveraging of data and third-party management.

Focus on policies and practical realities of data use in companies and communications by employees in higher-risk markets.



Incorporate guidance on messaging and clawbacks to the extent possible.

Evaluate whistleblowing channels and hotlines.

Monitor new FCPA resolutions for guidance on cooperation and self-disclosure (including in M&A context).

What to watch for in 2024

Continued increase in enforcement



Increased use of data to identify new cases



Geopolitical trends, and US-China relations



Application of new guidance and policies in enforcement actions



Upcoming trials



Key takeaways



Key areas of convergence



- Greater international cooperation
- Leveraging technology and data
- Fostering whistleblowing
- Privilege assertions (UK growing closer to US)
- Corporate criminal liability (UK growing closer to US)

But key differences remain:

- Approval of negotiated resolutions (UK has greater judicial scrutiny)
- Compliance defence (UK has a formal recognized defence/ US does not)



Tomorrow's session

Global enforcement priorities and challenges
Thursday 23 May, 3.00 - 4.00 pm BST | 4.00 - 5.00 pm CEST | 10.00 - 11.00 am EDT



Questions



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