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

2022 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 2022.

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.

FCPA enforcement in the third quarter of 2022 continued the moderate pace set over the last several quarters, with the DOJ initiating three FCPA-related **Enforcement Actions** compared to the SEC's two. The DOJ settled with one corporate defendant and charged four individual defendants in two separate actions over the last three months. In addition, the DOJ publicly announced two earlier-filed enforcement actions, the first filed under seal in August 2020 and the second filed last quarter. The SEC settled administrative proceedings initiated against two corporate defendants. Figure 1 shows all enforcement actions filed, announced, or unsealed between July and September of 2022.

Fig. 1, FCPA-Related Enforcement Actions Initiated or Announced in Q3, 2022

Case	Date Initiated	Date Announced/ Unsealed	Sanctions
U.S. v. Cary Yan, et al.	Aug. 10, 2020	Sep. 2, 2022	Ongoing
U.S. v. Ralph Steinmann, et al.	Jun. 12, 2022	Jul. 12, 2022	Ongoing
U.S. v. Esteban Eduardo Merlo Hidalgo, et al.	Jul. 14, 2022	Jul. 19, 2022	Ongoing
U.S. v. Rixon Rafael Moreno Oropeza	Aug. 24, 2022	Aug. 24, 2022	Ongoing
U.S. v. GOL Linhas Aereas Inteligentes, S.A.	Sep. 9, 2022	Sep. 15, 2022	$17,000,000
In the Matter of GOL Linhas Aereas Inteligentes S.A.	Sep. 15, 2022	Sep. 15, 2022	$24,500,000
In the Matter of Oracle Corporation	Sep. 27, 2022	Sep. 27, 2022	$22,905,417

In *US. V. Cary Yan, et al.*, the DOJ filed charges against two defendants employed by a non-governmental organization affiliated with the United Nations for allegedly bribing elected officials in the Marshall Islands in exchange for the officials' support of legislation that would benefit the defendants' business interests.

In *U.S. v. Ralph Steinmann, et al.*, the DOJ filed charges against two individuals for corruptly laundering funds related to a bribery scheme involving Venezuela's state-owned and state-controlled energy company, Petroleos de Venezuela, S.A. ("PDVSA"). The DOJ's action against Rixon Rafael Moreno Oropeza similarly involved payments to senior officials at a joint venture between PDVSA and an American oil company. In the past few years, the DOJ has filed criminal charges against over 50 individuals stemming from a wide-ranging investigation into corruption in Venezuela.

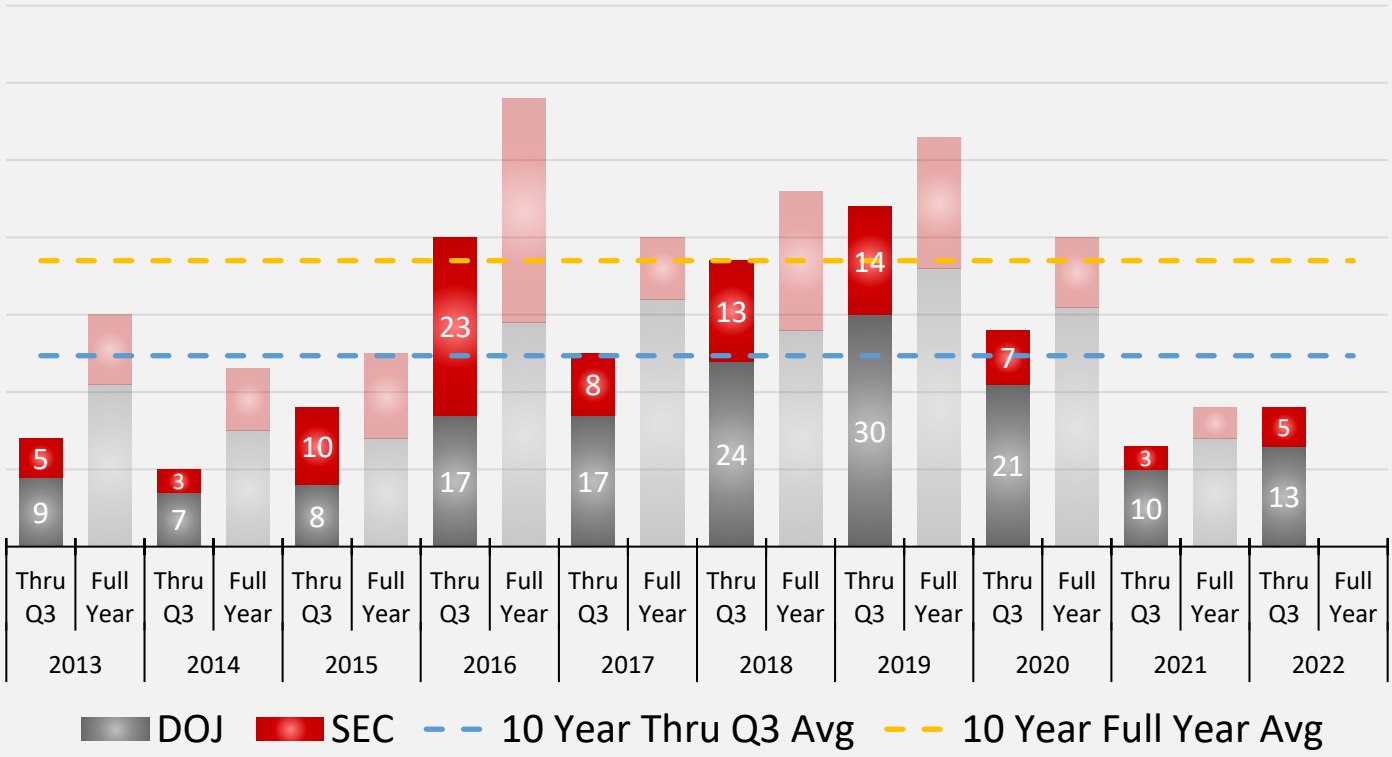
The DOJ charged Esteban Eduardo Merlo Hidalgo, Luis Lenin Maldonado Matute, and Cristian Patricio Pintado Garcia in *U.S. v. Esteban Eduardo Merlo Hidalgo, et al.* for participating in a bribery scheme involving the Ecuadoran insurance industry. That same bribery scheme has separately ensnared at least five other individual defendants.

Both the SEC and the DOJ filed charges against GOL Linhas Aereas Inteligentes, S.A., Brazil's second largest domestic airline by market share, for paying bribes to Brazilian politicians in exchange for reduced taxes. These actions appear to have stemmed from investigations originally initiated by Brazilian tax authorities. Over the last several years, Brazilian authorities have commenced several large anti-corruption investigations, often with colorful names such as Operation Car Wash or Operation Weak Meat, that have prompted U.S. agencies to initiate FCPA-related investigations and enforcement actions against companies like Odebrecht S.A., Petroleo Brasileiro S.A., Vantage Drilling International, BRF S.A., and J&F Investimentos S.A.

In an administrative proceeding filed against Oracle Corporation, the SEC alleged that employees of Oracle's subsidiaries in India, Turkey, and the United Arab Emirates used discount schemes and sham marketing reimbursement payments to finance slush funds that were then used to pay bribes and provide other benefits such as improper travel expenditures to foreign officials in violation of Oracle's internal policies. Oracle's Indian subsidiary was also implicated in Oracle's 2012 settlement with the SEC, which resolved allegations that employees of Oracle India had secretly "parked" a portion of the proceeds from certain sales to the Indian government and put the money to unauthorized use, creating the potential for bribery or embezzlement. The new enforcement action against Oracle makes the company one of 20 repeat FCPA offenders.

Though enforcement activity through Q3 of this year has increased slightly as compared to the same time period last year, overall it remains well-below the ten-year average. So far, the pace of enforcement this year is roughly on par with 2015. Figure 2 compares the level of enforcement activity in the first three quarters of the year with annual totals in each of the last ten years.

Fig. 2, Enforcement Actions by Year



Investigation Statistics

U.S. authorities are currently investigating at least 32 different entity groups for possible FCPA violations. Although no company disclosed a new government **Investigation** in Q3, two companies first disclosed FCPA-related internal investigations during the period. One company (Ideanomics, Inc.) completed an investigation into possible FCPA-related misconduct prior to disclosure. According to Ideanomics, the investigation uncovered no improper actions or practices; nonetheless the company's audit committee requested that management conduct what appears to be a routine review of the company's compliance program. The other investigation (Boston Scientific Corporation) remains ongoing. In neither instance did the company indicate whether U.S. authorities had initiated a related government investigation. Figure 3 shows all entity groups that disclosed new FCPA investigations between July and September 2022.

Fig. 3, New FCPA-Related Investigations Disclosed in Q2 2022

Company	Agencies Involved	Date Investigation Disclosed	Internal Investigation Disclosed?	Country/Region Investigated
Boston Scientific Corporation	N/A	Aug. 4, 2022	Yes	Vietnam
Ideanomics, Inc.	N/A	Aug. 8, 2022	Yes	China

According to information disclosed in SEC filings and charging and settlement documents, the DOJ and SEC each concluded one publicly-disclosed investigation in the third quarter. Both agencies brought an enforcement action against GOL Linhas Aereas Inteligentes S.A., which first disclosed in 2016 that it had initiated an internal investigation and hired outside counsel after Brazilian tax authorities requested information regarding certain expenditures the company had made in 2012 and 2013. The SEC investigation that resulted in the

enforcement action against Oracle Corporation was never disclosed prior to the announcement of the enforcement action. Oracle similarly declined to disclose the FCPA-related investigation that led to an SEC Consent Agreement in 2012.

Hoskins

In July 2013, the DOJ filed charges against Lawrence Hoskins in what, by 2022, would become the oldest ongoing FCPA case not to involve a fugitive. After two appellate court rulings and years of litigation, that case may finally be coming to an end.

Hoskins was employed by the U.K. subsidiary of Alstom S.A., a French power and transportation company. He was assigned to Alstom Resources Management S.A. in France where he worked as a Senior Vice President for the Asia Region in Alstom's International Network. In 2013, prosecutors charged Hoskins with FCPA, money laundering, and conspiracy offenses for his alleged role in a scheme to bribe Indonesian officials to secure a $118 million power contract with the Indonesian government for Alstom and its partners.

The district court and the Second Circuit originally rejected the government's conspiracy and accomplice theories of FCPA liability, finding that Hoskins, who was not an American citizen, was not employed by the American subsidiary, and did not enter the United States while allegedly working on the scheme, could not be liable as an accomplice if the government lacked the jurisdiction to prosecute him directly under the Act. The government then refiled the case under an agency theory of liability, arguing that Hoskins's work for an American subsidiary rendered him an agent of a 'domestic concern' and hence squarely within the jurisdictional reach of the FCPA. Hoskins was convicted at trial and moved for an acquittal, arguing that the DOJ had not adequately proven that he acted as an agent of Alstom's U.S. subsidiary. The court agreed, setting aside his conviction on the FCPA charges while allowing the money laundering charges to stand. The DOJ then appealed to the Second Circuit.

In August 2022, the Second Circuit affirmed Hoskins's acquittal, finding that the district court had properly determined that no agency or employee relationship existed between Hoskins and Alstom's U.S. subsidiary. Applying the "common law meaning of agency" to the complex facts of the case, the Second Circuit concluded that Hoskins and the U.S. subsidiary's relationship lacked "key elements of agency, such as any indication that Hoskins had any authority to act on [the subsidiary's] behalf, and whether [the subsidiary] could 'revoke' any authority it purportedly gave to Hoskins, or even do anything to control Hoskins's actions."

While it remains possible that the DOJ could appeal the Second Circuit's decision to the Supreme Court, it seems relatively unlikely for at least two reasons. First, there is no current circuit split supporting Supreme Court review, and the Second Circuit decision relies on a fact-specific question of agency rather than a disputed interpretation of law. Second, and perhaps more importantly, Hoskins was unsuccessful in overturning his conviction on the money laundering charges, with the court sentencing him in March 2020 to 15 months in prison. The DOJ could take this "win" and be done with the case. The Hoskins saga may, at long last, be at an end.

Although the recent Second Circuit decision may be notable for the simple fact that very few appellate courts issue rulings in FCPA actions, its actual impact may be muted. Other courts have disagreed with the Second Circuit's narrow interpretation of accomplice and conspiracy liability under the FCPA, which cabins the impact of that court's earlier ruling. Moreover, prosecutors have a number of different tools for reaching foreign nationals in international corruption cases, even if they lack jurisdiction to charge those nationals with FCPA violations (by way of example, see the section below on the prevalence of money laundering charges in FCPA-related cases).

Monaco Memo

In a speech delivered at the New York University Program on Corporate Compliance and Enforcement on September 15, 2022, Deputy Attorney General Lisa O. Monaco announced new guidance on DOJ corporate enforcement. In many ways, the speech, which accompanied a memo going into greater detail, broke little new ground, instead reiterating the DOJ's corporate enforcement priorities and clarifying the DOJ's expectations for corporations involved in DOJ enforcement actions. Nevertheless, the announcement may impact how companies build and test their compliance programs, structure compensation plans, and evaluate the risks and benefits of voluntary self-reporting.

In the speech, Monaco outlined the changes in five parts. First, reiterating the position first enunciated in the 2015 Yates Memo, she emphasized the DOJ's priority in holding individuals accountable for wrongdoing, while adding that the DOJ needs to move faster in prosecuting individuals. To that end, Monaco instructed prosecutors to file charges prior to or at the same time as reaching a resolution with the corporation, and indicated that departmental policy will, going forward, require companies to disclose more quickly any evidence of individual misconduct. Failure to do so could imperil a company's cooperation credit in its own resolution.

Second, she noted the problem of recidivism among corporate offenders – pointing out that "between 10% and 20% of large corporate criminal resolutions have involved repeat offenders" – and articulated standards regarding the kind of prior misconduct that will receive greater weight, such as conduct involving the same personnel or management.

Third, Monaco emphasized the expectation for companies to voluntarily self-report misconduct, adding that the DOJ will not seek a guilty plea or compliance monitor absent "aggravating factors," in instances where the company voluntarily self-discloses, cooperates, and remediates the misconduct.

Fourth, Monaco further clarified that there is no presumption in favor of monitorships and that it will not seek to impose a monitor if the company has implemented and tested an effective compliance program prior to resolution of the action. She also explained that the DOJ will adopt a transparent and consistent monitor selection and oversight process.

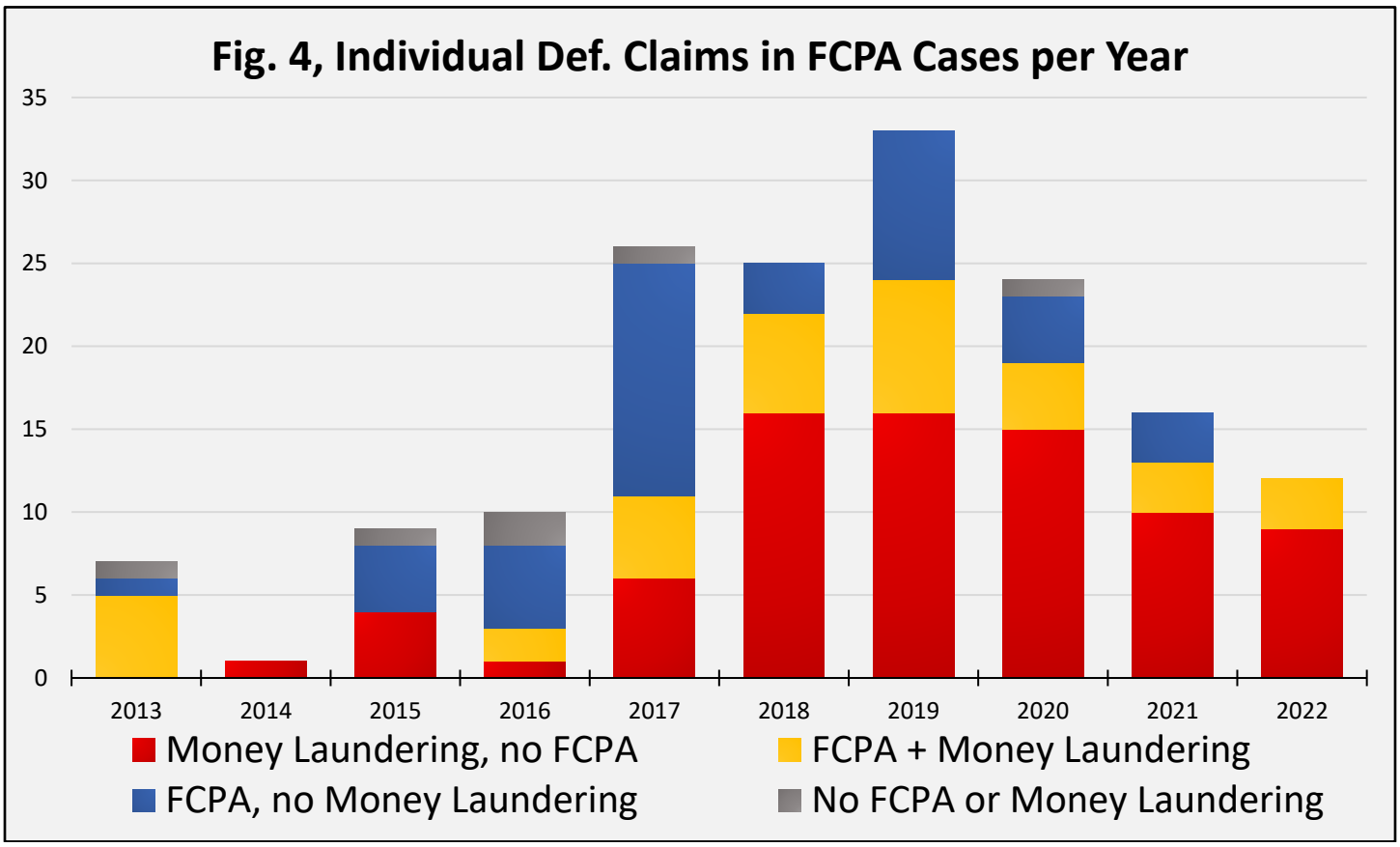
Finally, Monaco noted that when assessing a company's compliance program, prosecutors must consider whether its compensation system rewards compliance-promoting behavior and imposes sanctions on those who contribute to the misconduct through mechanisms like clawback provisions and escrowed compensation. She directed the Criminal Division to provide further guidance by the end of this year on how to reward corporations that develop and apply compensation clawbacks or similar policies.

Money Laundering

The Clearinghouse and other FCPA commenters have noted an increase in money laundering charges in FCPA-related enforcement actions over the last several years. Money laundering can be an attractive charge for prosecutors because the maximum prison terms allowable under the Money Laundering Control Act ("MLCA") are higher than under the FCPA, and because individual defendants who might otherwise be outside the jurisdictional reach of the FCPA can still generally be charged with money laundering. Moreover, money laundering is often the primary charge available to prosecute foreign officials who accept bribes, as those officials are generally not directly liable under the FCPA.

Over the last ten years, the DOJ has charged a clear majority (70 percent) of individual defendants with money laundering violations in connection with FCPA-related enforcement actions. Further, the rate at which the DOJ has filed money laundering charges in FCPA cases against individual defendants *without a related FCPA claim*

has increased dramatically in recent years. Figure 4 shows the numbers of defendants charged with FCPA, money laundering, and other claims over the last ten years.



This enforcement trend is not without risk, however. Two individual foreign defendants charged in the same case in Texas have recently successfully challenged FCPA and money laundering claims on jurisdictional grounds. In that case, the DOJ alleged that Daisy Teresa Rafoi-Bleuler ("Rafoi") and Paulo Jorge da Costa Casquiero-Murta ("Murta"), both Swiss citizens, acted as agents for a domestic concern as part of a bribery scheme involving officials at PDVSA. Both defendants were charged with conspiracy to violate the FCPA and MLCA, and the DOJ additionally charged Rafoi with aiding and abetting violations of the MLCA.

In Rafoi's case, the DOJ alleged that her knowing participation in communications and financial transactions through interstate commerce established the agency relationship between Rafoi and the principal businessmen conducting the bribery scheme. The court rejected that argument, finding that, as a matter of law, those allegations simply did not create the required agency relationship to support jurisdiction under the FCPA. With respect to the money laundering allegations, the court interpreted the MLCA to require that Rafoi had personally conducted part of the scheme while in the United States. Since the DOJ conceded that Rafoi had not committed any acts in furtherance of the scheme while in the U.S., the court held that the DOJ lacked jurisdiction to prosecute her under the MLCA as well.

The court used similar logic in the opinion dismissing Murta's claims, despite allegations that Murta had indeed been in the U.S. to meet with co-conspirators. The court instead found that it lacked jurisdiction because Murta had not been present in the U.S. at the time of the alleged money transfers that formed the basis for the money laundering claim. The DOJ has appealed both rulings to the Fifth Circuit Court of Appeals.

In a similar case in Florida, the court rejected the Texas court's reasoning and denied a motion to dismiss filed by defendant Claudia Patricia Diaz Guillen ("Diaz"), the National Treasurer of Venezuela. The DOJ charged

Diaz with conspiracy to commit money laundering as well as direct money laundering violations. Relying on the Texas decision dismissing Rafoi's claims, Diaz argued that the DOJ lacked jurisdiction to prosecute her because she had not committed any of the relevant conduct while physically present in the United States. The court disagreed, finding nothing in the MLCA required the defendant to be physically present in the U.S. to establish jurisdiction, and that it was sufficient for the government to allege that some of the bribes were wired to accounts in the U.S. The Florida court's reasoning is more consistent with the expansive assertion of jurisdiction employed by the DOJ in many FCPA-related enforcement actions.

Looking Ahead

Honeywell International Inc. is the only company with an ongoing investigation that has disclosed an accrual ($160 million) in anticipation of settling an FCPA-related investigation. Honeywell's disclosure occurred in October 2021, which at almost exactly a year ago represents an uncommonly long time between accrual and announcement of the enforcement action. Typically, companies disclose accruals within a few months of the settlement. This likely indicates that the company has an agreement in principle with U.S. authorities but that details continue to be negotiated. The Clearinghouse will continue to monitor Honeywell's filings for further information.