

**Davis Polk**

# **2024 FCPA Review and outlook: Anti-corruption developments and trends**

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# Introductions



**Greg D. Andres, Partner**

Greg is co-head of our White Collar Defense & Investigations practice and one of *Benchmark Litigation's* "Top 100 Trial Lawyers." He focuses on white collar defense, congressional investigations, complex civil litigation and crisis management. In forums including federal and state court, mediation and arbitration, Greg represents financial institutions, hedge funds, private equity firms and companies in multiple industries.

As a member of Special Counsel Robert Mueller's team in 2017-2019, Greg was the lead trial lawyer in the successful prosecution of Paul Manafort. Earlier, he was a federal prosecutor and a Deputy Assistant Attorney General in the Criminal Division of the Department of Justice and the Chief of the Criminal Division in the U.S. Attorney's Office for the EDNY. At DOJ, Greg supervised the Department's FCPA practice nationwide.



**Raul F. Yanes, Partner**

Raul is chair of our White Collar Defense & Investigation practice. Raul served for six years in senior roles in the Bush Administration including Associate Counsel to the President, Senior Counsel to the Attorney General, General Counsel in the Office of Management and Budget, and Assistant to the President.

Raul also served as the Chief Compliance Officer and Head of Non-Financial Risk at Morgan Stanley from 2017-2023. Starting in 2022, he served on the bank's senior-most executive body. Raul was responsible for Morgan Stanley's Global Finance Crimes and Operational Risk Department and oversaw a team of approximately 1,800 risk management professionals across the world.

Raul represents clients in criminal, regulatory, and internal investigations across multiple non-US jurisdictions.



**Daniel S. Kahn, Partner**

Dan represents clients in criminal and regulatory investigations and in civil and criminal trials. A former prosecutor, he served for 11 years in senior roles at the Department of Justice.

The *Wall Street Journal* described Dan as DOJ's "most recognizable expert on the Foreign Corrupt Practices Act." At DOJ, Dan was acting Deputy Assistant Attorney General of the Criminal Division and, earlier, head of the Fraud Section and FCPA Unit. He supervised matters involving FCPA violations, money laundering and sanctions violations, and fraud related to digital currency, fintechs, commodities, securities, healthcare and procurement.

Dan represents clients in internal investigations and government investigations, including corruption, healthcare fraud, securities fraud, commodities fraud, and compliance matters.



**Tatiana R. Martins, Partner**

Tatiana represents companies and individuals in white collar defense and regulatory enforcement matters and conducts internal investigations involving bribery, money laundering, financial frauds, criminal antitrust and workplace misconduct. She also advises companies and boards on governance and compliance.

An experienced trial lawyer, Tatiana has tried multiple cases to jury verdict. As an Assistant U.S. Attorney for the SDNY, she tried high-profile cases including that of former N.Y.S. Assembly Speaker Sheldon Silver. As Chief of the SDNY Public Corruption Unit, she oversaw major cases against Michael D. Cohen, NCAA basketball coaches, and high-level U.N. officials.



**Yuan Zheng, Counsel**

Yuan advises multinational corporations, banks and Asia-based companies in regulatory and internal investigations of alleged FCPA violations and breaches of securities, anti-money laundering and sanctions laws. She also represents clients in securities litigations and transactional due diligence, and advises fintech firms in relation to regulatory compliance.

Earlier in her career, Yuan spent two years in the Office of Legal Affairs at the United Nations headquarters and four years at the International Court of Justice in The Hague working on interstate disputes on various international law subjects.

# Agenda and Overview

- 1. DOJ and SEC Enforcement Trends**
- 2. U.S. Policy Developments**
- 3. Developments in Asia**
- 4. Takeaways for Corporate Compliance**
- 5. What to Watch**

# DOJ and SEC Enforcement Trends

01

# Overview of Enforcement in 2023






## Corporate resolutions

- 9 SEC and 7 DOJ corporate resolutions
- 2 declinations
- 3 DPAs
- More than \$450 million in monetary sanctions

## Individual prosecutions







- 12 individuals charged by DOJ in 2023; none by SEC
- 4 individual guilty pleas
- 4 individuals charged in 2020 convicted at trial

# Corporate Enforcement Actions Snapshot

Entity	Resolution Details
	<ul style="list-style-type: none"> <li>— DOJ deferred prosecution agreement; SEC cease and desist order</li> <li>— Colombia</li> <li>— DOJ: \$40.6 million penalty; SEC: \$28.6 in forfeiture; \$32.1 million disgorgement, \$8.1 million prejudgment interest (parent Grupo Aval)</li> </ul>
	<ul style="list-style-type: none"> <li>— SEC cease and desist order</li> <li>— Colombia</li> <li>— \$32.1 million disgorgement, \$8.1 million prejudgment interest</li> </ul>
	<ul style="list-style-type: none"> <li>— SEC cease and desist order</li> <li>— China</li> <li>— \$3.5 million disgorgement, \$1 million prejudgment interest, \$2 million penalty</li> </ul>
	<ul style="list-style-type: none"> <li>— SEC cease and desist order</li> <li>— China</li> <li>— \$16.4 million disgorgement, \$3.8 million prejudgment interest, \$6 million penalty</li> </ul>
	<ul style="list-style-type: none"> <li>— DOJ non-prosecution agreement; SEC cease and desist order</li> <li>— Vietnam, Indonesia, and India</li> <li>— DOJ: \$98.2 penalty, \$98.5 forfeiture; SEC: \$81.9 million disgorgement (credited toward the DOJ forfeiture), \$21.8 million prejudgment interest</li> </ul>

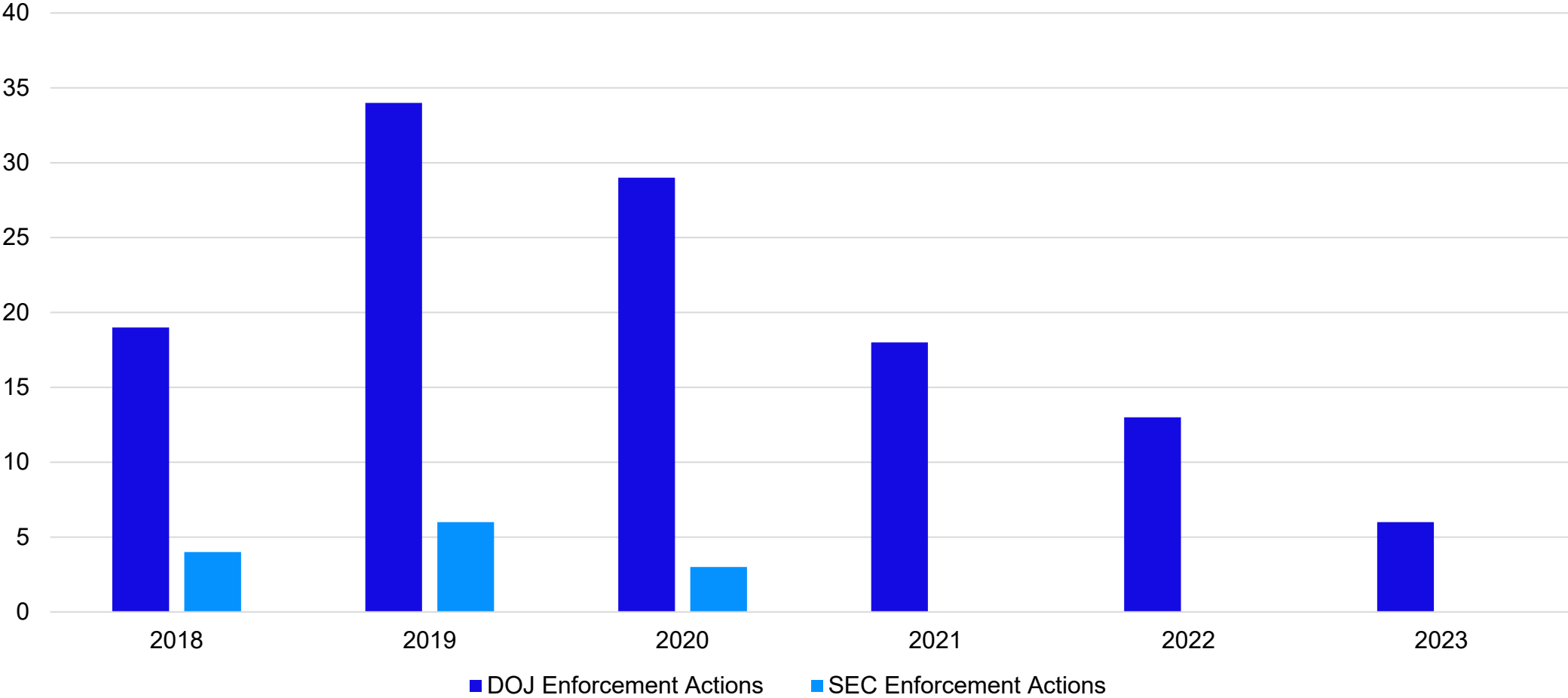
\*Data reflects U.S. resolutions (not reflecting offsetting payments to foreign authorities)

# Corporate Enforcement Actions Snapshot

Entity	Resolution Details
	<ul style="list-style-type: none"> <li>— DOJ deferred prosecution agreement</li> <li>— Ecuador</li> <li>— \$36 million penalty, \$10.6 million forfeiture</li> </ul>
	<ul style="list-style-type: none"> <li>— DOJ deferred prosecution agreement</li> <li>— Ecuador</li> <li>— \$508 thousand penalty</li> </ul>
	<ul style="list-style-type: none"> <li>— DOJ declination</li> <li>— Mexico</li> <li>— \$407 thousand disgorgement</li> </ul>
	<ul style="list-style-type: none"> <li>— DOJ deferred prosecution agreement</li> <li>— Brazil</li> <li>— \$68 million penalty, \$30.6 million forfeiture</li> </ul>
	<ul style="list-style-type: none"> <li>— DOJ deferred prosecution agreement; SEC cease and desist order</li> <li>— South Africa, Indonesia</li> <li>— DOJ: \$118.8 million penalty, \$103.4 million forfeiture; SEC: \$85 million disgorgement (credited toward the DOJ forfeiture), \$13.4 million prejudgment interest</li> </ul>
	<ul style="list-style-type: none"> <li>— DOJ guilty plea</li> <li>— Ecuadore</li> <li>— \$374.6 million penalty, \$287.1 million forfeiture</li> </ul>

\*Data reflects U.S. resolutions (not reflecting offsetting payments to foreign authorities)

# Individual Enforcement Actions Snapshot





# U.S. Policy Developments

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# “Reasonably Prompt” Self-Disclosure

- Absent aggravating circumstances, a company warrants a presumption of a declination if it:
  - Voluntarily self-discloses misconduct
  - Fully cooperates with an investigation
  - Timely and appropriately remediates
- With aggravating circumstances, a declination is only possible if a company:
  - Voluntarily self-discloses misconduct immediately, within weeks, upon the company becoming aware of misconduct
  - Has effective compliance program and system of internal accounting controls
  - Provides extraordinary cooperation
- DOJ Issues voluntary self-disclosure policy that applies to all USAO offices
  - Companies only entitled to presumption against seeking a guilty plea if they meet the CEP criteria, not a presumption in favor of a declination

# M&A Safe Harbor Policy

- In October 2023, the DOJ released a new Safe Harbor Policy for voluntary self-disclosures made in connection with mergers and acquisitions
  - Confirms that corporations that promptly and voluntarily self-disclose misconduct identified in the context of a M&A, cooperate with any ensuing investigation, and timely and appropriately remediate receive a presumption of a declination
  - Presence of aggravating factors at the acquired company will not impact acquiring company's ability to receive a declination
  - Misconduct disclosed under new Safe Harbor Policy not factored into acquiring company's future recidivism analysis
- Heightened expectations for due diligence
- Deadlines encourage early engagement of compliance in M&A process

# Proactive Efforts to Identify FCPA Cases

- On November 29 2023, Acting Assistant Attorney General Nicole Argentieri spoke at the International Conference on the FCPA and described the tools the DOJ is using to generate and investigate new FCPA cases
  - Argentieri highlighted the DOJ’s use of data analytics, noting that “we have proactively used data to generate FCPA cases, and we’ve only just gotten started”
  - The DOJ intends to increase investments in personnel and tools that can interpret and synthesize data—both public and nonpublic—to enhance its ability to identify FCPA misconduct that may otherwise have gone undetected
- To DOJ also launched the International Corporate Bribery Initiative, a program driven by three prosecutors who will focus on regions believed to have the most impact in coordination and case generation



**Nicole Argentieri**  
Acting Assistant Attorney General

# Foreign Extortion Prevention Act

- In late December, Congress enacted the Foreign Extortion Prevention Act (FEPA)
- The 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
    - (1) any person while in the territory of the United States
    - (2) an “issuer”
    - (3) any “domestic concern”
  - In return for
    - (1) being influenced in the performance of an official act
    - (2) being induced to do or omit an act in violation of an official duty
    - (3) conferring any improper advantage in connection with obtaining or retaining business for or with, or directing business to, any person
  - For the benefit of a “foreign official” or “any other person or nongovernmental entity”

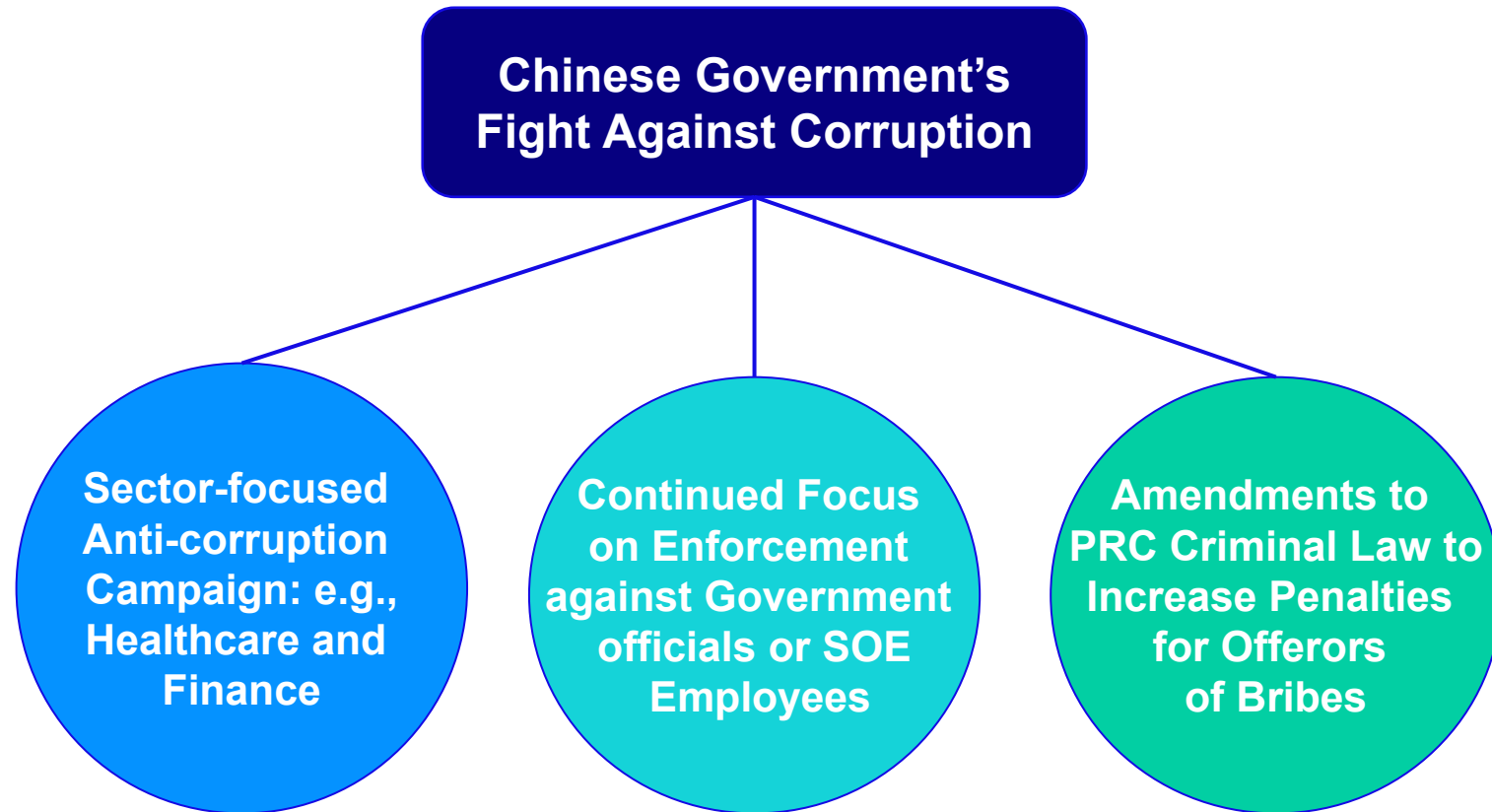
# Foreign Extortion Prevention Act

- Notable differences between the FCPA and FEPA
  - Definition of “foreign official”
    - FEPA uses an expanded definition that includes not only agents acting in an “official capacity” but also agents acting in an “unofficial capacity” on behalf of a government, department, agency, or instrumentality
    - While FEPA does not include an explicit prohibition of payments and offers to a “foreign political party or official thereof or any candidate for foreign political office” like the FCPA, it’s “foreign official” definition includes “senior foreign political figures,” which covers “immediate family members,” “close associates,” and “entities set up by or for” foreign officials
  - FEPA covers payments for the ultimate benefit of “any other person or nongovernment entity”
  - Use of interstate commerce required, even for corrupt acts in the United States and by U.S. persons abroad
  - FEPA does not confer additional jurisdiction on the SEC to investigate or bring civil actions against foreign officials
  - FEPA includes the potential for companies to be investigated and prosecuted for a conspiracy to pay bribes

# Developments in Asia

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# Anti-corruption Initiatives in China





# FCPA Risks in Emerging Markets in Asia

## Trends Observed

### **Increase in U.S. Investments in Emerging Markets**

- Be mindful of heightened corruption risk associated with certain Asian markets
- Allocate sufficient resources and attention to pre- and post-investment due diligence
- Consider applicability of DOJ's M&A safe harbor policy

### **Business expansion in high risk markets in Asia**

- Pay close attention to the use of local finders in developing new markets and business relationships
- Third-party risk heightened in developing countries, in particular in connection with distribution partners

### **Need for regional or global supervision in emerging markets**

- Evaluate compliance talent and expertise in local markets and consider overseas recruitment of compliance personnel if needed
- Make sure ABAC compliance reporting line is appropriately designed
- Adopt global monitoring systems to the extent feasible

# Takeaways for Corporate Compliance

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# What can companies do?

## Takeaways

- Incentivize compliance with employee compensation structures and enforce through internal investigations
- Include active and periodic third party monitoring in compliance programs
- Implement guidance on personal devices and off-systems messaging in record-keeping policies
- Prompt responses and remediation efforts beyond responding to voluntary requests are critical to cooperation credit

# Appendix

# 2023 DOJ & SEC FCPA Resolution Tracker

Corporate FCPA resolutions from 08/01/2023 through 12/31/2023

Target	Enforcer	Resolution*	Alleged FCPA Violation	Industry	Geography	Allegations
8/1 Corporacion Financiera Colombiana S.A.	DOJ & SEC	DOJ: \$40.6M (DPA) SEC: \$40.2M, parent Grupo Aval (cease-and-desist order)	<ul style="list-style-type: none"> <li>— Anti-bribery</li> <li>— Books and Records (SEC)</li> <li>— Internal Controls (SEC)</li> </ul>	Finance	Colombia	Conspired to pay bribes to Colombian government officials to win a contract from Colombia's state-owned infrastructure agency.
8/10 Grupo Aval Acciones Y Valores S.A	SEC	\$40.2M (cease-and-desist order)	<ul style="list-style-type: none"> <li>— Books and Records</li> <li>— Internal Controls</li> </ul>	Finance	Colombia	Corficolombiana and a joint venture partner won a contract from the Colombian government and bribed government officials to win an extension to the contract. Corficolombiana is a subsidiary of Grupo Aval.
8/25 3M Company	SEC	\$6.5M (cease-and-desist order)	<ul style="list-style-type: none"> <li>— Books and Records</li> <li>— Internal Controls</li> </ul>	Manufacturer	China	Employees of 3M-China arranged for Chinese government officials employed by state-owned health care facilities to attend overseas conferences, educational events, and healthcare facility visits, often as a pretext to induce them to purchase 3M products.
9/28 Clear Channel Outdoor Holdings, Inc.	SEC	\$26.2M (cease-and-desist order)	<ul style="list-style-type: none"> <li>— Anti-bribery</li> <li>— Books and Records</li> <li>— Internal Controls</li> </ul>	Advertising	China	Clear Media provided improper benefits to obtain and renew concessions and advertising contracts in China and failed to appropriately document and record those payments in its books and records.
9/28 Albermarle Corporation	DOJ & SEC	DOJ: \$196.7M (NPA) SEC: \$103.6M, \$81.9M offset (cease-and-desist order)	<ul style="list-style-type: none"> <li>— Anti-bribery</li> <li>— Books and Records (SEC)</li> <li>— Internal Controls (SEC)</li> </ul>	Chemicals Manufacturing	Vietnam, Indonesia, and India	Albermarle, through its third-party sales agents and subsidiary employees, conspired to pay bribes to government officials to obtain and retain chemical catalyst business with state-owned oil refineries in Vietnam, Indonesia, and India
10/24 Tysers Insurance Brokers Limited	DOJ	\$46.6M (DPA)	<ul style="list-style-type: none"> <li>— Anti-bribery</li> <li>— Books and Records</li> <li>— Internal Controls</li> </ul>	Insurance	Ecuador	Engaged in a conspiracy in which their employees and third party agents agreed to pay bribes in order to obtain reinsurance business with state-owned insurance companies.
10/24 H.W. Wood Limited	DOJ	\$508K (DPA)	<ul style="list-style-type: none"> <li>— Anti-bribery</li> </ul>	Insurance	Ecuador	Engaged in a conspiracy in which their employees and third party agents agreed to pay bribes in order to obtain reinsurance business with state-owned insurance companies.
11/16 Lifecore Biomedical, Inc. (f/k/a Landec Corporation)	DOJ	\$407K (Declination with disgorgement)	<ul style="list-style-type: none"> <li>— Anti-bribery</li> </ul>	Food and Biomaterials	Mexico	Employees paid bribes to Mexican government officials to secure a wastewater discharge permit.
12/14 Freepoint Commodities LLC	DOJ	\$98.6M (DPA)	<ul style="list-style-type: none"> <li>— Anti-bribery</li> </ul>	Oil and Gas	Brazil	Employees paid millions in corrupt commission payments, knowing that all or a portion of the money would be used to pay bribes to officials at Brazil's state-owned oil company in order to obtain business.

\* Resolution figures do not reflect amounts credited to other state and federal agencies or international regulators.

# 2023 DOJ & SEC FCPA Resolution Tracker

Individual FCPA resolutions from 08/01/2023 through 12/31/2023

	Target	Enforcer	Resolution*	Alleged FCPA Violation	Industry	Geography	Allegations
8/3	Javier Alejandro Aguilar Morales	DOJ	Indictment	— Anti-bribery	Oil	Mexico	An oil and commodities trader for Vitol Inc., one of the largest oil distributors and energy commodities traders in the world, engaged in a scheme to pay bribes to assist Vitol in winning business from PEMEX Procurement International, Inc.
9/11	Orlando Alfonso Contreras Saab	DOJ	Plea Agreement	— Anti-bribery	Food, Medicine	Venezuela	Engaged in a scheme to bribe Venezuelan officials to obtain multi-million dollar contracts with the Venezuelan government for the production, importation, and distribution of food and medicine to the people of Venezuela under a government program.
11/28	Carl Zaglin Aldo Marchena Francisco Cosenza	DOJ	Indictment	— Anti-bribery	Security	Honduras	A Georgia businessman, a former Honduran government official, and a former Florida resident were indicted for their alleged participation in an international scheme to pay and conceal bribes to Honduran government officials to secure contracts to provide uniforms and other goods to the Honduran National Police.