Stanford Law School
Foreign Corrupt Practices Act Clearinghouse
a collaboration with Sullivan & Cromwell LLP

2024 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 2024.

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.

After a particularly slow second quarter, FCPA enforcement activity picked up between July and September of 2024, with the DOJ initiating one new FCPA-related **Enforcement Action**, unsealing two previously filed actions, and issuing one declination letter pursuant to the agency's Corporate Enforcement Policy. The SEC instituted and simultaneously settled one administrative action. Figure 1 shows all enforcement actions filed, announced, or unsealed between July and September of 2024.

Fig. 1, FCPA-Related Enforcement Actions Initiated or Announced in Q3, 2024

Case	Date Initiated	Date Announced/ Unsealed	Sanctions
U.S. v. Julian Aires	June 11	July 15	Ongoing
U.S. v. Deepak Sharma	June 24	August 1	Ongoing
U.S. v. Juan Andres Donato Bautista, et al. Juan Andres Donato Bautista Roger Alejandro Pinate Martinez Jorge Miguel Vazquez Elie Moreno	August 8	August 8	Ongoing
In Re: The Boston Consulting Group, Inc.	August 27	August 27	$14,424,000
In the Matter of Deere & Company	September 10	September 10	$9,930,355

In U.S. v. Julian Aires, the DOJ alleged that the principal at a company contracting with AAR Corporation, an Illinois-based provider of aviation services, conspired to pay bribes to officials connected to the South African state-owned airline, South African Airways. The DOJ and SEC have been investigating AAR since 2019 for possible misconduct in South Africa and Nepal.

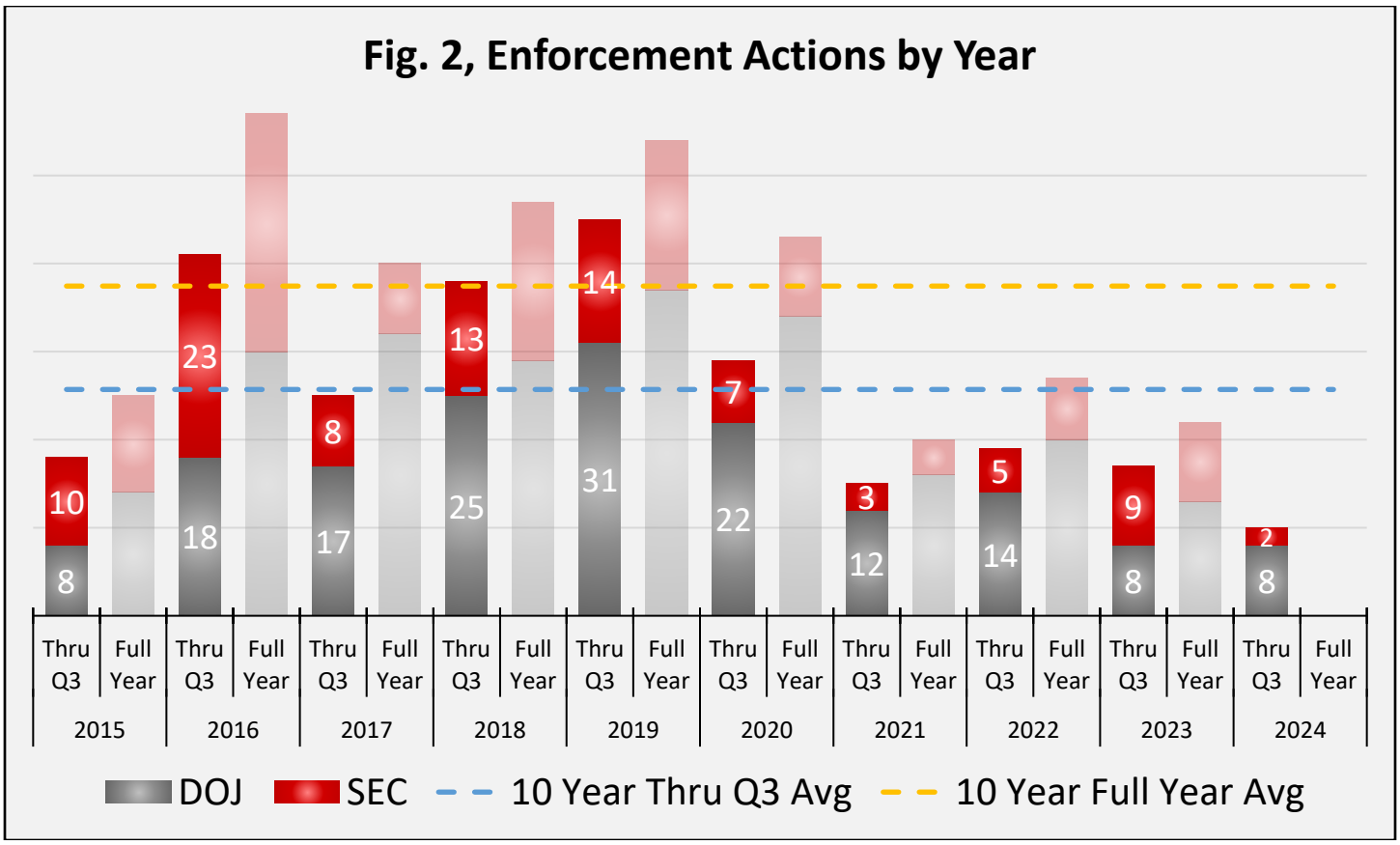
Similarly, in U.S. v. Deepak Sharma, the DOJ charged an executive at a subsidiary of AAR for his alleged role in a conspiracy to bribe Nepali officials in order to sell airplanes to Nepal's state-owned airline, Nepal Airlines.

In U.S. v. Juan Andres Donato Bautista, et al., the DOJ filed charges against three executives at Smartmatic Corporation, a multinational election voting machine and service provider company headquartered in the U.K., for their alleged scheme to pay bribes to Bautista, an official with the Commission on Elections of the Republic of the Philippines, in order to secure contracts to provide voting machines for the country's 2016 presidential election.

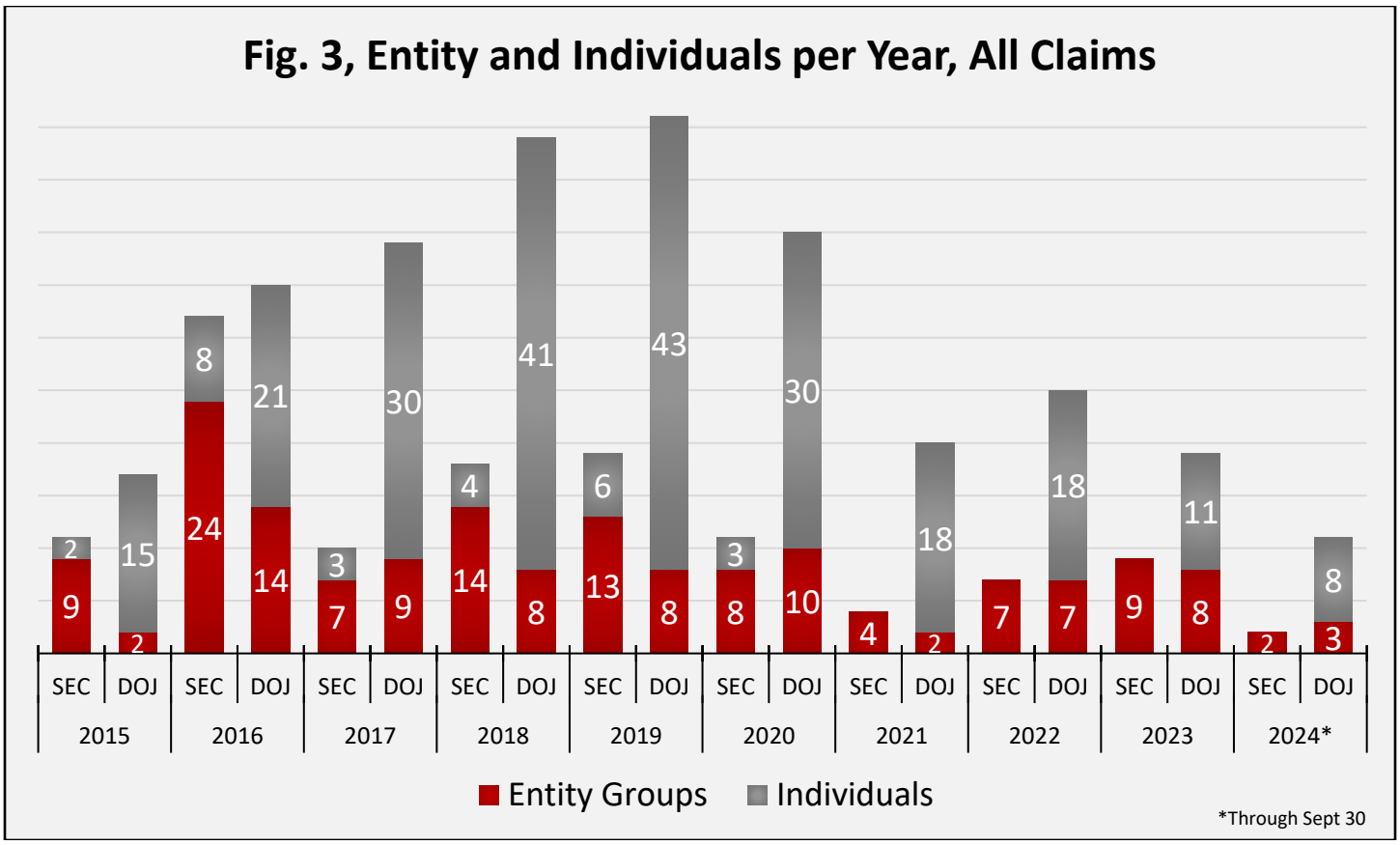
In In Re: Boston Consulting Group, Inc., the DOJ issued a declination letter pursuant to its Corporate Enforcement Policy to The Boston Consulting Group, Inc. (BCG), a global management consulting firm based in Boston, for bribes paid to Angolan officials to obtain business with the government of the country. The DOJ declined to prosecute the company based on BCG's timely self-disclosure of the misconduct; its full and proactive cooperation; its adoption of appropriate remedial measures, including terminating employees involved in the misconduct, requiring implicated BCG partners in Portugal to give up their equity in the company, denying access to financial transition normally accorded to BCG employees leaving the firm, and withholding bonuses; and the company's agreement to disgorge all profits associated with the misconduct. The fact that the declination letter called out compensation-based measures is notable. On March 3, 2023, the DOJ launched a Pilot Program Regarding Compensation Incentives and Clawbacks. Pursuant to this program, prosecutors are directed to consider possible fine reductions for companies that fully cooperate, timely and appropriately remediate, and demonstrate they have implemented a program to recoup compensation from employees who engaged in wrongdoing in connection with the conduct under investigation, or others who had supervisory authority over the employees or business area engaged in the misconduct and knew of, or were willfully blind to, the misconduct. In such circumstances, prosecutors should, in addition to any other reduction available under Department policies, reduce the fine in the amount of 100% of any such compensation that is recouped during the period of the resolution. Although the Department did not specifically cite to the Pilot Program in the declination letter, this appears to be the fourth instance in which the Department has rewarded a company for compensation-based remedial measures since the Pilot Program began. The other three cases in which the DOJ rewarded companies for their compensation-based remedial measures were In Re Albemarle, In Re: Lifecore Biomedical, Inc., and U.S. v. SAP SE.

In In the Matter of Deere & Company, the SEC ordered Deere & Company, a global manufacturer of agricultural machinery and heavy equipment, to cease and desist violating the accounting provisions of the FCPA. The SEC alleged that employees at Deere's subsidiary in Thailand paid bribes to government officials with the Royal Thai Air Force, the Thai Department of Highways, and the Thai Department of Rural Roads to win numerous government contracts, and did not accurately record the bribes in the company's books and records.

Enforcement activity through Q3 of this year remained well below even the last three years of lower than average enforcement. Figure 2 compares the level of enforcement activity in the first three quarters of 2024 with annual totals in each of the last ten years.



As the Clearinghouse has noted in previous quarterly reports, the number of individual defendants the SEC and DOJ have charged with FCPA-related violations has declined considerably since 2019, with the SEC initiating its last FCPA-related action against an individual in 2020. The third quarter of 2024 does not alter that trend, though individual criminal actions are on track to be roughly consistent with last year. Figure 3 compares the number of individual and corporate defendants charged in each of the last ten years. Because some actions initiated against individuals in Q3 2024 may have been filed under seal, enforcement statistics could change in the coming months as complaints and indictments are unsealed by the courts.



Investigations

U.S. authorities are currently investigating at least 33 different entity groups for possible FCPA violations. Last quarter, no companies disclosed a new FCPA-related **Investigation**. According to information disclosed in SEC filings and charging and settlement documents, neither the DOJ nor the SEC concluded a publicly-disclosed investigation in the third quarter of 2024.

DOJ Whistleblower Reward Pilot Program

In March, the DOJ announced that it would be developing a new pilot program to provide rewards for whistleblowers as a complement to the existing whistleblower programs overseen by the SEC, CFTC, and FinCen. On August 1, the Department launched the pilot program and simultaneously unveiled guidance outlining the details of the program. According to the DOJ's guidance, a whistleblower must (1) be an individual (not a company or other type of entity); (2) not be eligible for an award "through another U.S. government or statutory whistleblower, qui tam, or similar program if they had reported the same scheme that they reported under this pilot program;" (3) not be affiliated with the DOJ; (4) not be a foreign government official; (5) not have meaningfully participated in the reported criminal scheme; (6) not lie to the DOJ; and (7) not have learned of the misconduct from someone else who is ineligible under the above criteria. Additionally, the DOJ noted that the program is not retroactive, so whistleblower awards would be available only for information disclosed to the Department on or after August 1, 2024.

The DOJ intends the pilot program to cover four areas of corporate crime, which the agency identified as prosecutorial priority areas not covered by existing whistleblower programs: (1) foreign corruption, (2) crimes involving financial institutions (specifically abuse of the financial system), (3) domestic corruption, and (4) health care fraud involving private insurers. In addition to the whistleblower information being restricted to these areas of corporate crime, the DOJ requires, at a minimum, that the information be original, voluntarily provided, truthful, complete, and that it must lead to a successful forfeiture of at least $1 million. If the

information leads to a forfeiture of more than $1 million, whistleblowers can receive an award of up to 30% of the first $100 million of net assets forfeited and up to 5% of any additional forfeited assets between $100 million and $500 million. No additional award is available for forfeited assets above $500 million. The DOJ noted that, absent any aggravating factors that could decrease the award, there is a presumption that the whistleblower will be awarded the maximum 30% of the first $10 million in net proceeds forfeited. Like the SEC's whistleblower program, the DOJ's Pilot Program does not require a whistleblower to report the possible misconduct internally at the company prior to reporting it to the Department. However, if a whistleblower reports internally first, they can still report to the agency within 120 days and maintain eligibility to receive a whistleblower award.

Foreign Extortion Prevention Act Update

In December 2023, President Biden signed into law the National Defense Authorization Act, which included the Foreign Extortion Prevention Act (FEPA). FEPA criminalized demand-side bribery by foreign officials, and it was meant as a complement to the existing supply-side enforcement under the FCPA. While FEPA shared many features with the FCPA, it differed in a few ways. Specifically, an official convicted under FEPA could face a stricter penalty than under the FCPA; FEPA's definition of "foreign official" went beyond the FCPA's by including actions by officials in their unofficial capacities as well as official capacities; and FEPA created no parallel jurisdiction for the SEC to bring a civil enforcement actions. In addition to these differences, FEPA was curiously included in the domestic bribery statutes, adding "foreign officials" as a class of persons to whom existing federal bribery prohibitions applied.

Recognizing the incongruity of FEPA's addition to the domestic bribery law and its inconsistencies with the FCPA, Congress passed the Foreign Extortion Prevention Technical Corrections Act (FEPTCA) on July 22, which President Biden signed into law on July 30. FEPTCA updated FEPA in two key ways. First, it moved the law to 18 U.S.C. § 1352 in the criminal code alongside various fraud and related offenses. Second, it substantively revised FEPA to more closely track the language and scope of the FCPA. Specifically, it removed the "unofficial capacity" language from the definition of a foreign official to align with the FCPA's definition, with one key distinction: FEPTCA still defines a foreign official to include "senior foreign political figure[s]," which exceeds the FCPA's definition and could encompass many current and former government officials and politicians. FEPTCA also added language prohibiting foreign officials from seeking or accepting bribes from any officer, director, employee, agent, or stockholder of an issuer or domestic concern (the stockholder would have to be acting on behalf of the issuer or domestic concern), consistent with the FCPA.

While FEPTCA was intended to align its language more closely to the FCPA than FEPA had initially, some minor differences remain. Specifically, FEPTCA clarified that territorial jurisdictional requirements applied to foreign officials or those acting on their behalf. Under FEPTCA, foreign officials or their agents must seek or accept the bribe while in the territory of the United States. This is different from the territorial jurisdiction stipulated under the FCPA, which requires that the bribe-payer act within the territory of the United States, independent of the location of the foreign official.

These corrections could help the DOJ to pursue corrupt foreign officials, but to date, it does not appear the DOJ has charged any official under either FEPA or FEPTCA.

Update to the Evaluation of Corporate Compliance Programs Guidance

In remarks given at the Society of Corporate Compliance and Ethics 23rd Annual Compliance & Ethics Institute on September 23, Principal Deputy A.G. Nicole M. Argentieri announced three substantive updates to the agency's Evaluation of Corporate Compliance Programs (ECCP), which is designed to guide both the DOJ and companies in the best practices for compliance program design and implementation.

First, the DOJ will now consider how companies assess and manage risk related to new or emerging technologies, such as artificial intelligence, both in their business and in their compliance programs. Prosecutors can now consider what technology a company uses to conduct business, whether the company has conducted a risk assessment regarding the use of such technology, and whether the company has taken appropriate steps to mitigate any risks associated with that technology's use.

Second, in conjunction with the DOJ's new whistleblower reward program detailed above, the ECCP proposes questions designed to evaluate whether companies are encouraging employees to speak up and report misconduct or whether companies employ practices that chill reporting. Prosecutors are directed to evaluate a company's commitment to whistleblower protections and anti-retaliation by assessing policies and training, as well as treatment of employees who report misconduct.

Third, the updated ECCP instructs prosecutors to assess the appropriateness of data access in a compliance program, including data measuring its own effectiveness. Compliance and risk management personnel at companies should have access to data and the resources and technology needed to adequately complete their jobs. The DOJ will consider whether the companies are leveraging the same resources and technology into gathering and analyzing compliance-related data as they are in their other business operations.

Looking Ahead

At least two companies with ongoing investigations have disclosed accruals in anticipation of settling an FCPA-related investigation. On July 25, RTX Corporation disclosed it had accrued $364 million for pending settlements of investigations into alleged misconduct in the Middle East. The company said it expected to enter into a deferred prosecution agreement with the DOJ and an administrative settlement with the SEC. Additionally, the anticipated settlement of investigations by the SEC and DOJ into by BIT Mining Ltd., noted by the Clearinghouse last quarter, remains pending.