Benesch

White Collar QUARTERLY REPORT

Q1 | 2024

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Benesch Spotlight

Substantial Victory for Benesch's White Collar, Government Investigations & Regulatory Compliance Practice Group

Christopher Grohman
Partner

In a significant win for Benesch's White Collar, Government Investigations & Regulatory Compliance Practice, a federal judge in Chicago acquitted the firm's client, Illinois environmental attorney and former Loyola University Chicago faculty member David Sargent, of insider trading charges. The acquittal, decided by U.S. District Judge Manish Shah, came after Sargent's co-defendant was found not guilty of the same charges, underscoring inconsistencies in the prosecution's case. Benesch attorney Christopher Grohman argued the government's reliance on circumstantial evidence didn't prove insider trading, highlighting Sargent's strategy as consistent with long-term investment interests rather than illicit information use.

Introducing Benesch's White Collar Quarterly Report

We are thrilled to introduce the inaugural issue of our quarterly White Collar newsletter, a dedicated resource from Benesch's White Collar, Government Investigations & Regulatory Compliance Practice Group.

Each issue promises a wealth of knowledge, providing you with insightful information and analysis from our experienced team. You can expect to see a curated selection of topics, including, but not limited to, key regulatory developments that could impact your operations and compliance strategies, summaries of major cases and their implications for the industry at large, and updates on legal industry trends and how they might affect your business.

Our White Collar team stands ready to assist you with any legal needs or questions that may arise, and we look forward to hearing your thoughts and feedback as we work to maximize this newsletter's value to you with each issue.

Warm regards,

Marisa Darden
Chair, White Collar, Government Investigations & Regulatory Compliance

About our team:

Representing major corporations, officers, board members and executives, as well as municipalities and public agencies, Benesch's White Collar, Government Investigations & Regulatory Compliance Practice Group has repeatedly prevailed for clients in regulatory investigations and high-stakes white collar cases. Our team includes former federal and state prosecutors, former members of public defender and attorney general offices, experienced trial and appellate lawyers, investigators, healthcare regulators and securities and compliance-focused lawyers. Many of our attorneys have experience working for the same agencies investigating cases and bringing enforcement actions against our clients. As a result, we understand the government's perspective, how regulators think and how they build cases, and we have the connections and credibility to guide clients successfully through every phase of a government investigation or inquiry.

Benesch Insights

Shaneeda Jaffer
Partner

Parth Patel
Associate

Matthew Farrell
Associate

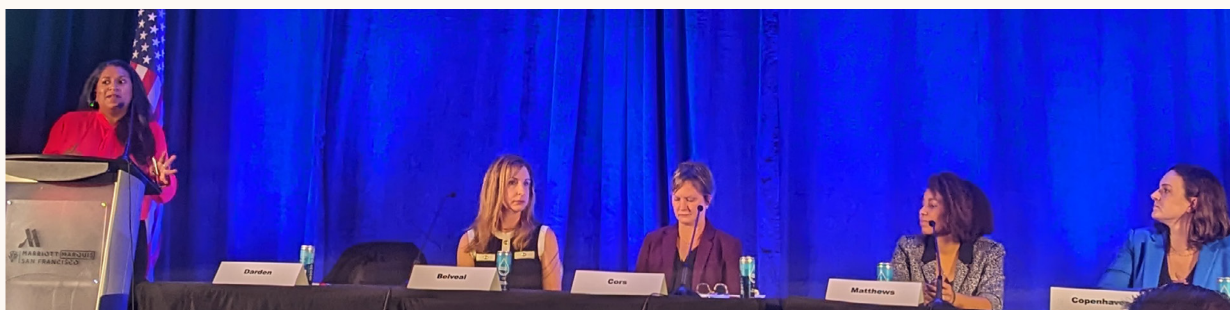
Department of Justice Announces New Whistleblower Rewards Program

During the recent ABA National Institute on White Collar Crime, Deputy Attorney General Lisa Monaco announced that the DOJ will implement a whistleblower rewards program within the next 90 days. While the DOJ has yet to announce the specifics of the program, we can expect it to be similar to the programs successfully used by other federal agencies.

Considerations for our Clients:

- Employees will now have a significant incentive to take concerns directly to DOJ rather than using internal reporting mechanisms. Our clients must ensure that their compliance programs are rigorous and well-known to employees and that accessible reporting avenues exist internally to counteract this incentive.
- Companies will need to move more quickly to decide whether to voluntarily self-report. Companies receive the full benefits of self-reporting only if they report conduct of which DOJ was unaware, but under the new program, employees faced with the increased incentive to report misconduct may be faster to do so. Companies will need to ensure that their internal decision-making is efficient and that they consult with experienced counsel in a timely manner.

This new program could increase companies' risk by creating a new avenue for garnering unwarranted DOJ scrutiny. As always, companies should regularly assess, monitor and update their compliance practices and contact us for skilled assistance in these areas. As more details emerge about this new initiative, Benesch's White Collar Group will be ready to assist with any questions you may have.



Benesch White Collar Chair **Marisa Darden** participated in a panel discussion during the **American Bar Association (ABA) National Institute on White Collar Crime conference** in San Francisco. The panel addressed new developments and trends to better inform attorneys of strategies and arguments used in litigating white collar cases.

Key Findings

The DOJ secured $4.8 billion in criminal penalties in corporate resolutions in 2023 as of mid-December 2023. The average penalty imposed was $350 million, while the average alleged fraud loss in cases charged by the department's Fraud Section was over $25 million per individual defendant. **These are the highest numbers in years and demonstrate the scale and complexity of the Criminal Division's white collar cases.**

SOURCE: U.S. Department of Justice

Although the DOJ's Criminal Division had a banner year in the fight against white collar and corporate crime and continues to prioritize bringing high-impact cases, it is committed to encouraging companies to make voluntary self-disclosures. Initiatives to achieve that end include:

- Incentivizing acquiring companies to promptly and voluntarily disclose criminal misconduct uncovered during the M&A process, the DOJ introduced a Mergers & Acquisitions Safe Harbor Policy.
- While the Corporate Enforcement Policy was established in 2016 as a pilot program available to companies that voluntarily self-disclosed violations of the FCPA, it's a model that's now being used more outside of the FCPA context. The DOJ issued its first-ever CEP declination in a healthcare fraud case to HealthSun in Oct.

SOURCE: U.S. Department of Justice

A legal analyst cautioned that companies may be wary of voluntary self-disclosure as a result of the CEP's requirement that companies pay all "disgorgement, forfeiture, and/or restitution" of these profits. However, the DOJ is standing by the notion that all parties will benefit if they voluntarily self-disclose, fully cooperate, and remediate their corporate misconduct. In addition:

- While the DOJ continued to revise and promote the policy in 2023, it continues to wrestle with how to provide greater transparency when it ends investigations of companies without pressing charges, knowing it will give companies more certainty that self-reporting white collar crime won't backfire.
- The DOJ pointed to cases that highlight the impact a voluntary self-disclosure can have on an industry. The department noted its investigation will not focus on just the company that self-reports and its employees but will also look to develop cooperators and determine whether other companies and individuals in the industry engaged in similar misconduct and hold them to account as well.
- The DOJ's plans to double down on harnessing and analyzing public and non-public data to identify potential wrongdoing involving foreign corruption, and companies considering whether to disclose misconduct should be aware of this.

SOURCE: Bloomberg Law

The DOJ had other "firsts" in Q4 2023, including one of the largest criminal resolutions in the department's history with a cryptocurrency exchange, and its CEO. Notable cases include:

- Binance pleaded guilty and agreed to forfeit $2.5 billion and pay a criminal fine of $1.8 billion in the DOJ's first corporate resolution with a cryptocurrency exchange and one of the largest corporate criminal resolutions in the department's history. It's also, by far, the largest corporate criminal resolution that included charges against the company's CEO.
- Arrayit president Mark Schena was sentenced to eight years in prison and ordered to pay $24 million in restitution in the department's first criminal securities fraud case related to the COVID-19 pandemic and the first criminal COVID-19 healthcare fraud case to reach trial.
- Peter Kambolin, who was the owner and CEO of Systematic Alpha Management, pleaded guilty to a "cherry-picking" scheme, making this the first criminal charge against a commodities trading advisor and commodities pool operator for engaging in a "cherry-picking" scheme involving cryptocurrency futures contracts.
- Simon Chu and Charley Loh were convicted in the first corporate criminal enforcement action ever brought under the Consumer Product Safety Act.

SOURCE: U.S. Department of Justice

When it comes to public corruption, the DOJ had a perfect conviction record in 2023, showing prosecutors used their limited resources correctly.

- The department also disseminated new procedures for investigating members of Congress and their staff, marking a "BIG WIN" and a sign that the DOJ has "caved" to the House Judiciary Committee's oversight.
- Meanwhile, the U.S. Supreme Court agreed to review the scope of the federal funds bribery statute, an issue that had split the circuit courts. The decision has already reverberated in several of Chicago's biggest public corruption cases, where defense attorneys have long complained that prosecutors overreach when charging public officials under the federal bribery statute.
- Sen. Bob Menendez (D-N.J.) has been charged with purportedly conspiring to act as a foreign agent of Egypt—the first time a sitting U.S. senator has been accused of working on behalf of another government.

SOURCES: Bloomberg Law, Chicago Tribune, The Hill

A federal jury convicted FTX co-founder Sam Bankman-Fried within hours of beginning deliberations, an unusually swift verdict in a complex white collar case.

- The case was a high-pressure test of U.S. Attorney Damian Williams's trumpeted aim to pursue white collar prosecutions selectively and swiftly. Customer outrage over the exchange's collapse added to the pressure to act quickly and decisively.

SOURCE: Bloomberg

Congress approved the Foreign Extortion Prevention Act, a landmark law that would make it a crime for a foreign official to demand or accept a bribe from an American or American company.

- Or from any person while in the territory of the U.S., in connection with obtaining or retaining business.

The Economic Crime and Corporate Transparency Act, which introduces world-leading powers that will allow U.K. authorities to proactively target organized criminals and others seeking to abuse the country's open economy, received Royal Asset.

- Also in the U.K., the Crown Prosecution Service entered into its first-ever deferred prosecution agreement (DPA) with London-based global online sports betting and gaming business Entain in connection with alleged bribery offenses.

SOURCES: U.K. Government, Crown Prosecution Service

The SEC charged SolarWinds and its CISO with fraud and internal control failures for allegedly misleading investors about the company's cybersecurity practices.

- The charges could have enormous implications for CISOs at companies nationwide.

SOURCE: Cybersecurity Dive

The Biden administration further delayed the deadline for finalizing proposed updates to Title IX.

- In addition, the University of Oregon was hit with a lawsuit that could provide the first ruling on whether name, image, and likeness activities are subject to Title IX.

SOURCES: The Hill, Front Office Sports

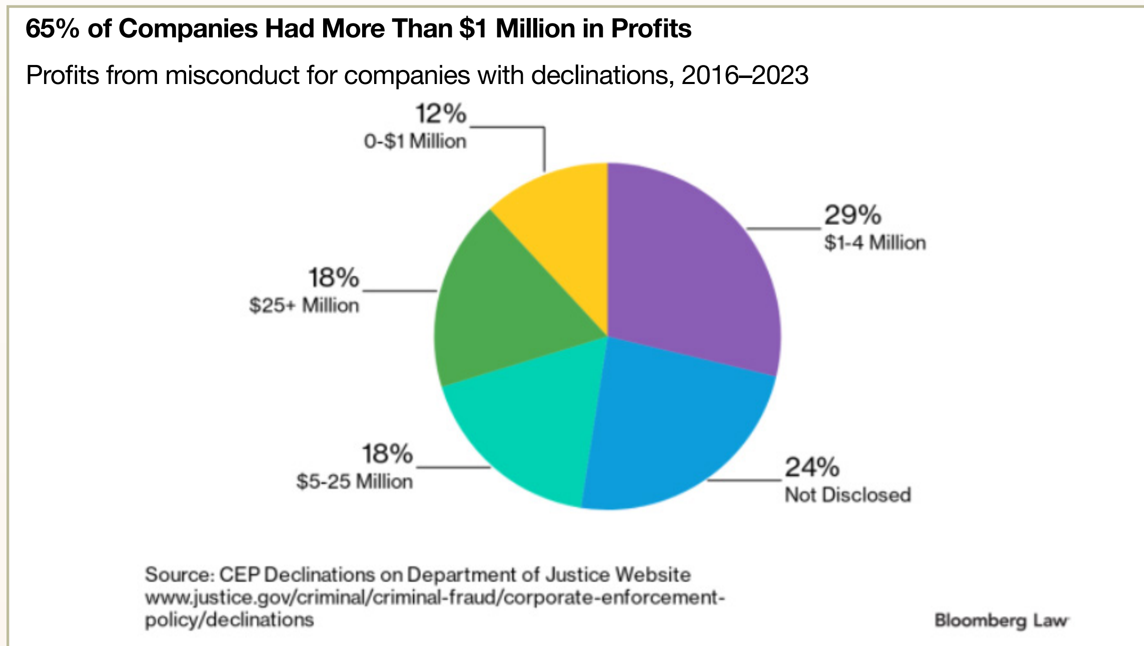
Trends

ANALYSIS: Why Don't More Companies Disclose Bad Behavior to DOJ?

Companies do not appear to voluntarily self-disclose corporate misconduct, according to an analysis of the DOJ's publicly available enforcement agreements related to the Corporate Enforcement Policy (CEP). Since the policy's inception in 2016, only 19 companies that voluntarily self-disclosed, fully cooperated, and remediated the misconduct were rewarded with a not-guilty charge. During this time, there were over 60 criminal corporate enforcement actions.

The analysis also found the CEP's "significant profit" requirement would not likely eliminate companies' chance of declination as more than two-thirds of companies awarded declinations profited over $1 million from their misconduct and more than one-third profited over $5 million. Companies may be wary of voluntary self-disclosure because of the CEP's requirement that companies pay all "disgorgement, forfeiture, and/or restitution" of these profits. A closer look at the declines indicates that several companies had a tight turnaround period of 10 business days to hand over their large profits to the DOJ, which may not be feasible for many companies.

Nevertheless, the DOJ continued to revise, broaden, and promote the policy in 2023 and is still standing behind the notion that all parties will benefit if companies voluntarily self-disclose, fully cooperate, and remediate their corporate misconduct. The model is spreading to other federal agencies, including the SEC, whose Enforcement Cooperation Program similarly provides incentives, such as reduced sentences and sanctions in enforcement actions.



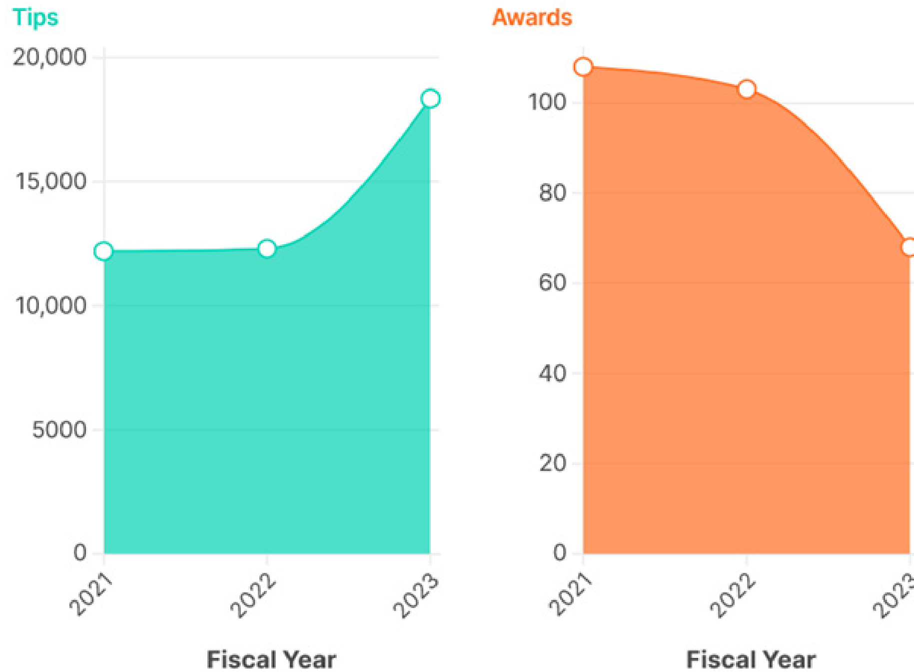
SOURCE: Bloomberg Law

SEC Payouts to Whistleblowers Plummet Amid Record Surge in Tips

The number of whistleblowers receiving awards from the SEC dropped sharply in fiscal year 2023, even as more tips poured in than ever before, and a single informant received the largest payout in agency history. The agency received more than 18,000 tips in the fiscal year ending Sept. 30, 2023, a 50% jump from the previous year, but only 68 tipsters got any money, compared to more than 100 in each of the previous two years, according to the SEC whistleblower program's annual report. The agency awarded nearly $600 million, although nearly half ($279 million) went to the tipster credited with uncovering a $1-billion fraud at Swedish telecom Ericsson. The lure of huge payouts with no growth in the program's staffing or budget may be taxing the SEC's ability to keep up with the intent of the legislation authorizing it, attorneys say. Despite it being the most successful anti-corruption program ever established, numerous holes need to be addressed, including delays that can keep whistleblowers waiting years to be paid even after the SEC sanctions a company, the difficulty whistleblowers face when appealing an SEC decision, and the lack of information tipsters receive while their claims are processed, said whistleblower attorney Stephen Kohn of Kohn, Kohn & Colapinto.

Whistleblower Tips Rise by Almost 50%

An increasing number of tips strains the SEC's ability to investigate them and process awards.



SOURCE: Bloomberg Law

Outing Companies That Avoid Charges a Dilemma for US Prosecutors

The DOJ is wrestling over how to provide greater transparency into declinations, which are usually concealed from the public, as details of their existence are sought by the defense bar and other businesses considering whether to self-report white collar crime. While keeping under wraps the circumstances when prosecutors opt against bringing charges could hamper the department's progress toward a top Biden administration priority of incentivizing companies to self-disclose misconduct, it also denies the public an indicator of whether the DOJ is advancing its ultimate goal of obtaining greater company cooperation to help put executives in jail. Internal DOJ deliberations and discussions with outside counsel over ways to make the process less opaque have a major obstacle to overcome, according to six lawyers who have been involved in the talks that date to at least 2016. All parties benefit from more declination visibility except the recipient companies that are outed. Over recent years, officials have discussed options such as announcing statistics on the volume of declinations and posting anonymized determinations to close cases that do not reveal company names. However, overall statistics would force the DOJ to determine what exactly counts as a declination, while the opinion letter model that redacts the company name may provide enough details that industry insiders could still determine the company's identity.

SOURCE: Bloomberg Law

Wall Street Fraudsters Rush to Cut Prison Terms with New Ruling

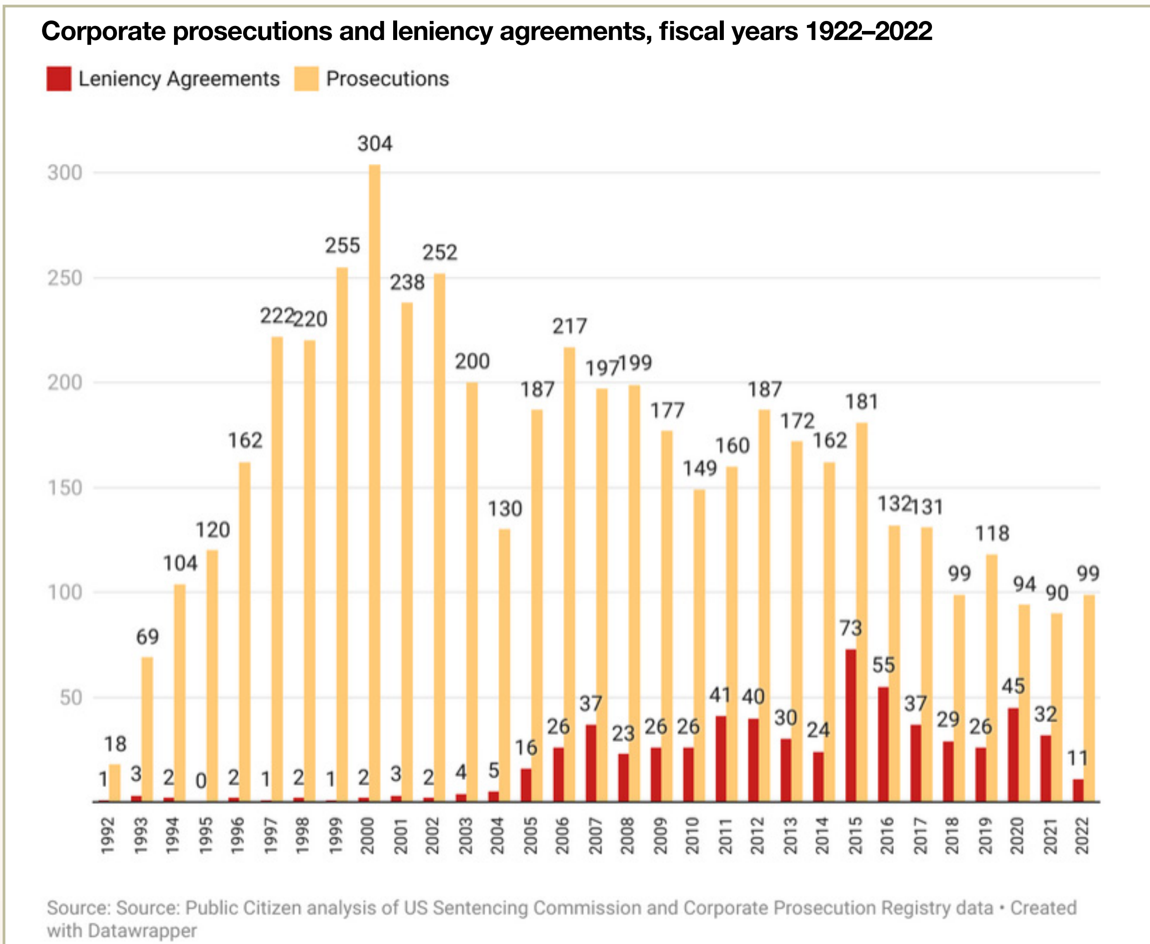
Gary Frank, who was sentenced to more than 17 years behind bars for scamming Prudential Insurance and others out of tens of millions of dollars, is among the Wall Street fraudsters hoping to shorten their sentences under a Third Circuit ruling that has generated waves across the country. In 2022, the U.S. appeals court ruled that Frederick Banks, who was convicted of attempting to dupe Gain Capital Group out of $246,000, should be resentenced. The court held the online trading company suffered no actual losses given that it never sent him the funds. The opinion upended a long-standing practice of lengthening sentences for white collar criminals based on how much they intended to defraud victims—versus the amounts they stole. It is significant since the gap between actual and intended losses in fraud cases can be vast, greatly skewing the amount of prison time from barely any to more than a decade.

The *Banks* decision could significantly reduce prison time for defendants in securities and commodities cases since it is difficult to figure out actual losses in those situations. It could also impact charging decisions, especially in Third Circuit territory, where prosecutors may think twice about devoting resources to cases with small actual losses. The ruling has divided judges and may ultimately have to be settled by the country's highest court.

SOURCE: Bloomberg Law

Corporate Prosecutions Remain Near Record Lows in Biden's Justice Department

Despite promises to ramp up enforcement, the DOJ prosecuted only 99 corporate offenders in 2022, a small uptick from the previous year's 90 prosecutions, according to a report from Public Citizen. President Joe Biden's second year is thus tied with former President Donald Trump's second year for having the fourth lowest number of corporate prosecutions since the start of the Clinton administration. In addition, the number of corporate leniency agreements fell to 11—the lowest number since 2004, when there were just five. These agreements accounted for 10% of the total number of criminal enforcement actions against corporations—lower than the total has been since 2005, when there were 7%. This means the federal government concluded just 110 criminal cases against corporations in 2022—fewer than any previous year since 1994. Even though it pledged to end the era of corporate impunity, the modest enforcement policies the administration later announced seem more likely to accelerate the crisis instead of addressing it, Public Citizen argues. It found that 15% of the leniency agreements between the DOJ and large corporations involve repeat offenders, the overwhelming majority of which were large multinationals.



SOURCE: Public Citizen

Benesch Insights

Preparation for the Next Covid Wave: The Enforcement Wave

Compliance issues should always be top of mind for businesses and organizations, particularly those affected by the ongoing effects of COVID-19 and the risks associated with the pandemic. Organizations must prepare now for the potential surge in government enforcement efforts. Benesch's Mark Silberman and Theresa Cross outline the specific, proactive steps your teams should be taking to mitigate risk.

Mark Silberman
Partner

Theresa Cross
Associate

Source: Benesch

Those Subject to the Corporate Transparency Act Should Continue to Comply with its Requirements

On March 1, 2024, Judge Liles C. Burke of the District Court for the Northern District of Alabama held the CTA unconstitutional and enjoined the Government from enforcing the CTA "against the [p]laintiffs." The Department and FinCEN are expected to appeal this decision. However, in the interim, entities that are otherwise subject to the CTA should make arrangements to comply with the reporting requirements set forth therein. Those should include pairing with knowledgeable outside counsel that can shepherd you through the CTA's requirements, advise on the enforcement mechanisms, and provide forward-looking guidance with regard to its constitutionality.

Jennifer Stapleton
Partner

Allyson Cady
Associate

Source: Benesch

Regulatory Developments

Congress Passes Landmark Law to Criminally Prosecute Corrupt Foreign Leaders

As part of the National Defense Authorization Act, Congress approved the Foreign Extortion Prevention Act (FEPA), a landmark, bipartisan law that would make it a crime for a foreign official—including any employee of a foreign government or any current or former senior official of a foreign government's executive, legislative, judicial, or military branches or any immediate family member or close associate thereof—to demand or accept a bribe from an American or American company, or from any person while in the territory of the U.S., in connection with obtaining or retaining business. If convicted, international leaders would face up to 15 years in prison, a potentially critical deterrent against extorting American executives. FEPA is arguably the most sweeping and consequential foreign bribery law in nearly half a century, according to Transparency International U.S.

SOURCE: Transparency International U.S.

Benesch Insights

How can I prepare my business for FEPA enforcement?

U.S. companies should perform a thorough review of anti-corruption policies and procedures. Compliance officers should analyze current anti-bribery policies to ensure that protections are in place in the event of a foreign bribery demand and train all employees who engage in foreign commercial communications on the company's anti-corruption controls and reporting procedures. It is vital for all employees who may receive a foreign bribery demand to understand the requirements under FEPA and how the company requires them to act in that circumstance.

Our White Collar, Government Investigations & Regulatory Compliance Practice Group is here to help at any stage of the process. Whether you're facing a disclosure, an investigation or an enforcement action, our experienced team can help navigate whatever challenges you may face.

Read more

Bianca Smith
Associate
Source: Benesch

Regulatory Developments (cont'd)

FCPA opinion tackles government-authorized payments

An opinion procedure release published by the DOJ offers an example of when stipends paid to foreign government personnel wouldn't be considered a violation of the anti-bribery provisions of the FCPA. The opinion procedure release addressed the request of a U.S.-based provider of training events and logistical support. The company contacted the DOJ regarding a contract it had with a U.S. government agency to provide logistical support for foreign government personnel attending training events established for and utilized by multiple U.S. government entities. The logistical support included stipends for the foreign officials intended to pay for meals not served during the event, along with driving mileage costs for certain participants. Based on the current facts provided by the company, the DOJ determined it wouldn't bring an enforcement action under the anti-bribery provisions of the FCPA. However, such opinion procedure releases have no binding application to any party other than the requestor and only to the extent the disclosure of facts and circumstances in its request and supplements is accurate and complete.

SOURCE: Compliance Week (sub. req.)

Robust new laws to fight corruption, money laundering and fraud

Royal Assent was given to the Economic Crime and Corporate Transparency Act, which introduces world-leading powers that will allow U.K. authorities to proactively target organized criminals and others seeking to abuse the country's open economy.

Companies House will receive enhanced abilities to verify the identities of company directors, remove fraudulent organizations from the company register, and share information with criminal investigation agencies. These powers represent the biggest shakeup in the service in its 180-year history. Once the powers come into force, the agency will provide businesses with greater clarity on who they're working with, while allowing civil society organizations to expose corrupt actors, and for the public to increase their trust in governments.

Major reforms to corporate criminal liability will also provide prosecutors with powers to hold large corporations accountable for malpractice. The creation of a criminal offense, called "failure to prevent fraud," will hold a large organization criminally liable if it benefits from a fraud that's committed by a member of staff. An update to a legal principle known as the "identification doctrine" will also ensure businesses can be held criminally liable for the actions of senior managers who commit an economic crime.

In addition, the National Crime Agency (NCA) will gain greater powers to compel businesses to hand over information that's suspected to be used for money laundering or terrorist financing, while law enforcement agencies will benefit from greater powers to seize, freeze and recover crypto assets. The NCA's National Assessment Centre estimates that more than £1 billion of illicit cash was transferred overseas using crypto assets in 2021.

SOURCE: U.K. Government

Regulatory Developments (cont'd)

Deputy Attorney General Lisa O. Monaco Announces New Safe Harbor Policy for Voluntary Self-Disclosures Made in Connection with Mergers and Acquisitions

To incentivize acquiring companies to promptly and voluntarily disclose criminal misconduct uncovered during the M&A process, the DOJ introduced a Mergers & Acquisitions Safe Harbor Policy, which will be applied department-wide, though each part will tailor its application to fit their specific enforcement regime. To qualify for the safe harbor, companies must disclose misconduct discovered at the acquired entity within six months from the date of closing, whether it was discovered pre- or post-acquisition. Companies will then have one year from the date of closing to fully remediate the misconduct. However, those deadlines could be extended depending on the specific facts, circumstances, and complexity of a particular transaction. As for misconduct threatening national security or involving ongoing or imminent harm, companies can't wait for a deadline to self-disclose.

In addition, aggravating factors will be treated differently in the M&A context. The presence of aggravating factors at the acquired entity won't impact the acquiring company's ability to receive a decline. Unless aggravating factors exist at the acquired company, that entity can also qualify for applicable voluntary self-disclosure benefits, including potentially a decline. Finally, misconduct disclosed under the Safe Harbor Policy won't affect any recidivist analysis at the time of disclosure or in the future, nor will anything in this policy impact civil merger enforcement.

More than a dozen progressive non-profit organizations and lobbying groups are **pressing** the DOJ to reverse the policy, arguing it will incentivize more concentration of corporate power through strategically-timed mergers or acquisitions sought in order to wipe the slate clean for lawbreakers.

SOURCE: U.S. Department of Justice

Related: Private Equity Seeks Legal Guidance on New M&A Disclosure Policy**—Bloomberg Law**

Bribery & Foreign Corrupt Practices Act

British Reinsurance Brokers Resolve Bribery Investigations

Tysers Insurance Brokers and H.W. Wood agreed to resolve DOJ investigations into FCPA violations arising from their participation in a corrupt scheme to pay bribes totaling approximately $2.8 million to Ecuadorian government officials to earn tens of millions of dollars in illicit profits for themselves and their co-conspirators. Each U.K.-based reinsurance broker entered into a three-year deferred prosecution agreement (DPA), under which they will continue to cooperate with the DOJ in any ongoing or future criminal investigations relating to this conduct. In addition, Tysers will pay a $36-million criminal penalty and administrative forfeiture of approximately $10.5 million. H.W. Wood agreed that the appropriate criminal penalty is $22.5 million and approximately $2.3 million is forfeitable to the U.S. However, due to its financial condition and demonstrated inability to pay, H.W. Wood and the DOJ agreed the appropriate criminal penalty is $508,000 and that the reinsurance broker is unable to pay the forfeiture amount.

continued on next page

Bribery & Foreign Corrupt Practices Act (cont'd)

These FCPA resolutions showcase the rationale and effect of the DOJ's emphasis on self-disclosure and cooperation, said Acting Assistant Attorney General Nicole M. Argentieri of the department's Criminal Division. She explained these cases grew out of the voluntary self-disclosure that resulted in a 2022 CEP declination for Jardine Lloyd Thompson (JLT). The U.K.-based reinsurance broker's voluntary self-disclosure and cooperation led to the prosecution of four individuals involved in the bribery scheme and allowed the DOJ to secure the cooperation of those individuals and gather additional evidence demonstrating that others in the industry—namely, Tysers (known then as Integro) and H.W. Wood—were involved in similar misconduct. Building on this evidence, the DOJ prosecuted three more individuals, in addition to holding Tysers and H.W. Wood to account for their conduct.

SOURCE: U.S. Department of Justice

Post-Secondary Education & NCAA – Title IX, NIL

Biden administration punts deadline for updated Title IX regulations to March

The Biden administration will finalize its proposed updates to Title IX by March 2024, nearly a year after it missed its first deadline. The Education Department unveiled its initial proposal to strengthen protections for student survivors of sexual assault, as well as LGBTQ students, in 2022, on the 50th anniversary of the landmark law. The department originally intended to issue its final rule change by May 2023, but extended the deadline to October after receiving 240,000 of public comments—nearly twice the amount it received during its last rulemaking on Title IX under former President Donald Trump. A separate proposal regarding transgender student-athletes, which was also due by October, will be released by March 2024. The staggering number of comments is believed to be playing a large role in why it's taking so long for the Education Department to finalize both rules.

SOURCE: The Hill

Related: Hearing Wrap Up: The Biden Administration's Title IX Rule Change Denies Women Opportunities—**House Committee on Oversight and Accountability**

Students and Advocates Demand Urgent Action from Biden Administration to Release Final Title IX Rule—**National Women's Law Center**

Post-Secondary Education & NCAA – Title IX, NIL (cont'd)

Benesch Insights

NCAA transfer portal may be opened without restriction

The NCAA's long-standing rule requiring college athletes who transfer twice or more between Division 1 schools to sit out a year before competing may be coming to an end, following U.S. District Judge John Preston Bailey's temporary restraining order against its enforcement. This decision, made in December 2023, could significantly affect college-athlete compensation debates and allows previously restricted athletes immediate competition, potentially affecting up to 100 or more student-athletes. A coalition of attorneys general from several states, including West Virginia, Ohio, Colorado, Illinois, New York, and Tennessee, is challenging the NCAA's rule, arguing it violates the Sherman Act by preventing student-athletes from playing. The Department of Justice and additional states have joined the lawsuit, marking a significant moment in the fight against the NCAA's control over student-athlete mobility and compensation. The NCAA has temporarily lifted the transfer rule while the legal battle continues, allowing affected athletes to compete immediately.

Marisa Darden
Chair

Bianca Smith
Associate

Source: Benesch

NCAA proposal would allow schools to pay their athletes directly

To address long-standing inequities, NCAA President Charlie Baker proposed a new economic model that would allow all Division I schools to compensate athletes directly through name, image, and likeness deals and remove the cap on education-related payments that athletes can receive. He also pitched a new subdivision within Division I that would allow well-resourced schools to form their own set of rules addressing such things as NIL, scholarship limits, and transfer rules to better suit their investment in athletics, should they opt-in. Those that opt-in would have to invest a minimum of $30,000 per athlete per year into an "enhanced educational trust fund for at least half of the institution's eligible student-athletes." The funds would be subject to Title IX rules that call for an equal distribution of resources between male and female athletes. It's unclear how Baker's proposal could turn into policy or how it might affect settlement discussions for major lawsuits and the NCAA's discussions with federal lawmakers.

SOURCE: The Washington Post (sub. req.)

Related: What to expect for NIL, Title IX with proposed NCAA rule changes—**ESPN**
Utah schools ordered to make athletes' NIL contracts public—**The Salt Lake Tribune**

Post-Secondary Education & NCAA – Title IX, NIL (cont'd)

NCAA hit with antitrust lawsuit in US court over 'amateurism' rules

Matthew Bewley and Ryan Bewley are challenging the NCAA's decision to deny their request for "amateur" status to play competitive team basketball for Chicago State University because they allegedly violated U.S. college sports rules that limit compensation and contracts for student-athletes. The twins argue they were unfairly barred from playing based on the compensation they "lawfully received in exchange for the use of their name, image, and likeness" when they played for an elite basketball academy in Georgia before enrolling at Chicago State. The NCAA insists their compensation from the academy exceeded "actual and necessary" expenses and that they competed for a team that considered itself professional. The Bewleys contend the NCAA imposed a "wage cap" on aspiring athletes, in violation of antitrust law, and has allowed other academy players, including their former classmates and teammates, to play college basketball. They're seeking an injunction against the NCAA "from enforcing their unlawful and anticompetitive regulations," as well as damages, including loss of endorsement opportunities and harm to their potential to be selected in a draft to play for a professional basketball team.

SOURCES: Bailey & Glasser, Front Office Sports, Reuters, The Hill, The Philadelphia Inquirer, The Washington Post

Related: NCAA faces new lawsuit over athletes' drive for compensation**—Reuters**
US judge says NCAA athletes can pursue class actions seeking over $1.3 bln**—Reuters**

Public Corruption

Ex-Portage Mayor Wins Bid for High Court Review in Bribery Case

The U.S. Supreme Court agreed to review the scope of the federal funds' bribery statute, an issue that had split the circuit courts when it granted James Synder's petition for certiorari. The question in the case is whether 18 USC § 666 criminalizes gratuities—that is, payments rewarding actions an official has already taken or committed to take—without any quid pro quo agreement. Section 666(a)(1)(B) makes it a crime for a state or local official to "corruptly" solicit, demand, or accept "anything of value from any person, intending to be influenced or rewarded in connection" with government business "involving anything of value of $5,000 or more."

Snyder, the former mayor of Portage, Ind., was convicted for soliciting and accepting $13,000 in connection with the city's acquisition of garbage trucks. He was initially tried and convicted of one count of bribery and one tax-related offense in 2019 but successfully moved for a new trial on the bribery count. The jury convicted him again following a second trial in 2021. The Seventh Circuit rejected Snyder's argument that Section 666 didn't apply without a prior quid pro quo agreement. "This circuit has repeatedly held that § 666(a)(1)(B) 'forbids taking gratuities as well as taking bribes,'" the court said, noting that the Second, Sixth, Eighth, and Eleventh circuits had adopted the same position. The court acknowledged that the First and Fifth circuits had reached the opposite conclusion but said their reasoning didn't persuade it. In Snyder's case, the government said there

continued on next page

Public Corruption (cont'd)

was no reason to think the jury convicted him on a gratuity theory alone. As both the district court and appeals court held, there was ample evidence that he engaged in a quid pro quo bribery, the government said.

The U.S. Supreme Court decision to take up the case has already reverberated in several of Chicago's biggest public corruption cases, where defense attorneys have long complained that prosecutors overreach when charging public officials under the federal bribery statute. In wake of the high court's announcement, the lawyer for a co-defendant of former House Speaker Michael Madigan told a federal judge he will seek to delay the landmark case set for April. Patrick Cotter, who represents Madigan's longtime confidante, Michael McClain, made the disclosure during a hearing in the "ComEd Four" case, where McClain and three others were convicted in a scheme to bribe Madigan to help the utility's legislative agenda in Springfield.

SOURCE: Bloomberg Law

Benesch Insights

Supreme Court to Weigh in on Scope of Federal Bribery Statute

In *Snyder v. United States*, the Supreme Court of the United States could redefine the legal boundaries regarding federal bribery as it prepares to answer whether the primary federal bribery statute criminalizes gratuity payments to officials in recognition of actions the official had previously taken, absent any quid pro quo agreements to take those actions. In light of the Supreme Court taking up the Snyder question, federal courts are faced with balancing the resolution of prominent corruption cases and determining the accurate interpretation of federal legislation, which could have monumental implications for future corruption prosecutions. Since Snyder is a pending case, the full implications are not yet clear; however, it is apparent that by affirming Snyder, the Supreme Court would likely require businesses and public officials to be more cautious when engaging in lobbying activities, and when offering gratuities and benefits to public officials.

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Source: Benesch

Public Corruption (cont'd)

Former Baltimore City State's Attorney Marilyn Mosby Convicted on Two Counts of Perjury

A federal jury convicted Marilyn J. Mosby on federal charges of perjury relating to the withdrawal of funds from the City of Baltimore's Deferred Compensation Plan, claiming she suffered adverse financial consequences during the COVID-19 pandemic when she was Baltimore City State's Attorney. According to the evidence presented at trial, on May 26, 2020, and Dec. 29, 2020, Mosby submitted "457(b) Coronavirus-Related Distribution Requests" for one-time withdrawals of $40,000 and $50,000, respectively, from the Deferred Compensation Plan. Trial evidence proved Mosby falsely certified that she met at least one of the qualifications for distribution as defined under the CARES Act, specifically that she experienced adverse financial consequences from the Coronavirus. However, Mosby didn't experience any such financial hardships as she received her full gross salary of $247,955.58 from Jan. 1, 2020, through Dec. 29, 2020, in bi-weekly gross pay direct deposits. She faces a maximum sentence of five years in federal prison for each of the two counts of perjury. U.S. District Judge Lydia K. Griggsby hasn't yet scheduled sentencing.

In a separate pending federal case, Mosby faces two counts of making false mortgage applications relating to purchasing two vacation homes in Fla. Those charges remain pending, and a trial date hasn't been set. If convicted of those counts, the defendant faces a maximum of 30 years in federal prison for the two remaining counts.

SOURCE: U.S. Department of Justice

Related: Maryland bar counsel seeks to suspend law license of Marilyn Mosby after perjury conviction—**The Baltimore Banner**

Sanctions

Commerce strengthens restrictions on semiconductors, equipment, supercomputing items to countries of concern

The U.S. Department of Commerce's Bureau of Industry and Security (BIS) released a package of rules designed to update export controls on advanced computing semiconductors and semiconductor manufacturing equipment, as well as items that support supercomputing applications and end-uses, to arms embargoed countries, including the People's Republic of China. The updated rules are intended to increase the effectiveness of controls and to eliminate pathways to evade restrictions. Secretary of Commerce Gina M. Raimondo said the department will keep working to protect national security by restricting access to critical technologies and vigilantly enforcing its rules while minimizing unintended impact on trade flows.

This comes after China's commerce minister, Wang Wentao, expressed concerns in Nov. over U.S. curbs on semiconductor exports to China, saying that it's very important that the two sides discuss the boundary between national security concerns and trade and economic cooperation. The two economies used to be each other's biggest trading partner, with trade hitting a record $758 billion in 2022, as U.S. demand for

continued on next page

Sanctions (cont'd)

Chinese consumer goods rose and Beijing's demand for U.S. farm products and energy grew. The U.S. has since shifted its trading strategy from China due to security concerns, with two-way trading down around 19%.

In addition, Huawei Technologies alarmed politicians from the U.S. to Japan when it unveiled a $900 smartphone in Nov. that signaled China's rapid advance in semiconductor technology. The accomplishment was made despite it having been hit with U.S. restrictions for more than a decade.

SOURCE: Bureau of Industry and Security

Commerce Department issues three rules to reflect export controls with allies and partners

The Commerce Department's Bureau of Industry and Security (BIS) released three rules as part of a broad effort to ease several categories of export licensing requirements and expand the availability of export license exceptions for key allied and partner countries, as well as for members of certain multilateral export control regimes. The rules include:

1. Licensing requirements for certain Australia Group-controlled pathogens and toxins, and their related technologies;
2. Expanded license exception eligibility to additional countries for certain missile technology items, which excludes any countries of concern for missile technology reasons or that are subject to a U.S. arms embargo; and
3. A rule seeking public comment on ways to facilitate the use of License Exception Strategic Trade Authorization.

SOURCE: Bureau of Industry and Security

FinCEN, U.S. Department of Commerce's Bureau of Industry and Security announce new reporting key term and highlight red flags relating to global evasion of U.S. export controls

As part of the ongoing efforts to strengthen export controls and prevent global evasion of U.S. export controls, the agencies issued a joint notice highlighting a new Suspicious Activity Report (SAR) key term ("FIN-2023-GLOBALEXPORT") for financial institutions to reference when reporting potential efforts by individuals or entities seeking to evade U.S. export controls not related to Russia's invasion of Ukraine. FinCEN and BIS previously issued two joint alerts in June 2022 and May 2023 urging financial institutions to be vigilant against potential Russian export control evasion. The latest joint notice emphasizes the importance of financial institutions applying a risk-based approach to trade transactions and remaining vigilant against efforts by individuals or entities.

SOURCE: Bureau of Industry and Security

Other Major Cases

Two Corporate Executives Convicted in First-Ever Criminal Prosecution for Failure to Report Under Consumer Product Safety Act

A Los Angeles jury convicted Simon Chu and Charley Loh of conspiracy to defraud the U.S. Consumer Product Safety Commission (CPSC) and failure to report information related to defective residential dehumidifiers that had been linked to multiple fires, as required by the Consumer Product Safety Act (CPSA). Both defendants were acquitted on one count of wire fraud.

The defective dehumidifiers sold by Chu and Loh's two corporations were included in multiple recalls of a larger number of defective dehumidifiers manufactured by Gree Electric Appliances of Zhuhai (Gree Zhuhai) in China. According to the recall notices, more than 450 reported fires and millions of dollars in property damage have been linked to the recalled Gree Zhuhai dehumidifiers.

Gree USA, which was partly owned by Chu, was sentenced in Apr. to pay a $500,000 criminal fine after pleading guilty to failing to notify the CPSC about the problems with the dehumidifiers. The fine, along with provisions to pay restitution to victims, was part of a $91-million criminal resolution with Gree USA, Gree Zhuhai, and another related Gree company. This resolution is the first corporate criminal enforcement action ever brought under the CPSA.

SOURCE: U.S. Department of Justice

Legal Industry Developments

Spoofing Market Manipulation Cases Set Stage for More Enforcement

The Seventh Circuit issued the third in a trilogy of opinions in Oct., establishing the metes and bounds for criminal prosecutions of "spoofing"—a form of market manipulation, mostly in the commodities markets—that Congress expressly prohibited in the 2010 Dodd-Frank Act. The decisions create a roadmap for government enforcers to bring more cases, writes Bradley partner Elisha Kobre.

The government brought its first federal spoofing prosecution against trader Michael Coscia in 2014 in the Northern District of Illinois, where the Chicago Mercantile Exchange is located, and the Seventh Circuit affirmed the conviction in 2017. This prompted the government to start bringing spoofing prosecutions in greater numbers, leading to the Seventh Circuit's decisions in *U.S. v. Chanu* in 2022 and *U.S. v. Pacilio* in Oct. 2023. In this trilogy of cases, the Seventh Circuit answered fundamental legal questions arising in spoofing prosecutions largely in favor of the government, paving the way for both the DOJ and CFTC to increase enforcement against spoofing.

Although issues will undoubtedly continue to arise in spoofing prosecutions, Kobre is expecting to see increasing enforcement activity against spoofing in the coming years. Recently, the DOJ and CFTC charged a commodities trader with investment bank Jeffries with securities and wire fraud for engaging in spoofing in a 16-count indictment in N.J. federal court.

SOURCE: Bloomberg Law