Stanford Law School

Foreign Corrupt Practices Act Clearinghouse

a collaboration with Sullivan & Cromwell LLP

2023 Q1 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 first quarter of 2023.

Enforcement Statistics

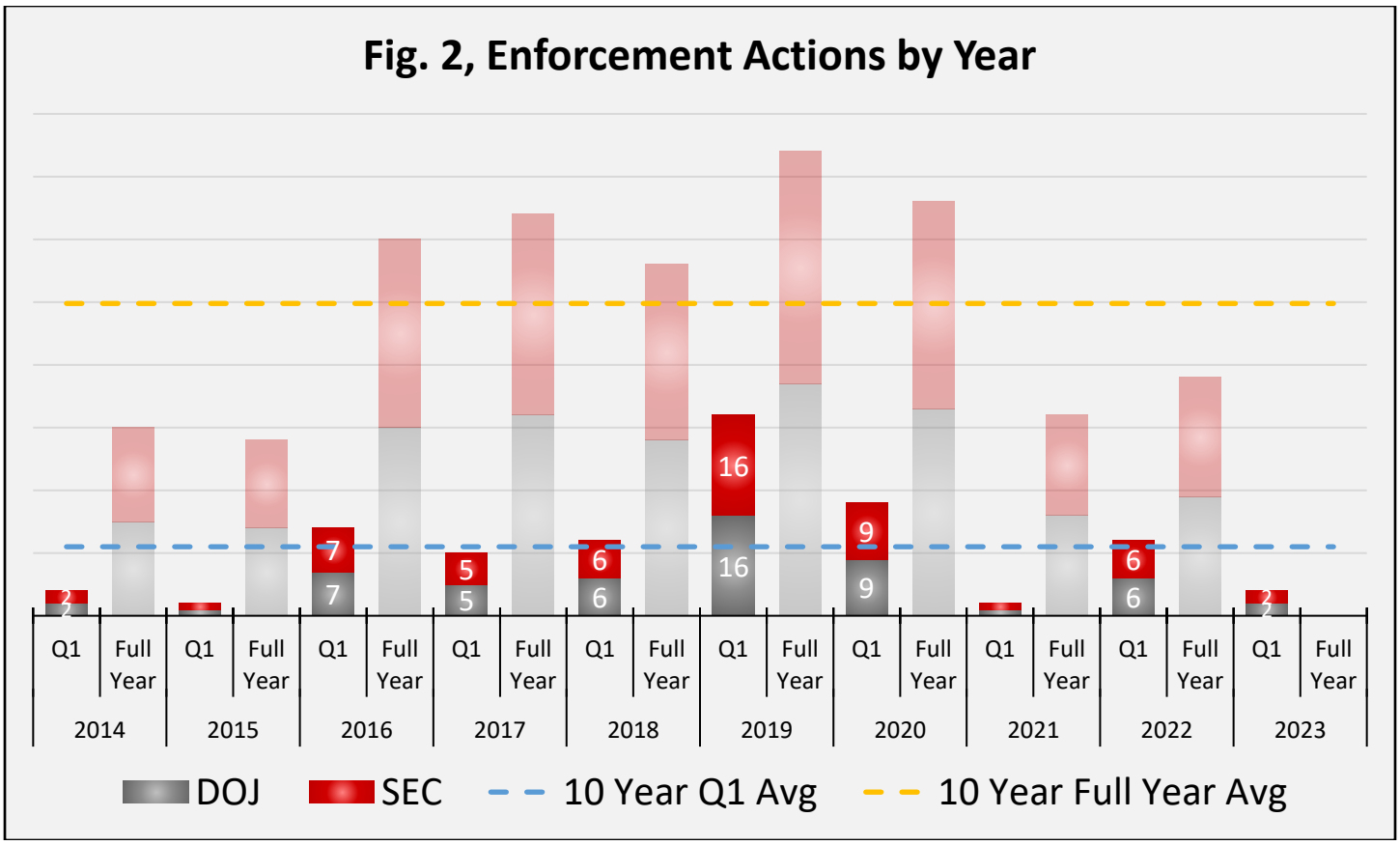
There are a number of different ways to define FCPA enforcement activity and to count the number of new actions initiated each year. The FCPA Clearinghouse does not advocate one counting methodology over another, but instead presents the data in a number of different ways so that users can make their 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 in the first quarter of 2023 continued the slow trend seen over the last two years. The SEC initiated two FCPA-related **Enforcement Actions**. The DOJ filed one enforcement action, added an FCPA charge to an existing non-FCPA action, and issued one declination with disgorgement pursuant to the FCPA Corporate Enforcement Policy. Figure 1 shows all enforcement actions filed, announced, or unsealed between January and March of 2023.

Fig. 1, FCPA-Related Enforcement Actions Initiated or Announced in Q1, 2023

Case	Date Initiated	Date Announced/ Unsealed	Sanctions
U.S. v. Samuel Bankman-Fried, et al.			Ongoing
Samuel Bankman-Fried*	Dec. 9, 2022	Dec. 13, 2022	
Zixiao (Gary) Wang	Dec. 19, 2022	Dec. 19, 2022	
Caroline Ellison	Dec. 19, 2022	Dec. 19, 2022	
Nishad Singh	Feb. 28, 2023	Feb. 28, 2023	
*Only Bankman-Fried was charged with an FCPA violation. No other defendant was alleged to have been connected to the FCPA-related misconduct.			
U.S. v. Glenn Oztemel, et al.			Ongoing
Glenn Oztemel	Feb. 14, 2023	Feb. 17, 2023	
Eduardo Innecco	Feb. 14, 2023	Feb. 17, 2023	
In the Matter of Flutter Entertainment plc, as successor-in-interest to The Stars Group, Inc.	Mar. 6, 2023	Mar. 6, 2023	$4,000,000
In the Matter of Rio Tinto plc	Mar. 6, 2023	Mar. 6, 2023	$15,000,000
In Re: Corsa Coal Corporation (declination with disgorgement)	Mar. 8, 2023	Mar. 8, 2023	$1,200,000

This year's first quarter enforcement activity has tracked well below the ten-year average of 11 actions. Over the last ten years, there appears to be a loose correlation between the level of enforcement activity in the first quarter and the level of activity for the full year, with only two of the last ten years breaking that trend. If this correlation persists, 2023 may see fewer enforcement actions than average. Figure 2 compares the level of enforcement activity between January and March with annual totals in each of the last ten years.



Over 200 individual defendants have been criminally prosecuted for FCPA-related misconduct in the last decade, although many of those actions allege no FCPA claims but instead are predicated on related claims such as money laundering and wire fraud that frequently are filed against government officials and intermediaries. Notably, the SEC has not sued a single individual for FCPA violations or for FCPA-related misconduct since 2020. Figure 3 shows the breakdown of individual and entity defendants charged by the DOJ and SEC with FCPA or FCPA-related claims (Table 3A) and with FCPA claims only (Table 3B) for each of the last ten years.

Fig. 3A, Entity and Individuals per Year, FCPA Claims Only

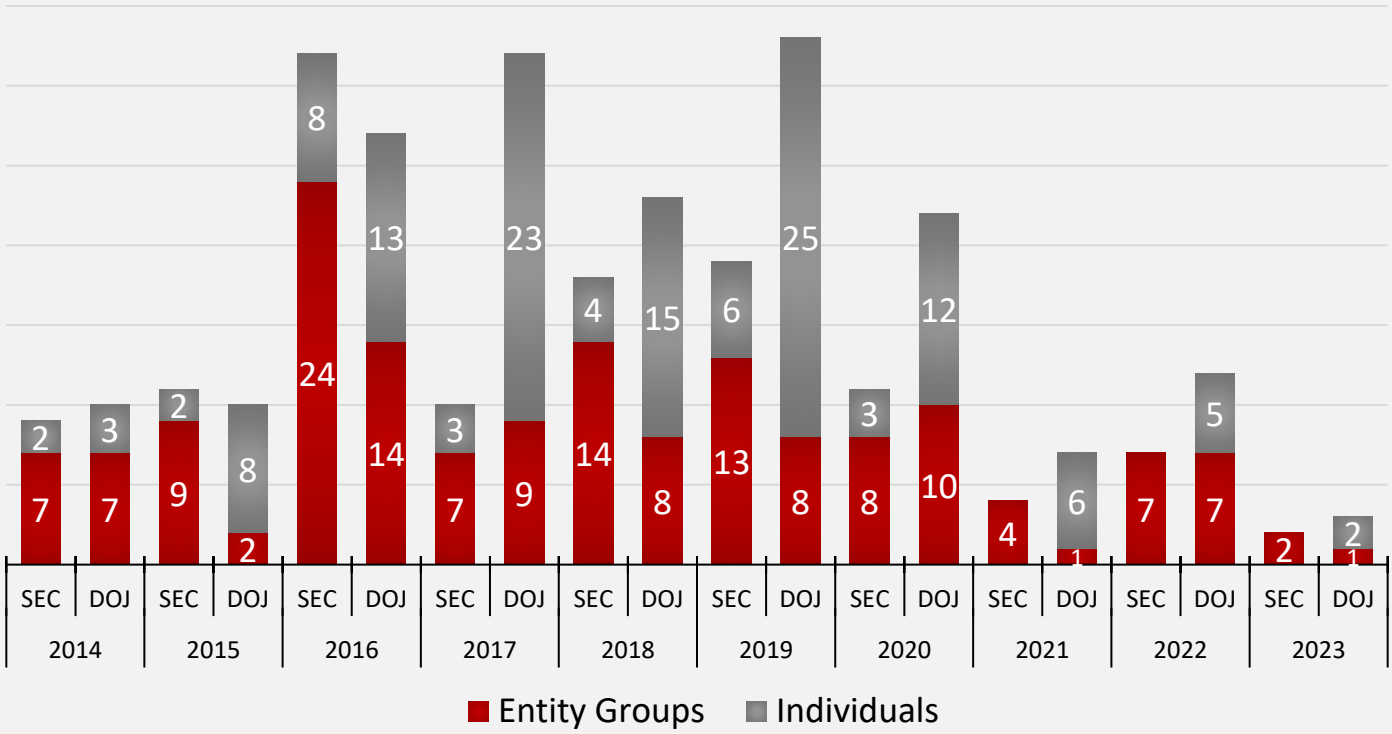
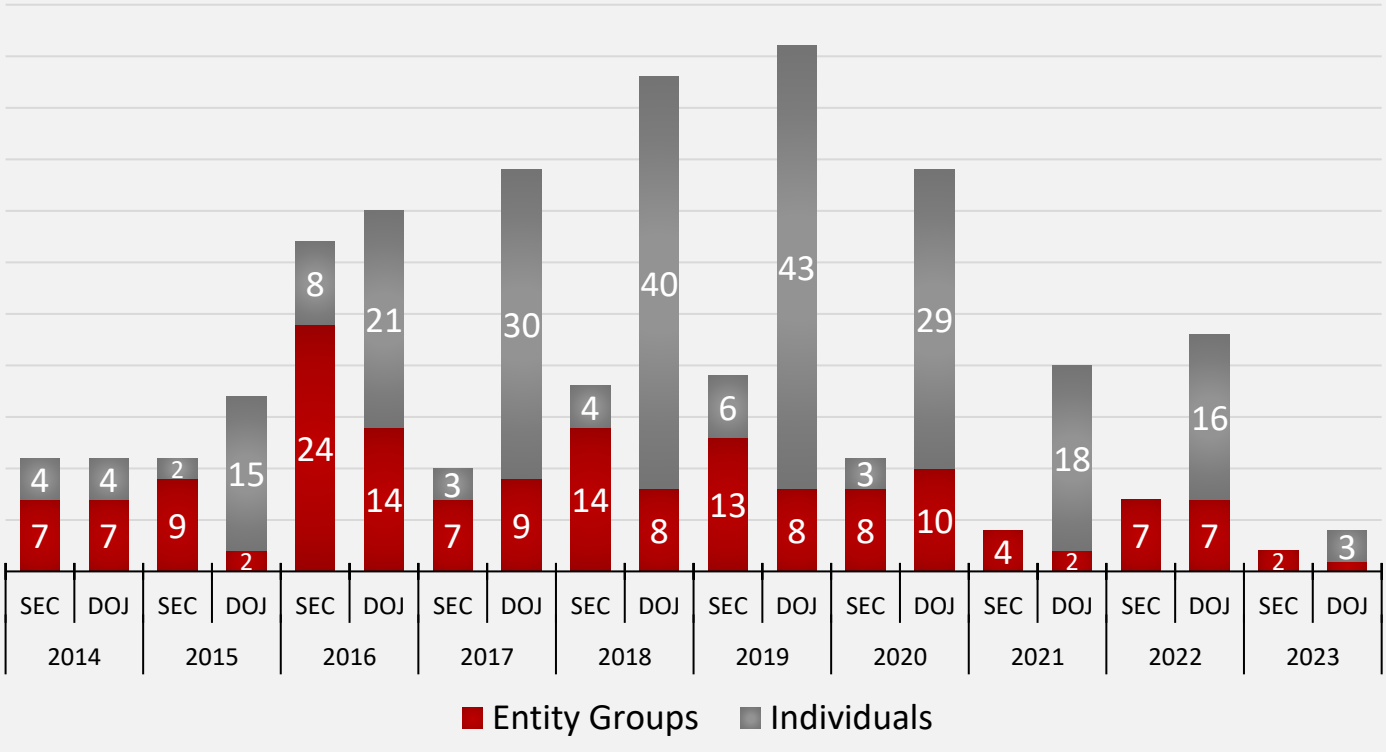


Fig. 3B, Entity and Individuals per Year, All Claims



Investigations

U.S. authorities are currently investigating at least 34 different entity groups for possible FCPA violations. Last quarter, only one company (Stanley Black & Decker, Inc.) first disclosed a new FCPA-related **Investigation**. Figure 4 shows all entity groups that disclosed new FCPA investigations in the first quarter of 2023.

Fig. 4, New FCPA-Related Investigations Disclosed in Q1 2023

Company	Agencies Involved	Date Investigation Disclosed	Internal Investigation	Country/Region Investigated
Stanley Black & Decker, Inc.	DOJ, SEC	Feb. 23, 2023	Undisclosed	Undisclosed

According to information disclosed in SEC filings and charging and settlement documents, in the first three months of 2023, the SEC concluded publicly-disclosed FCPA-related investigations into three companies and the DOJ concluded two. The SEC brought enforcement actions against Rio Tinto plc and Flutter Entertainment plc (the successor to The Stars Group Inc.) and concluded its investigation into Kosmos Energy Ltd. with no further action. The DOJ entered into a new plea agreement with Telefonaktiebolaget LM Ericsson, concluding its investigation into the company's breach of its 2019 deferred prosecution agreement, and the agency issued a declination with disgorgement to Corsa Coal Corporation pursuant to its FCPA Corporate Enforcement Policy.

Ericsson Breach

Breaches of deferred prosecution agreements in FCPA-related enforcement are quite rare. In the 45-year history of the FCPA, only three companies have breached DPAs and been forced to settle anew with U.S. authorities: Aibel Group Ltd. in 2008, Biomet Inc. in 2017, and now Ericsson. Though the facts in each case are distinguishable, all three involve failures by the companies to adhere to promises made to the government in their respective DPAs.

Aibel first entered into a DPA with the DOJ in February 2007 for violations of the anti-bribery provisions of the FCPA. In November 2008, Aibel notified the DOJ that it was unable to meet its obligations under the DPA with respect to implementation of significantly enhanced compliance policies, despite committing "substantial time, personnel, and resources to meeting the obligations." In response, the DOJ filed a superseding information against Aibel, to which the company pled guilty.

Biomet first entered into a DPA with the DOJ in 2012 for violations of the anti-bribery and accounting provisions of the FCPA stemming from improper payments made by Biomet and its subsidiaries in China, Argentina, and Brazil. As part of the DPA, Biomet also agreed to retain an independent compliance monitor. Over the next several years, the DOJ twice extended the DPA after Biomet discovered additional potentially improper activities in Mexico and Brazil, including alleged improprieties that predated the entry of the DPA. In January 2017, Biomet's successor, Zimmer Biomet Holdings Inc., entered into a new DPA with the DOJ relating to alleged violations of the FCPA's internal controls provisions. Zimmer Biomet acknowledged that Biomet had failed to comply with the terms of the 2012 DPA and agreed to pay $24 million in penalties, disgorgement, and pre-judgment interest, and appoint an independent monitor for three years.

Ericsson first entered into a DPA with the DOJ in 2019 for violations of the anti-bribery, books and records, and internal controls provisions of the FCPA. At the time, the DPA was part of a coordinated resolution with the SEC, and the approximately $1 billion settlement was and remains among the largest FCPA-related resolutions in history. However, in October 2021, the DOJ notified Ericsson that the company had breached its obligations under the DPA by violating the agreement's cooperation and disclosure provisions, and the company later

confirmed that it had failed to provide information related to its internal investigation into misconduct in Iraq. Due to these failures, Ericsson pled guilty to two criminal offenses and agreed to pay an additional $207 million in fines.

Updates to the DOJ's Corporate Enforcement Policy

In a speech delivered at Georgetown Law Center on January 17, 2023, Assistant Attorney General Kenneth A. Polite, Jr. announced revisions to the DOJ's Corporate Enforcement Policy (CEP), which applies to all corporate criminal matters handled by the agency, including FCPA cases. The revisions are intended to further incent companies to voluntarily self-disclose misconduct, to cooperate with the DOJ, and to remediate any wrongdoing or compliance deficiencies at the company.

Before the revisions, companies qualified for a presumption of a declination if, absent aggravating factors, they disclosed misconduct, cooperated, and timely and appropriately remediated. Under the revised guidance, prosecutors now may decide that a declination is appropriate even when aggravating factors are present so long as the following three conditions are met:

1. the company disclosed the misconduct immediately upon becoming aware of it;
2. the company had "an effective compliance program and system of internal accounting controls," both at the time of the misconduct and disclosure, and those controls are what led to the discovery of the misconduct and disclosure; and
3. the company provided "extraordinary" cooperation with the DOJ's investigation and undertook "extraordinary" remediation.

The updated CEP also revised incentives for companies that do not receive a declination. When a company self-discloses, fully cooperates, and timely and appropriately remediates but a criminal resolution is still warranted due to aggravating factors or other circumstances, the Criminal Division will now recommend at least a 50 percent and up to a 75 percent fine reduction off the bottom of the U.S. Sentencing Guidelines range – up from a maximum of 50 percent – except for recidivists. If a company is a recidivist, the reduction generally will not be from the low end of the Guidelines range. Furthermore, the Criminal Division will generally not require a guilty plea, even for recidivists, "absent multiple or particularly egregious aggravating circumstances."

For companies that do not voluntarily self-disclose but still fully cooperate and timely and appropriately remediate, the Criminal Division will recommend up to a 50 percent reduction off the low end of the Sentencing Guidelines range, up from 25 percent under the prior version of the CEP. In the case of a criminal recidivist, the reduction will likely not be off the low end of the range.

AAG Polite indicated that the immediacy, consistency, degree and impact of the cooperation may inform prosecutors' assessment of whether the cooperation qualifies as "extraordinary" rather than "full." Specifically, AAG emphasized the importance of immediate cooperation, consistent truthfulness, access to evidence that would otherwise be unavailable to the government such as recorded conversations or images from electronic devices, witness testimony at trial, and information that leads to additional convictions. That list, however, is not exhaustive. Rather, the DOJ maintains a certain squishiness to its definition of "extraordinary," paraphrasing Justice Potter Stewart's definition of obscenity – the DOJ knows extraordinary cooperation when it sees it.

U.S. Attorneys' Offices Voluntary Self-Disclosure Policy

In a memo released on September 15, 2022, Deputy Attorney General Lisa O. Monaco directed each Department of Justice component that prosecutes corporate crime to review its policies on corporate voluntary self-disclosure, and if the component lacks a formal, written policy to incentivize such self-disclosure, to draft and publicize such a policy. In response, on February 22, 2023, United States Attorneys' Offices from across

the country jointly announced a new Voluntary Self-Disclosure Policy that establishes a national standard for voluntary self-disclosure credit in corporate criminal enforcement actions brought by U.S. Attorneys' Offices (USAO).

The USAO policy defines a "voluntary self-disclosure" as one that is:

1. voluntary and not subject to a preexisting obligation to disclose (e.g. via regulation, contract, or prior DOJ resolution);
2. timely, i.e. prior to an imminent threat of disclosure or government investigation, prior to public disclosure, and within a reasonably prompt time after the company becomes aware of the misconduct (the burden rests on the company to demonstrate timeliness); and
3. substantive, including all relevant facts concerning the misconduct that are known to the company at the time of the disclosure.

A company that meets the criteria for voluntary self-disclosure and fully cooperates and remediates can receive up to 75 percent off the bottom of the U.S. Sentencing Guideline range, absent any aggravating factors. Moreover, the new policy stipulates that U.S. Attorneys will not require the appointment of an independent monitor for companies that have met the above criteria and can demonstrate that it has implemented and tested an effective compliance program at the time of the resolution.

Though the new USAO policy is intended to align generally with existing voluntary disclosure policies at the enforcement divisions of main DOJ, it differs slightly from those policies. First, assuming a company meets all the criteria laid out in the USAO policy and absent aggravating factors, the company can be assured only that it will not have to plead guilty. Prosecutors will have discretion about how to resolve the matter, either through declination, non-prosecution agreement, or deferred prosecution agreement. At the criminal division, by contrast, a declination is presumed. Second, the USAO policy establishes no specific benefit for a company that fully cooperates and remediates but does not voluntarily self-disclose. Third, while both the USAO policy and the CEP define aggravating circumstances to include involvement by executive management and pervasiveness of the misconduct, the USAO policy adds misconduct that "poses a grave threat to national security, public health, or the environment." Finally, the CEP provides a path to achieve a declination even when aggravating circumstances are present, while the USAO policy does not.

Updates to the DOJ's Selection of Monitors in Criminal Division Matters

On March 1, 2023, Assistant Attorney General Kenneth A. Polite, Jr., issued a Revised Memorandum on Selection of Monitors in Criminal Division Matters, which affirmed guidance that Deputy Attorney General Monaco had outlined in her September 2022 memo. Polite intended the update to clarify the criteria for when independent monitors will be required as part of a DOJ resolution. While reiterating Monaco's statement that prosecutors should have no presumption for or against the imposition of a monitor, Polite laid out ten non-exhaustive criteria prosecutors should consider when assessing the necessity of a monitor. Those criteria broadly address the quality and effectiveness of the company's compliance policies and internal controls both at the time of the misconduct and resolution, who was involved in the misconduct, the risk of recurrence, and the regulatory framework in which the company operates.

Updates to the DOJ's Evaluation of Corporate Compliance Programs Policy

On March 3, 2023, the DOJ's Criminal Division updated its Evaluation of Corporate Compliance Programs (ECCP) policy for the first time since June 2020. The update centered on two key revisions. First, the department issued new guidance related to the use of personal devices, communications platforms, and ephemeral messaging. Second, the department expanded its guidance on how compensation structures can help prevent misconduct. Both updates stem from Deputy Attorney General Monaco's September 2022 memo where she stated that "all corporations with robust compliance programs should have effective policies governing the

use of personal devices and third-party messaging platforms" and where she asked the Criminal Division to develop guidance for how to reward companies for incorporating clawback provisions into their compensation and compliance policies.

The ECCP explains that a company's policies regarding the use of personal devices, communications platforms, and messaging services (including ephemeral messaging) should be "tailored to the corporation's risk profile and specific business needs" and ensure that "business-related electronic data and communications" can be accessed and preserved. In evaluating these policies, prosecutors should consider how they are communicated to employees and to what degree they are enforced. Furthermore, the ECCP guides prosecutors to consider which electronic communication channels the company allows employees to use to conduct business, the policies and procedures governing the use of those channels, and the company's risk management measures, including the consequences for employees who refuse to grant the company access to company communications.

Prior to the most recent updates, the ECCP recognized that companies could foster a strong compliance culture internally through incentives and disciplinary measures. That section of the ECCP was revised and retitled as "Compensation Structures and Consequence Management," and now highlights the role that compensation can play in effective corporate compliance. While disciplinary actions can be a strong incentive, the ECCP directs prosecutors to consider the company's use of both sticks and carrots in its compliance program. Among the carrots companies can deploy are compensation structures that "defer or escrow certain compensation tied to conduct consistent with company values and policies" or that include "contract provisions that permit the company to recoup previously awarded compensation if the recipient … is found to have engaged in … corporate wrongdoing."

In connection with the revised compensation guidance in the ECCP, the Criminal Division also initiated the "Compensation Incentives and Clawbacks Pilot Program" as part of an effort to promote ethical corporate cultures and to deter criminal conduct. Under the program, the DOJ will require any company subject to a criminal resolution to "implement criteria related to compliance in its compensation and bonus system." While not an exhaustive list, these criteria may include measures such as (1) prohibiting bonuses for employees who fail to satisfy compliance performance requirements, (2) disciplinary measures for employees who violate applicable law as well as their managers who knew or should have known about the misconduct, and (3) incentives for employees who demonstrate commitment to the company's compliance policies. Furthermore, if the disciplinary measures for employees or managers include recoupment of compensation, prosecutors may reduce a fine paid by the company up to 100 percent of the amount recouped.

Looking Ahead

At least two companies (Clear Channel Outdoor Holdings, Inc., and Expro Group Holdings N.V.) have recently disclosed accruals in anticipation of settling FCPA-related investigations. Telefonaktiebolaget LM Ericsson has an ongoing SEC investigation based on the same misconduct identified in its 2022 settlement with the DOJ, indicating that another enforcement action could be forthcoming.