

2021 Q3 Report

The FCPA Clearinghouse’s quarterly report provides an overview of some of the more notable trends and statistics in FCPA enforcement activity to emerge during the third quarter of 2021.

Enforcement Statistics

There are a number of different ways to define FCPA enforcement activity and to count the number of new actions initiated each year. The FCPA Clearinghouse does not advocate one counting methodology over another, but instead presents the data in a number of different ways so that users can make their own informed judgments. Because our counting methodologies rely on defined terms (which are denoted below in bold), we make those definitions available at the “[Definitions](#)” tab of the [About Us](#) page.

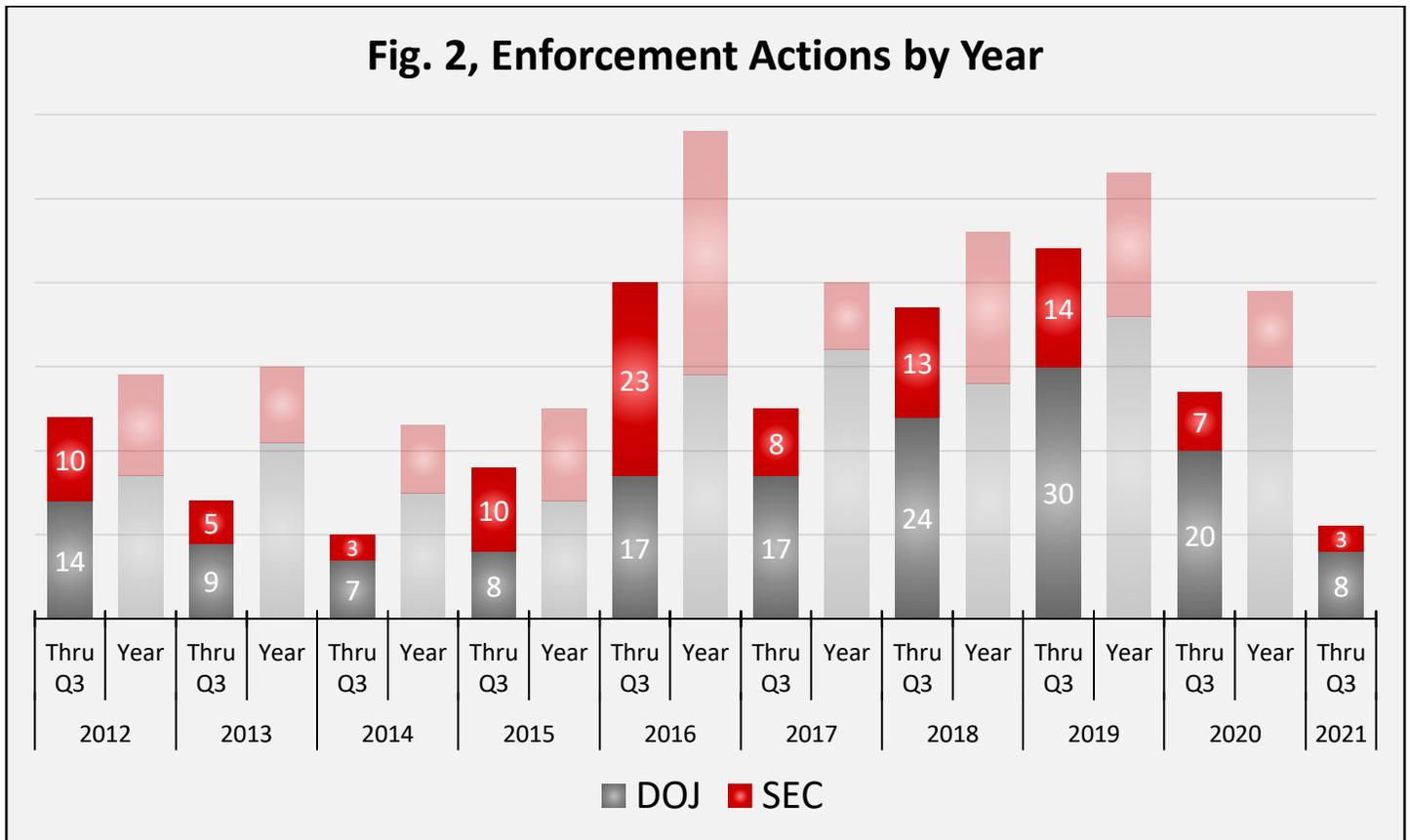
Enforcement activity remained quiet in the third quarter of 2021, with the DOJ filing two FCPA-related [Enforcement Actions](#) and announcing one previously filed action. The SEC filed only one new action in the third quarter. All three DOJ actions involved individual defendants, while the SEC filed its sole action against a corporate defendant. Two of the three individual defendants, [Afework Bereket](#) and [Anthony Stimler](#), worked for subsidiaries of major public companies, [Ericsson](#) and [Glencore](#), respectively, conducting work in regions with a history of a high risk of corruption. While Ericsson settled its own FCPA-related enforcement actions with the DOJ and SEC in 2018, Glencore remains under investigation by the DOJ. The third individual defendant, [Naman Wakil](#), was a Syrian businessman living in the U.S. who owned and controlled several companies that did business with Venezuelan state-owned enterprises. Figure 1 shows all the enforcement actions filed, announced, or unsealed between July and September of 2021.

**Fig. 1, FCPA-Related Enforcement Actions
Initiated or Announced in Q3, 2021**

Case	Date Initiated	Date Announced/ Unsealed	Sanctions
United States v. Afework Bereket	June 3, 2020	Sept. 8, 2021	Ongoing
United States v. Anthony Stimler	July 26, 2021	July 26, 2021	Ongoing
United States v. Naman Wakil	Aug. 4, 2021	Aug. 4, 2021	Ongoing
In the Matter of WPP plc	Sept. 24, 2021	Sept. 24, 2021	\$19,224,660

Enforcement activity continues to track well below the ten-year average. Indeed, if the 11 enforcement actions filed through the first three quarters of the year are predictive, 2021 will see the second fewest enforcement actions in a decade. The Clearinghouse explored some of the possible reasons for this slowdown in previous quarterly reports—[here](#) and [here](#)—noting in particular the declining number of publicly disclosed FCPA

investigations. Figure 2 shows the level of enforcement activity between January and September compared to annual totals in each of the last ten years.

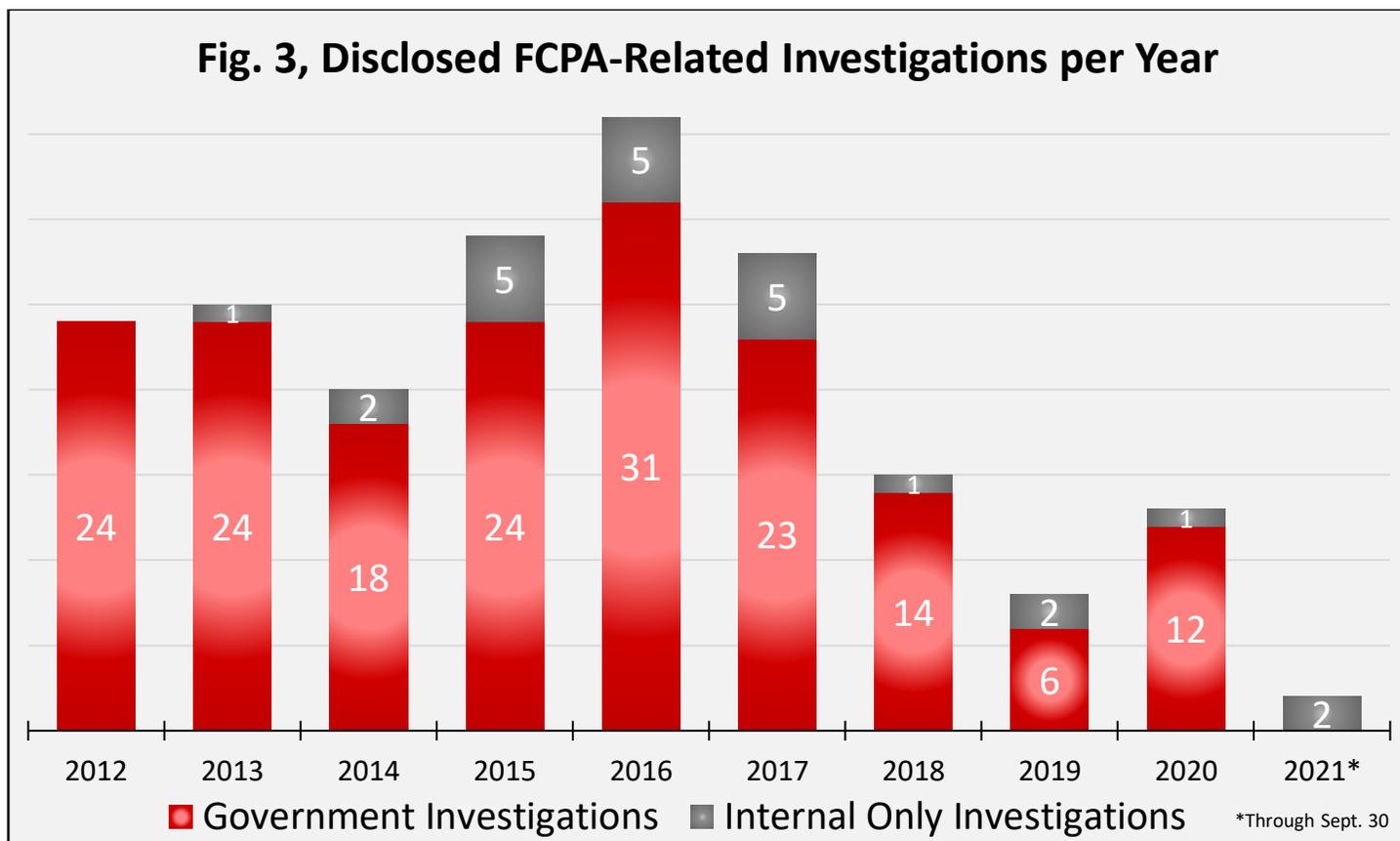


The slowdown may be short lived, however. As noted in this year’s [Q2 report](#), recent statements from both the White House and the DOJ indicate that the [Biden Administration is prioritizing anticorruption enforcement](#). These efforts may bolster both the resources and the investigatory tools available to the government in its fight to uncover and prosecute FCPA violations.

Investigations

The number of new FCPA-related [Investigations](#) publicly disclosed by companies has continued its downward trajectory in 2021. Despite a slight bounce in 2020, the number of publicly disclosed FCPA-related investigations has declined steadily since a peak in 2016. Figure 3 shows the number of publicly disclosed FCPA-related investigations initiated in each of the last 10 years.

Fig. 3, Disclosed FCPA-Related Investigations per Year



At the close of Q3, U.S. authorities appear to be actively investigating at least 33 different entity groups for possible FCPA violations. Between January 1 and September 30, only two companies first disclosed new FCPA-related investigations in their SEC filings. On August 9, [NewAge, Inc.](#) first disclosed an FCPA-related investigation by the DOJ and SEC, although the disclosure indicates that the agencies had actually initiated the investigation in 2020. A second company ([Edwards Lifesciences Corp.](#)) first disclosed on July 30 that it had initiated a new FCPA-related internal investigation. Figure 4 shows all entity groups known by the FCPA Clearinghouse to have publicly disclosed new FCPA investigations in the third quarter.

Fig. 4, New FCPA-Related Investigations Disclosed in Q3 2021

Company	Agencies Involved	Date Investigation Disclosed	Internal Investigation Disclosed?	Country/Region Investigated
Edwards Lifesciences Corp.	N/A	July 30, 2021	Yes	Japan
NewAge, Inc.	DOJ, SEC	Aug. 9, 2021	Yes	Undisclosed

According to information disclosed in SEC filings and charging and settlement documents, the DOJ and SEC concluded one publicly-disclosed FCPA-related investigation in the third quarter of 2021. On August 5, 2021, [Pactiv Evergreen Inc.](#) disclosed that the SEC intended to close its investigation into the company's possible FCPA violations without taking any further action. While the SEC also concluded an apparent investigation into the conduct of [WPP plc](#) by filing the enforcement action noted in Figure 1, that investigation was not publicly disclosed prior to resolution.

SEC Whistleblower Rules

On August 2, 2021, SEC Chair Gary Gensler issued a [statement](#) concerning amendments to the SEC's Whistleblower Program that were adopted under the Trump Administration. Those amendments were designed to increase efficiencies around the review and processing of whistleblower award claims, and to provide the Commission with additional tools to reward meritorious whistleblowers for their contributions to a successful matter. However, according to Gensler's statement, "[v]arious members of the whistleblower community, as well as Commissioners [Allison Herren] Lee and [Caroline A.] Crenshaw, have expressed concern that two of these amendments could discourage whistleblowers from coming forward." Accordingly, Gensler directed SEC staff to prepare potential revisions to the amendments that would address these concerns.

On August 5, 2021, the SEC issued a [statement](#) indicating that the Commission would effectively ignore the two amended rules while the SEC staff prepared the proposed revisions. According to the statement, this was done so that whistleblowers "are not disadvantaged under the components of Rule 21F-3(b)(3) and Rule 21F-6 that may be revised." The SEC staff is expected to present the proposed revisions to the Commission later this year.

Ng Denial of Motion to Dismiss

In November 2018, the DOJ filed charges against two [Goldman Sachs](#) employees, [Ng Chong Hwa \(a.k.a. "Roger Ng"\)](#) and [Tim Leissner](#), in connection with a bribery scheme involving [1 Malaysia Development Berhad](#) ("1MDB"), Malaysia's state-owned and state-controlled investment development company. Leissner pled guilty in 2018, but Ng chose to fight the charges, and in December 2020 filed a motion to dismiss the superseding indictment, which included charges of conspiracy to launder money and conspiracy to violate the internal controls provisions of the FCPA. Among his claims in support of the motion to dismiss, Ng argued that Count 2 of the indictment failed to allege that he conspired to circumvent a set of internal accounting controls cognizable under the FCPA. Ng argued, among other things, that the FCPA's language specifically refers to the transactions and dispositions of the assets of an issuer. In this case, Ng claimed that he could not be charged under the FCPA because the assets used in the alleged bribery scheme were not Goldman Sachs' assets but rather 1MDB's, which was not an issuer.

On September 10, 2021, the court denied Ng's motion to dismiss, rejecting Ng's arguments with respect to Count 2. The court noted that "the relevant 'transaction' and use of 'assets' are the Goldman Sachs Group's purchase of the bonds with its own assets," rather than the assets of 1MDB as Ng asserted. Moreover, "the internal accounting controls provision does not strictly require that the issuer's assets be used, . . . but rather focuses on 'transactions.' Nor does the plain language of the statute support Ng's assertion that internal accounting controls can only be implicated in transactions where an issuer uses its own assets to pay a bribe directly [internal citations removed]." The court further found that while "[i]n the civil context, courts have dismissed claims that a defendant conspired to circumvent internal accounting controls where the SEC failed to specifically allege which controls were violated," in criminal cases, it is generally sufficient for the government to make "allegations that track the language of the statute." In the case against Ng, "questions such as whether 'transactions' or 'assets' of the issuer were involved, and whether the controls at issue are internal 'accounting' controls, are matters for the jury to decide."

In a separate part of his motion to dismiss, Ng had requested that the court modify the deferred prosecution agreement (DPA) that Goldman Sachs had signed with the DOJ on the ground that the DPA impaired his constitutional rights at trial. Specifically, Ng claimed that a provision in the DPA that would allow the DOJ to prosecute Goldman Sachs for making public statements that contradict the statement of facts in the DPA prevents Goldman Sachs employees from acting as potential witnesses in defense of Ng. The court held, however, that the DPA "only binds the Goldman Sachs Group and does not control the behavior of individual employees." If a possible witness were to make statements in contradiction to the statement of facts, the DPA would allow the company to repudiate those statements, thus maintaining the company's agreement.

Looking Ahead

While FCPA enforcement activity has remained relatively quiet in 2021, the report and recommendations stemming from the interagency review process mandated by the White House's [June 3 anticorruption memorandum](#) are due to be submitted to the President by the end of the year. Whether this report will prompt an uptick in FCPA-related investigations and enforcement actions remains to be seen. Stay tuned.