

## WHITE-COLLAR CRIME

# Is FCPA Individual Enforcement at Odds With Government Rhetoric?

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**W**ith ample bravado, in recent years the Foreign Corrupt Practices Act unit of the Department of Justice has proclaimed that holding individuals accountable for foreign bribery schemes is of “critical importance,” and that “it is unambiguously this department’s first priority” to prosecute individuals in corporate criminal matters. Similarly, Securities and Exchange Commission officials consistently have proclaimed that “individual accountability is critical to FCPA enforcement.” Reviewing the enforcement record, however, one sees that the volume of FCPA enforcement activity with respect to individuals has steadily declined in the last three years, and in the case of the SEC, disappeared entirely. Looking beyond the numerical decline uncovers some further patterns. Of the individuals criminally charged in connection with foreign bribery schemes in recent years, most were charged with criminal offenses other than substantive FCPA violations. The enforcement record also shows that when DOJ has brought FCPA-related charges against individuals, they are rarely the executives of the companies DOJ has pursued in its notable corporate FCPA prosecutions, but rather are foreign officials or individuals associated with small or privately held companies.

In regard to SEC enforcement, instead of focusing on individuals, recent actions have targeted entities, particularly foreign issuers, and pursued violations of the accounting provisions of the FCPA rather than substantive anti-bribery violations. Although time will tell whether the government’s recent FCPA enforcement record reflects the lingering impact



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of COVID on investigative efforts or a longer term trend, these recent patterns are worthy of note for white-collar practitioners and company counsel addressing potential FCPA issues.

## Individual Liability Under the FCPA

The FCPA has broad applicability to both companies and individuals. The anti-bribery provisions of the FCPA, which prohibit any payment to a foreign official in order to influence the official’s conduct or to secure any other improper advantage to benefit business, apply to “issuers” (companies with securities listed on a national securities exchange or companies required to file periodic reports with the SEC) and their officers, directors, employees, agents or stockholders, 15 U.S.C. Section 78dd-1, as well as “domestic concerns” (any individual who is a citizen, national, or resident of the United States, or any corporation or organization other than an issuer that is organized under the laws of or has its principal place of business in the United States). Individuals who aid or abet an FCPA anti-bribery violation or conspire to commit such violation also can face liability. The FCPA also contains accounting provisions that mandate that issuers make and keep accurate record of their

transactions and dispositions of their assets, see Section 78m(b)(2)(A), and also require issuers to devise and maintain a system of internal accounting controls. See Section 78(m)(b)(2)(B). The SEC can hold individuals liable for knowingly causing an issuer's violation of the accounting provisions, see Section 78m(b)(5), and criminal liability can be imposed on individuals for willful violations of those provisions. See *id.* § 78ff(a). As with the anti-bribery provisions, individuals can also face criminal liability for conspiring to violate, or aiding and abetting violations of, the accounting provisions.

### **Individuals Have Felt Less FCPA Heat in Recent Years**

In 2019 DOJ brought FCPA or FCPA-related charges against the greatest number of individuals in the last decade—43 people. Since then, enforcement activity has fallen. Last year, DOJ criminally charged 16 individuals with FCPA-related offenses, compared to 18 in 2021 and 29 in 2020, marking a continued drop from DOJ's high of 43 individuals charged in 2019. Last year's numbers also fell well below the ten-year average of 23 individual defendants. See Stanford Law School Foreign Corrupt Practices Act Clearinghouse, 2022 FCPA Year in Review, available at <https://fcpa.stanford.edu/resources-fcpac-reports.html>. Because individual charges may be initially filed under seal and remain under seal for months or even years until an arrest is made or another enforcement development occurs, last year's record may increase in the upcoming months. In the past, however, first quarter statistics have had a correlation with the level of enforcement activity for the full year, and the record so far in 2023 is most similar to Q1 activity from 2021—the lowest FCPA enforcement activity year in a decade. See Stanford Law School Foreign Corrupt Practices Act Clearinghouse, 2023 Q1 Report, available at <https://fcpa.stanford.edu/resources-fcpac-reports.html>.

In Q1 of 2023, DOJ brought two FCPA-related individual enforcement actions against three defendants and added an FCPA conspiracy charge in an existing action—statistics which fall significantly below the ten-year average of 11 enforcement actions by Q1 in other years. The FCPA conspiracy charge was added to the existing action against Samuel Bankman-Fried, founder of cryptocurrency exchange FTX, in connection with bribes he allegedly paid to Chinese government officials to unfreeze certain company trading accounts.

While the DOJ's individual enforcement record is down, the other agency responsible for FCPA enforcement—the SEC—has not brought a single FCPA enforcement action against an individual since October 2020—its longest drought for individual FCPA enforcement actions in nearly a decade. See SEC Enforcement Actions: FCPA Cases, available at <https://www.sec.gov/enforce/sec-enforcement-actions-fcpa-cases>. Over the years, the SEC typically has charged fewer FCPA cases against individuals than DOJ—SEC had a high of eight individual defendants in 2016—but it is notable that of the 15 FCPA enforcement actions the SEC has brought in the last 2 ½ years, not one has involved charges against individuals. It is difficult to pinpoint the potential reasons for the decline in individual actions. In light of the strong incentives for corporations to cooperate in investigations and voluntary self-disclose misconduct, evidence of corporate liability may effectively be handed to the DOJ, while individuals are not equally incentivized to come forward. Unless individuals are willing to cooperate or a whistleblower comes forward, evidence of individual conduct sufficient to establish an FCPA-related charge may be more difficult to gather. The Bankman-Fried case, in which it is widely reported that senior company executives close to Bankman-Fried are cooperating, seems to support this hypothesis. Otherwise, because COVID-related constraints posed particular hurdles for foreign investigations, U.S. authorities still may be catching up on cross-border investigatory work delayed by the pandemic. While we wait to see if 2023 and beyond yield more individual enforcement actions, or if the statistics from 2021 and 2022 mark the new norm, a closer examination of recent DOJ and SEC FCPA enforcement suggests some further patterns.

### **Trends for Individuals Subject to Criminal Prosecution**

In the last decade, the vast majority of individuals whom DOJ has charged criminally with FCPA-related offenses have not been the executives or employees of the large public corporations that were the subject of the most serious and well-publicized FCPA enforcement activity. See Stanford Law School Foreign Corrupt Practices Act Clearinghouse, 2022 FCPA Year in Review, available at <https://fcpa.stanford.edu/resources-fcpac-reports.html>. Instead, most criminal enforcement against individuals has arisen from separate

conduct involving small or privately held companies. Further, the few individuals charged in connection with conduct involving major public companies typically have been the foreign officials who accepted the bribes rather than executives of the corporate bribe-payor. In 2022 this pattern applied to the great majority of the 16 individuals criminally charged with FCPA-related misconduct.

An examination of individual cases also reveals that, more often than not in pursuing conduct that involves payments to foreign government officials or intermediaries, DOJ relies on other criminal statutes such as the Travel Act, anti-money laundering statutes, the mail and wire fraud statutes, or the criminal tax laws, rather than charging substantive violations of the FCPA. DOJ appears to use these broader statutes because the conduct at issue may not entail all elements necessary to establish liability under the FCPA. When DOJ does bring substantive FCPA charges against individuals, the conduct usually falls under the anti-bribery provisions, but one notable recent criminal prosecution involved a violation of the accounting provisions. Last month, four former executives and associates of Commonwealth Edison (ComEd) were convicted of violations of the FCPA's books and records provision in connection with bribing the former Speaker of the Illinois House of Representatives, in a case notably involving no foreign bribery. ComEd marks one of the highest profile criminal prosecutions under the FCPA's accounting provisions; typically the SEC pursues violations of these provisions via civil enforcement action.

### SEC's FCPA Focus

With respect to SEC civil enforcement, the commission has brought four FCPA-based actions thus far in 2023, all of which have been against entities. Notably, three out of those four SEC actions have alleged violations of the FCPA accounting provisions without accompanying claims under the anti-bribery provisions. Pursuing standalone accounting provisions violations marks a change from the SEC's pattern for 2022; all but one of the SEC's seven FCPA enforcement actions last year involved claims under the FCPA's anti-bribery provision.

In recent years, however, the SEC increasingly has used the accounting provisions to expand the reach of FCPA enforcement. For example, in its 2018

enforcement action against Stryker Corp., the SEC brought books and records violations against the company for inadequate documentation of transactions with private hospitals and healthcare providers in India, even though no government official or state-owned entity was claimed to be involved in the scheme.

Then, in its actions against Brazil-based Petrobras and Eletrobras, the SEC brought books and records violations against the companies for concealing the receipt of bribes, although the FCPA's anti-bribery provisions, and traditional FCPA enforcement generally, target the payment of bribes. Notwithstanding the FCPA's books and records provision's potential application to individuals, the SEC has not brought a single enforcement action against an individual under that or any other FCPA provision since October 2020.

Additionally, although the accounting provisions apply broadly to "issuers" and "domestic concerns," the SEC has brought enforcement actions only against foreign issuers so far this year. Regardless, the FCPA's accounting provisions remain a powerful and broad tool in the SEC's and DOJ's FCPA toolbox that white collar practitioners and company counsel cannot ignore.

### Conclusion

Even though individuals have felt reduced FCPA heat in recent years, the FCPA's broad potential application and significant consequences demand continued vigilance. As seen with the recent charge against Bankman-Fried, DOJ will pursue substantive FCPA charges against corporate executives when it believes it has the evidence, although in recent years it has found the vast majority of its individual targets in other places. The recent convictions in ComEd and the SEC's pursuit of standalone books and records violations also serve as a warning that the FCPA may apply beyond foreign bribery schemes. Whether DOJ and SEC will pick up the pace on FCPA individual enforcement actions in the coming years remains to be seen.

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