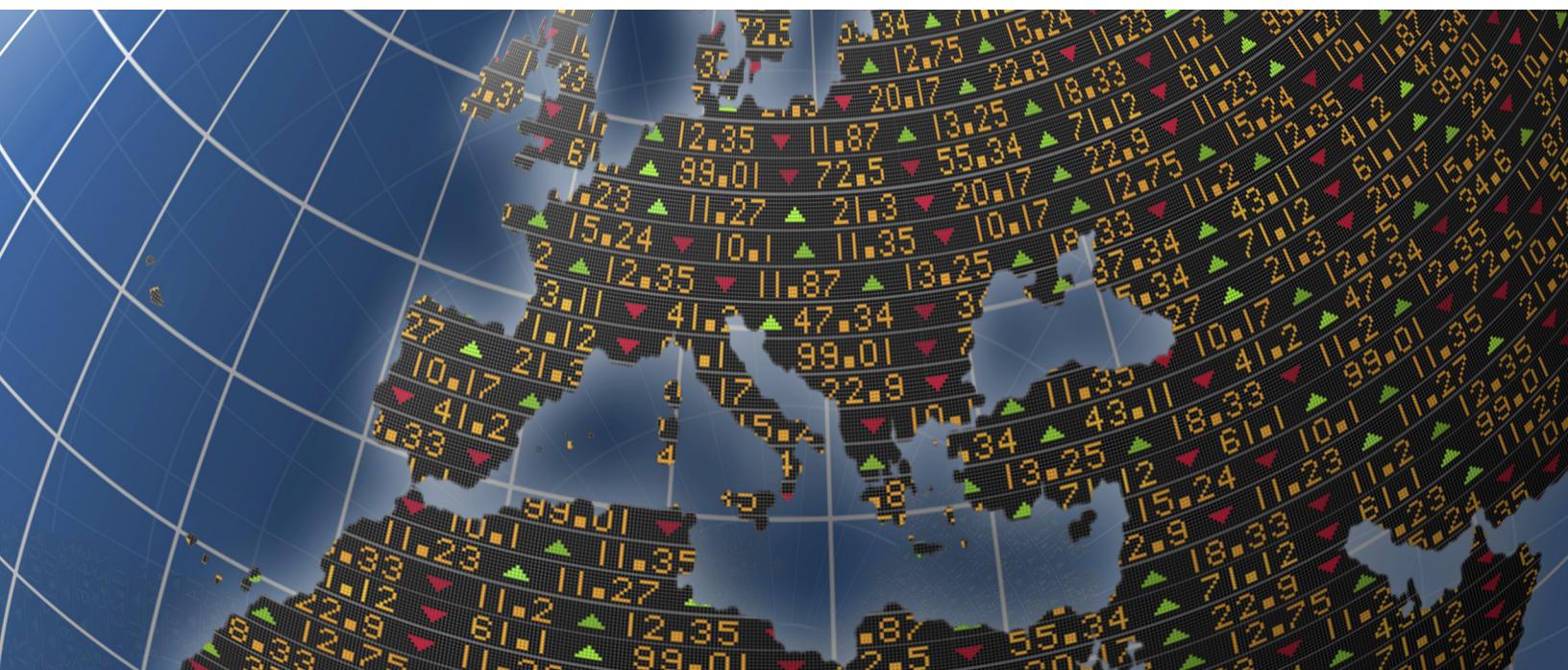


FCPA Update

A Global Anti-Corruption Newsletter



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SEC's Division of Enforcement Year-End Results Reflect Continuing Aggressive Approach to Enforcement and Remedies

On November 14, 2023, the U.S. Securities and Exchange Commission's Division of Enforcement ("Division") announced its enforcement results for fiscal year ("FY") 2023.¹ Disgorgement and penalties were the second highest in the SEC's history at just under \$5 billion, while the overall number of actions rose by 3% over FY 2022. The Division maintained its focus on individual accountability for company officers and directors, as well as for gatekeepers, such as auditors and lawyers. In addition, the Whistleblower Program continued to grow significantly with a record-high number of awards and tips.

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1. Press Release, "SEC Announces Enforcement Results for Fiscal Year 2023" (Nov. 14, 2023), <https://www.sec.gov/news/press-release/2023-234> [hereinafter "FY 2023 Enforcement Press Release"].

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The SEC highlighted a number of continued areas of focus, including recordkeeping procedures, crypto assets, ESG, and cybersecurity, and also noted several initiatives where the Commission is targeting “recurring” or “widespread” violations. The actions highlighted by the SEC in its press release provide valuable insights into evolving trends and a roadmap for industry players as to ongoing initiatives.

FCPA Violations

In FY2023, 11 companies consented to cease-and-desist orders that found violations of the FCPA’s anti-bribery and/or accounting provisions. The SEC collected approximately \$390 million in disgorgement and prejudgment interest in these cases, which related to alleged violations in at least 12 countries. As has become the norm, all of these cases involved the use of third parties (e.g., sales agents, consultants or distributors) and alleged violations of the FCPA’s books and records and internal accounting controls provisions flowing from deficient accounting controls regarding the use of third parties (many supported by insufficient documentation) and inaccurate bookkeeping at subsidiaries whose books were consolidated into an issuer’s financial statements. While there were a few larger resolutions, many of the cases resulted in relatively modest disgorgement and penalty numbers, illustrating that the SEC is not limiting itself to large multi-jurisdictional bribery schemes.

Recordkeeping Violations by Regulated Entities

Recordkeeping violations again received significant attention in FY 2023, part of what the SEC termed its “Off-channel Communications Initiative.” The SEC’s press release specifically called out actions against several large banks, among 22 other advisory firms, broker-dealers, and credit rating agencies, which resulted in over \$400 million in penalties. In each of these cases, the SEC highlighted that respondents’ employees used unauthorized messaging platforms on personal devices to communicate about business matters, and the respondents failed to preserve the “substantial majority” of these communications. The off-channel communications actions were also significant in that the respondents agreed to retain independent compliance consultants and undertake comprehensive reviews of their internal policies and procedures.

Given the SEC’s clear focus on the area, we expect continued enforcement activity for the foreseeable future. In addition, in light of the scrutiny over the broker-dealer rules relating to recordkeeping requirements, we expect to see the SEC’s focus begin to shift to standalone violations of the Advisers Act rules.

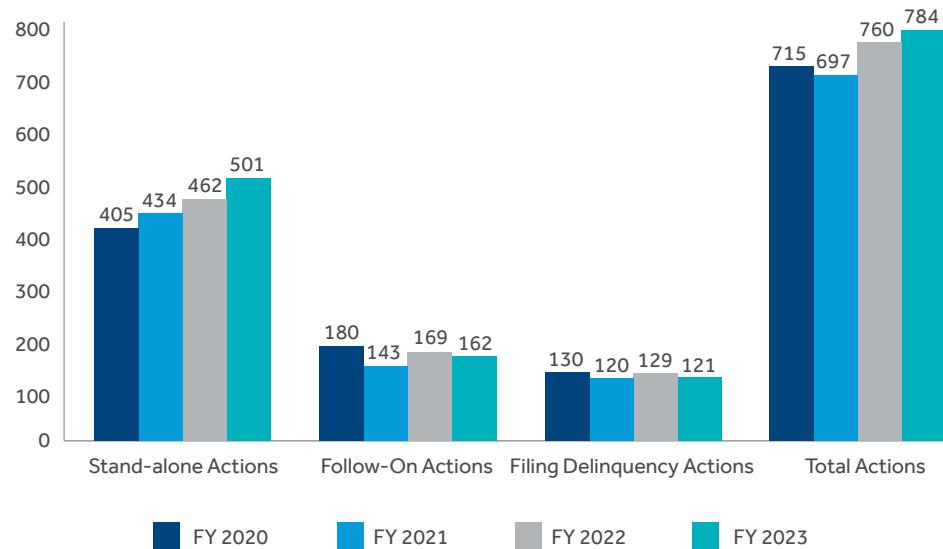
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FY 2023 Statistics

The SEC brought 501 standalone enforcement actions in FY 2023, continuing the upward trend starting in FY 2020 with an 8% increase year-over-year. The number of follow-on administrative proceedings and actions against issuers who were delinquent in making required filings with the SEC hovered around the same level as last year. Overall, the total number of actions also increased slightly to 784.

SEC Enforcement by the Numbers



“Disgorgement and penalties were the second highest in the SEC’s history at just under \$5 billion, while the overall number of actions rose by 3% over FY 2022. The Division maintained its focus on individual accountability for company officers and directors, as well as for gatekeepers, such as auditors and lawyers.”

Three types of actions constituted the majority of standalone actions brought during FY 2023:

- Securities offering matters (33% of the total);
- Investment adviser and investment company matters (17% of the total); and
- Issuer reporting/accounting and auditing matters (17% of the total).

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There were two types of actions with significant year-over-year increases: securities offering matters (55% increase) and broker-dealer matters (30% increase). The increase in securities offering matters was partly due to the investigative sweep focusing on failure to comply with Regulation A requirements, but also reflects a return to levels seen in such retail-type enforcement in the prior administration. In addition, there were 11 FCPA matters brought in FY 2023, bringing the number closer to pre-pandemic levels after two considerably slower years that were partly attributed to the administrative transition and shifting enforcement priorities into crypto, off-channel communications, and other areas. On the other hand, several other types of actions experienced year-over-year decreases, including matters involving market manipulation (31% decrease), investment adviser/investment company (28% decrease), and insider trading (26% decrease).

Standalone Enforcement Actions by Primary Classification

Primary Classification	FY 2020		FY 2021		FY 2022		FY 2023	
Investment Adviser / Investment Co.	21%	87	28%	120	26%	119	17%	86
Broker-Dealer	10%	40	8%	36	10%	46	12%	60
Securities Offering	32%	130	33%	142	23%	106	33%	164
Issuer Reporting / Audit & Accounting	15%	62	12%	53	16%	76	17%	86
Market Manipulation	5%	22	6%	26	7%	32	4%	22
Insider Trading	8%	33	6%	28	9%	43	6%	32
FCPA	2%	10	1%	5	1%	6	2%	11
Public Finance Abuse	3%	12	3%	12	4%	19	1%	6
SRO / Exchange	0%	0	0%	1	0%	1	1%	5
NRSRO	1%	3	0%	2	0%	1	1%	4
Transfer Agent	0%	1	0%	2	2%	7	1%	3
Miscellaneous	0%	5	2%	7	1%	6	4%	22

The Division filed more than 40% of the standalone matters brought in FY 2023 as litigated matters, in whole or in part. This trend is likely reflective of the more aggressive settlement demands made by this administration, which make settlement less likely, as well as the focus on crypto cases, which tend to litigate more often given the novel issues involved and the existential nature of some cases, the latter of which often makes settlement impossible.

The SEC's press release focused on jury trial wins involving false and misleading statements in press releases, fraudulent schemes regarding penny stocks, and

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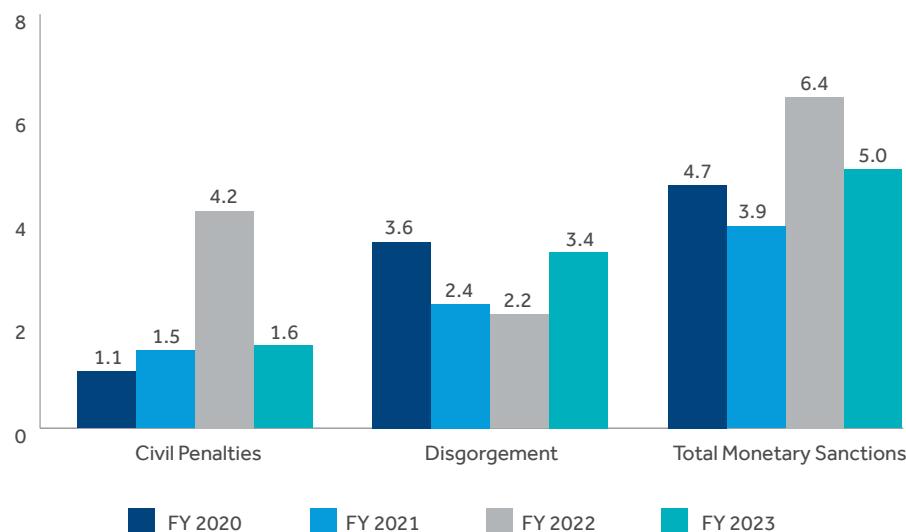
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fraudulent schemes involving trading in microcap securities. The impact of the Supreme Court's highly anticipated *Jarkesy*² decision on the future of administrative proceedings remains to be seen.

Second Largest Total Monetary Sanctions in SEC History

While monetary sanctions were not nearly as high as the Commission's record-breaking FY 2022 (as the Division correctly signaled last year would be the case in subsequent years), the SEC imposed nearly \$5 billion in monetary sanctions, the second highest in the Commission's history. Monetary sanctions included approximately \$1.6 billion in penalties – a sharp drop from last fiscal year's \$4.2 billion – and \$3.4 billion in disgorgement.

Breakdown of Monetary Sanctions Imposed by the SEC (in billion USD)



As shown above, the amount of disgorgement in FY 2023 exceeded the amount of penalties imposed, indicating that FY 2022 may have been an outlier in terms of penalties due to the recordkeeping investigative sweep that resulted in combined penalties of approximately \$1.1 billion.³ However, as further described below, actions involving alleged recordkeeping violations continued to constitute a significant portion of the total penalties in FY 2023.

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2. *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), cert. granted, 143 S. Ct. 2688 (2023) (mem.).

3. See Press Release, "SEC Charges 16 Wall Street Firms with Widespread Recordkeeping Failures" (Sept. 27, 2022), <https://www.sec.gov/news/press-release/2022-174>. Given the Second Circuit's recent ruling in *SEC v. Govil*, No. 22-1658, 2023 WL 7137291 (2d Cir. Oct. 31, 2023), which significantly limited the availability of the remedy, it will be interesting to see whether disgorgement remains at this level in FY 2024.

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Overall, another year of high monetary sanctions illustrates the Division's continued objective to "aggressively employ[] all of its tools to protect investors and market integrity[,]"⁴ including by demanding penalties significantly exceeding penalty precedents in similar cases.

Gatekeepers

The SEC has maintained its attention on a perennial enforcement area against so-called "gatekeepers" – namely auditors and lawyers. The press release highlighted actions against several audit and accounting firms, including Prager Metis and Crowe U.K. LLP ("Crowe"). In the action involving Crowe, for example, the SEC charged the auditing firm, its CEO, and a senior audit partner for conduct relating to an allegedly deficient audit of a SPAC target.⁵ As a result of the action, Crowe and the individuals agreed to pay civil penalties and the individuals cannot appear or practice before the SEC as accountants.

In addition, although not specifically referenced in the press release, the SEC brought an insider trading case against an attorney alleging that the lawyer accessed MNPI about law firm clients and traded in the securities of these issuers while in possession of MNPI, an indication that lawyers remain on the Commission's radar as important gatekeepers.⁶

Cooperation

The SEC highlighted several actions resulting in cooperation credit, including a settlement with GTT Communications, Inc. alleging that GTT failed to disclose material information in its filings. GTT was awarded credit for promptly self-reporting, undertaking affirmative remedial measures, and providing substantial cooperation, and the Commission did not impose a penalty.⁷ Another no-penalty example was the action against View Inc., which recognized the company for providing detailed factual analyses and explanations, proactively identifying key documents and witnesses, and following up on the Commission's requests without requiring subpoenas.⁸

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4. FY 2023 Enforcement Press Release.
 5. Press Release, "SEC Charges UK Audit Firm, CEO, and Senior Auditor for Failures in Connection with De-SPAC Transaction" (Aug. 14, 2023), <https://www.sec.gov/news/press-release/2023-152>.
 6. SEC Complaint, *SEC v. Costa Neto*, 23-cv-02451 (D.D.C. Aug. 23, 2023), <https://www.sec.gov/files/litigation/complaints/2023/comp-pr2023-158.pdf>.
 7. Press Release, "SEC Charges GTT Communications for Disclosure Failures" (Sept. 25, 2023), <https://www.sec.gov/news/press-release/2023-195>.
 8. Press Release, "SEC Charges 'Smart' Window Manufacturer, View Inc., with Failing to Disclose \$28 Million Liability" (July 3, 2023), <https://www.sec.gov/news/press-release/2023-126>.

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While the SEC promoted rewarding cooperation as a way to encourage firms to “proactively” self-police, self-report, remediate potential violations, and provide meaningful cooperation with the investigations, the level of predictability in actions brought by the Commission continues to raise questions about whether the incentive is effective.

Individual Accountability

The SEC has stayed consistent in its focus on “individual accountability” as a “pillar” of the SEC’s enforcement program. Similar to FY 2022 and prior years, more than two-thirds of the standalone enforcement actions during FY 2023 involved at least one individual. Moreover, the SEC barred 133 individuals from serving as officers and directors of public companies, resulting in the highest number of officer and director bars obtained in a decade.

The SEC’s press release also noted that barred individuals could face substantial penalties. For example, the SEC ordered a former Wells Fargo executive to pay a \$3 million penalty and more than \$1.9 million in disgorgement for allegedly misleading investors about the success of Wells Fargo’s core business.⁹ This focus on individual accountability appears to have prompted more respondents to litigate with the SEC.

“As has become the norm, all of [the FCPA] cases involved the use of third parties (e.g., sales agents, consultants or distributors) and alleged violations of the FCPA’s books and records and internal accounting controls provisions flowing from deficient accounting controls regarding the use of third parties (many supported by insufficient documentation) and inaccurate bookkeeping at subsidiaries whose books were consolidated into an issuer’s financial statements.”

Whistleblower Protections

FY 2023 was another consequential year for the Whistleblower Program. The SEC received more than 18,000 tips, approximately 50% more than FY 2022. The Commission also issued a new record-high amount in whistleblower awards, which totaled nearly \$600 million.

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9. Press Release, “Former Wells Fargo Senior Executive Carrie Tolstedt Agrees to Settle SEC Fraud Charges for Misleading Investors About Abusive Sales Practices to Inflate a Key Performance Metric” (May 30, 2023), <https://sec.gov/news/press-release/2023-99>.

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In particular, the SEC issued a \$279 million award to a single whistleblower this year. By itself, that award exceeded FY 2022's total dollar amount in whistleblower awards by 22%. In announcing the award, the SEC noted that even though information obtained from a whistleblower may "not prompt the opening of the Commission's investigation," the quality of information and continued cooperation of a whistleblower can lead to the distribution of a large award.¹⁰ Certainly we expect that with awards like this, the Whistleblower Program will continue to incentivize reporting.

In addition, the Commission has increased its focus on Rule 21F-17, which targets actions taken to impede reporting to the SEC. The five enforcement actions brought during FY 2023 constitute approximately a quarter of all Rule 21F-17 actions brought since 2015.¹¹ In one of those actions, the Commission found that a company's employee separation agreement violated Rule 21F-17 because the agreement contained broad language requiring a statement that the employee did not report any of the company's misconduct to any federal agency, despite also including a specific carve-out for SEC reporting.¹² We expect to see continued attention in this area by the Commission.

Conclusion

The SEC continues to be focused on issues such as recordkeeping and industries such as crypto. Looking ahead to FY 2024, we expect continued emphasis on off-channel communications and increased enforcement proceedings against current and defunct players of the crypto industry. While the past two fiscal years had seen enforcement activity below recent averages, the level of activity in FY 2023 suggests that enforcement is beginning to return to pre-pandemic levels.

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10. Press Release, "SEC Issues Largest-Ever Whistleblower Award" (May 5, 2023), <https://www.sec.gov/news/press-release/2023-89>.

11. See Office of the Whistleblower, SEC Enforcement Actions, available at <https://www.sec.gov/whistleblower/retaliation#enforcement-actions> (last accessed Nov. 20, 2023).

12. See Press Release, "SEC Charges CBRE, Inc. with Violating Whistleblower Protection Rule" (Sept. 19, 2023), <https://www.sec.gov/news/press-release/2023-184>.

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Kara Brockmeyer

Julie M. Riewe

Anna Moody

Stephan J. Schlegelmilch

Mark D. Flinn

Berk Guler

Justin M. Shindo

Kara Brockmeyer and Julie M. Riewe are partners in the Washington, D.C. office.

Anna Moody and Stephan J. Schlegelmilch are counsel in the Washington, D.C. office.

Mark D. Flinn and Berk Guler are associates in the Washington, D.C. office. Justin M. Shindo is a law clerk in the Washington, D.C. office. Full contact details for each author are available at www.debevoise.com.

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DOJ Issues Opinion Procedure Release on Providing Stipends to Foreign Officials

On October 25, 2023, DOJ issued Opinion Release 23-02, the second FCPA opinion release of 2023 and its third in the last two years, following relatively limited use of this mechanism over the last decade.¹ As with numerous earlier opinion releases, including the one issued in August,² the Release addresses benefits provided to government officials in connection with trainings or other business travel, specifically daily stipends between \$8 and \$40. While most opinion releases on this topic (as well as the *Resource Guide to the U.S. Foreign Corrupt Practices Act, Second Edition*) have suggested that the best practice is to pay costs directly to providers as opposed to cash stipends, the Release confirms earlier guidance that reasonable stipends paid in cash to government officials are permitted in at least some circumstances.³

The request that prompted the Release reflects that businesses continue struggling with the issue of corporate travel and hospitality and the uncertainty of how the enforcement agencies will assess this conduct with the benefit of hindsight. Unfortunately, as with most opinion releases, the highly specific facts underlying the request and the narrowness of DOJ's response likely will do little to address that uncertainty, even when dealing with small stipends that in other contexts would be considered objectively reasonable.

Release 23-02

The FCPA Opinion Procedure enables issuers and domestic concerns to obtain a DOJ opinion as to whether certain specified, prospective – not hypothetical – conduct conforms with DOJ's present enforcement policy regarding the antibribery provisions of the FCPA.⁴ In the Release, a company (the "Requestor") asked DOJ to opine on whether the company could provide stipend payments for meals and travel to foreign officials who attend training events. The Requestor is a U.S.-based company contracted with a U.S. government agency (the "Agency") to provide training events, including logistical support to foreign government personnel.

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1. United States Department of Justice, Opinion Procedure Release No. 23-01 (Oct. 25, 2023), <https://www.justice.gov/criminal-fraud/opinionprocedure-releases> (hereinafter, the "Release").
2. Opinion Release 23-01 (Aug. 14, 2023), <https://www.justice.gov/criminal/criminal-fraud/opinion-procedure-releases>.
3. A Resource Guide to the U.S. Foreign Corrupt Practices Act, Second Edition at 25 (2020), <https://www.justice.gov/criminal/criminal-fraud/fcpa-resource-guide>; see also Opinion Release 08-03 (July 11, 2008); Opinion Release 04-04 (Sept. 3, 2004), <https://www.justice.gov/criminal/criminal-fraud/opinion-procedure-releases>.
4. Foreign Corrupt Practices Act Opinion Procedure. 28 C.F.R. part 80 (July 1, 1999), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/frgnrpt.pdf>.

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This support included providing stipend payments to foreign officials attending the trainings. The Requestor represented that the stipends were intended to pay for meals that are not required to be served during the event, along with mileage costs for certain event participants who drove personal cars. The Requestor noted that it did not intend to pay the stipend directly to the foreign officials, but would furnish the cash to a U.S. government officer, who would then pay the stipend to the foreign officials.⁵

According to the Requestor, the Agency had advised that the stipends were authorized by the Foreign Assistance Act of 1961.⁶ Additionally, the Requestor reported that all stipend payment amounts had been approved by the Agency (or had been set by the U.S. Government according to State Department or embassy rates). The stipend amounts were modest, amounting to between \$8 and \$40 per day, depending on the training's location. The Requestor also represented that it would maintain accounting records to document the payments and provide these records to the Agency.

In the Release, DOJ stated that it did not presently intend to take any enforcement action against the company based on the facts presented. DOJ made this determination based on the Requestor's clear lack of corrupt intent, including the assertion by another U.S. government entity that the payments were authorized by the Foreign Assistance Act. Further, DOJ opined that the payments were not made for the purpose of obtaining or retaining business, as they were "both called-for and ultimately delivered by agencies and/or personnel of the United States Government."⁷

Analysis

In recent years, the opinion release process has been both under-used (with only four opinions issued since 2014) and unedifying, in that companies rarely request opinions and when they do, those opinions deal with seemingly straightforward applications of the statute. Companies are unwilling to attract DOJ's attention or otherwise tie their hands with regard to uncertain requests and the resulting opinions have little or no comfort for companies beyond the requestor. The Release is no exception, except insofar as it involves an issue that has not been asked about in 15 years: providing stipends to government officials.

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5. Release at 1.
 6. Public Law 87-195 (Sept. 4, 1961), as amended; 22 U.S.C. §§ 2152 and 2396.
 7. Release at 2-3.

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The underlying question in the Release is whether it is acceptable to provide a cash stipend to a foreign official. In discussing the FCPA's reasonable and bona fide expenditure affirmative defense,⁸ the *Resource Guide* provides several non-exhaustive "safeguards" that the enforcement agencies suggest businesses can use in determining risk related to providing travel and expenses to government officials. These safeguards include "pay[ing] all costs directly to travel and lodging vendors and/or reimburse costs only upon presentation of a receipt," and "not advance[ing] funds or pay[ing] for reimbursements in cash."⁹ Representations made in earlier opinion releases dealing with travel and expenses for government officials also include these two safeguards.¹⁰

"Because the Release declines to offer broader guidance that small, reasonable stipends are unlikely to result in enforcement action, the unique circumstances of the Release ... leave some doubt about how enforcement agencies may approach other stipends, especially in more commercial circumstances."

Opinion Release 04-04 involved a U.S. company proposing to fund a study tour of foreign officials involved in drafting a law on mutual insurance.¹¹ The requestor did not have business in the relevant foreign country and proposed to pay for travel, hotel, and local transportation (paid directly to providers), as well as "a modest per diem of \$35/day" and occasional other expenses. The requester estimated that the total cost of the entire tour would be approximately \$16,875.¹² Without providing any explanation, DOJ opined that it did not intend to take enforcement action based on the scenario provided.

Similarly, Opinion Release 08-03 involved expenses, including stipends of between \$28 and \$62, paid to journalists employed by state-owned media to attend a press conference associated with an anti-corruption event organized by TRACE International, Inc. in Shanghai. According to TRACE, it was common practice to

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8. 15 U.S.C. §§ 78dd-1(c)(2); 78dd-2(c)(2); 78dd-3(c)(2)

9. *A Resource Guide to the U.S. Foreign Corrupt Practices Act, Second Edition* at 25 (2020), <https://www.justice.gov/criminal/criminal-fraud/fcpa-resource-guide>.

10. See, e.g., Opinion Releases 04-01, 04-03, 07-01, 07-02, 08, 11-01, 12-02.

11. United States Department of Justice, Opinion Procedure Release No. 04-04 (Sept. 3, 2004), <https://www.justice.gov/criminal-fraud/opinionprocedure-releases> (hereinafter "23-01").

12. *Id.*

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pay expenses of journalists to cover press conferences in China.¹³ DOJ opined that the expenses, including the stipends, fall within the FCPA's affirmative defense for bona fide business expenses, because the expenses were reasonable and directly related to the promotion of TRACE's services.

Although the Release is the third such DOJ opinion suggesting that reasonable stipends are permitted, the specific facts of each of the three opinion releases make clear why there is continuing uncertainty around reasonable cash payments to government officials. However, there are a few general guidelines that can be drawn:

- Small amounts are permitted (the amounts involved in the opinion releases were between \$8 and \$62);
- Good evidence that the payments are not connected to any attempt to obtain or retain business is helpful (in Opinion Release 04-04, the Requester had no current or planned business in the relevant country, and, in Opinion Release 23-02, the payments were made through U.S. government personnel);¹⁴
- Finally, the travel related to each of the stipends was far removed from ordinary commercial concerns (Opinion Release 04-04 dealt with a clearly educational purpose; Opinion Release 08-03 involved attendance at an anti-corruption conference; and the current Release involved trainings organized by a U.S. government agency).¹⁵

Conclusion

Unfortunately, none of the opinion releases on this topic is a silver bullet. Companies still need to be careful with travel and related benefits for foreign officials, and the Release does little to change that. Because the Release declines to offer broader guidance that small, reasonable stipends are unlikely to result in enforcement action, the unique circumstances of the Release (and Opinion Releases 04-04 and 08-03) leave some doubt about how enforcement agencies may approach other stipends, especially in more commercial circumstances. Looking at the opinion releases more generally, the bases for finding a lack of corrupt intent or a bona fide expenditure (two of the three reasons underpinning the opinion releases that permitted stipends) likely are the reasonableness of the stipend amount and the

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13. United States Department of Justice, Opinion Procedure Release No. 08-03 (Jul. 11, 2008), <https://www.justice.gov/criminal-fraud/opinionprocedure-releases> (hereinafter "08-03").

14. It is unclear why DOJ considered these payments to be made for reasons other than "to obtain or retain business" given the broad definition of the term in *United States v. Kay*, 359 F.3d 738 (5th Cir. 2004). The Requestor represented that the stipend was required as part of its contract with the Agency and presumably necessary to retain that business.

15. Opinion Release 10-01 also involved a benefit (employment) provided to a foreign official pursuant to a contract with a U.S. government agency.

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bona fide nature of the associated training or event. However, the highly specific factual circumstances associated with the opinion procedure releases obscure the more general compliance principles.

Kara Brockmeyer

Andrew M. Levine

Philip Rohlik

Amaya Contreras Driggs

Kara Brockmeyer is a partner in the Washington, D.C. office. Andrew M. Levine is a partner in the New York office. Philip Rohlik is a counsel in the Shanghai office. Amaya Contreras Driggs is a law clerk in the New York office. Full contact details for each author are available at www.debevoise.com.

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Debevoise & Plimpton LLP

66 Hudson Boulevard
New York, New York 10001
+1 212 909 6000
www.debevoise.com

Washington, D.C.
+1 202 383 8000

San Francisco
+1 415 738 5700

London
+44 20 7786 9000

Paris
+33 1 40 73 12 12

Frankfurt
+49 69 2097 5000

Hong Kong
+852 2160 9800

Shanghai
+86 21 5047 1800

Luxembourg
+352 27 33 54 00

Bruce E. Yannett
Co-Editor-in-Chief
+1 212 909 6495
beyannett@debevoise.com

Andrew J. Ceresney
Co-Editor-in-Chief
+1 212 909 6947
aceresney@debevoise.com

David A. O'Neil
Co-Editor-in-Chief
+1 202 383 8040
daoneil@debevoise.com

Karolos Seeger
Co-Editor-in-Chief
+44 20 7786 9042
kseeger@debevoise.com

Douglas S. Zolkind
Co-Editor-in-Chief
+1 212 909 6804
dzolkind@debevoise.com

Philip Rohlik
Co-Executive Editor
+852 2160 9856
prohlik@debevoise.com

Kara Brockmeyer
Co-Editor-in-Chief
+1 202 383 8120
kbrockmeyer@debevoise.com

Andrew M. Levine
Co-Editor-in-Chief
+1 212 909 6069
amlevine@debevoise.com

Winston M. Paes
Co-Editor-in-Chief
+1 212 909 6896
wmpaes@debevoise.com

Jane Shvets
Co-Editor-in-Chief
+44 20 7786 9163
jshvets@debevoise.com

Erich O. Grosz
Co-Executive Editor
+1 212 909 6808
eogrosz@debevoise.com

Andreas A. Glimenakis
Associate Editor
+1 202 383 8138
aaglimen@debevoise.com

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regarding topics covered in
this publication to the editors.

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