POHLMANN & COMPANY

US Enforcement Trends 2024

What's to be Expected by European Companies?

January 2024

Introduction

In the past year, the **upward trend in anti-corruption corporate enforcement activities by US authorities continued**. In November 2023, the SEC announced that it filed 784 total enforcement actions in 2023, a three percent increase over fiscal year 2022, including 501 original or "*stand-alone*" enforcement actions, an eight percent increase over 2022 (see here). Regarding the FCPA, the DOJ and the SEC brought enforcement actions against thirteen companies and imposed financial penalties totaling USD 776 million (see here).

Moreover, the Chiefs of the FCPA Units of SEC and the DOJ affirmed – during the American Conference Institute's 40th International Conference on the FCPA, held on November 28–30, 2023 – the **government's continued commitment** to, and **interest** in, **combating corruption by bringing additional enforcement matters**. The Chief of DOJ's Fraud Section expressly stated that **more corporate FCPA resolutions** will be made public and that the number of resolutions in 2024 will outpace the number in 2022. This announcement was followed by action in January 2024, when the DOJ announced the first settlement of the year: SAP SE, a publicly traded global software company based in Germany, has to pay over USD 220 million to resolve investigations by the DOJ and the SEC into violations of the FCPA (for details, see here).

In addition to anti-corruption enforcements, issues related to companies' **environmental**, **social**, and **governance** (ESG) **policies**, **practices**, and **disclosures** have recently come under the spotlight and heightened scrutiny of US authorities. Regulatory bodies, including the SEC, have not only **issued particular guidance on ESG disclosures** but have also shown increased interest in assessing how companies **disclose** and **report** on their **ESG-related risks, impacts**, and **opportunities**. At the same time, whistleblowers have taken up ESG-related topics in their reports to governmental authorities, such as the SEC, and **ESG-related enforcements** relating to greenwashing are only the beginning.

Reasons enough to take a closer look at the **most important current enforcement trends** in the US and how they may **affect European** and **German companies** as we look ahead to 2024:

1 | Overall Strategy on Countering Corruption

Background

One of the key factors behind the trend we are currently seeing in US enforcement activities is the **Strategy on Countering Corruption** which was released by the Biden-Harris Administration in December 2021 (see here). This Strategy has been the **first of its kind outlining** a **comprehensive, whole-of-government approach to combat corruption** (for details, in particular, the five pillars on which the Strategy is organized and its recent accomplishments, see the Fact Sheet issued by the White House in March 2023, see here). Just recently, in October 2023, the US Department of State released an implementation plan for the Strategy (see here). This plan details **activities undertaken to integrate** and **elevate anti-corruption efforts** across global engagement.

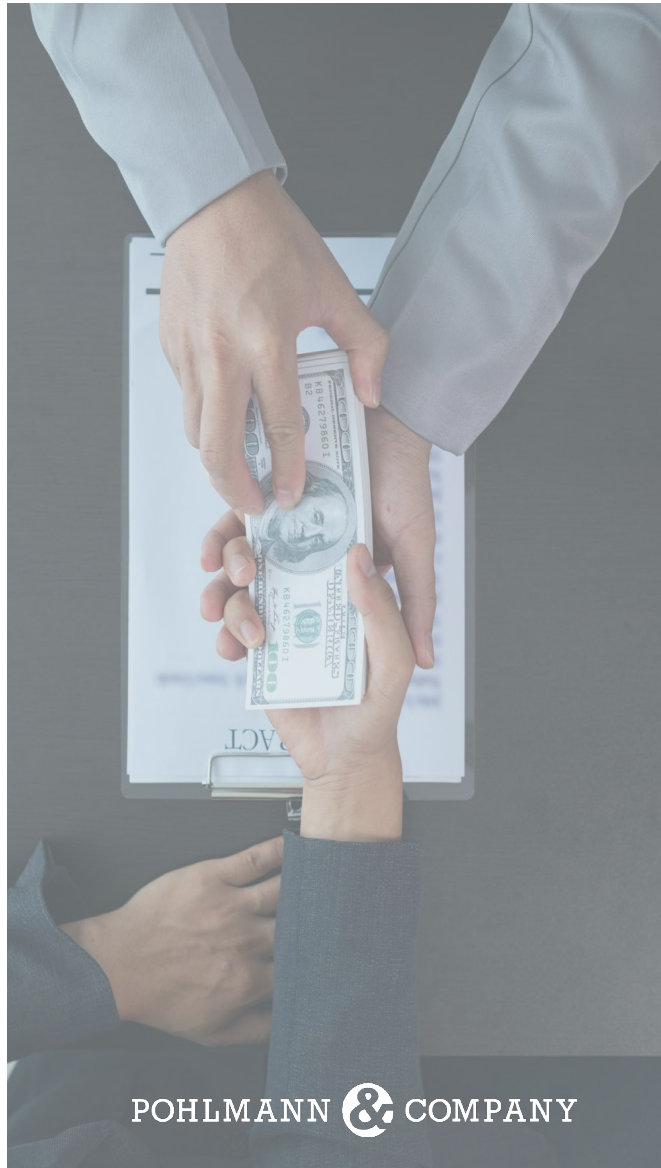
"Demand-Side" of Corruption Criminalized

A direct implementation activity in light of the strategy is the **Foreign Extortion Prevention Act** which has just been passed by the US Congress on December 14, 2023. The FEPA forms the long-missing counterpart to the FCPA by **directly criminalizing** the **corrupt conduct** of **bribe-seeking foreign officials** (for details, see our blog post from December 2022).

The enactment of the FEPA shows that the US government is clearly committed to **continuing** to **fight international corruption** and that **further regulatory measures** and **enforcement activities** can be expected in the near future.

Our Practical Guidance

Global companies should not only be alerted to the upcoming developments under the FEPA but also to the **potential enactment of additional laws and regulatory guidance** in this respect. They should particularly focus on how the FCPA and FEPA may impact their enforcement risks and ethics and compliance programs going forward.



2 | Compliance in Compensation Systems

Introduction of the Program

Speaking at the 38th American Bar Association National Institute on White Collar Crime in March 2023, Deputy Attorney General Monaco and former Assistant Attorney General Polite announced the DOJ's plan to **establish incentives for companies to design their compensation structures to encourage compliant behavior** (for details, see our blog post from March 2023). Compensation systems should align the financial interests of executives and employees with the interests of the company. The DOJ Criminal Division's respective **Pilot Program Regarding Compensation Incentives and Clawbacks** became effective in March 2023, promising, inter alia, enforcement benefits to those companies that are seriously preparing for and trying to reclaim salary or bonus components from directors and employees involved in corporate wrongdoing (see here).

In connection with the implementation of the Pilot Program, the DOJ also issued a revised version of the **DOJ Guidance on Evaluation of Corporate Compliance Programs**, which now incorporates the principles outlined in the Pilot Program (see here).

Program's Enforcement – "Albemarle" Case

Recent prosecutorial developments show that the DOJ is putting the Pilot Program into practice. As part of the recent **FCPA-settlement agreement** with chemical giant **Albemarle** in September 2023, the DOJ **reduced** the **fines** imposed by 45 percent compared to the lowest applicable benchmark (for details, see here).

One of the reasons given for the reduction was the **application** of its **Pilot Program**. In addition to the voluntary disclosure, Albemarle was particularly **credited** for its **extensive** and **timely remedial measures**, including **commencing remedial measures** based on its internal investigation of the misconduct prior to the commencement of the DOJ's investigation and it with its **extensive cooperation with the authorities**. Part of the company's remedial action included the withholding of bonuses totaling USD 763,453 from employees who were involved in the alleged misconduct. Notably, this amount was deducted when calculating Albemarle's penalty.

Pilot Program Affects European Companies

The requirements of the Pilot Program and DOJ's expectations when it comes to integrity-incentivizing compensation schemes do not spare European companies. Just recently, on January 11, 2024, the DOJ announced that SAP SE has committed to **implement compliance criteria** in the company's **compensation and bonus system** as part of a three-year deferred prosecution agreement.

By applying the Pilot Program, the DOJ **reduced SAP's criminal penalty** by USD 109,141 for compensation it withheld from employees involved in the relevant misconduct and defended in extensive litigation.

2 | Compliance in Compensation Systems

What Comes Next?

Most importantly, it should not be lost sight of the fact, that – in addition to the one-to-one crediting of any clawed-back salary components, which has often been criticized as a too marginal and irrelevant incentive – **preventive measures** and **integrity incentives** in a **company's salary and bonus system** will henceforth also play a significant and serious role in the assessment of the effectiveness of a company's compliance program as a whole, not only by the DOJ but also by other US enforcement authorities such as the SEC. A company that during settlement negotiations can **demonstrate** that it has **far-sighted incentive** and **clawback regulations** will certainly **benefit from general compliance and cooperation credits.**

Our Practical Guidance

European companies that may be subject to US enforcement should begin to **review** and **adjust their current performance and compensation programs** to meet the clear requirement for having compliance incentives and clawback mechanisms in place. They should do so not only to comply with US enforcement trends, but also to **use** the **opportunity to incorporate early and effective measures** that reinforce a company's **strategic intent** and **commitment to sustainable ESG efforts** and allow the company's management to be **measured on the success** of those efforts.

3 | M&A Safe Harbor Policy

Background of the Policy

Already in a speech held in October 2023, Deputy Attorney General Monaco announced a new M&A safe harbor policy to **promote voluntary self-disclosures of potential misconduct discovered** in the course of **due diligence** to the DOJ (see here). As part of the DOJ's broader efforts to encourage corporate compliance and self-disclosure of misconduct, the new policy provides **incentives for companies** to proactively **address misconduct** and **strengthen** their **compliance programs**, thereby **promoting better corporate governance** and potentially **shielding companies** from significant financial risks and penalties. Companies with effective compliance programs shall not be discouraged from lawfully acquiring companies with ineffective compliance programs and/or a history of misconduct.

Self-Disclosure Obligation

According to the M&A Safe Harbor Policy, companies must, *inter alia*, **self-disclose any criminal misconduct within six months** after the transaction closes, regardless of whether the misconduct was discovered pre- or post-acquisition. Additionally, the **misconduct must be fully remediated within one year from the closing date**. However, the DOJ recognizes the challenges in this timeline and may extend the deadline based on specific circumstances. Companies must also **fully cooperate with DOJ investigations**, which includes identifying individual wrongdoers, providing access to witnesses, and assisting in interpreting key documents. This cooperation should be ongoing, even during internal investigations. Finally, it should be noted that the "Safe Harbor" does not apply to misconduct that was already required to be disclosed, publicly known, or known to the DOJ.

Remaining Uncertainty

Although the M&A Safe Harbor Policy strains to provide clear and consistent benefits for voluntary self-disclosures in M&A transactions, it also raises **many questions** and **concerns** that need to be answered before it can be concluded whether the **new policy** will be **effective** and **work in practice**. For example, it remains unclear how the DOJ will determine whether to extend the deadlines and what is reasonable in this regard.

Despite these contingencies, in particular the **uncertain interpretation** and **application** of the Safe Harbor Policy by the US authorities, it is to be expected that the DOJ will place an **increased focus on M&A transactions globally**.

3 | M&A Safe Harbor Policy

Our Practical Guidance

Companies are therefore strongly advised to **conduct a thorough risk-based compliance due diligence** to identify potential misconduct and evaluate gaps or weaknesses in a target company's ethics and compliance program. To the extent that access to certain documents and/or books and records was not possible before the acquisition, respective compliance due diligence should be completed as soon as practicable after closing.

Post-completion due diligence should be planned and prepared well ahead so that any necessary analytical steps can be completed as soon as possible. "Timely post-acquisition integration" (as highlighted by Monaco in her speech of October 4, 2023) also in terms of **corporate culture** and **compliance**, including, as the case may be the **implementation of any necessary remedial measures**, must not be underestimated but start without delay – they become increasingly important for a M&A transaction's ultimate success.

4 | Whistleblowing

The SEC's Whistleblower Program

In recent years, the number of persons that **reported potential** or **actual violations** of law in and by companies has **increased significantly**, and not only in the US. In the US, this phenomenon – in addition to the global COVID-19 pandemic – can be (partially) attributed to the **ever-increasing rewards for whistleblowers under the SEC program**: In 2023, nearly USD 600 million – the highest annual total by dollar value in the program's history – were awarded to 68 individual whistleblowers; these totals include a single award for almost USD 279 million – the largest in the history of the program (for details, see here).

Whistleblowing in the EU

In the EU, the notable increase of whistleblowing can certainly be attributed to the entry into force of the EU Whistleblowing Directive. The long-awaited **protection of whistleblowers**, particularly **against retaliation**, is achieved by the fact that the EU Whistleblowing Directive obliges EU member states to implement a set of **minimum requirements** for **internal whistleblowing systems** (see also our blog post from October 2019 for more details). It also gives whistleblowers the **right to choose** between **internal reporting** (if the company has more than 50 employees) and **external reporting**.

In Germany, between July 2023 and the end of November 2023, the **external federal reporting office** established at the Federal Office of Justice received according to press information **more than 300 reports** from whistleblowers who chose the external reporting procedure.

Our Practical Guidance

Considering these remarkable developments, it is now more important than ever for companies to **establish appropriate whistleblower systems** that not only meet regulatory minimum requirements but also **work effectively** and thus **reliably protect companies in practice**. Once a report has been made, it is important to ensure that it is taken seriously, handled carefully, professionally, and promptly, and followed up appropriately. This is the only way to **build employees' confidence** in company-internal systems and to **prevent** them from immediately **reporting** their concerns externally **to any authorities**.

However, this also means that companies that already have existing whistleblowing systems may need to **revise** and **amend** them.

In summary, companies **should respond timely** and **appropriately** to (potential) violations within their organizations and as part of their compliance systems **demonstrate effective reporting and internal investigation mechanisms** to prevent corporate criminal liability and respective enforcement, including by US authorities.

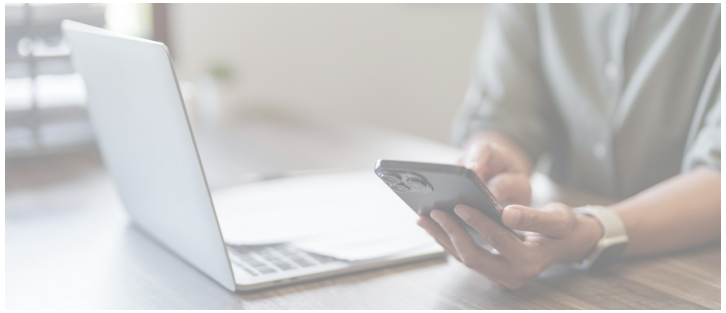
5 | Ephemeral Messaging and Data Retention

DOJ's Guidance on Ephemeral Messaging

In our blog post from March 2023, we already reported on the **DOJ's relevant guidance on ephemeral messaging**. As we have seen over the past year, companies' use of private end devices and various communication services for ephemeral or self-deleting messages will **continue to grow in importance** in the future.

In many companies, business communication via messaging services, including the use of personal devices – not seldom driven by the customer – is part of everyday business life. The revised DOJ guidance (ECCP) has created a clear need for companies to **implement robust data security** and **retention regulation** and **governance** (for details, see here).

The **SEC** and the **CFTC** have recently taken **consistent action against companies**, particularly in the highly regulated financial sector, for **failing to comply with strict requirements** to secure and preserve business-related communications. As of October 2023, the regulators have ordered financial institutions to pay more than USD 2.5 billion in penalties.



The **enforcement trend** is likely to **continue in 2024**. The SEC and CTCF have already announced that they will **continue to pursue misconduct** relating to the retention of ephemeral messaging communications.

Even though primarily financial sector companies are subject to strict retention requirements for business communications under banking and securities laws, the **DOJ guidelines** basically express that a **similar approach** should also apply to **non-financial sector companies**. If, in the event of a regulatory investigation, a company is unable to produce complete business communications, including ephemeral messaging-related communication, because it has failed to implement appropriate internal policies, this malus may be considered as part of the company's sanction.

Our Practical Guidance

Companies, whether in the financial sector or not, are strongly advised to **become aware of their communications landscape** and **to establish clear governance and risk-based technical solutions** for securing and retaining relevant business communications – taking into account the complex legal issues that may arise for international companies, for example from EU data protection regulations. This also applies to European companies with international operations in the US.

Although there are certainly still many unanswered questions, intensive discussions, including corporate legal and compliance practitioners at the FCPA Conference, evidence that **the matter is highly topical**. Companies will at least be expected to demonstrate **proactive**, **serious**, and **forward-looking self-analyses**, **specific ideas** and **concepts** and, if necessary, **concrete preventative measures** in this context.

6 | ESG Enforcements

DWS' Greenwashing Enforcement

In September 2023, the **SEC charged** the registered and German-based investment adviser **DWS** with an enforcement action concerning **misstatements** regarding its **ESG investment process (greenwashing)**. DWS agreed to pay a total of USD 19 million penalty to settle the enforcement actions. The SEC justifies the order with **materially misleading statements** about DWS's controls for **incorporating ESG factors** into recommendations for **ESG-integrated products**. The SEC found that DWS marketed itself as a leader in ESG, however, failed to adequately implement certain provisions of its global ESG integration policy (see our blog post from June 2022).

SEC'S ESG Task Force

The penalties imposed on DWS are a result of a tougher enforcement approach by the SEC implementing its newly launched **climate** and **ESG task force** (for details, see here).

The **purpose** of the task force is to **develop initiatives to proactively identify ESG-related misconduct** consistent with increased investor reliance on climate and ESG-related disclosure and investment. It coordinates the effective use of the SEC Division of Enforcement's resources, including sophisticated data analysis tools to identify potential violations including material gaps or misstatements in disclosures.

The task force announced to focus also on **truth in advertising in fund disclosures** when using terms like "***green***" and "***sustainable***". On its website, the SEC publishes a list of enforcement action examples related to ESG issues or statements that include a charging and USD 4 million settlement payment of Goldman Sachs Asset Management.

New ESG Regulations in the EU

Given this trend, **more related enforcement activities** on the US front are very likely. This development in the US also coincides with a variety of **regulatory initiatives in Europe** to **foster adherence to ESG standards** and to **prohibit greenwashing**, including the proposed EU Green Claims Directive, the proposed EU Directive on Corporate Sustainability Due Diligence, the EU Taxonomy Regulation, the EU Corporate Sustainability Reporting Directive and a rising number of climate litigation cases.

Our Practical Guidance

To avoid legal disadvantages, companies are well advised to **obtain an overview of the ESG regulations** relevant to them and the corresponding enforcement regime as quickly as possible and to **promptly establish a holistic ESG management system** with correspondingly strong internal governance.

7 | Conclusion

New year – New Challenges

A rapidly changing regulatory landscape and increased pressure from the US authorities to prosecute corporate misconduct pose considerable **challenges for global companies**, also in the **EU** and in **Germany**.

Considering the aforementioned developments and trends, companies should **continuously review**, **further develop**, and **adapt** their governance structures, **enhance** or **fine-tune** their compliance programs, policies and procedures, and associated internal controls, and finally **test** their compliance programs for effectiveness.

In addition, companies should **also leverage data to identify risks as data analysis** is also considered a key topic for the DOJ. In her speech during the FCPA Conference, Acting Assistant Attorney General Argentieri noted that data analytics is a critical tool for the DOJ to proactively identify and prosecute fraud cases.

She explicitly stated: "*Let me be the first to tell you that we have proactively used data to generate FCPA cases – and we've only just gotten started*".

As part of these efforts, Argentieri noted that the DOJ intends to **increase its investments** in both **personnel** and **tools** that can interpret and synthesize data to enhance its ability to identify FCPA misconduct that may otherwise have gone undetected.

In all of this, the expansion and application of established compliance standards to the **constantly growing ESG environment of globally operating companies** is of particular importance. The dimension of ESG-enforcement waves that will hit Europe and Germany – sooner or later – should by no means be underestimated. What previously applied to compliance with legal standards will in future apply to compliance with and implementation of the standards set and publicly reported by companies themselves.

With an increasingly interested and vocal group of stakeholders, including most importantly, employees, shareholders, investors, and customers as well as NGOs, the **causes for investigations and enforcement measures will continue to increase**.

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